RECENT CASES

AGENCY.

Liability of Firm for Slander by an Agent

In an action for slander the petition alleged that an agent of the defendants, who were partners in the liquor business, said to a customer of the plaintiffs, who sold aperient water, that "The Duquesne Distributing Company appropriated $10.000 to further the Prohibition movement;" that these words were false, and that the agent uttered them while on the business of the defendants and within the scope of his authority. A demurrer to this petition was sustained. On appeal the judgment of the lower court was affirmed on the ground that the matters alleged in the petition were not sufficient to constitute a cause of action; that a partnership, as far as its liability for slander is concerned, is on the same legal footing as a corporation, and that to hold the latter liable for the slander of its agent, it must be averred and shown that it expressly directed or authorized the agent to speak the actionable words or subsequently ratified them. *Duquesne Distributing Co* v. *Greenbaum et al.*, 121 S. W. Rep. (Ky.) 1026 (1909).

The Court is undoubtedly correct in attaching the same liability to a partnership as it does to a corporation. The former in some cases is a legal entity, just as is the latter, except in a more limited sense. The old view was that a corporation was never liable for slander, because it was soulless, without mind or tongue. Therefore it was impossible for it to have the malicious intent necessary for the tort or the ability to utter the words. *Townsend on Libel and Slander*, 2nd ed., sec. 265. *Childs* v. *Bank of Missouri*, 17 Mo. 213 (1852); *Behre* v. *National Cash Register Co.*, 100 Ga. 213 (1896). This view is now practically obsolete, and it is definitely settled, that although the corporation itself cannot commit malicious wrongs, its agents or officers can, so as to make it liable. *Clark & Marshall on Private Corporations*, Vol. 1. pp. 627-629, and cases cited.

But the courts are by no means so unanimous as to the correct rule to apply in determining when the corporation is liable for the slander of its agent. Our principal case adopts the more limited view that there must be an express authorization or ratification of the slander by the principals; that to hold them liable wherever the words are spoken by the agent in their business and for their interest, would impose a liability on them against which it would be impossible to protect themselves. Slanderous words are very easily spoken and generally represent only the speaker's personal opinion, and no person can reasonably prevent another, not in his immediate presence, from expressing his voluntary opinions. This view and its reasons are expressed in numerous other cases. *Singer Mfg. Co.* v. *Taylor*, 150 Ala. 574 (1907); *Eichner* v. *Bowery Bank*, 24 App. Div. 63 (1897).

However, it would seem that the modern trend of judicial opinion, if not the present weight of authority, is in favor of the broader doctrine, that the corporation can be held liable if the slander was uttered by the agent within the scope of his authority while on the business of the corporation. The theory of these cases is that a corporation under such circumstances has the same legal liabilities attached to it as a natural person and hence the rules of master and servant or principal and agent should govern, and that a man should be liable for the slander of

AGENCY (Continued).

his agent, just as much as for any other tort. *Hypes* v. *Southern Railway Co.*, 64 S. E. (S. C.) 395 (1909); *Rivers* v. *Yazoo R. R. Co.*, 43 So. (Miss.) 471 (1907); *International Text Book Co.* v. *Heartt*, 136 Fed. 132 (1905). The North Carolina courts have attempted to apply an intermediate doctrine. If an implied authority from the corporation to the agent to utter the slanderous words can be shown, the former is liable. *Redditt* v. *Singer Mfg. Co.*, 124 N. C. 100 (1899); *Sawyer* v. *R. R. Co.*, 142 N. C. 1 (1906). But, as the cases show, this practically amounts to an application of the broader doctrine; for wherever the act is in the corporation's business, this authorization of the slander is implied.

BILLS AND NOTES.

That the original holder of an undated accommodation note may not postdate the note and bind the accommodation indorsers (such a party not being a holder in due course as required by Sec. 13, N. I. L.) was recently decided in the case of *Bank of Houston* v. *Day et al.*, 122 S. W. 756, 1909 (Mo.).

Postdating by Holder

In England the courts originally followed Lord Mansfield's decision in *Russell* v. *Langstaffe*, 2 Doug. 514 (1780), and held that in instrument incomplete in any respect but delivered by the person who had signed it, in its incomplete condition, should be held to have been delivered by him in whatever form it may have been filled up by the person to whom it had been so entrusted, although known by the plaintiff to have been incomplete. This continued to be the rule in England until shaken by the case of *Awde* v. *Dixon*, 6 Ex. R. 869 (1851), followed later by *Hatch* v. *Searles*, 2 S. & Y. 147 (1854). The principle of the last two cases was afterwards incorporated into the English Bills of Exchange Act adopted in 1882. Thus it will be seen that the present English authorities are in accord with the principal case. See *Herdman* v. *Wheeler*, 1 K. B. 361 (1902).

There are innumerable authorities in the United States prior to the negotiable instrument law which follow the rule laid down in *Russell* v. *Langstaffe, supra; Hepler* v. *Bank*, 197 Pa. 420 (1881); *Frank* v. *Tillenfeld*, 33 Grattan (Va.) 377 (1880); *Bank* v. *Bradner*, 44 N. Y. 680 (1871); *Bank* v. *Stowell*, 123 Mass. 196 (1877).

