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NOTES

CRIMINAL LAW—SEPARATE OFFENSES—FORMER JEOPARDY—*State* v. *Sampson*[1] is in accord with the great weight of authority in holding that if A, at one and the same time, and at one and the same place, steals the goods of B and C, he is guilty of but one offense and a conviction for the theft of B's goods will bar a subsequent conviction for the theft of C's goods. The decisions in a few jurisdictions are *contra* to this, but the reasoning upon which these courts have arrived at their conclusions is hardly convincing. Before looking further into these decisions, it may be well to examine the attitude of the courts toward the somewhat similar problem which arises when several articles all belonging to the same person—as opposed to diverse ownership as in the principal case—are stolen at the same time and at the same place.

The authorities are practically uniform in holding that if two

[1] 138 N. W. Rep. 473 (Ia., 1912).

or more articles are taken successively from the same owner, and such taking is continuous so as to form one transaction the offense is not divisible, but indictable only as a single act. This is the general law in England[2] and in America.[3] Thus, if gas is feloniously drawn during a long space of time from a main pipe by means of a fraudulent pipe, the larceny, being set in motion by a single impulse and operated upon by a single unintermittent force, is one act and not divisible;[4] likewise, where a coal mine has been tapped at one orifice and the operation continued over a series of years.[5] It seems that the Roman law in regard to the stealing of wine from tanks applies the same principle.[6] Where, as a result of a single impulse, a series of articles are removed in the execution of a general fraudulent plan, even though a few minutes of time separate the successive takings, the offense is single;[7] but if so much as half an hour intervene between two takings, there is a new and separate offense.[8] These and similar cases are decided on the theory that the offense committed is the result of a single criminal intent to steal, coupled with a series of acts so closely related in time as to form practically a continuing transaction, and is, therefore, but a single offense and punishable but once. Technically, separate larcenies have been committed in every such case, and the Massachusetts courts have held that separate indictments can be brought.[9] This rule, however, is opposed to the great weight of authority.[10] The argument usually advanced against the Massachusetts doctrine is, that under it the extent of the prisoner's punishment is made to depend entirely upon the will of the prosecutor.[11] Such an argument, standing alone, would hardly be controlling, for in many instances, the prisoner's punishment depends upon the course which the prosecutor chooses to pursue in framing the indictment.

When, now, we turn to the decisions dealing with the question as to whether or not separate indictments can be presented when the several articles are the property of different persons, we discover the somewhat interesting fact that a single statement by Lord Hale is, apparently, the authority on which the earlier cases

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[2] Rex v. Brettel, Car. & M. 609 (1842); Rex v. Knight, 9 Cox C. C. 437 (1862).

[3] Jackson v. State, 14 Md. 327 (1860); Fisher v. Com., 1 Bush 211 (Ky., 1866); State v. Nelson, 29 Me. 329 (1849); Lorton v. State, 7 Mo. 55 (1830); State v. Johnson, 3 Hill 1 (S. C., 1835); State v. Cameron, 40 Vt. 555 (1868); Lisle v. Com., 82 Ky. 250 (1884).

[4] Rex v. Firth, 11 Cox. C. C. 234 (1869).

[5] Rex v. Bleasdale, 2 Car. & K. 765 (1848).

[6] Wharton on Criminal Law, § 1169.

[7] Rex v. Jones, 4 Car. & P. 217 (1830).

[8] Rex v. Birdseye, 4 Car. & P. 386 (1830).

[9] Com. v. Butterick, 100 Mass. 9 (1868); re-affirmed in Meserve v. Com., 137 Mass. 109 (1884).

[10] Wharton on Criminal Law, § 1169.

