RECENT CASES

BILLS AND NOTES.

The case of *Bradley Engineeering & Mfg. Co.* v. *Heyburn et al.*, 106 Pac. R. 170 (Wash. 1910) held that one apparently a joint maker of a note could not show as a defense under section 58 of the Negotiable Instruments Act in an action thereon by a holder for value that he signed as accommodation maker and surety, without consideration, which plaintiff knew. The defenses referred to in that section are only such as are permitted by the act or such equities as do not deny the tenor of the bill; a holder for value being in the same position as one in due course as to such defense. *Anderson* v. *Mitchell*, 51 Wash. 265. The court further held that being primarily liable as an accommodation maker, appellant was not discharged by an extension of time to the principal debtor. *Vanderford* v. *Farmers' & Mechanics' National Bank*, 105 Md. 164; *Wolstenholme* v. *Smith* 34 Utah, 300; *Cellers* v. *Meachem*, 49 Or., 186. The grounds of these decisions are, that one who is a maker, is absolutely required to pay the note and therefore such a maker even though for accommodation, has assumed a primary liability, and is not relieved from liability by an extension of time of payment without his knowledge or consent.

Extension of Time: Accommodation Maker

Before the advent of the Negotiable Instruments Act, the general law in the United States was that where a note is signed by one of the parties as accommodation maker, and the holder, with knowledge of that fact, grants the principal maker an extension of time, without the consent of the accommodation maker, the latter is discharged.

For a criticism of the wisdom of the change in the law necessitated by the act, and on the question whether the proper interpretation of the act does demand such change, see 56 *University of Pennsylvania Law Review*, 341 (1908).

Affirming in general the doctrine of *Price* v. *Neal*, 3 Burr. (1762) 1324. *Held*, the exception to the rule there laid down by Lord Mansfield is well established, that if the holder of a bill or check himself has been guilty of negligence in purchasing it or acquiring possession of it by failing to require identification of the payee who transferred the paper, that then the drawee who has honored a check for the holder may recover the amount so paid in assumpsit, on discovery of the forgery of the drawer's signature with due notice and demand; provided the drawee has not himself been at fault in the matter of honoring a signature not in fact that of his depositor, *e. g.*, in having at hand no standard signature for purposes of comparison. *Bank of Williamson* v. *McDowell County Bank*, 66 S. E. (W. Va. 1909) 761.

Recovery of Money Paid on Forged Signature of Bank Depositor

The doctrine of the early English case that after acceptance or

BILLS AND NOTES (Continued).

payment, the drawee is estopped from denying the validity of the drawer's signature has met with general approval and as stated, is recognized law. 2 Daniels' Neg. Inst. § 1655. The courts of North Dakota stand practically alone in refusing to recognize the case as sound. The rule in that state is that the drawee may, upon discovery of the forgery, recover the money paid from the party who received it, though a holder in good faith, provided the latter has not been misled or prejudiced by the drawee's failure to detect the forgery. *First National Bank* v. *Bank of Wyndmere*, 108 N. W. (N. D. 1906) 546.

Where the question of recovery of money paid on a forged drawer's signature has involved a bank as drawee, the obvious possibilities of working frequent injustice to the drawee-bank under the general rule, because of carrying modern business and banking customs has impelled the courts to set up an exception. Such expection is stated in the leading American case: the responsibility of the drawee who pays a forged check, for the genuineness of the drawer's signature is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud or to mislead the drawee. *National Bank of North America of Boston* v. *Bangs*, 106 Mass. (1871) 441, 8 Am. Rep. 349. What constitutes contributing fault or negligence of the holder may depend upon many circumstances. Those circumstances are stated to be when, either by express agreement or a settled course of business between the parties, or by a general custom in the place and applicable to the business, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud. *Ellis* v. *Ohio Life Insurance and Trust Co.* 4 Ohio St. 628 (1855). Such precaution *inter alia*, is the general custom prevailing in the banking business, when a check is presented by a stranger, to a bank other than that upon which it is drawn, to make inquiries in reference to his right to the check and his identity. *Idem; First National Bank* v. *Recker*, 71 Ill. 439. In view of such custom, a bank which has accepted a transfer of a check and become a holder under such circumstances, in presenting it to the drawee-bank, authorizes the latter to assume this precaution has been taken, and to pay the check on such assumption. And if in fact the precaution has not been taken, and the drawee-bank pays the check without knowledge of the forgery, it may on discovery, recover the amount so paid. *Canadian Bank of Commerce* v. *Bingham*, 71 Pac. (Wash. 1903) 43; 60 L. R. A. 955; *Ford & Co.* v. *People's Bank of Orangeburg*, 54 S. E. (S. C. 1906) 204.