The Negotiable Instrument Act has changed the law in these states and they now hold that the purchaser of a negotiable instrument with an unfilled blank is put upon inquiry as to the authority of the person intrusted with the incomplete instrument. *Guerrant* v. *Guerrant*, 7 Va. L. Reg. 639 (payee); *Boston Steel & Iron Co.* v. *Stener*, 183 Mass. 140 (amount); *Van Ploeg* v. *Van Zunk*, 112 N. W. (Iowa) 807 (merely a signed blank).

CONTRACTS.

Shiffer v. *Mosier*, 225 Pa. 552, 74 Atl. 426 (1909) decided, that the signature of an attesting witness at the instance of the obligee, subsequent to the execution of a non-negotiable instrument, was a material alteration which rendered it void. The decision is significant in view of the fact that this practice is more or less prevalent to-day. It seems strictly in accord with previous Pennsylvania decisions cited in the opinion. The question has arisen in other jurisdictions. In Massachusetts at an early date it was held a material alteration in the

Alteration of Instrument by Addition of Name of a Subscribing Witness

CONTRACTS (Continued).

case of a promissory note, because by statute notes witnessed were excepted from the operation of the Statute of Limitations. *Homer* v. *Wallis,* 11 Mass., 309 (1814). Later it was held, that if the witness saw the maker sign the note, but did not subscribe as a witness until afterwards, it should not make the note void, although it could not be considered as a witnessed note. *Smith* v. *Dunham,* 25 Mass. 246 (1829). Finally a decision was had in the case of a non-negotiable instrument. The Court said, "While the addition of a subscribing witness's name did not alter the terms of the instrument, it did affect the mode of proof and was therefore material." This is the argument in Pennsylvania also. "But the rule would be too harsh, if in all cases the instrument was rendered void for such an alteration. So the rule was stated: (1) If the procuring of a subsequent attesting witness is fraudulent, the obligor is discharged; (2) the act itself makes out a *prima facie* case, but it may be explained. *Adams* v. *Frye,* 44 Mass. 103 (1841). Maine has similar decisions. In *Milberry* v. *Storer,* 75 Me. 69 (1883) it was said, "It is a somewhat common belief among the masses of the people, that if a person sees another sign an instrument or if he knows his handwriting, such person may attest his knowledge of the fact by signing the instrument as a witness without maker's knowledge or consent." The general rule is against this, although there are exceptions. Alabama holds it to be a material alteration. *White Sewing Machine Co.* v. *Saxon,* 121 Ala. 399 (1898). Wisconsin, however, takes the other view. The argument is, that when the claimed alteration is proved, the party whose name has been affixed as an attesting witness is no longer such a witness and consequently the proof of his handwriting would be no proof of the execution of the contract. *Fuller* v. *Green,* 64 Wis. 159 (1885). North Carolina takes this view also. *Blackwell* v. *Lane,* 4 Dev. & B. 113 (1838).

Those who are in the habit of having instruments witnessed in this manner should take warning.

CRIMES.

Libel: Publication, and Federal Jurisdiction

In the case of *United States* v. *Smith et al,* 173 Fed. Rep. (1909) 240, the defendants were the publishers of a newspaper in Indianapolis and had printed certain articles alleged to be libelous, against high government officials in connection with the Panama Canal. The government desired to secure a conviction for criminal libel, and in pursuance of this object had the proprietors of the paper arrested in Indianapolis and sought to transfer them to the District of Columbia for trial. Since criminal libel is not one of the offenses over which the Federal Courts have jurisdiction, *In re Dana,* 68 Fed. (1895) 886, it was necessary to bring the prosecution in the District Court at Washington, where, in common law offenses, the Maryland law is still in force.

The objectionable articles were printed in Indianapolis and about fifty copies mailed to subscribers in the District of Columbia. The argument was advanced to procure the transfer of the prisoners that this constituted a publication in Washington as well as at the home office. The newspaper maintained no sales agency at the capital. In an oral opinion, without the citation of authorities, the court *held,* that the publication in such a case takes place at the home office, and is not repeated in every place where the paper is circulated. As the crime was complete therefore in Indianapolis, the offense was only triable there,

CRIMES (Continued).

and as it was not recognizable in a Federal Court, the prisoners were discharged.

There are some civil cases which seem to hold the opposite doctrine; *Julian* v. *Kansas City Star Pub. Co.*, 209 Mo. (1907) 35. But the learned Judge is supported by the *dicta* in the well-considered case *In re Dana* (*supra*), and also by *In re Kowalski*, 73 Cal. (1887) 120, where the California State Constitution is quoted as stating that criminal prosecutions for libel against the publishers of a newspaper must be brought either in the county where they have their home office, or else where the injured party resides. The inference here is plain, that one prosecution and only one is to be the result of a libelous criminal article. As the Court clearly points out in our principal case any other conclusion than the one arrived at would lead almost to a travesty on justice, since, if a prosecution might be brought in every county of a state wherein a paper had circulated, as each offense was separate and complete; one trial would be no bar to any of the others, and so a hundred trials might result, from one article, against the defendants.

However, it would seem that apart from this interesting question, a reference to *In re Dana* (*supra*) would have decided the case, as it is there clearly laid down that criminal libel is not one of the offenses for the trial of which removal from one Federal District to another can be had under Sec. 1014, U. S. Revised Statutes.

The same result was reached in the indictment of the Press Publishing Co., publishers of the *New York World*. Hough, J., delivered his opinion on January 26th, so that it is not yet in the advance sheets.

