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NOTES.

LAW SCHOOL—THE ORDER OF THE COIF—ELECTIONS—The Pennsylvania Chapter of The Order of the Coif held its annual meeting on Friday, April 9, 1915. The meeting was called to elect officers for the present year, and to choose members from the Class of 1915. The officers elected are William A. Schnader, Esq., President; H. Harrison Smith, Esq., Vice-President; L. P. Scott, Esq., Secretary and Treasurer. The new members chosen from the Class of 1915 are Robert M. Gilkey, Earle Hepburn, Alvin L. Levi, Edward W. Madeira and Thomas Reath, Jr. It is probable that some additional members will be selected when the results of the final examinations become known.[1]

CARRIER'S LIEN—STOPPAGE IN TRANSITU—THE COMMERCIAL COURT—An interesting illustration of the spirit in which cases in

[1] For the complete list of members of THE ORDER OF THE COIF previous to this election, see 62 UNIV. OF PA. LAW REV. 629.

the Commercial List,[1] in the King's Bench Division of the English High Court, are decided is afforded by a decision of Mr. Justice Pickford, which was recently reversed in the Court of Appeal.[2] A vendor, through his agent, entrusted to a carrier for delivery to the purchaser a quantity of steel, and prepaid the carriage. One of the conditions printed in the carrier's contract was a very usual one, in the following terms:

> "All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods *and also to a general lien for any other moneys due to them from the owners of such goods upon any account.*"

The purchaser became insolvent before delivery of the steel, so the vendor exercised his right of stoppage *in transitu* and demanded the return of the steel from the carrier. The carrier, however, set up that there was a sum of money owing to it by the consignee on other accounts, which, though they had nothing to do with this shipment or this vendor, were covered by the contractual lien created upon the goods, and refused to return the steel. The shipper, to obtain release of the steel, paid the amount claimed to be due from the consignee to the carrier, and then sued the carrier to recover the amount so paid.

The question was thus clearly raised whether or not such a clause in a bill of lading must be so interpreted as to subject a shipper who stops goods *in transitu*, to liability for a debt of his insolvent vendee, with which he has nothing to do and of which he can have no prior knowledge. Mr. Justice Pickford, in giving judgment against the carrier, said:[3]

> "It is fairly obvious that the condition when framed was not framed with the present sort of case in view. It was framed for the purpose of extending the particular lien which would exist in respect of the carriage of any lot of goods to a general lien in respect of all charges owing from the person who was going to receive those goods, and what was contemplated was that the carrier should not be bound to deliver to

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[1] The Commercial List is a separate list of causes, created in 1895, in which actions of a commercial nature may be entered by the leave of the judge presiding over it, and to which one judge selected for the purpose confines his entire attention so that it is never in arrears. The room in which the List is heard is usually referred to, informally, as the Commercial Court. For an outline of its history and practice see Theobald Mathew: Practice of the Commercial Court (London, 1902); and Studies in English Civil Procedure, 63 UNIV. OF PA. LAW REV. 380, at page 418 ff. (March, 1915).

[2] United States Steel Products Co. v. Great Western Railway Co., [1913] 3 K. B. 357, before Mr. Justice Pickford. In the Court of Appeal, [1914] 3 K. B. 567.

[3] At page 365.

> that person unless that person had satisfied the general lien and paid his general account as well as the particular charges upon the particular lot of goods. *I do not say for a moment that the words of the condition are not large enough to extend considerably beyond that, but I think that the clause may be and ought to be held to be satisfied by extending it no further than that,* and by reading it, as it quite well can be read, as meaning that the goods shall be held by the company, and the company shall not be bound to deliver them to the consignee until he, the consignee, has discharged the debt that is due in respect of all goods which have been carried for him by the carrier. *That is quite a possible and fair reading of the condition, and it is not necessary that it should be read as meaning that the company should be entitled to hold as against persons who have nothing to do with the debt.*"

These words illustrate admirably the manner in which the custodian of the Commercial List, specializing, as he does, for the time being, in commercial causes, is able to get the point of view of the business community and to interpret the terms of a contract so as to make them mean what they are generally understood to mean by the persons who habitually use them.