The chief question as to the soundness of this line of reasoning to support the exception, is whether a drawee bank does in fact rely, in judging of the authenticity of its depositors' signatures, upon the fact that the bank presenting the checks has made inquiry as to the identity and right of its transferror, or does the drawer bank credit its correspondents with the checks which pour into it each day and rely only upon the ability of its own officials to discover those forgeries with the detection of which it is charged? Moreover, granting an affirmative answer to the first question, does even the most positive identification of the original holder of the check by the presenting bank have any legitimate and certain tendency to prove the drawer's signature is not forged? Suppose, as was the fact in the principal case, that the original holder was himself the forger, he could readily secure identification, and the requirement thereof by the intermediary bank, which had no knowledge of the drawer's signature,

BILLS AND NOTES (Continued).

would prove nothing as to the existence of a forgery. Therefore, it is submitted that reliance by the drawee bank upon the requirement of identification of the original holder by the other bank, which has no probative value as to the forgery, should not relieve the drawee of the obligation to know its drawer's signature. In other words, the neglect by the intermediary of its customary duty to require identification, is not the natural and probable cause of the damage, which results from the drawer's failure to detect the forgery.

Another exception to the doctrine of *Price* v. *Neal* is urged forcibly by eminent text writers on the subject. Mr. Daniels says, "when the bank discovers the forgery immediately, and demands restitution, offering to return the check, *before the holder has lost anything by regarding the matter as all right*, we cannot help thinking it should be allowed to recover the money back." 2 Daniels Neg. Inst. § 1655a. And 2 Parsons W. & B. 80, supports the same view, favoring the recovery of money so paid if the person to whom it was paid was at fault, or, being innocent, would then be in no worse condition than if the drawee bank had originally discovered the forgery and refused honor to the check. There is much to be said for the wisdom and justice of this exception to the hard and rigorous doctrine of the English leading case, as applied to banks and checks. The doctrine is itself an exception to the more general rule that money paid under mistake of fact may be recovered. As an exception it should not be extended. Under the view urged above, it would not apply where the refusal to apply it will cause no loss to the bank or banker who has received the money paid. If he is called on to refund, he will be in no worse position than if the drawee bank had at once refused payment. That is, he is still in a position to recover over from his transferror or has as yet, made no settlement with the latter. This is in accord with the general rule that there should be no estoppel where the conduct upon which it is based has caused no loss or damage.

Still a third view, refusing to apply the doctrine of *Price* v. *Neal* to certain cases where the bank or person presenting the paper has indorsed it, raises an exception based upon the supposed ground that the indorsement is a guaranty of the genuineness of the signatures on the instrument. See 56 *University of Pennsylvania Law Review*. 122, where it is argued that such an indorsement is not a true indorsement in law, but a receipt, and so without a warrant, and that therefore, the exception is not supportable. However, granting the indorsement may be a guaranty, if the drawee, after acceptance or payment, is estopped from denying the validity of the drawer's signature, can he be heard to allege the breach of guaranty, proof of which is, through his right to show the forgery, a right he has lost by payment?

See on the general topic, 33 *American Law Review* 411 (1875); "The Doctrine of *Price* v. *Neal*," 4 Harv. L. R. 297.

CONSTITUTIONAL LAW.

Right to Public Trial

On a trial for rape, the making and enforcement of an order excluding all persons from the courtroom (after the jury was impanelled, and until the argument to the jury commenced) except "all jurors, officers of the court, including attorneys, litigants, and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain," was assigned as

CONSTITUTIONAL LAW (Continued).

error in the case of *State* v. *Nyhus*, 124 N. W. (N. D.) 71, 1909. The defendant contended that this action of the trial court deprived him of his constitutional right to a "speedy and public trial."

The court held that these constitutional provisions were enacted to make it forever impossible for public prosecutors or courts to continue the evils of secret trials as they formerly existed; and that "public trials" in the literal sense of those words have never been construed to be granted by these provisions. Therefore courts may, where indecent and immoral acts are to be detailed, limit the attendance at trials so far as young persons are concerned, and so far as others are concerned, if the defendant's friends and those whom he or the counsel request to be present are permitted to attend, if they desire. Accord: *Jackson* v. *Com.*, 38 S. St. (Ky.) 422; *State* v. *Callahan*, 100 Minn. 63; *People* v. *Swafford*, 3 Pac. (Cal.) 809. See also Cooley on Const. Lim. (6th ed.) p. 372 and Bishop on Criminal Procedure § 959.