Gambling: Bookmaking

People ex. rel. Lichtenstein v. *Langan*, 89 Northeastern Rep. 920 (N. Y., 1909) decides that under Pen. Code §351, making any person who engages in bookmaking guilty of a misdemeanor, a person who has no books or papers, and does not occupy any building or tent, and records and registers no bets within the other terms of the section, but who orally offers to bet, and so announces to others, on a horse that is about to engage in a race in which he lays odds, is not a bookmaker, since the intent of the Legislature was to do away with the recording and registering of bets whereby the party offering to bet was enabled to make odds that in the long run would enable him to win, and cause the public betting with him to lose.

The Court comes to this conclusion by several steps, (*a*) The term "bookmaking" originally indicated the collection of sheets of paper or other substances on which entries could be made, either written or printed. (*b*) The intent of the Legislature must be followed, in determining the meaning of the word, and the Legislature gave to the term its ordinary meaning, thinking that without a system of bookmaking it would be difficult to carry odds and bets mentally, so that very few bets could be taken and the masses could not be drawn into the scheme. (*c*) The laying of odds, standing alone, does not constitute a crime, since there is a distinction between betting and gambling, or betting and the maintaining of a house or a place to which people could resort to gamble. (*d*) While in reality the statute is directed against gambling, not against its incidents, the law has laid hold of certain incidents, on the theory that those being prohibited, the evil itself will be suppressed, because of the impracticability of carrying on gambling on a large scale without some of the accessories denounced by the statute.

CRIMES (Continued).

Grinstead v. *Kirby,* 110 S. W. 247 is a case which decides that a certain kind of gambling on horse races is legal. One section (Ky. St. 1903, §1960) of a statute makes it a felony for any one to set up and carry on any machine used in betting whereby money or other things may be won or lost. Section 1961 provides that such section shall not apply to persons who sell combination or French pools on any regular race track during the races thereon. Section 1977 provides that any persons who engage in any game on which money or property is bet, won or lost shall be subject to a fine. The Court decided this case, as *People* v. *Lichtenstein* was decided, on the principle that "every statute ought to be expounded according to the meaning," and held that neither the selling nor buying of combination or French pools on any regular race track during the races thereon is illegal.

In re Opinion of the Justices, 63 Atlantic 505 (1906), states that where a gambler is defined as "every person who plays at a game of chance or skill in a place which is resorted to for the purpose of gaming, unless the game is for amusement only without a stake or possibility of loss," gaming includes horse racing, and therefore betting on such races is illegal gaming.

The decision in the New York case, so far as lack of conflicting authority and the facts go, would seem correct, though it is a strict interpretation of the statute.

Gambling: Slot Machines

In *Roberts* v. *Harrison,* 101 Law Times 540 (1909) the appellant had at his shop automatic slot machines. On placing a half-penny in the slot of one of these machines and then pulling a lever this caused a ball to be thrown to the top of the machine. If the ball came back into one cup the half-penny was returned to the player; if it went into another the ball was returned to the player to be played again; and if it went into a third cup the half-penny became the property of the appellant. The Court held the conviction under Section 4 of the Gaming House Act, 1854, to be right, as the using the machine constituted unlawful gaming within the section, because the chances are not alike favorable to all the players, including the owner of the machine.

This case seems rather near the line. It is true that the player can never recover more than he put up, and that the appellant may win, and the only possible money or money's worth that the player might obtain is to play again, but in no case to obtain more money than he actually started with. It seems that beside this argument, the Court was influenced by the fact that the players were boys and were taught by this device the spirit of gambling.

Other slot machine cases hold that where a check is given in exchange for a sum of money, for the purpose of buying goods, it falls within a statute punishing the keeper or exhibitor for purposes of gambling of any slot machine. In these cases the check is never less and sometimes more than the sum deposited. *Lytle* v. *State,* 100 S. W. 1160 (1907); *In re Cullinan,* 99 N. Y. Suppl. 1097 (1906). But *Ex parte Williams,* 87 Pac. R. 565 (1906) holds that it is not a crime, under Pen. Code, §330, making it an offense to operate any banking or percentage game played with any device "for money, checks, credit or other representative of value," to set up and operate a slot machine on which games are played, unless played for money, checks, credits or other representative of value; and, if played for something not included in these words, as for cigars, it is not a crime.

CRIMES (Continued).

Cheats: Wearing Badge of Secret Society of which the Prisoner was Not a Member

In *Hammer* v. *The State,* 89 N. E. (1909, Ind.) 850 the prisoner was charged with unlawfully wearing the badge of a secret society of which he was not at the time a member contrary to a statute of the state and was convicted and fined. On appeal it was contended that the statute was an unconstitutional interference with appellant's right to dress or adorn himself as he pleased. The Court, however, held the statute a police regulation aimed against false personation and false pretences of a particular kind and that it did no more than make a misdemeanor of that which at the common law was a "cheat."

EVIDENCE.

Dying Declaration: Hopeless Expectation of Death Defined

What mental condition of a dying person will permit the admission in evidence of his ante-mortem statements as to the cause of his injuries, when ultimately the death of such person is under judicial investigation? Both the early and more recent English cases have used many expressions in stating the rule. The majority of those cases are decisions and observations of single Judges at *nisi prius.* The new English Court of Criminal Appeals recently has given an appellate interpretation to the requirements of the rules in *Rex* v. *Perry,* 1909, 2 K. B. 697. Lord Alverstone, C. J., speaking for the entire court, holds there must be a settled and hopeless expectation of death in the mind of the declarant, believing death, so far as there can be any certainty, to be imminent, but not necessarily believing that he is then actually breathing his last, now that death will immediately follow, nor within an hour nor a day.