The decision was, however, reversed by a somewhat impromptu Court of Appeal,[4] who decided that the contract must be literally construed and enforced in its apparent meaning, without any limitation and without any reference to the intent with which the clause was framed. Lord Justice Kennedy said that he looked at the contract "apart altogether from the purpose, which is a dangerous guide",[5] and Mr. Justice Bray, saying, "There is a clear contract",[6] could not even see room for a difference of opinion, so they refused to ratify the limitation put upon it by the Commercial Court. That is the abstract barrister's point of view, as opposed to the business man's, and it explains the reasons for the setting up of a Commercial List separate from the ordinary list of King's Bench actions.

It is worth while to note here that twenty-five years earlier two American Supreme Courts came, independently, to a conclusion identical with that of Mr. Justice Pickford, but neither decision was cited either in the Commercial Court or in the Court of Appeal. The first was a Pennsylvania case which arose out of a very similar contract.[7] There the disputed clause in the bill of lading read:

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[4] Lord Sumner was called from the House of Lords and Mr. Justice Bray from the King's Bench Division to constitute, with Lord Justice Kennedy, a third Court of Appeal, at the end of Hilary Term, 1914, because of the arrears in that branch of the Supreme Court.

[5] At page 581.

[6] At page 586.

[7] Pennsylvania R. R. Co. v. American Oil Works, Ltd., 126 Pa. 485 (1889).

> "Said merchandise may be retained for all arrearages of freight and charges due thereon *and also on any other goods by the same consignee or owner,"*

and the carrier claimed by virtue of this clause to retain the goods, after a stoppage *in transitu,* for a general balance left unpaid by the insolvent consignee. Judge Finletter, giving judgment in favor of the vendor, indicated his views on the question of construction of such contracts, as follows:

> "If it be conceded that a common carrier can affect the shipper with special contracts, by simply printing them upon the bills of lading, it cannot well be questioned that such contracts are to a certain sense compulsory. The shipper is not in a condition to dispute the terms; to do so would result in delay and perhaps litigation. In this event, ordinary trade and commerce would suffer. The least that ought to be done, under such an involuntary contract, would be to give the consignor upon whom it is imposed the benefit of a most liberal construction, and hold the common carrier to the converse."

On this principle, which conforms to the generally accepted rule that when the terms of a contract have been drawn by one of the parties they ought to be construed strictly against him, the court held that the clause was aimed not at the shipper, but solely at the consignee, and that interpretation was affirmed on appeal. It is rather a coincidence that in the English case the steel was shipped from Philadelphia. In North Carolina a similar conclusion was reached upon the following words in a bill of lading:

> "The several carriers shall have a lien upon the goods *for all arrearages of freight and charges due by the same owners or consignees on other goods."*

The court said:[8]

> "The commercial world would doubtless be surprised if it were understood that whenever such a stipulation was imposed upon consignors they were in effect yielding up their lien for the purchase money, and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possibly insolvent vendee."

An earlier English case, *Wright* v. *Snell,*[9] is very similar to *United States Steel Products Company* v. *Great Western Railway Company.* There the shipper, after having received from the carrier a notice that goods would be accepted only subject to a general lien "for any general balance from their respective owners," deliv-

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[8] Farrell v. Richmond & Danville R. R. Co., 102 N. C. 390 (1889).

[9] Barnewall & Alderson, 350 (K. B. 1822).

ered to the carrier goods to be conveyed to the shipper's own factor. Title, therefore, never passed out of the shipper. The carrier sought to hold the goods for a general balance owing by the factor on other accounts, but it was held that the carrier could not subject A's goods to B's debt and must deliver back the goods upon the demand of A. The difference in the cases is, of course, that the exercise of the right of stoppage *in transitu* does not revest the title in the vendor. But it does revest in him the right to take possession, which is, after all, the only right contested by the carrier's claim of lien. There ought, therefore, to be no distinction, as between shipper and carrier, between a case where title never passes from the shipper, and one where, though title has passed, the right to take possession has revested.

As far back as 1802 it was held by the Common Pleas, in *Oppenheim* v. *Russel,*[10] that a carrier could not set up either a custom of the trade or even a contract with the consignee, giving the carrier a general lien against the consignee, to defeat the vendor's right to stop goods *in transitu* and retake them, and that decision was referred to with approval by Lord Ellenborough[11] and by Chief Justice Tindal.[12] If, therefore, the view of Mr. Justice Pickford and the American cases be the true one—that the present contract is at most an agreement that the carrier should have a general lien against the consignee—then *Oppenheim* v. *Russel* is a further reason for declaring the right of the vendor superior to any carrier's lien, once the freight on the particular shipment is paid.