[11] See argument by the prisoner's counsel in State v. Thurston, 2 McMull 394 (S. C., 1842). Also State v. Hennessey, 23 Ohio, 339 (1872).

on both sides rest. Hale says[12] that "if the prisoner steals the goods of A of the value of 6 d., goods of B of the value of 6 d., and goods of C of the value of 6 d., being perchance in one bundle or upon a table, or in one shop, this is grand larceny, because it is one entire felony, though the persons had several properties, and, therefore, if in one indictment, they make grand larceny." Those courts which hold that separate prosecutions will not lie in such a case, seize upon the words "*because it is one entire felony*," and argue that if such is the case, then the offense is not divisible and but one indictment will lie.[13] On the other hand, O'Neall, J., in *State* v. *Thurston*,[14] while admitting that for the purpose of proving grand larceny, the different takings might be considered as one act, and therefore one offense, argues that the words *if in one indictment* qualify the statement showing that the larcenies *may* be considered as one offense, and then stoutly contends "that it never entered into the head of the learned Judge, that each of these could not be regarded as *separate petit larcenies*." The Massachusetts courts have adopted the same view.[15] It is to be noted, however, that the prevailing doctrine in America is *contra*.[16] And it is submitted that the prevailing view is essentially sound. The particular ownership of the property is not of the essence of the crime of larceny. The gist of the offense is the felonious carrying away of property, and the quality of the act is not at all affected by the fact that the property stolen, instead of being a single article, the property of a single individual, consists of several articles which are the property of several individuals.

It follows as a matter of course that in those jurisdictions where the offense is construed to be single, the same count may join the larceny of several distinct articles belonging to different owners, where the time and place of the taking of each are the same,[17] and proof of the stealing of any one will support a conviction and bar a subsequent conviction for the theft of the others.[18] *Com.* v. *Sullivan*[19] permits the prosecutor to indict the defendant for one entire crime, or for several distinct offenses, and intimates that where the indictments are unreasonably multiplied, the court in superintending the course of trial and in passing sen-

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[12] 2nd Hale's P. C. 254.

[13] State v. Williams, 10 Hump. 101 (Tenn., 1849); Wilson v. State, 45 Tex. 76 (1876); Lorton v. State, 7 Mo. 55 (1841); State v. Newton, 42 Ver. 537 (1870); State v. Larson, 85 Ia. 659 (1892).

[14] 2 McMull. 397 (S. C., 1842).

[15] Com. v. Sullivan, 104 Mass. 553 (1870).

[16] See 13, *supra*.

[17] Stevens v. State, 62 Me. 284 (1873); State v. Hennessey, 23 Ohio, 339 (1872).

[18] State v. Pednan, 68 Vt. 109 (1896); State v. Clark, 32 Ark. 231 (1878). As to effect of fraudulently procuring a conviction before a magistrate for a lesser element of the offense in order to bar subsequent indictment for the whole offense, see Bradley v. State, 32 Ark. 722 (1878), and Univ. of Penna. Law Review, Vol. 45, page 198.

[19] 104 Mass. 553 (1870).

tence, will see that justice is done and oppression prevented. It is rather difficult to see why, under this view, an indictment for the offense as a whole, alleging the articles to be the property of various persons, is not bad for duplicity.

H. W. W.

EASEMENTS—RIGHT OF WAY—ALTERATION OF USER—INCREASE OF BURDEN—Easements, being rights in and over the lands of others, are distinguished from corporeal hereditaments primarily in the restrictive uses to which they may be put. In this connection, there arises one of the many vexing problems in the law of real property. It is, when the user of a right of way has once been acquired, to what extent, if any, may it be altered. The latest decision on the subject, at least in the English courts, is *White* v. *Grand Hotel, Limited*.[1] In that case, a right of way for general purposes was granted by express agreement, although not in writing. At the time of the grant, the dominant tenement consisted of a private dwelling-house and garden and the way was used as a means of access to the road. Subsequently, the cottage and garden were purchased by an adjoining hotel, which turned the building into a garage and used the right of way for the automobile entrance. The plaintiff claimed that the passing of so many automobiles unduly increased the burden on the servient tenement. But the court decided that the generality of the grant admitted of this altered user.

The construction and extent of the user of a right of way depend largely upon the method of creation of the easement. It may arise by prescription or by express grant. The user growing out of prescription is *strictissimi juris*, *i. e.*, it is to be confined to those users only which gave rise to the prescriptive right.[2] As James, L. J., puts it, in *Wimbledon Conservators* v. *Dixon*,[3] "no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. . . . The way ought to be used only for the purposes for which it was used when the land was in a state in which it was formerly."

When the right of way exists by virtue of an express grant, the words of the grant must determine the extent of the user;[4] but if the grant is in any way ambiguous, the familiar principle applies that a grant shall be construed most strongly against the grantor.[5] If the grant is general, then it seems the user is unrestricted as to quality or quantity so long as its substance is not changed.[6] Our principal case falls under this head.