As early as 1789, about which time the Dying Declaration exception to the Hearsay Rule began to be formulated as such, the inchoate condition of the English law on this phase of the rule is observable. Eyre, C. B., deciding a case in that year, uses expressions of varying degrees of belief in the nearness of death in point of time, viz.: "at the point of death," "almost immediate death," and "inevitably oblige her soon to answer before her Maker." *Woodcock's Case,* 1 Leach 500.

Forty years later uniformity of expression appears in two reported cases. Declarations *in articulo mortes* are made under "an impression of almost immediate death." *Rex* v. *Van Butchell,* 3 C. & P. 629 (1829). The deceased must have had "the impression on her mind of an almost immediate dissolution." *Rex* v. *Crockett,* 4 C. & P. 544 (1831). But only three years later, Patterson, J., considers apprehension of immediate death the necessary ground to admit a statement as a dying declaration. 'It is not necessary to prove expressions of apprehension of immediate danger," and accordingly he admitted the statement, being convinced that all the circumstances indicated such a belief in declarant, though he had not expressed it. *Rex* v. *Bonner,* 6 C. & P. 386 (1834), After another period of nearly forty years, Byles, J., sums up the cases, saying, "The result of the authorities is that the dying person must be under the impression that his or her death is *almost immediately pending." Reg.* v. *Jenkins,* 11 Cox C. C. 250 (1869). But a few years later the effect of this is materially altered when Willis, J., states the rule, "It must be proved that the man was dying, and there must be a hopeless expectation of death in the declarant." *Reg.* v. *Peel,* 2 F. & F. 21

EVIDENCE (Continued).

(....). And in 1881, Lush, L. J., "The person making the declaration must entertain a settled, hopeless expectation of *immediate* death. If he thinks he will die to-morrow, it will not do." *Reg.* v. *Osman,* 15 Cox C. C. 1. Thereafter came *Reg.* v. *Gloster,* 16 Cox C. C. 471 (1888), wherein Charles, J., reviewed the authorities, stating the judgment of Lush, L. J., to be that of Willes, J., with the insertion of the word *immediate,* and giving his reasons for differing from, and not following, the former. At least, the word immediate must be construed in the sense of danger impending, not on the instant, but in a very short distance indeed. It would seem this decision, though not of an Appellate Court, might well have dominated future decisions. But the same looseness of expression, perhaps inaccurately conveying the true meaning of the Judges, reappears almost immediately. *Reg.* v. *Mitchell,* 17 Cox C. C. 503 (1892), Cave, J., rejected a statement offered as a dying declaration, saying, "I do not think there is sufficient proof that the deceased had a settled hopeless expectation of immediate death." And in *Rex* v. *Smith,* 65 J. P. 426 (1901), counsel on both sides take it for granted an expectation of immediate death is necessary and so express themselves *arguendo.* In *Rex* v. *Abbott,* 67 J. P. 151 (1903), it is said there must be "an expectation of impending death, an unqualified belief in the nearness of death, a belief without in the declarant, that he is about to die."

To give an authoritative statement to the rule was thus a task rightly set before an appellate court, and was the evident purpose of the Judge at the trial of the principal case when he reserved the point. The decision, already given, is an express indorsement of the judgment of Charles, J., in *Reg.* v. *Gloster, supra,* and a frank overruling of that of Lush, L. J., in *Reg.* v. *Osman, supra.* The mental condition of declarant must be absolutely without hope of recovery, accompanied with fear of death reasonably soon to take place, but not necessarily within the day or any definite limits.

The American rule on this phase of the subject cannot be stated with accuracy. The many jurisdictions are seemingly in conflict with each other and with themselves. Vagueness and variety of expression are to be found. The terms most commonly in use are, "impending death," "death near at hand," "impression of almost immediate dissolution," "sense of immediate and impending death," "expected quickly to die," or "immediate death." In *Hussey* v. *State,* 6 So. (Ala.) 420, it was said while death must not be regarded as unreasonably remote, it was not necessary that declarant should apprehend that death would follow immediately. On the other hand, the Illinois cases uniformly state the rule that the declarant must believe death to be impending and certain to follow almost immediately. *Westbrook* v. *People,* 18 N. E. (Ill., ...) 304; *Simons* v. *People,* 36 Id. (....) 1019; *Brom* v. *People,* 74 Id. (1905) 90. Again (a strong statement), "to constitute dying declarations the person making them must be convinced that he is dying, must see death staring him in the face." *People* v. *Robinson,* 2 Park, Cr. R. (N. Y.) 235. Contrast therewith *Krebs* v. *State,* 3 Tex. Ap. 348, holding it is not necessary that declarant should believe death will ensue within any specified time, and *State* v. *Nash,* 7 Iowa 347, the deceased need not have apprehended immediate death to render his declaration admissible, it being sufficient if he had no expectation of surviving the injury. In Massachusetts it is said the declarant must believe his death to be near at hand. *Commonwealth* v. *Haney,* 127 Mass. 455 (1879). "Made under a sense of impending death." *Commonwealth*

EVIDENCE (Continued).

v. *Latampa*, 74 Atl. (Pa., 1909) 736. From these cases selected at random the hopeless confusion in America is very evident. Perhaps the same comment is here applicable as was made on the state of the English rule before the judgment of the principal case was pronounced,—the necessity of accurate and authoritative statement of this phase of the rule has not been placed squarely before the appellate courts. For the American cases, see Subject Note, 56 L. R. A. 353.

