RECENT CASES

ACCOUNT STATED—RETAINING ACCOUNT RENDERED WITHOUT OBJECTION—In Minnesota, where a debtor retained an account rendered him by a creditor for an unreasonable time without objection, it was held that such retention was evidence of assent by the debtor to the balance as rendered, and an admission of its correctness from which the law implies a promise to pay the sum stated therein to be due; it is, therefore, an account stated. Western Newspaper Union v. Segerstrom, 136, N. W. Rep. 752 (Minn., 1912).

The principal case is in accord with the weight of authority. Sherman v. Sherman, 2 Vern. 276 (1692); Willis v. Jernegan, 2 Atk. 251 (1741); Anding v. Levy, 57 Miss. (1879); Fitzgerald v. First National Bank, 114 Fed. 474 (Neb., 1902). The rule that a debtor, by retaining an account rendered for an unreasonable time without objection, was presumed to have assented to it and it thereby became an account stated, arose out of the customs and practices of merchants, and was originally adopted in England by Courts of Chancery as applicable to merchants only. Sherman v. Sherman, 2 Vern. 276 (1692). It was, however, early applied in the United States in cases at law. Bainbridge v. Wilcox, 1 Baldw. (U. S.) 536 (1832).

In some states, the Courts have refused to extend the rule beyond controversies between merchants. Brown v. Vandyke, 8 N. J. Eq. 795 (1853); Reffner v. Hewitt, 7 W. Va. 585 (1874). With the enlarged needs of business, however, the majority of states have extended it to all classes of business men. Towsley v. Denison, 5 Barb. 490 (N. Y., 1866); McCord v. Manson, 17 Ill. App. 118 (1885). As in the principal case, the retention is merely regarded as evidence of an account stated which is rebuttable. Burst v. Jackson, 10 Barb. 219 (N. Y., 1850). It is a matter of fact for the jury to decide whether the retention by the debtor was for a reasonable time or not. Darby v. Lastrapes, 28 La. Ann. 605 (1876). The account as rendered must, however, be unambiguous and clearly indicate the nature and extent of the plaintiff's demand upon the defendant. Manon Co. v. Carrerras, 26 Mo. App. 229 (1887). The person to whom the account is sent must, of course, be a debtor of the sender; he is not liable for the debts of another of which an account is sent to him by mistake. Daytona Co. v. Bond, 47 Fla. 136 (1904); Allen & Co. v. Hotel Co. 88 N. Y. S. 944 (1904).

AMENDMENT OF PLEADINGS—ACTION AGAINST AN EXECUTOR—Suit was brought against an executor for his testator's negligence. After the Statute of Limitations had run, the Court refused to allow an amendment, which made the person, described as executor, defendant individually as the sole devisee under the will of the decedent. It was held that where an amendment may involve in personal liability one who was not made a party originally, it should not be permitted if objected to. Bender v. Penfield, 83 Atl. Rep. 585 (Pa. 1912).

After the Statute of Limitations has run, a new action would be unavailing. Hence an amendment which brings in new parties or changes the capacity of those involved will be disallowed. LeBar v. R. R. Co., 67 Atl. 413 (Pa., 1907); King v. Avery, 37 Ala. 169 (1861). It has been manyt imes decided that a new cause of action cannot be introduced, or new parties brought in, or new subject matter presented, or a vital and material defect in the pleadings corrected after the Statute of Limitations has become a bar. Grier v. Assurance Co., 183 Pa. 334 (1898); Trego v. Lewis, 58 Pa. 463 (1868); Kaul v. Lawrence, 73 Pa. 410 (1873); Wilkinson v. N. E. Borough, 215 Pa. 486 (1906).

The fact that the amendment happens, as in the principal case, to introduce as a party one who is the legal representative of the estate originally complained against, is a matter of no consequence. Rights of action in different capacities even though in the same individual cannot be mixed and interchanged. Garman v. Glass, 46 Atl. Rep. 923 (Pa., 1900).