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[1] L. R. (1913) 1 Ch. 113.

[2] Ballard v. Dyson, 1 Taunt. 279 (Eng., 1808); Wimbledon Conservator v. Dixon, 45 L. J. Ch. 353 (Eng., 1875); Bradburn v. Morris, 3 Ch. Div. 812 (Eng., 1876); Atwater v. Bodfish, 77 Mass. 150 (1858).

[3] 45 L. J. Ch. 353 (Eng., 1875).

[4] Washburn v. Copeland, 116 Mass. 233 (1874); Taylor v. Hampton, 4 McCord 96 (So. Car., 1827); Williams v. James, L. R. 2 C. P. 577 (Eng., 1867).

[5] Gonson v. Healy, 100 Pa. 42 (1881).

[6] United Land Co. v. Great Eastern Ry. Co., L. R. 10 Ch. 586 (Eng., 1875).

The leading case on the grant of easements is *Allen* v. *Gomme.*[7] A right of way was there granted "to the space or opening under the said loft now used as a woodhouse." It was held that the words "*now used as a woodhouse*" merely fixed the locality of the dominant tenement, but did not admit of the alteration of the loft and woodhouse into a cottage. Lord Denman said: "The defendant is confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed." The law as here laid down was later thought by Parke, B., in *Henning* v. *Burnet,*[8] to be too strict. He said: "If a general right of way is given to a cottage, the right is not altered by reason of the cottage being altered." *Finch* v. *Ry. Co.*[9] seems to express the present settled law in England in these words: "Where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant." Some of the late English cases[10] seem to throw a doubt on this principle and to revert to the doctrine of *Allen* v. *Gomme,* but the distinguishing feature of these cases is that they are decided under the restrictive provisions of various Railroad Acts.

In America, the user to which a right of way could be put has always been liberally construed. In *Tallon* v. *Hoboken,*[11] the easement was granted to operate a steam railroad. The court decided that an electric railway could be operated under this. Gummere, J.,: "It is settled law that the owner of an easement in the land of another is not bound to use it in the particular manner prescribed by the instrument which creates it. He may use it in a different manner if he so desires, provided he does not, in doing so, increase the servitude nor change it, to the injury of the owner of the servient tenement." In another very recent case[12] it was said: "The grant was one defined in general terms and without express limitation. Such a grant is to be construed as broad enough to include any reasonable use to which the land may be devoted."

J. F. N.

LEGAL ETHICS—QUESTIONS AND ANSWERS—We publish herewith three more of the questions answered by the New York County Lawyers' Association Committee on Professional Ethics:

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[7] 11 Ad. & El. 758 (Eng., 1840).
[8] 8 Ex. 187 (Eng., 1852).
[9] L. R. 5 Ex. D. 254 (Eng., 1879).
[10] Great Western Ry. Co. v. Talbot, L. R. (1902) 2 Ch. 759; Taff Vale Railway Co. v. Gordon Canning, L. R. (1909) 2 Ch. 48; Reg. v. Brown, L. R. 2 Q. B. 630 (1867).
[11] Tallon v. Hoboken, 60 N. J. L. 212 (1897).
[12] Peck v. Mackowsky, 85 Conn. 190 (1912). Also see Randall v. Grant, 210 Mass. 302 (1911); Arnold v. Fee, 148 N. Y. 214 (1895).

QUESTION:

A lawyer who states that he has had great difficulty in securing testimony in behalf of his client from lawyers as to the value of legal services, in a litigation between the client and a former lawyer, involving that value, has applied to the Association to designate lawyers who will act as expert witnesses in his case. His application has suggested the formulation of the following question:

Is it the ethical duty of a lawyer, when called on to give testimony as an expert witness concerning the value of legal services, to testify as a witness giving his opinion of such value on a proper question submitted to him, in a litigation where it is charged that another lawyer has greatly overcharged the latter's client, or may any number of lawyers who are appealed to give testimony respecting the value of such services, the nature and extent of which are not in dispute, decline to testify on the ground that they do not care to express an opinion adverse to a charge made by another lawyer and which is in litigation?