The soundness of the decision by Lord Alverstone will hardly be questioned. The principle upon which declarations *in extremis* are admitted in evidence is that in such circumstance, every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth. *Woodcock's Case, supra.* The motive leading to their introduction is the frequent necessity of the case, evidence from other sources oftimes failing. *Railing* v. *Commonwealth*, 110 Pa. 100. The rule as now stated in England recognizes the inherent improbability that one who believes beyond hope of recovery that he will die to-morrow or the next day, will lie any more than will he who believes himself to be already in the finality of death. With respect to the learning of an eminent Judge, the ruling of Lush, L. J., in *Regina* v. *Osman*, noted *supra*, imputes to man a low standard of intelligence and understanding of the solemnity of his approaching dissolution. One hopelessly expecting death does not add conscious falsehood to his misdeeds any more than does he who momentarily expects to die. He cannot believe that his sin will be any less in one case than in the other. And in both cases the motive for the introduction of such evidence from an interest in the prosecution of crime is the same.

Records of Weather Conditions

The question as to whether weather records kept at a U. S. Armory and also private records kept by an individual, should be admitted as evidence in order to show weather conditions at a place six miles distant, is touched upon in the recent case of *Ducharme* v. *Holyoke St. Ry Co.*, 89 N. E. 561 (Mass.) 1909. The lower court excluded this evidence, and on appeal; Sheldon, J., after stating that it was for the Judge in the exercise of his discretion to determine as to the admissibility of such evidence, went on to say that "it perhaps would have been a wiser exercise of that discretion to have admitted the testimony of these two witnesses to be considered together and to have left it to the jury to determine the weight to be given to it under proper instructions; but we cannot say as a matter of law that its exclusion was erroneous."

While there are a number of cases where the records of the weather bureaus have been admitted as evidence of the weather conditions in the immediate vicinity, the cases where such evidence has been admitted to show weather conditions at a distance are not so numerous.

The first case is that of *Evanston* v. *Gunn*, 99 U. S. 660, decided in 1878, where weather reports kept at Chicago were held admissible in order to show direction and velocity of winds and also the amount of snowfall at a place ten miles distant. Later in the case of *Hart* v. *Walker*, 100 Mich. 406 (1894), weather records kept at an asylum, twelve miles from the scene of an alleged assault, were admitted for purpose of showing the temperature. A statute has since been passed in Michigan which enacts that records of weather conditions taken by United States signal service department should be admitted as evidence and be *prima facie* evidence of facts and circumstances therein

EVIDENCE (Continued).

contained. Compiled Laws of Michigan, 1897, Act 10201. This statute makes no reference to distances and would seem to leave that question to the discretion of the Judge. Similar statutes have been passed in New York; Laws of New York, 1897, Chap. 622; and in Vermont, Vermont Statutes, 1894, Sec. 1250. In *Houston* v. *City of Council Bluffs,* 101 Iowa 33 (1897), records of U. S. weather bureau, five miles distant, were admitted to show temperature and the amount of snowfall. The records of the U. S. weather bureau ten miles distant were likewise admitted in *Mears* v. *N. Y., N. H. and H. R. R. Co.,* 75 Conn. 171 (1902) in order to show whether it was raining or clear at the place in question.

HUSBAND AND WIFE.

In a recent English case, a husband, finding that valuable clothes of his wife were about to be levied upon by her execution creditor, made the point which was put to the jury, that they might well be her paraphernalia.

Wife's Paraphernalia

The jury having so found, an appeal was allowed, on the ground that there can be no question of paraphernalia during the husband's life, and that its introduction could only result in confusing the jury; whereas under the Married Women's Property Act of 1882, the fact that this wearing apparel was purchased by the wife for her personal use with money supplied by her husband for the purpose, made it *prima facie* her separate property. And Farwell, L. J., observed that since the act, the old common law exception of paraphernalia from the husband's right to his wife's chattels personal has ceased to exist. *Masson, Templier & Co.* v. *De Fries,* 2 K. B. (1909) 831.

At common law, where all the wife's personal chattels were the property of her husband, articles of apparel or adornment, suitable to the station of her husband, which were her property before marriage, or were given to her during coverture by the husband, were denoted her paraphernalia; and while he had exclusive control of them during his lifetime, yet at his decease, the wife could claim them against executors or legatees. *Comyn's Dig. Baron et Feme.* Hence the Court well said in the principal case that this is no right of the husband at all; and that the issue would have been presented much more intelligibly to the jury had they been asked to decide whether this clothing was the property of the husband or the separate property of the wife.

That paraphernalia has been done away with by the act is, however, far from evident. In the absence of evidence as to the understanding between husband and wife as to what was to be her separate estate, and what her paraphernalia, the presumption may have been (*Graham* v. *Londonderry,* 3 Atk. 393) that articles of adornment given by him, were intended as ornaments of the person only, and were therefore but paraphernalia; and since the act, it may be in favor of regarding them as her separate estate (*Tasker* v. *Tasker et al., L. R. P.* 1895, p. 4). Yet this is a presumption only; and the question is still to be determined by evidence of the facts in each particular case. True, it has been held that in New York, under such a statute, the articles constituting paraphernalia at common law become the wife's separate property,—*Rawson* v. *Penna. R. R. Co.,* 48 N. Y. 216. But the opposite view has been generally maintained in this country, *Hawkins* v. *R. R.,* 119 Mass. 596, and so formerly in England,—*Tasker* v. *Tasker, et al., supra,*

EVIDENCE (Continued).