But where the Statute of Limitations has not run, an amendment substituting or adding a party will usually be allowed. Wilson v. First Church, 56 Ga. 554 (1876); Patton v. Pittsburgh Co., 96 Pa. 169 (1880); Wood v. Lane, 84 Mich. 521 (1891). In a few cases where the Statute of Limitations was not involved, such amendments have been held inadmissible. Miles v. Strong, 60 Conn. 393 (1891); Baron v. Walker, 80 Ga. 121 (1887).

CONTRACTS—MUTUALITY—ENFORCEMENT—The defendant made a written offer of a certain piece of land, complying with the Statute of Frauds, which offer was orally accepted by the plaintiff; whereupon the defendant refused to perform on the ground of lack of mutuality of obligation, insomuch as the acceptance was verbal and hence not binding on the plaintiff. *Held*: where a valid, written option to sell real estate is orally accepted, the agreement becomes mutual and may be specifically enforced notwithstanding the defense of lack of mutuality. Fox v. Hawkins, 135 N. Y. Supp. 245 (1912).

It is a general principle that mutuality of obligation is required as a condition to the right of specific performance. There is, however, an exception, which, while not entirely without contradiction, is almost as well established as the general principle itself; this exception is that specific performance may be granted at the instance of a party not originally bound by a contract within the Statute of Frauds because he did not sign the same, against another party who did sign it, Clason v. Bailey, 14 Johns. 489 (N. Y. 1817); Miller v. Cameron, 45 N. J. Eq. 95 (1889); Smith's Appeal, 69 Pa. 474 (1871); Austin v. Wacks, 30 Minn. 335 (1883); Corson v. Mubrany, 49 Pa. 88 (1865).

The reason generally given for the exception is that by resorting to a suit for specific performance, the party who did not sign adopts the agreement and renders it obligatory upon himself. This exception is, of course, a relaxation of the general principle requiring mutuality of obligation as a condition of specific performance; but the tendency of the cases is to regard the principle as satisfied if there is a mutuality of obligation at the time the relief is sought, and not to require such mutuality from the beginning.

Chancellor Kent, in Clason v. Bailey, said that he thought that the weight of argument was against the exception, but concluded that the exception was too well established to be questioned.

A few cases have held that, where the party seeking specific performance of a contract within the Statute of Frauds was not originally bound because he did not sign the contract, he is not entitled to its specific performance in equity against the party who did sign. Lipscomb v. Watrous, 3 App. D. C. 1 (1894); Durall v. Myers, 2 Md. Ch. 401 (1850); Kane v. Luckman, 131 Fed. 609 (1904). These cases, though not without the support of logic, are clearly against the great weight of authority.

CONTRACTS—NUDUM PACTUM—Two minors, respective sons of the plaintiff and the defendant, were arrested for stealing money from the plaintiff. To procure their release, the plaintiff paid the costs, relying upon the promise of the defendant to reimburse him one half the costs and also one half the sum stolen. Subsequently, the defendant paid the plaintiff his share of the costs but refused to pay the remainder. The Court denied the plaintiff recovery on the ground that the defendant's promise was *nudum pactum* inasmuch as the defendant was under no legal obligation to pay the debt of his son. Wilkins v. Barnes, 75 S. E. Rep. 361 (Ga., 1912).

This case is flatly *contra* to the well-established doctrine of consideration, which "may consist either in some right, intent, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, supplied or undertaken by the other," Currie v. Misa, L. R. 10 Excheq. 153, 162 (Eng., 1875). It is not necessary that the promisor receive any benefit. Henry v. Durrell, 71 Neb. 691 (1904), affirmed, 128 N. W. Rep. 528 (Neb. 1910); for any detriment suffered by the promisee at the request of the promisor is sufficient to bind the promise, no matter how small the detriment or injury be. Violet v. Patton, 9 U. S. 142 (1809); Houck v. Frisbee, 66 Mo. App. 16 (1896). Or if the promisee does anything legal, upon the promisor's request, which he is not bound to do.