In Abb. Tr. Br. Cr. (2nd ed.) p. 160, the rule is thus stated. (1) The requirement of public trial is fairly met if, without partiality or favoritism, a reasonable number of the public are admitted, notwithstanding that many whose presence would be of no service to the accused, and who would only be drawn thither by idle curiosity, are excluded altogether. (2) The exclusion by the court of all persons other than those interested in the case, where, from the character of the charge and nature of the evidence, public morality would be injuriously affected does not violate the right to a public trial.

The order of the court in *People* v. *Murray*, 50 N. St. (Mich.) 995 excluding all from the courtroom except "respectable citizens," (which order resulted in causing the exclusion of a number of attorneys and other citizens) was held to be too restrictive and consequently furnished proper grounds for the granting of a new trial. See also *People* v. *Hartman*, 37 Pac. (Cal.) 153 and *State* v. *Hensley*, 79 N. E. (Ohio) 462.

CRIMES.

Obstructing Officer: Automobile Trap

In *Betts* v. *Stevens*, 1 K. B. (1910) two constables were stationed at the end of an automobile trap with stop watches for the purpose of detecting and securing evidence of breaches of the Motor Car Act 1903. Certain cars belonging to the Automobile Association on approaching the trap, had been running at an excessive rate of speed. The appellant, who was a sergeant of the Association, gave signals to the drivers of the cars that there was a trap ahead. The speed of the cars was then reduced so that when they entered the trap they were running within the statutory rate of speed of twenty miles per hour. Stevens, one of the officers on duty, laid an information against the appellant for having unlawfully obstructed a police officer in the discharge of his duty, contrary to the Prevention of Crimes Amendment Act (48 & 49 Vict. c. 75, s. 2). The Judges below were of the opinion that the appellant had so obstructed the officer in the execution of his duty and convicted him. In dismissing the appeal the court distinguished *Bastable* v. *Little*, (1907) 1 K. B. 59, on the ground that the evidence in that case did not disclose the fact that the cars were being run at a rate of speed in excess of the statutory limit at the time the signal was given as was proven in the present case. There the court refused to draw the conclusion that they must have been

CRIMES (Continued).

breaking the law from the fact that the rate of speed was reduced after the warning was given. Darling, J., drew the further distinction that the act of the appellant was done not for the purpose of procuring observance of the law, but with the intent to enable the drivers of the cars to avoid arrest by keeping within the statutory limit at the only point where evidence against them could be obtained. The act was not done in order to assist the officers in the execution of their duty, nor to prevent a motorist from committing an offense, but to the end that the drivers should escape arrest; after that danger was removed it was immaterial to the appellant what rate of speed was maintained. The gist of the offense lay in the intention with which it was done.

CRIMINAL PROCEDURE.

An interesting question of criminal procedure arose in the case of *Enson* v. *The State*, 50 So. (Florida) 948 (1909). The indictment charged the larceny "of certain bank bills and notes, commonly known and denominated as lawful currency of the United States, of divers denominations, the number and denomination of which are to the prosecutor unknown, and certain silver specie, a more particular description of which is to the prosecutor unknown." The evidence showed that the person from whom they were taken knew the precise denominations, and therefore the prosecuting officer, by the exercise of due diligence, could have ascertained them. A request to charge that this constituted a fatal variance was refused. The Court said, "the indictment states the denominations to be unknown, the proofs show they could have been known. Ability to acquire knowledge is not the same thing as knowledge and there is no variance." Cases are cited in support of this in Massachusetts, Alabama, New York and some other jurisdictions.

Indictment: Variance

Taylor, J., dissented, holding there was a fatal variance. There are many jurisdictions which take this view, as the following cases show: *The State* v. *Stowe*, 132 Mo. 199 (1895); *State* v. *Thompson*, 137 Mo. 620 (1896); *Presley* v. *The State*, 24 Tex. App. 494 (1887); *Blodget* v. *The State*, 3 Ind. 403 (1852).

Among the text writers there seems to be some difference of opinion as to which is the better view. On the point of whether it constitutes a variance, it seems hard to disagree with the logic of the Court. But certainly it was not intended that a prosecuting officer should avoid describing the property stolen except in case of necessity, which would not prevail when he could have learned from the owner of the property exactly what was stolen. Therefore on principle it should constitute a defect in an indictment.

EQUITY.