It is submitted that while as a matter of fact, by reason of the provision of the act permitting her to retain as her separate estate those personal chattels which she possessed before marriage, and by the conditions of the various marital arrangements as now made, there is a general probability that the apparel which comprised paraphernalia at common law is now held as separate estate; yet in a case where all such articles were in fact provided by the husband for his wife's use, upon the distinct understanding that they were to remain his property, it is hard to see how the provisions of the act would deprive her of her right to paraphernalia in the event of his decease.

INSURANCE.

Increase of Rates by Mutual Agreement

A State Supreme Court has again denied the right of a mutual benefit association to increase the rates on its certificates of insurance, and incidentally to establish a lien on the policy, in effect reducing its face value, where no agreement was made by the members to abide by the amendments to the constitution to be subsequently adopted. *Fort* v. *Iowa Legion of Honor,* 123 N. W. (Iowa, 1909) 224. This decision is manifestly correct. The mutual benefit certificate is a contract of insurance, and the society cannot change the obligation expressed in it without the consent of the holder. *Langan* v. *A. L. H.,* 174 N. Y. 226. This is general law, and such changes of the by-laws are enforceable only where the beneficiaries contract to be bound thereby. *Fullenwider* v. *S. C. of R. L.,* 180 Ill. 621.

Indeed, in many jurisdictions, in cases where it has been provided in the contract that the beneficiary will be bound by subsequent by-laws, it has been held that this provision relates only to such changes as refer only to the management of the society and not to existing contracts of insurance, *Langan* v. *A. L. H., supra;* while others hold that such by-laws are to be considered as prospective only, in the absence of special provision. *A. O. U. W.* v. *Brown,* 112 Ga. 545. The settled law of Pennsylvania is that a fraternal insurance society has no power to arbitrarily reduce the amount of benefit on a contract. *Supreme Council A. L. H.* v. *Getz,* 50 C. C. A. 153.

In the principal case, several novel points were made for the defense, but unsuccessfully. Though the plaintiff had agreed to prior amendments to the constitution providing for increased rates, by paying assessments therefor, such action did not estop him from denying the validity of subsequent illegal amendments. The action of the plaintiff merely ratified those particular amendments then adopted, and not the power of the association to make any changes in the contract then or thereafter, as it might see fit. Nor was plaintiff deprived of his action for damages by the breach because his standing was lost by his failure to pay the assessments under the amendment. The society by its action had repudiated the contract so as to justify rescission by the member, and election to stand upon his right to damages for the breach.

MASTER AND SERVANT.

Employer's Liability Act: Constitutionality in the Territories of the United States

In *El Paso R. R. Co.* v. *Gutierrez*, 215 U. S. 89 (1909), the question was raised as to whether the Federal Employer's Liability Act of June 11, 1906, was unconstitutional so far as it relates to common carriers engaged in trade or commerce in the Territories of the United States. It was held to be constitutional within these limits.

This act in 1907 was declared to be unconstitutional in so far as it related to the states, on the ground that the terms of the statute were so broad as to include purely intra-state commerce, and that this portion could not be separated from the rest. *Employers' Liability Cases*, 207 U. S. 463; 56 *Am. Law Reg.* 257. The reasoning by which the act was saved as regards the Territories in our principal case is that an Act of Congress may be unconstitutional as measured by the commerce clause and constitutional as measured by the power to govern the Territories. The test of its separability is whether Congress would have enacted the legislation exclusively for the Territories. It then points out that the evident intention of Congress in passing the act was to make uniform rules as to an employer's liability. And if Congress had realized that it had no power to deal with these relations in the states, still it would have enacted the same curative provisions of the law in the Territories, where it has undoubted right to pass such a controlling law.

MONOPOLIES.

Sherman Anti-Trust Act (Act July 2, 1890, C. 647, 26 St. 209 [U. S. Comp. St., 1901, p. 3200])

To understand the decision in the case of the *United States* v. *Standard Oil Co.*, 173 Fed. 177 (1909) a brief history of the company since 1892 is necessary. In that year nine trustees held the legal title to the stocks of various corporations. Trust certificates had been given for the stocks so held. There were outstanding certificates for 972,500 shares in the trust. Following a decision by the Supreme Court of Ohio, holders of the trust certificates met and dissolved the trust and resolved that the stocks should be distributed to the owners of the trust certificates in proportion to their respective ownerships of shares in the trust. By a particular method of distribution, a certain clique took sufficient shares of the stock of each of the various companies to secure the control and management. In 1899 the Standard Oil Company of New Jersey secured an amended charter, which enabled them to become a holding company. They took over the majority stock held by the clique and succeeded thereby to the management and control. The United States brought a bill in equity against the holding company, the subsidiary companies and certain individual defendants alleging a violation of the Sherman Act.

The Court decided (1) it was a combination and conspiracy in restraint of trade under Section 1 of the act, on the ground that the direct and necessary effect was to stifle free competition in commerce among the states or with foreign nations; (2) it was a violation of Section II as well, because the combination and conspiracy in restraint of trade constituted illegal means by which the conspiring defendants combined and conspired to monopolize a part of interstate and international commerce and by which they have secured a monopoly of a substantial part of it.

The case has been appealed to the Supreme Court of the United States and is fixed for argument on March 14th next.