Street v. Galt, 136 App. Div. 724 (N. Y. 1910). It has been held to be valuable consideration if the promisee gave up the use of tobacco for a certain period. Talbot v. Stenmon's Admr. 10 Ky. Law Rep. 33 (1888). Change of residence by the promisee, Bigelow v. Bigelow, 95 Me. 17 (1901); extension of the time of payment, Reigel v. Ormsby, 111 Iowa, 10 (1900); giving up a letter at the promisor's request, Wilkinson v. Olivera, 1 Bingham's New Cases, 490 (Eng., 1835); a promise for a promise in a bilateral contract, Stanborough v. Warner, 4 Leonard, 3 (Eng., 1589). A benefit to a third party is sufficient consideration, so the promise of one brother to care for a third brother, imbecile, whom neither was under legal obligation to support, is valid consideration for the promise of the second brother to pay for such board. Harlan v. Harlan, 102 Iowa, 701 (1897).

The fact that the plaintiff in reality only suffered a detriment of one-half the costs upon a promise to be reimbursed of that sum plus one-half the amount stolen is not material, for "when a benefit results to the promisor or to another at his request, or where the loss or inconvenience is sustained at the instance of the promisor, the latter is bound to perform whether the consideration is sufficient or not." Newton v. Carson, 80 Ky. 309 (1882). And the adequacy or inadequacy of the amount paid by the promisee or its disproportion to the sum promised does not affect the question of the kind of consideration, since the adequacy is merely an element of good faith and has no bearing upon whether the consideration is valuable or good. Lindley v. Blumberg, 9 Pacific Rep. 894 (Colo., 1908).

CONTRACTS—PARTIES—BENEFIT OF THIRD PARTY—The lessee of the assignee of the mortgagor of certain properties in Pennsylvania covenanted in his lease to pay as rent a certain sum of money each year to a designated Trust Company on behalf of the bondholders of the mortgagor. In an action by the Trust Company against the lessee for unpaid rent, recovery was denied because the Trust Company was a stranger to both the contract and the consideration and the promisee owed no legal or equitable obligation to the plaintiff. The lease having been made after the mortgage, the mortgagee can neither distrain nor sue for the rent because there is no privity of contract or estate between the mortgagee and the tenant. There was no novation. Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 Atl. 520 (Del., 1912).

This case follows the strict common law doctrine that no one can sue upon a contract to which he is not a party. Pollock on Contracts, 222. According to the strict conception of contractual liability, privity created by act of the parties themselves is required to permit one to sue another in contract. In England today, therefore, one not a party to a contract cannot sue upon it although made for his express benefit. Gandy v. Gandy, 54 L. J. Ch. 1154 (1885). His remedy is in equity upon the trust.

This rule has been broken into in most American jurisdictions. Lawrence v. Fox, 20 N. Y. 268 (1859), Berry v. Doremus, 30 N. J. L. 399 (1863), Delp v. Brewing Co., 123 Pa. 42 (1888) and the early Massachusetts cases, Arnold v. Lyman, 17 Mass. 400 (1821) and Brewer v. Dyer, 7 Cush. 337 (1851), are all cases in which recovery was had by the beneficiary in assumpsit. In all these cases, there was a transfer of money or property by the promisee to the promisor for the plaintiff's benefit and in all of them the old common law action of debt or of account would have lain. The promisor is variously treated as "in effect a trustee. "Adams v. Kuehn, 119 Pa. 76 (1888); as a "forwarding agent," Baxter v. Camp, 71 Conn. 245 (1898) and Lilly v. Hays, 5 Ad. and E. 548 (Eng., 1836); and as a plain debtor, Berry v. Doremus, *supra*. The common law rule and this exception are well stated in Cooper v. Walther, 44 Pa. Super. 303 (1910).

The principal case does not fall within the exception; it is rather one of a line of cases qualifying the exception. To enable a stranger to a contract to sue upon it when there has not been a transfer of property to the promisor for the express benefit of the stranger, it must be shown (1) that the contract was made for his express benefit, Freeman v. Pa. R. R., 173 Pa. 274 (1896), and (2) that the promisee is under some legal or equitable obligation to the beneficiary. Vulcan Iron Works v. Pittsburgh Eastern Co., 144 N. Y. App. 82 (1911).