An act passed January 20, 1909, in Tennessee, prohibited the sale of intoxicating liquors within four miles of any school house. This act was construed by the prosecuting officers to prohibit sales at wholesale as well as retail. The plaintiffs, who were wholesale distillers and brewers, claiming that the act applied only to retailers, filed a bill to enjoin the prosecuting officers from instituting and prosecuting criminal actions against them for sales of liquors, on the ground that they would be subjected to a multiplicity of prosecutions and suffer irrep-

Injunction to Restrain Criminal Action

EQUITY (Continued).

arable damage. While the Court did not think that the apprehension of vexatious litigation and multiplicity of suits was made out, they nevertheless went on to say that it was well settled that courts of equity had no jurisdiction to entertain a bill to construe a valid criminal statute, and pending the proceedings, or at their termination, enjoin prosecution for violation of it. *Insurance Co.* v. *Craig*, 106 Tenn. 641; *Greiner-Kelley Drug Co.* v. *Truett*, 97 Tex. 380; *Arbuckle* v. *Blackburn*, 113 Fed. 625.

The decision expressly limited the power of equity to restrain criminal proceedings to those cases where the proceedings are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Saulle* v. *Browne*, L. R. 10., Ch. 64; *Kerr* v. *Preston*, 6 Ch. D. 463; *Scott* v. *Smith*, 121 N. C. 95; *Ewing* v. *Webster*, 103 Iowa, 226; *City of Bainbridge* v. *Reynolds*, 111 Ga. 759; *Crighton* v. *Dahmer*, 70 Miss. 602; *Whitemore* v. *Mayor*, 67 N. Y. 27; *Boin* v. *Jennings*, 107 La. 410; *Rhodes* v. *New Hampshire* (C. C.), 70 Fed. 721; *Arbuckle* v. *Blackburn*, 113 Fed. 617.

EVIDENCE.

Presumption of Death: Time of Death

It was material to the plaintiff's case that the death of an insured be established at a particular date. The evidence tended to show insured had been unexplainably absent and had not been heard of for seven years. The material date fell within the seven years. *Held*, There is no presumption that a person who has been absent for more than seven years died at any particular date, or before the lapse of the life insurance policy for non-payment of assessments two or three months after his disappearance. *Bradley* v. *Modern Woodmen of America*, 124 S. W. Mo. (1910) 69.

Mr. Wigmore says there is a genuine presumption of long standing and of universal acceptance to aid the proof of death. 4 Evid., sec. 2531. This presumption is of the common law, Thayer Prel. Treat., 319, and in an indefinite form was recognized by Lord Mansfield in 1763. *Rowe* v. *Hasland*, 1 W. Bl. 404. Its establishment as a fair presumption for the jury to make is conceded where there has been absence for seven years from time of last being heard of without later evidence of life. *Doe* v. *Jesson*, 6 East (1805), 80. And see *Prudential Assurance Co.* v. *Edwards*, L. R. 2 Q. C. 487 (1877). In America the common law presumption has been generally recognized. 4 Wigman Evid., *supra*, notes. Statutory enactments have even more generally adopted the presumption, sometimes varying slightly the circumstances necessary to raise it.

But in accord with the principal case, it is, perhaps, always held the presumption runs merely to the fact of death from and after the end of the period. There is no presumption as to the time of death within that period. *Nepean* v. *Knight*, 2 M. & W. (1837) 894; *Davie* v. *Briggs*, 97 U. S. (1878) 628. And if it be material to the success of either party to show death or life at, before, or after any particular date within the period of seven years, that party has the burden of evidencing this. 1 Greenl. Evid., sec. 41; *Flynn* v. *Coffee*, 12 Allen (Mass.), 204.

Whether from any certain facts proved, the jury will be permitted to infer death at or before any particular point of time is another question. Such inference, if justifiable, will merely aid the party in discharging the burden just shown to rest upon him. In *Davie* v. *Briggs*,

EVIDENCE (Continued).

supra, Mr. Justice Harlan thought that if it appeared in the evidence that the absent person, within the seven years, encountered some specific peril, or within the period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the Court or jury might infer that life ceased before the *expiration* of the seven years. Therefore, evidence of such circumstances of peril would be admissible. *Eagle's Case*, 3 Abb. Prac. 218; *Hancock* v. *Life Ins. Co.*, 62 Mo. 26.

