RECENT CASES

ACCORD AND SATISFACTION—ATTORNEY AND CLIENT—An attorney, having collected a claim for his client, remitted him a cheque for the proceeds less thirty-three per cent. retained as a fee. The remittance was accompanied by a notice that it was sent in full settlement of the claim. In an action by the client against the attorney, to recover a portion of the sum retained, wrongfully as alleged, it was held that the acceptance of the cheque did not constitute an accord and satisfaction, although there was a *bona fide* dispute concerning the amount of the fee, and consequently of the sum due. Wolfe v. Mack, 142 N. Y. S. 433 (1913).

It is well settled that the acceptance of a cheque purporting to be in full settlement of an unliquidated debt, operates as an accord and satisfaction. Hutton v. Stoddard, 83 Ind. 539 (1883); Brown v. Symes, 31 N. Y. S. 629 (1895); Tompkins v. Hill, 145 Mass. 379 (1888); Myers v. Green, 21 Ind. App. 138 (1899). And this is so, even if creditor accepts the cheque protesting that it is not in full settlement. Fuller v. Kemp, 138 N. Y. 231 (1893); Potter v. Douglas, 44 Conn. 541 (1878); Tanner v. Merrill, 108 Mich. 58 (1896).

In the principal case the relation the attorney bore to his client was fiduciary. Does this authorize the court to depart from the rule applicable in usual debtor and creditor cases? Eames Vacuum Brake Co. v. Prosser, 51 N. E. 986 (N. Y. 1898), and General Fireproof Construction Co. v. Butterfield, 128 N. Y. 407 (1892), answer this question in the affirmative. In the former case the court said: "The money belongs to the client absolutely and it does not lie in the attorney's mouth to say 'I send you an amount which I concede is yours, but if you take it you must acknowledge that you are not entitled to any part of the money that I have retained.'"

These decisions are in harmony with the scrutinizing and suspicious attitude of the courts towards contracts between a trustee and his beneficiary. Perry on Trusts (6th ed.), 313 *et seq.*

A similar transaction occurred between parties in a fiduciary relationship. Ostrander v. Scott, 161 Ill. 339 (1896), executor and legatee; and Vermont State Baptist Church v. Ladd, 58 Vt. 95 (1886), principal and agent. But the court treating them as the ordinary debtor and creditor cases made no distinction.

BANKS—CHEQUES—DEATH OF DRAWER—The rule that an agent's authority is revoked by the death of the principal does not apply to the payment of a cheque by a bank without knowledge of the drawer's death. Glennan v. Rochester Trust and Safe Deposit Co., 102 N. E. Rep. 537 (N. Y. 1913).

There seems to be practically no cases dealing with the question of law here involved, the authority upon which the principal case was decided—Rogerson v. Ladbroke, C. P. 1 Bing. 93 (Eng. 1822)—being nearest in point. There are numerous *dicta*, however, supporting the principal advanced. National Commercial Bank v. Miller & Co., 77 Ala. 168 (1884); Fordred v. Seamen's Savings Bank, 10 Abb. Prac. (N. S.) 425, (N. Y. 1871); Drum v. Benton, 13 App. D. C. 245 (1898). The text writers seem to have accepted the principle as settled law. 2 Parsons on Notes and Bills, p. 81; Morse on Banks and Banking, §400: Tiedeman on Commercial Paper, §448; Chitty on Bills (11th ed.), p. 298; Edwards on Bills and Notes, §739; Daniel on Negotiable Instruments, §1618b. All of these writers cite for authority the case of Tate v. Hilbert, 2 Ves. Jr. 118 (Eng. 1793). It is doubtful whether this decided the point in question.

If the bank pays after notice of the death of the drawer, it does so without authority and at its peril. In England the Bills of Exchange Act,

45 & 46 Vict., c. 61, s. 75 (1882), provides that "the duty and authority of a banker to pay a cheque drawn on him by a customer are determined by notice of the customer's death." In the United States the same result has been reached by judicial decision. Bank v. Williams, 13 Mich. 282 (1865); Simmons v. Cinn. Savings Society; 5 Ohio Dec. (Reprints) 527 (1877); Weiand's Admr. v. State Nat. Bank, 112 Ky. 310 (1901). The opposite conclusion was reached in Lewis v. International Bank, 13 Mo. App. 202 (1883), but in that case a cheque was considered an appropriation or assignment of so much of the fund on deposit—a view which is against the weight of authority.

The "gift" of a cheque by the donor himself has been held not to be valid unless acted upon in the donor's lifetime. Harris v. Clark, 3 N. Y. 93 (1849); Bank v. Williams, *supra*; Hewitt v. Kaye, L. R. 6 Eq. 198 (Eng. 1868); Beak v. Beak, L. R. 13 Eq. 489 (Eng. 1872); Walter v. Ford, 74 Mo. 195 (1881); Pullen v. Bank, 138 Cal. 169 (1902). There are some cases *contra*, where the intention of the drawer to transfer a present interest has been clearly evident. Beuts v. Ellis, 17 Beav. 121 (Eng. 1853); Rolls v. Pearce, 5 Chan. D. 730 (Eng. 1877); May v. James, 87 Ia. 189 (1893).

BANKS—LIABILITY FOR FORGED CHEQUE—NEGLIGENCE OF DEPOSIT—In Morgan v. U. S. Mortgage & Trust Co., 101 N. E. Rep. (N. Y. 1913), a bookkeeper after extracting the forged cheques from the paid vouchers returned by the bank handed the remainder to his employer, who compared them with the stubs in the cheque book without using the cheque list. *Held:* The bank was relieved from liability by the negligence of the employer in not exercising due care in the verification of the pass book and cheques.

The well settled rule that the payment of forged or altered cheques by a bank is done at its peril applies stringently in cases which involve no other elements. Pickle v. Muse, 88 Tenn. 380 (1890); Hatton v. Holmes, 97 Cal. 208 (1893); Kobre v. Corn Exchange Bk., 139 N. Y. S. 890 (1913); but does not apply where the customer's negligence has furnished the opportunity for the fraud which deceived the bank; Burnet Woods Savings Co. v. German Nat'l Bank of Cincinnati, 4 Ohio Dec. 290 (1895); Land Title & Trust Co. v. Northwestern Bank, 196 Pa. 230 (1900); nor where the facts are such as estop the customer. DeFereit v. Bank of America, 23 La. Ann. 310 (1871); McHenry v. Old Citizens' National Bank, 97 N. E. Rep. 305 (Ohio, 1911).