In certain other American jurisdictions although privity between the parties is recognized as essential to enable one to sue in contract, it is held that privity

between the beneficiary and the promisor is established by operation of law as soon as promisor and promisee have agreed. Tweeddale v. Tweeddale, 116 Wis. 517 (1903). Neither knowledge of, nor assent to, the agreement by the beneficiary is essential. Bay v. Williams, 112 Ill. 91 (1884); nor must any consideration move from the beneficiary. Rogers v. Gosnell, 58 Mo. 589 (1875).

FORGERY—FILLING UP BLANK CHECK—Where two men were partners in a joint speculative adventure, and one procured the indorsement of the other on a check in blank for payment of their joint losses, promising not to fill it up for more than a certain amount, but later filling it up for a much larger amount, which was, however, less than their joint indebtedness, it was held that he was not guilty of forgery; at most it was a breach of confidence. *Ex parte* Geisler, 196 Fed. Rep. 168 (1912).

It is well settled that when an instrument is executed in blank, it is forgery to fill in the blank so as to make it different than was intended by the maker. Rex v. Hart, 7 Car. & P. 652 (1836); State v. Kroeger, 47 Mo. 552 (1871). Accordingly, where one who is authorized to fill up checks signed in blank with certain amounts and to use them in the principal's business for a particular purpose, fills them up for a larger amount and appropriates the money, he is guilty of forgery. People v. Dickie, 62 Hun, 400 (N. Y., 1891); Regina v. Wilson, 2 Car. & K. 527 (1847); Rex v. Hart, 7 Car. & P. 652 (1836). This rule is put on the ground that by filling up the check with a larger amount, the rights of the drawer are prejudiced and an extra obligation is imposed upon him. For forgery is the fraudulent making or alteration of a writing to the prejudice of the rights of another. Com. v. Bargar, 2 Law T. (N. S.) 37 (Pa., 1880).

In the principal case, it is said that this rule is confined only to cases of employer and employee, and of principal and agent, but not to a case where the relationship is that of two partners jointly liable for losses.

INNKEEPER—LIABILITY—WHO ARE GUESTS—In the case of Pettit v. Thomas, 148 S. W. Rep. 501 (Ark., 1912), appellant was a hotel proprietor, who entertained families as his principal patrons, but received all transient guests who came. The appellee came to the hotel for the benefit of her health, expecting to remain an indefinite length of time, and although there was an agreement as to the weekly rate, there was none as to the time of stay. Appellee sued for loss of luggage by fire. The court sustained the finding that the appellant was an innkeeper within the meaning of the law. Walling v. Potter, 35 Conn. 185 (1868); Bonner v. Willborn, 7 Ga. 307 (1849). The term "inn" is synonymous with "tavern" and "hotel," but not with "boarding house," "restaurant" and "lodging house." Pinkerton v. Woodward, 33 Cal. 596 (1867); People v. Jones, 54 Barb. 311 (N. Y. 1863). Also a Pullman car company in so far as it renders services similar in kind to an innkeeper's is subject to the same liability. Pullman Palace Car Co. v. Lowe, 28 Nebr. Rep. 239 (1889). Being an innkeeper, the appellant was an insurer of the property of the guest committed to his care, and liable for any loss thereof not arising from the act of God, the public enemy, or the neglect or fraud of the owner. Mason v. Thompson, 9 Pick. 280 (Mass., 1830); Richmond v. Smith, 8 B. & C., 9 (Eng. 1828); Quinton v. Courtney, 2 N. C. (1 Hayw.) 40 (1794); Libley v. Aldrich, 33 N. H. 553 (1856). If they are stolen or burned without the fault of either guest or landlord, the latter must pay for them, Schultz v. Wall, 134 Pa. 263 (1890); Norcross v. Norcross, 53 Me. 163 (1865); Fuller v. Coates, 18 Ohio St. 343 (1868); Jalie v. Cardinal, 35 Wis. 118 (1874). A few jurisdictions restrict the liability for such loss to cases where the innkeeper has been guilty of negligence or default. Metcalf v. Hess, 14 Ill. 129 (1852); McDaniels v. Robinson, 26 Vt. 316 (1854); Cutler v. Bonney, 30 Mich. 259 (1874).