The principal case, however, expresses the rule of the Missouri Courts, adopting the view of several Iowa cases, that evidence of other import than circumstances of pending peril is admissible to justify an inference by the triers of fact that death occurred at or before a particular time. In *Tisdale* v. *Insur. Co.*, 26 Iowa, 170, it was held that the jury might draw the conclusion of death upon proof of any facts, which according to human experience, made it probable that the party, if alive, would have communicated with his friends. This doctrine is adopted in Missouri. *Hancock* v. *Life Ins. Co., supra; Lancaster* v. *Insur. Co.*, 62 Mo. 121, 128. It proceeds upon this thought taken from the Iowa case cited: "Must seven years pass or must it be shown that he was last seen or heard of in peril before his death can be presumed? No greater wrong could be done to the character of a man than to account for his absence, even after the lapse of a *few short months*, upon the ground of a wanton abandonment of his family and friends. He could have lived a good and useful life to but little purpose, if those who knew him could even entertain such a suspicion."

Thus, though the rule be generally stated, there is no presumption of death at any particular time, the jury will be permitted, following absence unexplained, to presume or infer death before the expiration of seven years, *i. e.*, at or before any particular date within the seven years, as a general rule, upon proof of circumstances of particular peril encountered; and under the Missouri and Iowa rule, also, upon proof of circumstances creating a probability that, unless dead, the absentee would have communicated with his family or friends. The probative method of the latter rule is practically that, because a certain result does not occur, the absentee cannot be alive.

HUSBAND AND WIFE.

Effect of Married Woman's Property Acts on Husband's Liability for Slander of Wife

A statute provided that "a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and alone sue or be sued in the courts of the state on account of said property, business, or services." It was held that this statute did not abolish by implication the common law liability of a husband for the slander of his wife, even though the slanderous words were uttered in his absence and without his knowledge or consent. *Jackson* v. *Williams*, 123 S. W. (Ark.) 751 (1909).

The liability of the husband at common law for slander by his wife was undoubted, but the reasons for the doctrine have been variously given. One was that the unity of husband and wife rendered the latter incapable of being sued alone. *Baker* v. *Braslin*, 16 R. I. 635 (1889). Another was that the husband had entire control over his wife's personal property, receiving all the benefits therefrom, and so ought to be

HUSBAND AND WIFE (Continued).

liable for her torts. Still another was that because of the great amount of personal control which a husband had at that time over his wife, he should not allow her to commit torts. *Martin* v. *Robeson*, 65 Ill. 129 (1872).

As to the effect of the Married Women's Property Acts on this common law liability, there is some difference of opinion. A few jurisdictions hold under similar acts, as in our principal case, that the statute abrogates the husband's liability. The ground of these decisions is that since the statute takes away the husband's control over the conduct and the personal property of his wife, and also permits her to be sued alone, all the reasons for the common law rule cease, and therefore the rule itself ought to cease. *Martin* v. *Robeson*, 65 Ill. 129 (1872); *Morris* v. *Corkell*, 32 Kan. 409 (1884); *Lane* v. *Bryant*, 100 Ky. 138 (1896).

But the large majority of jurisdictions are in accord with our principal case. Some of them take the broader view that the fundamental basis of the old common law rule was the absolute unity of the husband and wife in the marital relation and not a contractual one based on the husband's property rights. This unity of relation still exists unaffected by the statute, and so the husband should be liable. *Fitzgerald* v. *Quann*, 109 N. Y. 441 (1888); *Henley* v. *Wilson*, 137 Cal. 273 (1902); *Nichols* v. *Nichols*, 147 Mo. 409 (1898). Others assign the more practical reason, that, if the husband be not responsible, the injured party would be ordinarily without remedy, and it would be "permitting one-half of the adult members of society to slander the other half with impunity." *Gell* v. *State*, 37 W .Va. 479 (1894); *McElfreesh* v. *Kirkendall*, 36 Ia. 224 (1873). Still others hold that although the rule may have outlived its usefulness, it is for the legislature to change it. The Courts cannot judicially legislate it out of existence. *Fowler* v. *Chichester*, 26 Ohio St. 9 (1873).

The statutes of the different States vary greatly, some being much broader than others. In many cases, therefore, apparently conflicting decisions can be reconciled. In some States the statute expressly declares that the husband shall not be liable for the torts of his wife, unless he directed or participated in them. *Vocht* v. *Kuklence*, 119 Pa. 365 (1888); *Story* v. *Downey*, 62 Vt. 243 (1890). Where the slander is uttered in the presence of the husband and with his connivance, he, alone, is liable and must be sued alone. But where it is uttered in his absence or without his knowledge or consent, the wife is also liable, and they must be jointly sued, as in our principal case. *Baker* v. *Young*, 44 Ill. 42 (1867); *Nolan* v. *Traber*, 49 Md. 460 (1878).

NEGLIGENCE.