ANSWER:

We are of the opinion that mere considerations of courtesy or fraternity should not deter members of the legal profession from testifying in respect to the value of legal services, when it is contended that a lawyer has overcharged or attempted to overcharge a client, and the controvery is the subject of litigation.

QUESTION:

Is it the opinion of the Committee that an attorney, who has received a retainer, but who has no express agreement with his client for his compensation, may properly notify his client, upon the eve of trial for which he has made preparation, that he will not appear at the trial, nor proceed further with the suit, nor consent to the substitution of another attorney, nor release any of the client's papers in his possession and essential to the proper trial of the action, unless his client pays or secures to his satisfaction the payment of a bill which he had rendered, and which he deems reasonable compensation for his services to the date of his conditional refusal to proceed further in the cause?

ANSWER:

The suggested conduct of an attorney upon the eve of the trial of the case for which he had been retained is unethical and should be condemned.

QUESTION:

"A," an attorney, represents two creditors of "C," and is desirous of filing a petition in bankruptcy against "C." "A" knows that "B," an attorney, represents a third creditor of "C," and suggests to "B" that "B" should have his client join with "A"'s clients in signing and filing the petition in bankruptcy.

This was done under an arrangement between "A" and "B" with the knowledge of the clients, that if "A" represents the receiver in bankruptcy, the fees which "A" thus receives will be divided between "A" and "B." Is this considered unethical?

I should like to have this question answered entirely irrespective of whether "B" is to do any work or not in connection with the receivership.

ANSWER:

The Committee does not express any view at present as to the propriety of an attorney for petitioning creditors assuming also to represent the receiver and thus sustain two-fold obligations that may conflict; yet, since in this district the Federal Court itself undertakes to safeguard by its special order under Rule 20 the propriety of such representation in each particular case, we are of the opinion that the facts recited in the question, do not alone constitute unethical conduct.

NEGOTIABLE INSTRUMENTS — ACCOMODATION PAPER — CO-SURETIES—An interesting case, dealing with the Negotiable Instruments Law and the doctrines of suretyship was recently decided by the Supreme Court of Oregon. In this case,[1] the plaintiff and the defendant signed a promissory note for the accomodation of the maker. On the face of the note the plaintiff appeared to be a co-maker and the defendant's name appeared on the back as an anomalous indorser. The note was payable to a fourth person, who gave the accomodated party an extension of time The plaintiff having finally been forced to pay brings this suit against the defendant for contribution. The court allowed him to recover, saying that parol evidence was admissible to show that the defendant signed as co-surety with the plaintiff and, as the Negotiable Instruments Law does not apply to co-sureties, the law merchant governs.

Before the act, the anomalous indorser was held in different states to be *prima facie* an indorser, a second indorser, a maker, a guarantor or a surety.[2] These were only presumptions, however, and in most jurisdictions parol evidence was admissible to show the real intention of the parties.[3] Under section 63[4] of the Negotiable Instruments Law, the status of an anomalous indorser is that of an indorser unless parol evidence is admissible to change his character. From the majority of cases decided since the act was adopted, it would seem that parol evidence is not admissible[5] for this purpose. As an indorser, section 66[6] apparently makes him liable only to persons who sign subsequently to him. Without considering the liability of an ordinary indorser, however, section 64, sub-section 1[7] has expressly provided to whom the anomalous indorser is to be liable where the instrument is payable to a third party. The anomalous indorser is not liable, under any of these sections, to the maker.

In a New York case,[8] the court, feeling that this section would work an injustice, admitted parol evidence to show the true intention of the parties. The court in the principal case

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[1] Hunter v. Harris, 127 Pac. Rep. 786 (Ore., 1912).

[2] Carrington v. Odorn, 124 Ala. 529 (1899); DePonce v. Bank, 126 Ind. 553 (1890); Lewis v. Monahan, 173 Mass. 122 (1899); Sturtevant v. Randall, 53 Me. 149 (1865); Milligan v. Holbrook, 168 Ill. 343 (1897); Owings v. Baker, 54 Ind. 82 (1880); Temple v. Baker, 125 Pa. 634 (1889).