It is now well established that a bank is relieved from liability by the negligence of a customer. Champion Ice Mfg. Co. v. American Bonding Co., 115 Ky. 863 (1903); Snodgrass v. Sweetser, 44 N. E. Rep. 648 (Ind. 1896). Yet courts differ as to what constitutes negligence. If a depositor has neglected the duty of making a reasonable verification of the returned cheques, he must suffer all losses resulting from the payment. Frank v. Chemical Nat'l Bk., 84 N. Y. 209 (1881); Leather Mfrs.' Bk. v. Morgan, 117 U. S. 96 (1886); Wind v. Fifth Nat. Bk., 39 Mo. App. 72 (1890). Moreover, the verification must be made within a reasonable time. Cincinnati National Bank v. Creasy, 18 Wkly. Law Bul. 410 (Ohio, 1887); and upon discovery of any forgery it is not only the duty of the depositor to notify the bank immediately, but to return the cheques as soon as possible. U. S. v. National Ex. Bk., 45 Fed. Rep. 163 (1891); Van Wert Nat'l Bk. v. First National Bank, 6 Ohio Cir. Rep. 130 (1892). But if the depositor has made a prudent inquiry he is not liable for the forgery. Shipman v. State Bank, 126 N. Y. 318 (1891).

CONTRACTS—PUBLIC POLICY—SHERIFFS—The promise of a property owner to a sheriff to pay a stipulated amount for supplying deputies to protect his property from strikers is void as against public policy, if there is any profit to the sheriff in the transaction. Shields v. Latrobe-Connellsville Coal & Coke Co., 86 Atl. Rep. 784 (Pa. 1913).

A sheriff is entitled for the performance of his duty only such compensation as the law allows. Burk v. Webb, 32 Mich. 173 (1875); Crofut v.

Bundt, 46 How. Prac. 481 (N. Y. 1874). What compensation a sheriff shall be allowed in the hiring of deputies has largely been regulated by statute in the several jurisdictions. In the absence of a statutory provision he cannot recover for the service of deputies furnished by him. Decatur Co. v. Leaman, 73 Kans. 785 (1906); Beck v. Board of Supervisors of Erie Co., 53 N. Y. Supp. 156 (1898); *contra*, Windmiller v. People, 78 Ill. App. 273 (1898).

It is well settled that a promise to pay a public officer special compensation for doing that which he is legally bound to do is without consideration and against public policy. Worthen v. Thompson, 54 Ark. 151 (1891); Adams Co. v. Hunter, 78 Ia. 328 (1890); Lancaster Co. v. Fulton, 128 Pa. 48. However, a promise to a public officer to pay compensation for doing that which is without the scope of his official duty is enforceable. Studley v. Ballard, 47 N. E. 1000 (Mass. 1897); Texas Cotton Press & Mfg. Co. v. Mechanics Fire Co., 54 Tex. 319 (1881); Providence & A. Turnpike Co. v. City of Scranton, 170 Pa. St. 124 (1895).

Accordingly, sheriffs can recover from the promisor, provided they were not compelled to hire deputies and have not been gainers in the transaction. Sullivan v. Utah & N. Ry. Co., 11 Mont. 236 (1891); McCandless v. Allegheny Bessemer Steel Co., 152 Pa. 139 (1892); Clark v. Cork, 14 Pa. Sup. Ct. 309 (1900).

CONTRACTS—RESTRAINT OF MARRIAGE—A promise by a man to an unmarried woman that if she remained in his service, attended to his wants, and refrained from marrying until after his death, his executor would then pay her a specified sum, was held an agreement in restraint of marriage and void as against public policy. Although in such contract the performance of the service is legal, yet since the consideration is not severable the entire contract is vitiated. Lowe v. Doremus, 87 Atl. Rep. 459 (N. J. 1913).

The case follows the rule already established in Sterling v. Sinnickson, 5 N. J. L. 756 (1820), where it was held that a sealed bill providing for payment if the obligee did not marry for six months was invalid, on the ground that the law regards marriage as at the foundation of the social order and hence removes every unreasonable restriction "upon the freedom of choice and of action in a case where the law wills that all shall be free." It is in accord with early and modern English and American authorities. Baker v. White, 2 Vern. 215 (1690); Hartley v. Rice, 10 East. 22 (Eng. 1808); Conrad v. Williams, 6 Hill 444 (N. Y. 1845); Shafer v. Senseman, 125 Pa. 310 (1889); Arthur v. Cole, 56 Md. 100 (1881).

A wager by a person that he will not be married within a certain time is illegal. Chalfont v. Payton, 91 Ind. 262 (1884). But the general rule does not apply to the promises of Shakers not to marry while they continue members of the Society; Waite v. Merrill, 4 Me. 102 (1805); nor to a promise by a husband to pay for the support of his divorced wife as long as she does not marry. Jones v. Jones, 27 Pac. Rep. 85 (Colo. 1891). A contract of marriage is not illegal as being in restraint of marriage, although restraining the parties thereto from marriage with any other parties. Brown v. Odill, 52 L. R. A. 660 (Tenn. 1900). But a covenant not to marry any person but the covenantee is unenforceable. Lowe v. Peers, 4 Burr. 2225 (Eng. 1768).

Notwithstanding that the plaintiff can not maintain an action on the express contract, she is entitled to recover *quantum meruit* for work and labor. Papineau v. White, 117 Ill. App. 51 (1904), and see King v. King, 59 N. E. Rep. 111 (Ohio, 1900), where recovery under a contract similar to the principal case was allowed.

DAMAGES—DELAY IN DELIVERY OF TELEGRAPH MESSAGES—SPECIAL DAMAGES—A telegraph company, receiving for transmission messages reading, "Too low. Sell two cars two twenty eight deld there" and "Packed fifty

boxes crop apples," does not obtain information of the possible damages which may arise from a delay in their delivery and is consequently not liable for special damages. Stone v. Postal Tel. Co., 87 Atl. Rep. 319 (R. I. 1913)

The decision is based on the rule stated by Baron Alderson in Hadley v. Baxendale, 9 Ex. 353 (Eng. 1854), that the damages recoverable for breach of contract ought to be "such as may fairly and reasonably be considered either naturally arising from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract." This principle has been universally approved and followed both in this country and in England, particularly as applied to claims for special damages against telegraph companies for negligence in transmitting messages. Baldwin v. Telegraph Co., 45 N. Y. 744 (1871); Primrose v. Telegraph Co., 154 U. S. 1 (1893); Postal Tel. Co. v. Lathrop, 131 Ill. 575 (1890); and against common carriers for negligence in shipping goods. Brock v. Gale, 14 Fla. 523 (1874); Mather v. American Express Co., 138 Mass. 55 (1884).