Liability of Manufacturer of Dangerous Substance

Peterson v. *Standard Oil Co.*, 106 Pac. Rep. 337 (1910). The defendant negligently delivered to a merchant, who had ordered a certain kind of kerosene that would stand an open-fire test of 120 degrees, in a tank marked as containing the article ordered, a distillate that would stand a test of only 88 degrees. The merchant, relying on his contract and the label, sold some of it to the plaintiff's intestate, as the article ordered, and she, while trying to kindle a fire with it, without negligence (*quære*, if a domestic can kindle a fire with kerosene without negligence), was killed by an explosion which resulted. McBride, J., taking judicial notice of the dangerous character of the distillate, and deciding that the defendant's violation of the statute re-

NEGLIGENCE (Continued).

quiring the names and grades of distillates to be marked on the receptacles in which they are sold, and making it a misdemeanor not to do so, was negligence *per se*, held that the plaintiff could recover.

Huset v. *Case Threshing Machine Co.*, 120 Fed. 865, considers the liability of a manufacturer or vendor of an article to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article to its intended use, and lays down the general rule, as expressed in *Winterbottom* v. *Wright*, 10 M. & W. 109, that recovery must be confined to those who enter into the contract. But the following exceptions are recognized: (1) An act of negligence of a manufacturer or vendor, which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life, is actionable by third parties, who suffer from the negligence. *Thomas* v. *Winchester*, 6 N. Y. 397; *Norton* v. *Sewall*, 106 Mass. 143; *Bishop* v. *Weber*, 139 Mass. 411; *Dixon* v. *Bell*, 5 M. & S. 198. These cases stand upon two principles of law: (*a*) That everyone is bound to avoid acts or omissions imminently dangerous to the lives of others, and (*b*) that an injury which is the natural and probable result of an act of negligence is actionable.

(2) An owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner.

(3) One who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. *Langridge* v. *Levy*, 2 M. & W. 519; *Wellington* v. *Oil Co.*, 104 Mass. 64; *Lewis* v. *Terry*, 43 Pac. 398. A note in 57 C. C. A. Reports, 5, cites a number of cases on the "Liabilities of Manufacturers and Vendors of Injurious Substances or Defective Machinery and Appliances for Injuries to Persons other than Immediate Vendees," with which *Peterson* v. *Standard Oil Co.* is in accord.

The case of *Waters-Pierce Oil Co.* v. *Deselius*, 29 Sup. Ct. Rep. 270, held that where B sold coal oil to A and A resold to X, who was injured by an explosion caused by gasoline in the coal oil, B was liable therefor.

A full discussion of the principles involved in this case will be found in 57 Univ. of Pa. Law Review, 563 (1908-1909).

Chauffeur the Servant of Owner of Hired Automobile

An interesting case of a class which will often come before the courts in future, as the automobile comes more and more into use, is that of *Shepherd* v. *Jacobs*, 90 N. E. (1910) 393. The defendant rented an automobile with a licensed driver to the representative of the Fiat Automobile Co. for his use for two days at the Lowell races in 1908, and was to receive fifty dollars therefor. While the hirer was in the vehicle, a collision occurred owing to the negligence of the driver, and the plaintiff's machine was badly wrecked. Suit was brought, and the owners of the rented car requested the trial judge to rule that the Fiat Automobile Co. rather than themselves was liable. An appeal was taken from his refusal to so charge.

The Supreme Court in affirming the decision reviewed the law of master and servant as applied to the so-called "carriage cases," the

NEGLIGENCE (Continued).

conclusion of which seems now pretty well established in favor of the view that the hirer of a vehicle and driver, who exercises no further control over the latter than a bare authority to direct where he shall go, does not take the driver into his employ and so does not become liable for his negligence. *Frerker* v. *Nichelson*, 13 L. R. A. (N. S.) 1122, and cases there cited. The Court considered that for all practical purposes the renting of an automobile and driver is the same, in the eye of the law, as the renting of a carriage. The same authority is exercised over the driver in each case, and the nature of the vehicle itself should make no difference. Once, therefore, the "control test" to determine the relation of master and servant is adopted, the conclusion of the Court seems both logical and sound.

Injury to Licensee

In the case of the *P. C. C. and St. L. Ry. Co.* v. *Hall*, 90 N. E. (Ind.) 498 (1910), whether the plaintiff could recover for personal injuries from the railway company, depended upon his relation to them. Was he a licensee or an invitee? These facts were found by the jury. The plaintiff was employed by a glass company. Their yard contained a number of sidings connected with the tracks of the defendant. Cars consigned to the glass company were switched to these sidings to be unloaded. On the day of the accident, the plaintiff was engaged with others in unloading a car. Further up on the siding were some cars that had to be hauled away. In order to get them, it was necessary to take up the car that was being unloaded, pull it out on the main track with the other cars and then shunt it back by itself. The men unloading the car were notified. Some got off, others stayed on. Among the latter was the plaintiff. It was not an unusual thing to stay on during these switching operations and was permitted by the train crews, although prohibited by the rules of the road, and was not at all necessary.