[3] Carrington v. Odorn, *supra;* DePonce v. Bank, *supra;* Sturtevant v. Randall, *supra.*

[4] Brannon, N. I. L.: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

[5] Hopkins v. Merril, 79 Conn. 626 (1907); Baumeister v. Kuntz, 53 Fla. 340 (1907); Rockfield v. Bank, 77 Ohio St. 311 (1907).

[6] Brannon, N. I. L., page 82.

cited this decision with great approval[9] and under its authority admitted parol evidence to show that the defendant signed as co-surety with the plaintiff. Even though the plaintiff is a co-surety, he is, under section 192[10] of the act, a party secondarily liable. Section 120, sub-section 6[11] of the act says that a party secondarily liable is discharged by an extension of time given by the holder to the party primarily liable. It would seem, therefore, that under these sections the defendant would be relieved.[12] The court, however, did not discuss these sections, but said that as the act did not cover the liability of co-sureties the law merchant applied.[13]

The necessity for the discussion in the principal case was probably brought about by the interpretation of the act as to the liability of an accomodation maker where an extension of time has been given by the creditor to the real debtor. Before the act an extension of time to an accomodated party with knowledge that he was the real debtor relieved the accomodation maker in practically every jurisdiction.[14] Some jurisdictions even since the passage of the act still uphold this proposition.[15] The majority of jurisdictions, including that of the principal case, however, hold that the act having made the accomodation maker primarily liable, he is not relieved by an extension of time.[16] Under the cases which hold that the law has not been changed by the act, the payment by the plaintiff would have been voluntary and the defendant would have been discharged both under the act and at the law merchant.[17] In jurisdictions which hold that the law has been changed by the act, however, the payment by the plaintiff

[7] Brannon, N. I. L., page 76 (2 ed.): "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable in accordance with the following rules—(1) If the instrument is payable to a third person he is liable to the payee and to all subsequent parties."

[8] Haddock v. Haddock, 192 N. Y. 499 (1908).

[9] Brannon thinks the case was incorrectly decided. Brannon, N. I. L., page 78, 2nd Ed.

[10] Brannon, N. I. L., 2nd Ed., page 158: "Person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All others are secondarily liable."

[11] "A person secondarily liable on the instrument is discharged: (6) By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." Brannon, N. I. L., page 120.

[12] Deahy v. Choquet, 28 R. I. 338 (1907).

[13] Brannon, N. I. L., page 160.

[14] Canadian Bank v. Coumbe, 47 Mich. 358 (1882); Olmstead v. Latimer, 178 N. Y. 465 (1904); Drechler v. Fulham, 11 Col. App. 62 (1898); Turrill v. Boynton, 23 Vt. 142 (1851).

[15] Farmers' Bank, Wickliffe v. Wickliffe, 134 Ky. 627 (1909); Lumber Co. v. Snouffer, 139 Iowa 176 (1908). In this case the doctrine was limited to original parties to the instrument.

[16] Bradley etc. Co. v. Heyburn, 56 Wash. 628 (1910); Wolstenholme v. Smith, 34 Utah 300 (1908); Richards v. Bank Co., 81 Ohio 348 (1910); Vanderford v. Farmers' Bank, 105 Md. 164 (1907); Cellers v. Meschen, 49 Ore. 186 (1907).

[17] Childs on Suretyship, page 342 and cases cited.

would not have been voluntary. Had the court in the principal case held that the act governed and the defendant was relieved of liability, they would be deciding that a surety whose payment was non-voluntary could not recover from his co-surety for contribution. This would have been directly opposed to the contract between the parties and the laws of suretyship.

E. L. H.

SALES—PASSING OF TITLE—RISK OF LOSS—The ascertainment of the time when title passes in a sale of chattels becomes important when the chattels are destroyed before payment, since the usual rule is that the loss follows the title.[1]

In *Wesco Company* v. *Town of Allerton*,[2] the defendant bought of the plaintiff an electric lighting outfit. The contract provided that: "The acceptance of this machine . . . is solely on condition, after having been tested the machine is found to fully meet all conditions . . . . or it shall be removed by the town." The plaintiff was to furnish the apparatus for testing. Half the price was to be withheld until a satisfactory test was had. Upon testing, a leak was discovered, and a further test was agreed upon, pending which the defendant used the outfit. The machine was destroyed by fire, without negligence of the defendant, before the second test, and this was a suit for the cost. The Supreme Court of Iowa decided that, under these circumstances, the lower court was justified in finding, as a matter of fact, that title was not to pass until after the final test, and that therefore the plaintiff could not recover.