The distinction between a boarding house and an inn is, that in the former the guest is under an express contract for a certain time at a certain rate; while in the latter he is entertained from day to day under an implied contract. Willard v. Reinhardt, 2 E. D. Smith, 148 (N. Y., 1853); Beall v. Beck, 3 Cranch C. C. 666 (U. S., 1829). It is a question of fact for the jury to determine from

the contract. Berkshire Woolens Co. v. Proctor, 7 Cush. 417 (Mass., 1851); Neal v. Wilcox, 49 N. C. 146 (1856); Fay v. Pacific Improvement Co., 93 Cal. 253 (1892). In the present case, the appellate court affirmed the instructions embodying the foregoing holdings, under which the jury found that the appellee was a "guest," in view of the fact that her stay at the hotel was to be indefinite, and to be ended at her pleasure. But, under substantially similar facts, where the stay was to be "until such time as the appellee's wife should be benefited in health," upon a finding of the jury that the appellee was a "boarder," the appellate court, in Moore v. Long Beach Development Co., 87 Cal. 483 (1891), refused to disturb the verdict.

INSANE PERSONS—LIABILITY OF A LUNATIC FOR THE TORT OF AN EMPLOYEE OF THE GUARDIAN—The plaintiff, while driving on the highway, was injured through the negligence of a chauffeur employed for a lunatic by his guardian. Neither the lunatic nor the guardian was being carried in the car at the time, though evidence was given that the chauffeur was then about the general business of the lunatic's establishment. The court ruled, Gillett v. Shaw, 83 Atl. Rep. 394 (Md., 1912), that the lunatic was not liable, because (1) It was not his personal tort or done by his direction; (2) not being capable of appointing an agent, he is not liable for the acts of one claimed to be his agent, and so neither his property nor estate can be held; (3) the tort was that of the employee of the guardian; and (4) the tort of the employe or servant of the guardian of a lunatic cannot bind the lunatic either personally, or render his property liable.

The decision is a restriction, if not a departure, from the earlier adjudged cases, ruling that an insane person is civilly liable to answer in damages for his torts, although being incapable of criminal intent, he is not liable to indictment and punishment. Ward v. Weaver, Hob. 134 (Eng., 1646); Hale P. C. 15, 16. Lancaster Bank v. Moore, 78 Penna. St. 407, 412 (1875). Action is said to lie for any tort. Cross v. Kent, 32 Md. 581 (1870); Jewett v. Colby, 66 N. H. 399 (1890); intent being not material, Krom v. Schoomaker, 3 Barb. 647 (N. Y., 1848); his estate being liable for his tortious acts, McIntyre v. Scholty, 121 Ill. 665 (1887). One pertinent limitation on a lunatic's tort liability is recognized in actions for libel and slander where the fact of the well known insanity of the defendant may have prevented any heed being given. Yeates v. Reed, 4 Blackf. 463 (Ind., 1838); Dickinson v. Barber, 9 Mass. 225 (1812).

As to negligence, other than that personal to the defendant himself, Morain v. Devlin, 132 Mass. 87 (1882) holds that a lunatic is liable for the injury suffered by a stranger upon defective premises owned by the lunatic, but under the control of the guardian, and not in the exclusive occupancy and control of a tenant. The underlying questions of responsibility in this case, and the recent one considered above, are identical, but the decisions *contra.*

TORTS—NEGLIGENCE—DUTY TO CHILD TRESPASSER—When a child of 23 months trespasses upon a private siding, the owner owes no affirmative obligation to anticipate its presence and in absence of wanton and wilful negligence is not liable for any injury to it. Martin v. Hughes Creek Coal Co., 75 S. E. Rep. 50 (W. Va. 1912).