Though accepting the general rule of the Hadley case, *supra*, courts are not entirely in accord as to what constitutes sufficient indication of the importance of a message to give notice of the possibility of special damages within the rule. A message in cipher does not give such notice. Candee v. Telegraph Co., 34 Wis. 471 (1874); Primrose v. Telegraph Co., *supra;* Wheelock v. Cable Co., 197 Mass. 119 (1908). It has been held that the company must be expressly informed of the special circumstances which might give rise to special damages. Primrose v. Telegraph Co., *supra;* Wheelock v. Telegraph Co., *supra:* Candee v. Telegraph Co., *supra. Contra* to this, other courts have held that the mere fact of notice that a business transaction is contemplated is sufficient to enable the sender to charge the company with all pecuniary loss resulting from negligence in transmission. Fererro v. Telegraph Co., 9 App. D. C. 455 (1896); Postal Tel. Co. v. Lathrop, *supra.*

DISORDERLY HOUSE—EVIDENCE OF REPUTATION—In a prosecution for keeping a house of ill-fame, it was held competent to introduce evidence that the house had, in its neighborhood, the general reputation of being a place to which lewd persons of both sexes resorted for the purpose of unlawful sexual intercourse. Putnam v. State, 132 Pac. Rep. 916 (Okla. 1913). The court said that the old common law doctrine, that the reputation of a house could not be proved, was inadequate to check the social evil of today; under such a rule it would be practically impossible to convict the keeper of a disorderly house. Cf. Wigmore, 2 Evidence, 1621.

The authorities are divided on this question. In accord with the principal case are Sylvester v. State, 42 Tex. 496 (1875); Sprague v. State, 44 S. W. Rep. 837 (Tex. 1898); Betts v. State, 93 Ind. 375 (1883); State v. Bresland, 59 Minn. 281 (1894); Howard v. People, 27 Colo. 396 (1900); McConnell v. State, 58 S. E. Rep. 546 (1907).

On the other hand, in Parker v. People, 94 Ill. App. 648 (1900), it was said that in most of the states where evidence of the general reputation of the house is admitted, such admission is based upon the wording or requirements of the statute, as in King v. State, 17 Fla. 183 (1879); State v. Lee, 80 Ia. 75 (1890); or else the courts are led by the use of the word "ill-fame" to conclude that the reputation is a part of the crime. Cf. Wharton, Criminal Evidence, 261. The gist of the action is in the "use," and not in the "reputation," of the house. State v. Boardman, 64 Me. 523 (1874); Parker v. People, *supra;* State v. Lyon, 39 Ia. 379 (1874).

The authorities agree that the general reputation of the inmates and visitors may be proved to show the character of an alleged bawdy house, then as the house gets its reputation from its frequenters and inmates it should be permissible to prove that the house itself has acquired the name of a bawdy house. Commonwealth v. Murr, 42 W. N. C. 263 (Pa. 1898).

HUSBAND AND WIFE—CONVEYANCE BY HUSBAND TO WIFE—VALIDITY—A husband, in contemplation of leaving the state to escape being drafted during the Civil War, executed a deed to his wife in consideration of love and affection to provide for her support in his absence. *Held:* There was no fraud, and it will be upheld in equity as a provision for the wife. Thomas v. Hornbrook, 102 N. E. Rep. 198 (Ill. 1913).

The authorities support the doctrine of the principal case. Co. Lit. 3a; Shepard v. Shepard, 7 Johns. Ch. 57 (N. Y. 1823); Dale v. Lincoln, 62 Ill. 22 (1871); Semo v. Rickets, 35 Ind. 181 (1871); Turner v. Shaw, 96 Mo. 22 (1888).

Under the common law doctrine of merging the identity of husband and wife, a husband cannot convey the legal title directly to his wife. Beard v. Beard, 3 Atk. 72 (Eng. 1744); Coates v. Gerlach, 44 Pa. 43 (1862); Underhill v. Morgan, 33 Conn. 105 (1866). However, through the medium of a third person, a husband may make a conveyance indirectly to his wife, *i. e.*, make an absolute conveyance to the third person, who in turn conveys to the wife. Arundell v. Phipps, 10 Ves. Jr. 139 (Eng. 1804); Whitby v. Duffy, 135 Pa. 620 (1890); Donahue v. Hubbard, 154 Mass. 537 (1891).

The husband may also sue a third person as trustee, conveying the property to him for the use and benefit of the wife, and thereby vest the legal estate in the trustee and the equitable estate in the wife. Abbott v. Hurd, 7 Blackf. 510 (Ind. 1845); Whitcomb v. Sutherland, 18 Ill. 578 (1857). By virtue of the Statute of Uses, such a conveyance would vest the legal estate in the wife. Thatcher v. Emans, 3 Pick. 521 (Mass. 1792).

Despite the common law rule, equity may uphold a direct conveyance from husband to wife, provided it does not affect the rights of third persons. Pa. Salt Mfg. Co. v. Neel, 54 Pa. 9 (1866); Bancroft v. Curtis, 108 Mass. 47 (1871); Moore v. Page, 111 U. S. 117 (1883); Vough v. Vough, 50 N. J. Eq. 177 (1892). Equity will scrutinize the motives and purposes of the conveyance; but when made in good faith, and especially when supported by some valuable or meritorious consideration, it will generally be sustained. Shepard v. Shepard, *supra;* Bedell's Appeal, 87 Pa. 510 (1878); Smith v. Seiberling, 35 Fed. 677 (1888).

HUSBAND AND WIFE—LIABILITY ON WIFE'S CONTRACTS FOR NECESSARIES—AGENCY—A husband who lives with his wife and either supplies her with necessaries or gives her the money to purchase them is not liable for goods purchased by her on credit, although they were necessaries, when he has neither authorized nor ratified her act. McCreery & Co. v. Martin, 87 Atl. Rep. 433 (N. J. 1913).

This opinion is in accordance with the prevailing view and summarizes the well settled law. Wanamaker v. Weaver, 176 N. Y. 75 (1903); Morel v. Moreland, 1 K. B. 64 (Eng. 1903); Baker v. Carter, 83 Me. 132 (1891).

The wife is presumed to have authority to purchase necessaries and the burden is on the husband to show that the authority did not exist. Bonney v. Pesham, 102 Ill. 634 (1882); Bergh v. Warner, 47 Minn. 250 (1891). The agency of the wife is a question of fact, arising either from the husband's neglect to supply her with necessaries, or from the authority expressly given, or fairly to be implied from the circumstances. Martin v. Oakes, 85 N. Y. S. 387 (1903). He may ratify her acts as his agent. Grant v. White, 42 Mo. 285 (1868).

A husband is bound to provide for his wife and children whatever is necessary for their suitable clothing and maintenance, according to his and their situation in life. Keller v. Phillips, 39 N. Y. 351 (1868); Hughes v. Chadwick, 6 Ala. 651 (1844); Rea v. Durkee, 25 Ill. (15 Peck) 503 (1861). This obligation continues as long as she does not violate her duty as wife. Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1864). But if the wife lives apart from her husband, and such fact is known, the husband is not liable for articles furnished her unless he consented to the separation or had by his own misconduct induced it. Rutherford v. Coxe, 11 Mo. 347 (1848);

Reese v. Chelton, 26 Mo. 598 (1858); Belknap v. Stewart, 38 Neb. 304 (1893). If it is unknown to the vendor that the wife is living apart from her husband the express agency of the wife to make purchases is not revoked, M. v. W., 48 N. Y. S. 277 (1897), but the implied agency is revoked. Constable v. Rosener, 81 N. Y. S. 376 (1904).