NUISANCE.

Stagnant Water a Breeding Place for Mosquitoes

The tenant of certain real estate in Georgia brought an action against a power company to recover damages resulting from the backing of a large body of water over a great area of land near the plaintiff's home, owing to the construction of a dam by the defendant company. It was contended that the pond was a nuisance, caused sickness in the plaintiff's family and deprived him of the use of his premises. The main question in the case was whether the defendant, which possessed the right of eminent domain, could maintain a nuisance of the character complained of and it was very properly held that it could not. The defendant, however, made this ingenious additional contention: It appeared from the testimony of the defendant's experts that the malarial fever from which the plaintiff's family suffered was produced in them by the bite of a particular kind of mosquito which was harmless and incapable of carrying the disease unless it had first bitten some other human being infected with malaria. Hence, it was argued, the relation between the maintenance of the pond and the final communication of the disease was too remote. Moreover, the mosquito being an animal *ferae naturae, scienter* on the part of the person harboring it was a necessary allegation. The contention was dismissed in the following language: "Without making any specific classification of mosquitoes, we hold that they are a common pest, and that the maintenance of a place where they breed in unusual numbers is such a menace to persons residing nearby as to make that place ordinarily a nuisance; and that if as a result of the maintenance of such a place the mosquitoes do in fact breed there, as they otherwise would not have bred, and become inoculated with malaria, and, in accordance with what is naturally to be expected, fly abroad and communicate malarial fevers, the proprietor of the breeding place is in contemplation of law proximately the author of the damage." *Towaliga Falls Power Co.* v. *Sims,* 65 South Eastern Rep. (Ga., 1909) 844.

In regard to the main point in issue the Court was undoubtedly correct in its decision. Though a corporation has by legislative enactment, been given the authority to exercise the right of eminent domain, it is not thereby relieved from those consequences which arise from an improper use of the privilege conferred. Admitting that the corporation has not been negligent, the public character of its business is no defense to an action for damages consequent on acts done by it in exercise of the right which are contrary to law or beyond the powers conferred by its charter. *Baltimore and Potomac R. R.* v. *Baptist Church,* 108 U. S. 317; *Delaware and Raritan Canal Co.* v. *Lee,* 22 N. J. L. 243; *N. Y., C. & St. L. R. R.* v. *Co.,* 149 Ind. 344; see also, *M. K. & T. R. R. V. Mott,* 70 L. R. A. 579, and note.

The contention that the *scienter* was required to be proved is hardly to be treated seriously; it cannot be argued that the mosquito is an animal *mansuetae naturae* and so within the rule requiring proof of *scienter.* If the animal is of a notoriously vicious species, the owner thereof is liable without proof of negligence; proof of *scienter* is, likewise, not required. But if the animal is tame and domesticated, the owner is not liable unless it be proven that he knew of the vicious propensity of the animal. The liability in both cases has been based upon the "fault which the law attributes to the owner, and no further actual negligence need be proved than the fact that they are at large unrestrained." The gist of the action is not in keeping the animals, but the

NUISANCE (Continued).

keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not. *Klenberg* v. *Russell,* 125 Ind. 531.

PLEADING.

The case had been before the court once before on a question of pleading. After it was remanded the plaintiff filed five counts in addition to the two original counts of his declaration. Defendant demurred to these additional counts and was overruled. The case was then brought before the court for a second time on exceptions by the defendant, who contended that his demurrer to the five counts should have been sustained on the ground of misjoinder. In sustaining the judgment overruling the demurrer to the additional counts, the court held that the demurrer did not go to the whole declaration and therefore did not raise the question of misjoinder. *Lee* v. *Follensby,* 74 Atl. Rep. (Vt., 1909) 327.

Joinder of Actions: Demurrer

This decision is correct. The demurrer opens only that part of the record which is terminated by the pleading demurred to. To raise the question of misjoinder the demurrer must be to the whole declaration, 1 *Chitty, Pleading,* 205 (6th Edit.); *Kingdon* v. *Nottle,* 1 M. & S. 355; *King* v. *Morris,* 73 N. J. L. 279. Nor can the party aid the mistake by a *nolle prosequi,* 1 Saund. 207c; nor by abandoning one of the counts, *King* v. *Morris, supra.* The rule that misjoinder may be taken advantage of by demurrer to the whole declaration is true under code practice as well as at common law. *Lovett* v. *Pell,* 22 Wend. 369; *Longsdale* v. *Woollen,* 120 Ind. 16; *Wells* v. *Betts,* 45 N. Y. Ap. Div. 115.

QUASI CONTRACTS.

In the case of *Millard* v. *D. L. & W. R. R.,* 224 Pa. (1909) 448, a suit instituted to recover from the person benefited thereby, taxes voluntarily paid through mistake of law, there are *dicta* in the opinion which would lead to the inference that a ground exists for such recovery when the payment was made merely through mistake of fact.

Right of Recovery of Taxes Paid by Mistake from the Person Benefitted

In considering this proposition it is necessary to leave out of the discussion those cases where the plaintiff in order to save his property from attachment, paid taxes which he knew were legally due from the defendant, but which the latter had neglected to pay. Such instances frequently occur, and in many of them recovery has been permitted, but in such a case there can be no question of a voluntary payment. *Hogg* v. *Longstreth,* 97 Pa. (1881) 255. Also it seems well established that a mere voluntary payment of taxes known to be another's, where no mistake of fact exists as to plaintiff's necessity to make such payment, will permit of no recovery, unless some request or ratification on the part of the defendant can be discovered or implied. *Beach* v. *Vandenburgh,* 10 Johns (N. Y., 1813) 361; *Benson* v. *Thompson,* 27 Me. (1847) 471. A badly reported and ancient Maryland case, seems to be the only authority opposed to this doctrine. *Ott* v. *Chapline.* 3 Har. & McHen. (1793) 323.