Except so far as the right of third persons may be concerned, the passage of title is subject entirely to the intention of the parties.[3] It may happen at any stage of the proceeding, provided there is a subject of sale in existence,[4] and in the absence of a clear agreement, the courts have laid down certain rules of convenience and presumed intention.

In the ordinary case of the sale of a specific chattel, where nothing remains to be done except to deliver or to make payment, title is held to pass,[5] subject to the vendor's lien for the price,[6] and this is frequently so even where the sale is said to be "for cash."[7] Neither delivery nor payment is essential to the transfer of title.[8]

Where something remains to be done as between the parties

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[1] Joyce v. Adams, 8 N. Y. 291 (1853).
[2] 137 N. W. Rep. 1046 (Ia., 1912).
[3] Byles v. Collier, 54 Mich. 1 (1884); Riddle v. Varnum, 20 Pick. 280 (Mass., 1838).
[4] Dixon v. Yates, 5 B. & Ad. 313 (1834); Tarling v. Baxter, 6 B. & C. 360 (1827).
[5] Hinde v. Whitehouse, 7 East. 558 (1806).
[6] Wade v. Moffett, 21 Ills. 110 (1859).
[7] Clark v. Greeley, 62 N. H. 394 (1882); but see Paul v. Carver, 52 N. H. 136 (1872).
[8] Hayden v. Demets, 53 N. Y. 426 (1873).

to put the goods in deliverable condition, or by way of examination or testing to determine whether they are in fact the goods sold, or to determine the price, it is generally presumed that title does not pass.[9] Where the thing left undone is the securing of the approval of the vendee or of a third person, ordinarily no title passes.[10] If the thing remaining to be done is to identify the goods, title cannot pass until there are definite goods appropriated to the sale, assented to by the vendee.[11] Contracts for the sale of part of a mass of like constituents are exceptions to the last rule. Some courts hold that title may pass to an unseparated part of such a mass, if the parties so intend.[12] Title to goods to be manufactured does not pass until the goods are completed and accepted by the vendee,[13] although some jurisdictions require only a tender by the vendor.[14]

The vendee, in sales of unspecified goods, has a right of inspection before accepting them,[15] and in this inspection he may use the goods or even consume a reasonable part of them.[16] Using them, however, with knowledge of a defect is an acceptance and title then passes,[17] though the vendee may still have a remedy upon a warranty.

In the light of the foregoing rules, it appears that the principal case is a close one, and might well have gone the other way. As soon as the machine was made, title *could* have passed, and the terms of the contract itself in speaking of "acceptance" and stipulating for a right to remove, seem to indicate that title was to pass on delivery and that the test was a condition subsequent, rather than a condition precedent, to the transfer of title. Withholding payment is not repugnant to this view. There is also to be noted the fact, not emphasized by the court, that the defendant with knowledge of the defect, used the machine to furnish light—not by way of a further test, but apparently in the regular course of business. It is perhaps true that these circum-

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[9] Towne v. Davis, 66 N. H. 396 (1890); Foster v. Ropes, 111 Mass. 10 (1872); *contra*, where the thing was to be done merely to ascertain the price. Cleveland v. Williams, 29 Tex. 204 (1867); Crofoot v. Bennett, 2 N. Y. 260 (1849).

[10] Dando v. Foulds, 105 Pa. 74 (1884); B. & O. R. Co. v. Brydon, 68 Md. 198 (1885).

[11] Atkinson v. Bell, 8 Barn. & Cress. 277 (1828); Wilkins v. Bromhead, 6 Man. & G. 963 (1844). But see, *contra*, Boothby v. Plaisted, 51 N. H. 436 (1871); Col. Springs Co. v. Golding, 20 Col. 249 (1894).

[12] Kimberley v. Patchin, 19 N. Y. 330 (1859); a contrary line of decisions is represented by Scudder v. Worster, 11 Cush. 573 (Mass., 1853).

[13] Rider v. Kelley, 32 Vt. 268 (1859); Goddard v. Binney, 115 Mass. 450 (1874).