This obligation of the husband does not extend to goods other than necessaries. Deradraham v. Walker, 3 Wkly. Notes Cas. 26, not even to money loaned to her to buy necessaries. Schwarting v. Bosland, 24 N. Y. Supp. 700 (1893), unless at his request. Walker v. Simpson, 42 Am. Dec. 216 (Pa. 1844).

An exception is found in Watts v. Moffett, 12 Ind. App. 399 (1895). The husband paid all the wife's bills and requested her not to buy on credit again. She did and husband was liable, as he had not notified the merchant.

INTERSTATE COMMERCE—ATTACHMENT OF CAR—A sleeping car then in use in interstate commerce was attached under a state writ. *Held:* The attachment was void, being an encroachment on the power of Congress to regulate commerce among the several states. Pulman Co. v. Lincke *et al.*, 203 Fed. Rep. 1017 (1913).

The state courts have taken conflicting views on this question. The cases which support the principal case are: Wall v. N. & W. R. R. Co., 52 W. Va. 485 (1903); Michigan C. R. R. Co. v. M. L. S. R. R. Co., 1 Ill. App. 399 (1878); Shore v. B. & O. R. R. Co., 76 S. C. 472 (1906); Seibels v. Northern Central R. R. Co., 61 S. E. 435 (S. C. 1908); Railway Co. v. Forest, 95 Wis. 80 (1896).

The courts of other states, reluctant to impede the collection of the debts of its citizens, hold that in order to invalidate the attachment, it must appear that the statute authorizing it was framed with the deliberate object to regulate interstate commerce. DeRochemont v. N. Y. C. & N. R. R. Co., 71 Atl. Rep. 868 (N. H. 1909); Southern Flour and Grain Co. v. N. P. R. R. Co., 127 Ga. 626 (1906); Boss v. Chicago R. I. & P. R. R. Co., 72 Atl. R. 694 (R. I. 1910).

There has been no actual decision on this point in the Federal courts, but in Davis v. C. C. C. & St. L. R. R. Co., 217 U. S. 157 (1909), where it was decided that the attachment of *idle* cars of a foreign corporation doing interstate business was valid, the court intimated that their decision would have been the same, even if the cars had been actually in use. This is only *dicta*, for even those jurisdictions that support the principal case decide that such an attachment as occurred in Davis v. C. C. C. & St. L. R. R., *supra*, is valid.

MALICIOUS PROSECUTION—ESSENTIALS—In Crews v. Mayo, 132 Pac. Rep. 1032 (Cal. 1913), the court in deciding a case of malicious prosecution, observed that "two elements are necessary to sustain an action for abuse of process: (1) the existence of a bad motive; (2) an act in the use of the process not proper in the regular employment of the proceeding. Even evil intentioned use of process, if regular, is not abuse thereof."

This *dictum* represents the preponderating opinion, subject only to minor changes in the terminology used. Gonsouland v. Rosomano, 176 F. 481 (La. 1910); Dickerson v. Schwabacher, 58 So. Rep. 986 (Ala. 1912). "Bad motive" is defined to be that which contemplates the use of the process after its issue for a wrongful purpose: Wright v. Harris, 76 S. E. Rep. 489 (N. C. 1912); Williams v. Mayor, 73 S. E. Rep. 255 (Ga. 1911), substitutes "ulterior purpose"; a prior case in the same state, Brantley v. Rhodes, 131 Ga. 276 (1908), had held that the process must be used "knowingly, wrongfully and unlawfully"; see also Mullins v. Matthews, 122 Ga. 286 (1904). In Pennsylvania, "unlawful" is sufficient: Mayer v. Walter, 64 Pa. 283 (1870). On the other hand, it is said in Rogers v. O'Barr, 76 S. W. Rep. 593 (Tex. 1903), that process may wrongfully issue without necessarily being

unlawful. A later Pennsylvania case adds to "unlawful" either inferential or actual malice as an essential: Humphreys v. Sutcliffe, 192 Pa. 336 (1899). This additional element is generally repudiated: Page v. Cushing, 38 Me. 523 (1856). Biandri v. Leon, 118 N. Y. S. 386 (1909), and Spear v. Pendill, 164 Mich. 620 (1911), holding that the action lies for the wrongful use of process, not for maliciously causing it to issue.

If only one of the two essentials indicated in the principal case is present, the action does not lie: Jeffery v. Robbins, 73 Ill. App. 353 (1897), where the motive, through ulterior or otherwise, is held immaterial, if the process itself is regular. *Contra:* O'Kearney v. Holmes, 6 La. Ann. 373 (1851): "Where party has used the process of the courts for the sole purpose of harassing the defendant, without reasonable hope of recovering any portion of such claim, he is liable for abuse of process, though the suit was an ordinary civil suit." This unique exception has, however, a strong dissenting opinion.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CHILDREN—*Sui Juris*—CARE REQUIRED—In Jacob v. Koehler Sporting Goods Co., 102 N. E. Rep. 518 (N. Y. 1913), a boy of fourteen, was struck and killed by an automobile. *Held:* That the fact that the boy was *sui juris* did not impose on him the same duty of care required of an adult, but only that care common and usual among boys of his age.

This is the general principle applicable to such cases and has been followed in Cunningham v. Illinois Cent. R. Co., 165 Ill. App. 382 (1913); Rasmussen v. Whipple, 98 N. E. Rep. 592 (Mass. 1912); Moeller v. United Rys. Co., 147 S. W. Rep. 1009 (Mo. 1912); Pierce v. United Gas and Electric Co., 118 Pacif. Rep. 700 (Cal. 1911); Knickerbocker v. Detroit G. H. & M. R. Co., 167 Mich. 596 (1911).

Contributory negligence cannot be imputed to a child under six years of age; Bay Shore R. Co. v. Harris, 67 Ala. 6 (1880); Schnur v. Citizens' Traction Co., 153 Penna. 29 (1893); nor, in some jurisdictions, to a child under seven, Richardson v. Nelson, 221 Ill. 254 (1905); Ollis v. Huston, etc., Ry. Co., 73 S. W. Rep. 30 (Tex. 1903); McVoy v. Oakes, 91 Wis. 214 (1895).