This case merely follows the general rule that an owner of premises is not bound to keep them safe or in any particular condition for the benefit of trespassing children. Balls v. Middleboro Town & Land Co., 24 Ky. Law Rep. 114 (1902); Peninsular Trust Co. v. City of Grand Rapids, 131 Mich. 571 (1902); Hughes v. Boston & Maine R. R., 71 N. H. 279 (1902). The rule in the "Turn-Table" cases does not apply, as there is no liability for failure to fence a freight yard. Barney v. R. R., 126 Mo. 372 (1894), a *fortiori* single spur on private premises.

The Court distinguished this case from those of public service railroads and property. "A private siding leading merely from private property to the line of a public railroad, over which the public can have no rights is not a public utility. This is plainly true where the premises of the individual benefited either directly adjoin the railroad, or are separated only by a few feet." Wyman: Public Service Corporations, Vol. I, Section 226 and cases cited; Pittsburgh W. & K. R. R. Company v. Ben Wood Iron Works, 31 W. Va. 710 (1888).

The rule in West Virginia casting the affirmative duty upon railroad employees operating trains to watch out for infant trespassers, Gunn v. Railroad, 42 W. Va. 676 (1896), 36 L. R. A. 575, is *contra* to the general rule that employees of a railroad company operating one of its trains are not required to anticipate the presence of child trespassers upon its tracks or property and the duty of using ordinary care and diligence does not arise until his presence becomes known, Southern Railway Co. v. Chatman, 6 L. R. A. (N. S.) 283, 124 Ga. 1026 (1906); Palmer v. Oregon Short Line R. R. Co., 34 Utah, 466 (1908), 16 American and English Ann. Cases, 229 and cases cited.

The two dissenting justices relied strongly upon the rule in Smith v. R. R., 25 Kan. 738 (1881), but that case is not in point as the siding was part of a public service railroad.

VENUE—ACTIONS: LOCAL OR TRANSITORY—In a case where the plaintiff's real property, situated in New Jersey, was negligently set on fire and damaged, by the sparks from the defendant company's locomotive, it was held that, notwithstanding the allegation of negligence, such an action was, at common law, an action of trespass on the case for injury to real property, and, therefore, not maintainable in the Courts of New York. Brisbane v. Penna. R. R. Co., 98 N. E. Rep. 752 (N. Y. 1912).

The above decision is in accord with the great majority of the opinions in this country. Livingston v. Jefferson, 1 Brock. 203 (W. S. C. C. 1811); Alvin v. Conn. River Lumber Co., 150 Mass. 560 (1890); Cragin v. Lovell, 88 N. Y. 258 (1882); Dodge v. Colby, 108 N. Y. 445 (1888); Peyton v. Desmond, 129 Fed. 1 (1904).

The cases *contra* seem to be but three: Barney v. Burstenbinder, 7 Lans. 210 (N. Y. 1872), and Home Ins. Co. v. Penna. R. R., 11 Hun. 182 (N. Y. 1877), which have later been overruled in their own state; and Little v. R. R. Co., 65 Minn. 48 (1896), which is still the law in Minnesota.

By the common law of England, an action for the recovery of damages for injury to land is local and can be brought only where the land is situated. This is also the law in most of the States of the Union. In the leading case of Livingston v. Jefferson, *supra*, which has done more than any other case to mold the law in this country, Chief Justice Marshall argued against the rule, showing it to be merely technical, but concluded that it was so thoroughly established by authority that he was not at liberty to disregard it. In Barney v. Burstenbinder and in Home Ins. Co. v. R. R. Co., the Court attempted to lay down the principle that when the gravamen of an action, for injuries to real property, is negligence, there the action is transitory. This theory has not been recognized anywhere else and has been overruled many times in the very state that ventured it. Justice Mitchell, in the Minnesota case of Little v. R. R. Co., *supra*, while recognizing the trend of the authorities, nevertheless refused to be bound by them in what he considered a mere technicality, in that the reparation is purely personal and for damages; and changed the rule in Minnesota, thereby accomplishing the result that several other states have obtained by statute. 1 Revised Code of Virginia of 1819, page 450, pp. 14; Ohio Statutes annotated, 1897, Section 5031.