It was in the course of the switching that the plaintiff was injured. The car in which he was riding was shunted down the track and collided with some other cars. The impact threw him to the floor of the car and he was hurt.

The Court held the plaintiff to be a licensee and hence the defendants were not under a duty to take precautions to make it reasonably safe for him. This conclusion was reached on the ground that it was no part of the contract of shipment to permit the consignee's servants to stay on the cars during the switching. Therefore, the plaintiff was not on the car in the common interest or for the mutual advantage of himself and the railway, but for his own benefit or pleasure, and was at best a licensee.

The decision seems sound and the rule announced is the generally accepted one. See *Spry Lumber Co.* v. *Duggan*, 182 Ill. 218 (1899) and cases there cited, and also *Mackie Adm'x* v. *Heywood and Morrill Rattan Co.*, 88 Ill. App. 119 (1899).

QUASI CONTRACTS.

The case of *Baker* v. *Courage & Co.*, L. R. 1 K. B. (1909) 56, seems to finally lay down a rule in regard to the recovery of money paid by mistake, on which there has hitherto been considerable conflict of authority. The facts were these: The plaintiff agreed to sell his hotel and stock to the defendants and brokers were employed to decide the value of the property. To facilitate matters the defendants loaned the plaintiff £1000 to pay off a mortgage; the money to be taken off the purchase price. The brokers submitted their report showing a balance due the plaintiff of £9000, which was paid without anyone's noticing that the loan had not been deducted. This occurred in 1896 and the plaintiff allowed his money to remain in defendant's hands, drawing out sums from time to time. In January, 1909, he had a balance due him of £1000, which he attempted to draw, but the defendants, having, in going over some old accounts, just discovered the overpayment, refused to let him have his money. A suit was brought, and a set-off and counterclaim were put in for the money originally paid by mistake, which action the plaintiff argued was barred by the Statute of Limitations. The defendants claimed this defense was worthless, on the ground that either the statute began to run from the discovery of the mistake, or else from the accrual of the cause of action, and that demand and refusal were necessary to supply such cause.

Demand: Statute of Limitations: Recovery of Money Paid Under Mistake

In deciding the case for the plaintiff, the Court distinctly lays down the following propositions: First, that where money has been paid through mistake of fact, the Statute of Limitations begins to run from the moment of payment and not from the discovery of the mistake. Second, that in cases of mutual mistake the payor may maintain an action for the recovery of the money at once, without the necessity of notice to and demand on, the payee. The cause of action is complete the moment the money is paid.

This decision would seem, therefore, to settle the question of the necessity of demand, *contra* to the theory advanced by Mr. Keener in his book on Quasi Contracts, pp. 140-154, where the whole subject is elaborately discussed and all the cases bearing on the point cited and explained.

REAL PROPERTY.

The parties entered into an agreement to dig a ditch for the purpose of draining their lands, the expense to be borne equally. The ditch was dug and two years later the appellant stopped up the ditch on his own land so that the flow of water from the respondent's land was obstructed. In an action to enjoin the obstruction, the Court held that the appellant was estopped from so obstructing the ditch. *Munch* v. *Stetler*, 124 N. W. (Minn., 1910) 14.

Revocability of Parol License: Equitable Estoppel

A mere parol license to do an act on the land of another passes no interest in the land, is revocable at the will of the licensor, is a personal privilege and is not assignable. *Wood* v. *Leadbitter*, 13 M. & W. 838; *Great Falls Co.* v. *R. R.*, 21 Mont. 487; Jones, Easements, sec. 69; 25 Cyc. 645; Sheppard, Touchstone, 239; even where the licensee has expended money in the erection of structures in pursuance of such authority, *Lawrence* v. *Springer*, 49 N. J. Eq. 289, and note to this case in 31 Am. St. 702, where this question is thoroughly reviewed. It, of course, justifies anything done by the licensee before revocation. In