[14] Shanhan v. Van Nest, 25 Oh. St. 490 (1874).

[15] Charles v. Carter, 96 Tenn. 607 (1896); Holmes v. Gregg, 66 N. H. 621 (1890).

[16] Phila. Whiting Co. v. Detroit Works, 58 Mich. 29 (1885).

[17] See Cream City Co. v. Friedlander, 84 Wis. 53 (1893); Chambers v. Lancaster, 160 N. Y. 342 (1899); Dodsworth v. Hercules Iron Works, 30 U. S. App. 292 (1895).

stances are not sufficient to cause the appellate court to overrule the finding of fact by the lower court that title had not passed, but it is none the less clear that a good deal can be said in support of the view that it had passed.

Sales on the instalment plan present a seeming exception to the rule that the loss follows the title. Many of the cases hold the vendee liable for the price though the goods to which he had not yet received title are destroyed. The courts reason that the promise to pay is absolute, and the vendee has received all he expected to get—possession with a right to acquire title.[18] Or that, in fact, the transaction is a sale and mortgage, and should have such effect.[19] Some jurisdictions, however, adhere to the more logical rule, and place the loss on the vendor.[20]

J. C. D.

TORTS—PUBLIC SERVICE CORPORATION—LIABILITY OF WATER COMPANY TO INDIVIDUAL CITIZEN FOR NEGLIGENCE—In a recent case, the United States Supreme Court were called upon to decide the disputed question of the liability of a water supply company furnishing water to a municipality and its inhabitants under an ordinance, to respond in damages to a resident owner of property destroyed by fire on account of the negligent failure of the water company to fulfil its contract with the city to furnish adequate facilities for the extinguishment of fires, and it held that the water supply company was not liable.[1]

This decision is in accord with the overwhelming weight of authority[2] which is based, as is pointed out in an able summary of the leading decisions on the question in 58 U. of P. Law Review, p. 556, upon the fact that these authorities all deny that there is any privity of contract between the citizen and the water company, and, there being no common law obligation on the part of the municipality to furnish water, this total lack of privity of contract is a bar to any action by the tax-payer, whether brought *ex contractu* or *ex delicto*. In no jurisdiction is there any dispute as to the inability of the injured citizen to sue on the contract itself; but upon the possibility of maintaining the action in tort for damages arising from a negligent breach of this contract there is some conflict of decisions.

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[18] American Soda Fountain Co. v. Vaughan, 55 Atl. Rep. 54 (N. J., 1903); Tufts v. Griffin, 107 N. C. 47 (1890); Burnley v. Tufts, 66 Miss. 48 (1888).

[19] Osborne v. Shore Lumber Co., 91 Wis. 526 (1895).

[20] Randle v. Stone, 77 Ga. 501 (1886).

[1] German Alliance Ins. Co. v. Home Water Supply Co., 33 Sup. Ct. Rep. 32 (1912). This decision flatly overrules the former *dicta* of the Supreme Court upon this question as found in the opinion of Brewer, J., in Guardian Trust Co. v. Fisher, 200 U. S. 57 (1905); which has until now been cited as imposing this liability, in the Federal Courts.

[2] See III Dillon Mun. Corp., 5th Ed., p. 230 and cases cited; also Wyman, Pub. Serv. Corp., p. 305 and cases cited.

Before embarking upon a discussion of the matter it may be well to point out the obvious fact that, according to the weight of opinion, the water supply company is, in the absence of statute, under no liability whatever for damages caused by its negligent nonfulfilment of its contract with the municipality. For it is universally settled that the city itself is not liable in such cases if it undertakes to supply the water,[3] and, as Judge Freeman points out in a note to *Britton* v. *Waterworks Co.*,[4] if the contract is not made for the benefit of the individual taxpayer in such a way that he can sue for breach of it, it is not made for his benefit in such a sense that the city can recover damages in his name; and consequently such loss by fire is, as a result of the majority view, "*damnum absque injuria.*"