But when we examine the *dicta* of the principal case, namely, that recovery can be had by one who, believing as a matter of fact that he

QUASI CONTRACTS (Continued).

owed a tax assessed against him which in reality was due on another's property, and, acting under such belief, has paid the same, there seems to be a scarcity of authority in support thereof. The case of *Iron City Tool Co.* v. *Long,* 4 Sad. (Pa., 1886) 57, is the only one discovered which seems exactly in point. There the plaintiffs, who were lessees of a certain lot, received a tax bill which they paid, believing it the rightful assessment for their property. Later it was discovered that the bill covered their lot, as well as the defendant's adjoining property, who, suit being instituted, was compelled to refund to the plaintiffs this excess amount. In *Goodnow* v. *Moulton et al,* 51 Ia. (1879) 555 the payments extended over a long course of years, and from this the court inferred a consent on the part of the defendant. In that case, also, as well as in *Kemp* v. *Cosart,* 47 Ark. (1885) 62, as the title was in litigation, that a pure and *bona fide* belief existed in the plaintiff that he was the owner might well be questioned.

As clearly laid down in *Montgomery* v. *Severson et al,* 68 Ia. (1886) 451, where the payments extend over a long time and especially where the title is in litigation, the court will often presume a request or assent on the part of the defendant, on the ground that he must have realized the taxes were due and that some one was paying them for him. But where nothing of this nature can be inferred, it would seem that perhaps the weight of what little authority there seems to be on the subject, inclines to the view that as the payments are voluntary there can be no recovery. *Carr* v. *Stewart,* 58 Ind. (1877) 581; *Scharffbilling* v. *Scharffbilling,* 51 Minn. (1892) 349.

TORTS.

Deceit: Representations by a Creditor to Another Creditor which Cause the Latter to Defer Suit

Graham v. *Peale, Peacock & Kerr,* 173 Fed. 9 (1909). The defendant, while acting for a trust company to which a corporation was largely indebted, induced the plaintiff's attorney to refrain from pressing plaintiff's claim against the corporation then due by attachment or other process, by falsely representing to such attorney that the corporation was in good financial condition, that the trust company would extend the corporation's credit by loaning an additional $25,000, and that if plaintiff and the trust company and another, constituting the corporation's largest creditors, would permit the corporation to continue, the corporation would make *pro rata* payments, and would be able to relieve itself from difficulties. The trust company at this time, however, was secretly gaining absolute control of the corporation's assets, and recovered for itself a large portion of its indebtedness before plaintiff discovered defendant's duplicity, when the corporation was found to be a bankrupt. The Court held that an action for deceit could not be sustained against the defendant, Putnam, J., deciding there could be no recovery by a party who has an overdue claim and intends to demand immediate payment of a solvent debtor, and who is directly influenced from making his demand and enforcing payment by the wilfully false representations of another creditor, who intends that the false representation shall be acted upon, and who, by means thereof, reaps the benefit of his fraud by collecting his own claim in full, thereby rendering the debtor insolvent and thus causing the party whom he has misled to suffer substantial pecuniary loss, the right of recovery depending in such a case upon whether the

TORTS (Continued).

injured creditor had proceeded so far as to take out a writ. Aldrich, J., agrees with the result reached on the ground that the plaintiff is not in a position to make his damages legally certain.

This is a harsh doctrine. Putnam, J., bases his decision on *Bradley* v. *Fuller,* 118 Mass. 239, where it was held that, if a person who has a claim against a corporation, which he intends to enforce by an attachment of its property, is purposely induced by false and fraudulent representations of its treasurer to refrain from making an attachment, and all the property of the corporation is subsequently attached for the debt of another person and is sold on execution, an action of tort for such fraudulent representations will not lie against the treasurer.

Bigelow on Torts (7th ed., 82) states what seems to be the general rule: It is fundamental that the defendant's representation should have been acted upon by the plaintiff and acted upon to his injury. Fraudulent conduct or dishonesty of purpose, however explicit, will not afford a cause of action unless shown to be the very ground upon which the plaintiff acted to his damage. It is deemed necessary to this action that the damage as well as the acting upon the representation must already have been suffered before the bringing of the suit, and that it is not sufficient that it may occur.

In *Yates* v. *Joyce,* 11 Johns. 136, the plaintiff, who had a lien on the defendant's property, was allowed to recover where the defendant fraudulently removed the property, and in *Penrod* v. *Mitchell,* 8 S. & R. 522, an action on the case lay, in the nature of a writ of conspiracy for fraudulently withdrawing the goods of the defendant in an execution, from the reach of the plaintiff. But in both these cases actual damage was suffered by the plaintiff.

Findlay v. *McAllister,* 113 N. S. 406, in explaining cases where recovery was allowed, makes this general distinction: "The right of a judgment creditor to proceed by action against those who rescue the person of his debtor arrested on mesne or final process, or interfere with the goods of his debtor so as to prevent a levy or sale by the sheriff to satisfy his judgment, is well recognized at common law.