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some jurisdictions a license may become irrevocable when the licensee has made improvements or invested capital in reliance upon it. Some of the cases proceed upon the theory of estoppel *in pais*, *Brantley* v. *Perry*, 120 Ga. 760; *Joseph* v. *Wild*, 146 Ind. 249, 45 N. E. 467; *Meek* v. *Breckenridge*, 29 Ohio, 642; *Rerick* v. *Kern*, 14 S. & R. 267; 16 Am. Dec. 501; others upon the theory of part performance of a parol agreement for an easement taking it out of the Statute of Frauds. But in such case there must be a complete and sufficient contract founded upon a valuable consideration, accompanied by part performance clearly referable to the alleged agreement. *Van Horn* v. *Clark*, 56 N. J. Eq. 476; *St. Louis Co.* v. *Ferry Co.*, 112 Ill. 384; *Pitzman* v. *Boyce*, 111 Mo. 387. See also, note to *Metcalf* v. *Hart*, 31 Am. St. 122. In such case the interpretation of the agreement and the intent of the parties is material. *Jackson Co.* v. *P. W. & B. R. R. Co.*, 4 Del. Ch. 180 and note.

The doctrine of estoppel as applied to this question has been severely criticised, *Lawrence* v. *Springer*, *supra*, and, it seems, justly so. The rule undoubtedly infringes the Statute of Frauds, and also the common law principle that incorporeal rights lie in grant and can pass only by deed.

CHAMPERTY AND MAINTENANCE.

Champerty and Maintenance: Conveyance by Owner while Out of Possession of Land

In an action to try title to real estate the plaintiff claimed that the original owner, being out of possession, conveyed to him, who was in legal possession of said premises, through the actual possession of the defendant, to whom he had agreed to sell the land. The defendant claimed through another deed executed by the original owner at the same time to one X, who was admittedly out of possession, and who later conveyed to the defendant. This deed was prior in point of time, as it was delivered first. It was held that the deed through which the defendant claimed was void as against the plaintiff, who was in possession, being made by the owner, while out of possession and hence champertous. *Burke* v. *Scharf*, 124 N. W. (N. D.) 79 (1910).

This doctrine was well established at common law and arose out of the inequality of society in England. A conveyance by an owner, while out of possession, was held to pass no more than a right of entry, which was not assignable, because "under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." 1 *Co. Litt.* 214*a*. The Statute of Henry VIII laid a severe penalty on such grants, besides rendering them void. The doctrine was also in accord with the fundamental principles of common law. An ordinary feoffment was void without livery of seisin, and without possession, the owner could not make livery of seisin.

At the present time there is a hopeless confusion among the American jurisdictions on this point. Some under similar statutes have adopted the English doctrine. *Sherwood* v. *Barlow*, 19 Conn. 471 (1849); *Webb* v. *Bindon*, 21 Wend. 98 (1839). Others hold that the Statute of Hen. VIII was merely declaratory of the common law and adopt the same conclusion without the aid of any statutes. *Steeple* v. *Downing*, 60 Ind. 478 (1878); *Burdick* v. *Burdick*, 14 R. I. 574 (1884). On the other hand, the doctrine has been expressly done away with in some States by statute. *Lucas* v. *Piso*, 55 Cal. 126 (1880); *Morgan* v. *Blewitt*, 71 Miss. 409 (1893). And still others have decided that the whole doc-

CHAMPERTY AND MAINTENANCE (Continued).

trine is obsolete and against public policy, and have held such grants good without the aid of any statute. *Stoever* v. *Whitman*, 6 Binn. 420 (1814); *Wright* v. *Meek*, 3 Green (Ia.), 472 (1852); *Cain* v. *Monroe*, 23 Ga. 82 (1857).

It would seem that the doctrine had outlived its usefulness. The danger of powerful and influential persons buying up disputed or "fighting" titles as a means of oppressing the poor, is practically non-existent. And where a man is disseised of his land, the law should not add to his burden by depriving him of the power to sell it. In the jurisdictions where the rule still obtains, it is a doubtful question whether such a grant is valid between the parties to the grant on the theory of estoppel and void only as to the adverse possessor, *Hamilton* v. *Wright*, 37 N. Y. 502 (1868); or whether it is absolutely void, unenforceable against the grantor himself, *Wasle* v. *McBrayer*, 31 Ky. 565 (1833). If the former be the correct rule, the doctrine is of little effect, because the grantee might sue in the grantor's name, and the only practical result would be a variation in the form of the remedy. *Hamilton* v. *Wright, supra.*

The principal case is peculiar in that the doctrine was not set up by the defendant, who was in actual possession of the land, as is almost universally the case. It was set up by the plaintiff in order to establish his title, which was absolutely bad unless the doctrine obtained. This, as the dissenting justice points out, is using the rule affirmatively as a weapon of offense against the actual possessor, when the only reason for applying the doctrine is to afford protection to this adverse possessor.