A child between seven and fourteen is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show his capacity. Birmingham Ry. Light and Power Co. v. Jones, 146 Ala. 277 (1905), City of Roanoke v. Shull, 97 Va. 419 (1899). But see, *contra*, Central R. & Banking Co. v. Golden, 96 Ga. 510 (1894), where it is said that no presumption will arise in favor of an infant between ten and fourteen in case of moving railroad train.

A boy of fourteen or more is presumed to have sufficient intelligence to be chargeable with contributory negligence and is usually considered *sui juris*. Frauenthal v. Laclede Gaslight Co., 57 Mo. App. 1 (1896); Murphy v. Perlstein, 76 N. Y. S. 657 (1902); Columbus Ry. v. Connor, 27 Ohio Cir. Ct. R. 229 (1905).

The rule in Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308 (1891), states that there is a rebuttable presumption that an infant under the age of twelve cannot be guilty of contributory negligence. *Accord*, Hill v. Baltimore & N. Y. Ry. Co., 78 N. Y. S. 134 (1902); Rolin v. Reynolds Tobacco Co., 141 N. C. 300 (1906).

Courts cannot specify any certain age at which a child shall be held liable for his acts to the same extent as a person of maturity, since the peculiar circumstances of the case, the knowledge and experience of the particular child, and his capacity to appreciate danger must be considered. Moeller v. United Rys. Co., *supra;* Cherry v. St. Louis & S. F. R. Co., 145 S. W. Rep. 837 (Mo. 1912); Jollimore v. Conn. Co., 86 Conn. 314 (1913); Cole v. Searfoss, 97 N. E. Rep. 345 (Ind. 1912).

NEGLIGENCE—LIABILITY OF ONE FOR CONDITION OF PREMISES UNDER GENERAL CONTROL OF ANOTHER—PUBLIC TELEPHONE STATION—The telephone company placed its instrument in a shop under an agreement to share profits from

the instrument. The usual public telephone sign was displayed on the outside of the shop and the tolls collected by the servants of the shopkeeper. The plaintiff after using the telephone was injured by the faulty condition of the premises caused by the proprietor of the shop. *Held:* The shopkeeper was liable, but the telephone company was not. Sullivan v. New York Telephone Co., 142 N. Y. S. 735 (1913).

It is clear that the owner or occupier of land who induces others to come upon it for lawful purposes is bound to use due care with reference to their presence in the conduct and management of his business thereon. Bennet v. Louisville & N. R. Co., 102 U. S. 577 (1880); Hupfer v. National Distilling Co., 114 Wis. 279 (1902); Samuelson v. Cleveland Iron Co., 49 Mich. 164 (1882); Clussman v. Long Island R. R. Co., 9 Hun. 618 (N. Y. 1877).

The liability of the telephone company, under the facts of the principal case, is doubtful, for, as the court said, no authoritative precedent has been found. Upon analogous facts it was stated *obiter* that a telegraph company was not liable for injuries caused by the defective condition of a platform maintained by the railroad in whose station the telegraph office was located, although the plaintiff entered for the sole purpose of sending a telegram. Clussman v. Long Island R. R., *supra*.

In Thomas v. Springer, 119 N. Y. Supp. 460 (1909), a patron of a theatre was injured through the negligence of a servant of the company which had hired the building from the defendant for a stipulated percentage of the receipts. it was held that the theatrical company and the owner of the building were not copartners, but that the theatrical company was an independent contractor for whose negligence the owner was not liable. In Laguttata v. Chisholm, 72 N. Y. Supp. 905 (1901), the plaintiff was bitten by a dog of a tenant whose lease provided that he should receive thirty per cent. of the proceeds from the use of the premises, the remainder to go to the landlord. The court held that the tenant was managing the property for himself and the landlord was not liable for his negligence.

PARTIES—JOINDER OF—WHO MAY JOIN—The manager of a corporation fraudulently induced the stockholders to sell their shares to him at less than their real value, and resold the shares at a profit. Under the S. Car. Code of Civ. Proc. 1912, 166, providing that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, the stockholders were permitted to join as plaintiffs in an action requiring the manager to account for the profits of the transaction. Black v. Simpson, 77 S. E. Rep. 1023 (S. Car. 1913).

The majority of the court held that the subject of the action was the consummated scheme of the manager, the trustee, to defraud the stockholders, the *cestuis que trust;* and that the stockholders were all interested in the relief of an accounting. The minority said, that the suit was on different contracts of sale, made by different people at different times, and that each suit demanded a different money judgment.

In Gray v. Rothschild, 48 Hun. 596 (N. Y. 1888), the several plaintiffs, from whom the defendants had fraudulently obtained goods by separate sales at different times, were not permitted to join under an identical code provision (Code Civ. Proc. 146). The reason assigned, as in the dissenting opinion in the principal case, was that there was no joint subject of action and no joint judgment demanded.

There is no inflexible rule as to the joinder of parties and it depends largely on the discretion of the court when joinder will be allowed. Black v. Simpson, *supra*. The courts are divided on allowing the joinder of plaintiffs, and it is almost impossible to frame any general rules on the question. Pomeroy: Remedies, 266.

The difficulty is in determining what is "community of interest" in the subject of action and in the relief demanded. The principle is clear that such community is necessary to a joinder. Foreman v. Boyle, 88 Cal. 290

(1891); Hellams v. Switzer, 24 S. C. 39 (1885); American Plate Glass Co. v. Nicoson, 73 N. E. Rep. 625 (Ind. 1905); Western Union Telegraph Co. v. Huff, 102 Ind. 535 (1885); McIntosh v. Zaring, 150 Ind. 301 (1897); Mining Co. v. Bruce, 4 Colo. 293 (1878); Faivre v. Gillman, 84 Ia. 573 (1892); Keary v. Mutual Reserve Fund, 30 Fed. 359 (1887); Central State Bank v. Walker, 7 Kans. App. 748 (1898); Younkin v. Milwaukee Light Co., 112 Wisc. 15 (1901). In each case the court merely decides that under the facts of that case community of interest is, or is not, present.

"Personal Rights" of Wife—Loss of Consortium—A miner who had been injured through the negligence of his employers was incapacitated for work during several months. His wife sued the husband's employer for the loss of consortium. *Held:* The tort being an injury inflicted directly on the husband, to whom the direct cause of action accrued, and the loss of the wife being merely consequential, it did not amount to a violation of her "personal rights" within the meaning of the married women's statutes. Gambino v. Manufacturers' Coal and Coke Co., 158 S. W. Rep. 77 (Mo. 1913).

This case is in accord with the trend of decisions: Feneff v. New York Central and Hudson River Railroad Co., 203 Mass. 278 (1909); Brown v. Kistleman, 98 N. E. Rep. 631 (Ind. 1912); Goldman v. Cohen, 63 N. Y. Supp. 459 (1900).