Turning now to a consideration of the minority view, which obtains in Kentucky,[5] North Carolina,[6] and Florida,[7] with *dicta* in accord in Indiana,[8] it is clear that these opinions rest upon the conclusion that the citizen, as the beneficiary of the contract between the municipality and the water supply company, can sue in this capacity for damages resulting from a breach of this obligation; and it is also maintained that the water company's liability arises from its breach of duty in the exercise of its public calling[9] as well as its failure to act in accordance with its contract, upon which the citizen relied to his detriment. This acknowledgement of the tax payer's right of action is the result of a rather doubtful application of several ancient principles of law in an endeavor to arrive at the more equitable result of holding the water supply company liable. Among the reasons which have been assigned is the principle laid down in *Langridge* v. *Levy*,[10] namely: that if A makes a contract with B for the benefit of C, and C is injured in consequence of B's breaking the contract, C may recover damages of B. But this principle applies only where there has been fraud or deceit. Then, too, the well-settled rule that the beneficiary of a contract may sue upon it, though he himself is only a remote party to the consideration, is often advanced. But, as is indicated later, this begs the real queston, which is whether or not the citizen, as an individual, is the beneficiary. Still another rule of law sometimes advanced is the well-established principle stated by Gray, C. J., in *Osborne* v. *Morgan*,[11] namely: "The fact that a

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[3] III Dillon Mun. Corp. 5th Ed., p. 2301 and cases. This is obviously true because the act undertaken is one done for the good of the public in general as part of the municipality's governmental functions.

[4] 29 Am. St. Rep. 863 (Wis., 1892).

[5] Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340 (1889).

[6] Correll v. Greensboro Water Supply Co., 124 N. C. 328 (1899).

[7] Mugge v. Tampa Water Works Co., 52 Fla. 371 (1906).

[8] Coy v. Indianapolis Gas Co., 146 Ind. 655 (1896).

[9] See Webb's Pollock on Torts, p. 8.

[10] 2 Mee. & W. 519 (1837); also Thompson Neg., p. 906.

[11] 103 Mass. 102 (1881).

wrongful act is a breach of contract between the wrongdoer and one person does not exempt him from the responsibioity for it as a tort to the third person imposed thereby." This doctrine, however, is applied to breaches of contract only as between master and servant, principal and agent, *etc.*, and does not apply to the point under discussion. Perhaps the best argument for holding the defendant company liable in this class of case is that advanced by Ostrander in his work on Fire Insurance.[12] His contention is that the consideration between the citizen and the water supply company consists not only in the payment of the water tax, but also in the expenditure required to make connection with the street mains. He then says: "The citizen performs in reference to a supposed consideration, which is clearly that the water supply company shall furnish him with water for domestic use and extinguishing fires. Relying on the promises made to the city authorities he acts . . without providing other means of protection against fire; and if, through the company's negligence, his property is destroyed, is it a sufficient answer to say that they owed no duty? To whom does the water company owe a duty if not to the citizen who is taxed?"

This last sentence contains what is really the crux of the whole question. Is the duty owed by the water company through its contract and as a result of its grant of right of way on the city streets, a duty owed to the municipality as an entity, or does the obligation run to the citizens as individuals? In other words, as Prof. Wyman points out, "the only way by which the inhabitants could gain individual rights under this contract arrangement would be if the arrangement were made for their exclusive benefit as individuals." The answer to this proposition in turn depends upon the light in which the duty owed by reason of the relation of the parties should be regarded, for, as Cooley, C. J., pointed out in *Taylor* v. *L. S. & M. S. Ry. Co.*,[14] "The nature of a public duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively or whether individuals may claim that it is a duty imposed wholly or in part for their special benefit."

Thus in the last analysis the question turns upon the nature of the duty voluntarily undertaken by the municipality in contracting for a water supply. On applying the test just given, it is inevitably necessary to conclude that the majority opinion is correct, since the contract between the city and the water supply company was one made clearly as the result of the exercise of the municipality's public governmental function and it is difficult to see how any individual citizen could claim that it was assumed for his special

[12] Ostrander, Fire Insurance, p. 735.

[13] Wyman, Pub. Serv. Corp., p. 307.

[14] 45 Mich. 741 (1881).

benefit, in order to come within the rule *supra*. The result is, as indicated *ante*, inequitable in that it absolves the water supply company of all liability for damages caused by negligent non-fulfilment of its contract with the city and it would seem advisable to rectify the situation by statutory enactments.

P. C. M., Jr.