But where the tort is intentional, as the alienation of a husband's affections, the wife may recover in her own name for the loss of consortium. Golden v. Gartleman, 159 Ill. App. 338 (1909); Farneman v. Farneman, 90 N. E. Rep. 775 (Ind. 1909); Gross v. Gross, 73 S. E. Rep. 961 (W. Va. 1912). These cases proceed on the theory that the loss to be compensated results from the violation of the "personal rights" of the wife under the married women's statutes; and as the "personal rights" of the wife to have the companionship and support of her husband have been directly invaded, the tort involved is a wrong perpetrated on her.

Property—Assignment of Contingent Interests—A testator devised his property, real and personal, to his daughter for life, remainder to his son should he be living at the death of the daughter, but should the son be dead at the time, to his then living children share and share alike. *Held:* The estate of the son and his children was such as could be assigned and therefore will pass to his trustee in bankruptcy. Clark v. Grosh *et al.*, 142 N. Y. Supple. 966 (1913).

Recent decisions uphold the assignability and alienability of such contingent expectant estates. In National Park Bank v. Billings, 144 App. Div. 536 (N. Y. 1911), it was held that a future contingent interest in personal property is alienable, the same as a contingent remainder in realty. *Accord*, Moore v. Littel, 41 N. Y. 66 (1869); *In re* St. John, 5 Am. B. R. 190 (1900).

At common law contingent interests were not alienable or assignable to strangers for the same reason that choses in action were not assignable, *i. e.*, to prevent maintenance. Blanchard v. Brooks, 12 Pick. 47 (Mass. 1831); Smith v. Pendell, 19 Conn. 107 (1848); Stewart v. Neely, 139 Pa. 309 (1891). However, a contingent remainder could be released to a party being in interest. Sec. 477, Co. Litt. 265 b.; Smith v. Pendell, *supra;* Miller v. Emand, 19 N. Y. 384 (1859); Williams v. Esten, 179 Ill. 267 (1899).

Practically such interests were assignable, for in order to avoid the strict rule of law the doctrine of equitable estoppel was invoked. 4 Kent. Comm. 260; Robertson v. Wilson, 38 N. H. 48 (1859); Walton v. Follansbee, 131 Ill. 147 (1890); Stewart v. Neely, *supra.* The peculiar condition of society which gave rise to the common law doctrine of maintenance no longer exists, and at the present time the doctrine does not prevail except as expressly preserved by statutes. Thallhimer v. Brinckerhoff, 3 Cow. 623 (N. Y. 1824); Sedgwick v. Stanton, 14 N. Y. 289 (1856).

The tendency of the modern authority is to make a distinction where the contingency is in the uncertainty of the person and where it is merely

in the uncertainty of the event, and it is held that if the person who is to take the remainder is definitely ascertained, his interest is more than a mere possibility and may be conveyed. Grayson v. Tyler, 80 Ky. 358 (1882); Cummings v. Searns, 161 Mass. 506 (1894); but, *contra*, if the contingency is one both in the time of vesting and of the person. *In re* Hoadley, 3 Am. B. R. 780 (1900). *In re* Gardner, 5 Am. B. R. 432 (1901), held the remainder to be inalienable while the precedent life estate is outstanding and not a property right passing to the trustee.

In a number of the states contingent remainders are alienable under the statutes authorizing the conveyance of "expectant estates." Defreese v. Lake, 109 Mich. 415 (1896); or "any estate or interest," Brown v. Fulkeram, 125 Mo. 400 (1894); or "any interest or claim" in real property, Young v. Young, 89 Va. 675 (1893).

PROPERTY FIXTURES—SUBSTITUTED ARTICLES—A tenant, under a lease which provided that any improvements or additions made by the lessee should become the property of the lessor, obtained the landlord's consent to the removal and disposition of a portion of the lighting apparatus at the tenant's expense and for his profit, provided he should substitute in its place other similar equipment. The latter could not be removed without rendering the building practically useless as a theatre. *Held:* The substituted articles became an accession to the realty and could not be removed. Webb v. New Haven Theatre Co., 87 Atl. Rep. 274 (N. Y. 1913).

This decision follows the general rule that, even in the absence of any stipulation in the lease, trade fixtures substituted for essential parts of the leased premises, but not additions thereto, are not removable. They are presumed to be permanent additions. *Ex parte* Hemenway, 2 Lowell, 496 (Mass. 1876); Bovet v. Holgratz, 5 Tex. Civ. App. 141 (1893); Fletcher v. McMillan, 103 Mich. 494 (1894); Ashby v. Ashby, 59 N. J. Eq. 536 (1900); Glasgow v. Hill, 29 Pa. Sup. Ct. 222 (1905); Squire v. City of Portland, 106 Me. 234 (1909). Undoubtedly this should be the result under the letter of the lease in the principal case.

To determine what is a fixture, courts seek to ascertain the intention of the party, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. Eaves v. Estes, 10 Kan. 314 (1872); Seeger v. Pettit, 77 Pa. 437 (1875); Woolen Mill Co. v. Hawley, 44 Ia. 57 (1876); Hutchins v. Masterson, 46 Tex. 551 (1877); McLean v. Palmer, 2 Kulp. 349 (Pa. 1882); Langsten v. State, 96 Ala. 44 (1891).

Although there must be actual annexation, with an intention to make a permanent accession to the freehold, it is not necessary that there be an intention to make the annexation perpetual. An intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts as do not lead to, but repel, the inference that it is intended to be a temporary annexation. Feder v. Van Winkle, 53 N. J. Eq. 370 (1895).

SALES—CHATTELS BOUGHT FROM A THIEF—The owner is not divested of the title to his property by larceny and a transfer to a purchaser does not impair the right of the true owner, although acquired in the ordinary course of trade and in good faith. Reichard v. Hutton, 142 N. Y. Sup. 936 (1913).

This is a corollary of the old maxim, "One cannot confer upon another more right than he himself holds," and has never been doubted. Buchanan v. McClain, 110 Ga. 477 (1900); Soltau v. Gerdau, 119 N. Y. 380 (1890). Even under the Factor's Acts, if property is taken from the owner by theft the purchaser gains no title, for the Factor's Acts do not apply when the factor or agent has obtained the possession or documentary evidence of

the title by larceny. Soltau v. Gerdau, *supra;* Collins v. Ralli, 20 Hun. 246 (N. Y. 1880).

There is, however, an exception to the broad rule as stated in the principal case. Where the stolen property is money or negotiable paper, the vendee who purchased innocently and for value is protected. Miller v. Race, 1 Burr. 452 (Eng. 1758); Massachusetts National Bank v. Snow, 187 Mass. 159 (1905); Manhattan Savings Institute v. New York National Exchange Bank, 42 App. Div. 147 (N. Y. 1899). If, on the other hand, the purchaser from a thief gained possession through an unlawful transaction, as gaming, the true owner can recover in trover or for money had and received. Mason v. Waite, 17 Mass. 560 (1822).

Another exception to the rule of the principal case is the English custom of market overt. This doctrine is very narrow and the least technical defect in the sale will invalidate the purchaser's title. Market Overt, 5 Co. 83b (1595). It has never been introduced into the United States. Easton v. Worthington, 5 S. & R. 130 (Pa. 1819); Coombs v. Gorden, 59 Me. 111 (1871); Griffith v. Fowler, 18 Vt. 390 (1846).

The practical importance of this case is its relation to the pawnbroker cases. A pawnbroker gains no title to stolen property and can, therefore, hold no lien upon property pawned by a thief or vendee from a thief. Patton v. Joliff, 28 S. E. Rep. 740 (W. Va. 1897); Skora v. Miller, 57 N. E. Rep. 264 (Ind. 1900).

TORTS—LIBEL—INJURY TO BUSINESS—A newspaper published derogatory statements about the conduct of the plaintiff's slaughterhouse, thereby injuring his business. *Held:* Although the owners of the newspaper had the right to comment upon admitted facts as to the condition of the plant and the method of doing business, they were liable for publishing untrue statements about the plaintiff in connection with his business which they believed to be true. Schwarz Bros. Co. v. Evening News Pub. Co., 87 Atl. Rep. 149 (N. J. 1913).

It is established that a publication affecting one in his profession, business or trade, if false, is libelous *per se*, and no special damage need be shown. Mowry v. Raabe, 89 Cal. 606 (1891); Daily v. De Young, 127 F. Rep. 491 (1903); Holland v. Flick, 212 Penna. 201 (1905); International Text-Book Co. v. Leader Printing Co., 189 F. Rep. 86 (1910); Hinrichs v. Butts, 133 N. Y. S. 769 (1912); Astruc v. Star Co., 193 F. Rep. 631 (1912).

To be actionable, defamatory words must prejudice the one, concerning whom they are published, in the special profession or business in which he is actually engaged. People's United States Bank v. Goodwin, 149 S. W. Rep. 1148 (Mo. 1913); Winsette v. Hunt, 53 S. W. Rep. 522 (Ky. 1899); and no recovery will be allowed where the libel is in connection with a business in which the plaintiff has never engaged. Ramsear v. Gerry, 1 N. Y. S. 635 (1888).

The libel must be with reference to the plaintiff's business as a connected series of acts and not one particular transaction, in order that the plaintiff can recover without proving special damage. Fay v. Harrington, 176 Mass. 270 (1900); Manire v. Hubbard, 110 Ky. 311 (1901). If the business is unlawful, no recovery will be allowed. Johnson v. Simonton, 43 Cal. 242 (1872); Dauphin v. Times Pub. Co., Fed. Cas. No. 3584a (1884).

Bona fide communications on any subject in which both the maker and receiver have an interest or duty are privileged. Young v. Lindstrom, 115 Ill. App. 239 (1904). But if the statements are false, the defendant must show he had reasonable cause for believing them true. Neeb v. Hope, 111 Penna. 145 (1885). And the privilege may be lost if the publication be excessive. Smith v. Smith, 73 Mich. 445 (1889).

TORTS—MASTER AND SERVANT—ASSUMPTION OF RISK—Under the Federal Employer's Liability Act (April 22, 1908, c. 149, p. 4), abolishing the defense of contributory negligence in certain cases, it is intimated that the defense

of assumption of risk is also denied the defendant. Horton v. Seaboard Air Line Co., 78 S. E. Rep. 494 (N. C. 1913).

The basis of the decision is that assumption of risk is a part of contributory negligence and that a law taking away the greater must necessarily deny the lesser. There is support for the doctrine that contributory negligence includes assumption of risk in Johnson v. Mammoth Vein Coal Co., 114 S. W. Rep. 723 (Ark. 1908), which holds that the difference is one of degree rather than of kind; and in Johnson v. St. Paul & Western Coal Co., 126 Wis. 492 (1906), which holds that one is a phase of the other. Other cases, while recognizing a fundamental difference, realize that both may arise out of the same facts and become almost undistinguishable. Southern Pacific Co. v. Allen, 106 S. W. Rep. 441 (Tex. 1907); Chicago G. W. Ry. Co. v. Crotty, 141 Fed. Rep. 913 (1905).

A strong line of cases, however, maintain that there is a clear distinction between assumption of risk and contributory negligence. Assumption of risk is founded upon contract, while contributory negligence is a rule of tort. Narramore v. Cleveland, C. C. & St. L. Ry. Co., 96 Fed. Rep. 298 (1899); St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495 (1903); Choctaw, Oklahoma and Gulf R. R. Co. v. McDade (1903); Davis Coal Co. v. Polland, 158 Ind. 607 (1902). And directly *contra* to the decision in the principal case are the decisions holding that assumption of risk may be pleaded under a statute which abolishes the plea of contributory negligence. Barker v. Kansas City, M. & O. Ry. Co., 129 Pac. Rep. 1151 (Kan. 1913); Bowers v. Southern Ry. Co., 73 S. E. Rep. 677 (Ga. 1912); Freeman v. Powell, 144 S. W. Rep. 1033 (Tex. 1912).

As to the converse of the doctrine expressed in Horten v. Seaboard Air Line, *supra*, the courts are practically unanimous in holding that contributory negligence is a defense, where, either by statute or decision, the defense of assumption of risk has been denied. Schlemmer v. Buffalo, R. & P. Ry. Co., 207 Pa. 198 (1903); Coley v. N. C. Ry. Co., 129 N. Car. 407 (1901); Buckner v. Richmond & D. R. R. Co., 72 Miss. 873 (1895).

TORTS—THEATRE—TREATMENT OF PATRONS—The plaintiff purchased a ticket and was admitted to the defendant's theatre. In compliance with the request of a performer to handcuff him, the plaintiff went upon the stage, where the performer addressed him with defamatory language. *Held:* That the plaintiff had not ceased to be a patron of the proprietor who was liable in an action for breach of contract. Interstate Amusement Co. v. Martin, 62 So. Rep. 404 (Ala. 1913).

The decision is in accord with cases determining the liability of proprietors of theatres and other places of amusement for their tortious acts and for those of their employees, committed within the scope of their employment. Joseph v. Bidwell, 28 La. Ann. 382 (1876); Anderson v. Rawlings, Ohio Cir. Ct. 381 (1899); Fowler v. Holmes, 3 N. Y. Supp. 816 (1889); Brown v. Patchellor, 29 R. I. 116 (1908). In the case of Fox v. Dougherty, 2 W. N. C. 417 (Pa. 1876), the plaintiff was injured in consequence of the negligence of trapeze performers, and the manager was held liable, though the performance was under the entire direction of the acrobats.

When the prescribed admission fee is paid, persons have the right to assume that a safe place to witness the exhibition has been furnished. Lusk v. Peck, 132 N. Y. App. Div. 426 (1909). Owners of places of entertainment are bound to use reasonable care to protect patrons from injury. King v. Ringling, 130 S. W. Rep. 482 (Mo. 1910). But they are not insurers. Scott v. Univ. of Mich. Ath. Ass., 152 Mich. 684 (1908). Attendants upon performances assume the risk peculiar to the form of amusement. Lumsden v. Thompson Scenic Ry. Co., 130 N. Y. App. Div. 209 (1909).

Where a person is wrongfully ejected from place of amusement, his damages are not limited to amount paid for admittance; he will be compensated for the indignity, disgrace, or any other damage sustained. Smith v. Leo, 92 Hun. 242 (N. Y. 1895).

TROVER AND CONVERSION—PROPERTY OF EXTRINSIC VALUE—TAX RECEIPTS—The plaintiff sued in trover to recover certain tax receipts. *Held:* The action would lie. The receipts, though without commercial value, were of peculiar value to the plaintiff as evidence. Vaughn v. Wright, 78 S. E. Rep. 123 (Ga. 1913).

In general, trover may be maintained or every species of personal property which is subject to private ownership and has value. Nebraska v. Omaha National Bank, 59 Neb. 483 (1899). The property may be of commercial value, even though it has no legal value. Gambling machines, though without legal value, were recoverable in trover, having a considerable commercial value. Edwards v. American Express Company, 121 Iowa, 744 (1903). Evidentiary value of the property is sufficient; *e. g.*, cancelled commercial paper. Pierce v. Gilson, 9 Vt. 216 (1837); Stone v. Clough, 41 N. H. 290 (1860); Otisfield v. Mayberry, 63 Me. 197 (1874); Brunner v. Griffith, 4 Dist. 640 (Pa. 1894). And although stock itself, being a chose in action, cannot be recovered in trover, the certificate may. Neiler v. Kelley, 69 Pa. 403 (1871).

Apparently the only type of property which is not sufficiently valuable to be subject to trover is that which has neither legal, commercial, nor evidentiary value. Donohue v. Henry, 4 E. D. Smith, 161 (N. Y. 1855), where the recovery of letters, valuable only for the purpose of levying blackmail, was denied, there being no value which the law could recognize. The plaintiff failed to recover a fraudulent note by an action of trover in Miller v. Lamery, 62 Vt. 116 (1889).

TROVER AND CONVERSION—SUBJECT OF CONVERSION—MATERIALS IN A DEMOLISHED HOUSE—The plaintiff, under his contract, was entitled to the materials from the house he was employed to demolish. The defendant, owner of the house, prevented continuance of the work. In an action of trover for the materials in the portion of the house still standing, it was held the action would not lie, the materials remaining part of the realty until actually severed. Melton v. Fullerton-Weaver Realty Co., 142 N. Y. S. 852 (1913).

This case is in accord with the general rule both in England and America, that trover lies to recover damages for the conversion of personal property. Buildings of a permanent nature are ordinarily considered part of the realty. Mathis v. Dobschultz, 72 Ill. 438 (1874); Pangborn v. Insurance Co., 62 Mich. 638 (1886); Ry. v. Bank, 134 Ind. 127 (1892); Roberts v. Lynn Ice Co., 187 Mass. 402 (1905). Fixtures of this nature do not become personal property until actually severed from the realty. Noble v. Sylvester, 42 Vt. 146 (1869); and buildings and fixtures in general, while they remain attached to the realty, are not the subject of conversion. Minshall v. Lloyd, 2 M. & W. 450 (Eng. 1837); Mackintosh v. Trotter, 3 M. & W. 184 (Eng. 1838); Raddin v. Arnold, 116 Mass. 270 (1874); Thweat v. Stamps, 67 Ala. 96 (1880); Darrah v. Baird, 101 Pa. 265 (1882); Dewitz v. Shoeneman, 82 Ill. App. 323 (1899). This rule, however, does not apply when the fixture or building is attached to the realty under the agreement between parties that it is to remain personalty; in such case the thing attached remains personal property, at least as far as the contracting parties are concerned, and is, therefore, subject to conversion. Russell v. Richards, 10 Me. 429 (1883); Tyson v. Post, 108 N. Y. 217 (1888). In the principal case, however, the building was of a permanent nature and attached under no such agreement.

The dissenting opinion follows an extension of the doctrine of Russell v. Richards and Tyson v. Post, *supra*, holding that by the making of the contract the materials were constructively severed from the realty, and therefore personalty subject to conversion. There are a few cases which support this view. Johnston v. Philadelphia Mortgage and Trust Co., 129 Ala. 515 (1900), where it was held that fixtures still attached to the realty could be sold as personalty, provided that the contract was in writing and made with the same formalities as a conveyance of realty. In Straw v. Straw, 70 Vt. 240 (1897), the fixtures though annexed to the realty were reserved when the realty was mortgaged and held to be personalty.

WEAPONS—DEADLY WEAPON—RAZOR—Under a statute (Miss. Code, 1906, Par. 1103), making it a misdemeanor to carry any concealed bowie knife, dirk, butcher knife, pistol or other deadly weapon of like kind, a boy cannot be convicted for carrying a razor. Brown v. State, 62 So. Rep. 353 (Miss. 1913).

A razor is a sharp instrument for shaving purposes; Scott v. State, 62 S. W. Rep. 420 (Tex. 1901); and has a well known and specific use to which it is ordinarily applied and is not known or usually sold as a weapon. State v. Nelson, 38 La. Ann. 942 (1886).

Guilt in the crime of carrying concealed deadly weapons depends upon the character of the weapon and the intent with which it is carried. The carrying of a pistol for harmless purposes does not constitute this offense. State v. Roberts, 39 Mo. App. 47 (1890); State v. Brodnax, 91 N. C. 543 (1884); nor the carrying of a pistol in order to trade it off; State v. Harrison, 93 N. C. 605 (1885); nor the keeping of it for another; State v. Chippey, 33 Atl. Rep. 438 (Del. 1892); nor the retention of it to have it cleaned. Boissean v. State, 15 S. W. Rep. 118 (Tex. 1890). However, it was held in Custinger v. Comm., 70 Ky. 392 (1870), that one may be convicted though his purpose is harmless.

Ordinarily the carrying of a razor would not constitute crime, yet circumstances might tend to show that it was being carried as a weapon. State v. Larkin, 24 Mo. App. 410 (1887). It would seem, therefore, that there must be evidence that it was carried as a weapon in order to convict. Nevertheless a razor has been held a deadly weapon, *eo nomine*. State v. Iannucci, 4 Pennewill, 193 (Del. 1903). However, in this case the statute under which the indictment was framed alluded to no *specific* weapons.