But here a curious question arises. In these cases of stoppage *in transitu* title to the goods passes to the purchaser-consignee upon their delivery to the carrier. Can a shipper make a contract with a carrier which will bestow upon the carrier rights against a third party, the consignee, who is no party to the contract? One can hardly conceive an affirmative answer to such a question. That difficulty was, in fact, stated by Colam, K. C., in his argument in the Commercial Court.[13] Lord Sumner, in the Court of Appeal, was strongly influenced by it. The reasoning of his opinion seems to be:[14] the shipper cannot confer upon the carrier a lien over another's goods so as to bind *that other;* therefore the shipper must mean by his contract to bind *himself.* So here is a case where, because the contract intended by the parties (assuming Mr. Justice Pickford's statement of the intent to be correct) is one beyond their power to make, the court will erect upon their words a contract different from the one they intended and far broader than any shipper would, one feels certain, voluntarily enter into. It is horn-book law

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[10] 3 Bosanquet & Puller, 42 (C. P. 1802).

[11] Smith v. Goss, 1 Campbell, 282 (C. P. 1808).

[12] Leuckhart v. Cooper, 3 Bingham's New Cases, 99 (C. P. 1836).

[13] [1913] 3 K. B. at page 361.

[14] [1914] 3 K. B. at page 579.

that the consignor is primarily liable for payment of freight on every shipment and it is submitted that the only right he can confer on the carrier by way of a general lien is a right to retain goods in just such a case as this for the payment of an unpaid balance owing from him, the consignor, but not from the consignee.

There is, indeed, a *dictum* from Michigan, by no less an authority than Judge Cooley, to the effect that the consignor, in making a contract of carriage with the carrier, has a presumed authority to act as agent for and to bind the consignee.[15] That was said in his judgment in an action which arose out of the destruction by fire of goods in warehouse at the *terminus* of transit. The company, being sued by the consignee, sought to deny liability by virtue of a clause in the contract with the shipper exempting the carrier from such liability. But it is important to note that all the goods had been paid for by the consignee before their delivery to the carrier for transit. Where the vendor-consignor has been paid and has parted with all interest in the goods before he delivers them to the carrier, it may be considered that he acts as agent for the new owner in shipping the goods. But even there it may be doubted if such a presumed authority would be held to extend so far as to cover the creation of a general lien against the principal, in view of the settled hostility of the law to general liens.

We must wait for a case in which a carrier seeks to enforce against the consignee a general lien which has been thus "created" by a contract with a third party; to have it judicially considered whether or not such a contract is of any avail even against the consignee. But in the meantime, it is a matter of fact on which the testimony of the English business world would be of interest whether the view of shippers as to the meaning of this disputed clause agrees with that of Mr. Justice Pickford or with that of the Court of Appeal—whether it is understood by them to bind their own rights or those of consignees.

S. R.

CONFLICT OF LAWS—TORTS—"LORD CAMPBELL'S ACT"—Where a cause of action, which arose in a foreign jurisdiction, is sought to be enforced elsewhere, the law of the place where the cause of action arose, the *lex loci delicti*, will determine the substantive rights of the parties, while the *lex fori* will govern questions of remedy, such as statute of limitations.[1] But where a new right of action, unknown to the common law, has been created by statute and the statute which gives the right at the same time provides the remedy for violation of that right, those matters ordinarily pertaining to the remedy become

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[15] McMillan *et al.* v. R. R. Co., 16 Mich. 79 (1867), at page 119.

[1] Johnson v. R. R., 50 Fed. Rep. 886 (1892); Carson v. Smith, 133 Mo. 606 (1895).

limitations to the substantive right and hence are determined by the *lex loci delicti,* which governs all matters of substantive right.[2] The most important right of this nature, unknown to the common law, but created by statute, is the action for wrongful death authorized by Lord Campbell's Act[3] in England and by various adaptations of that act in practically every State in the Union.[4]

The enforceability of rights gained under such a statute in a jurisdiction other than the one in which the right was gained and the cause of action created has never been doubted.[5] There are many *dicta* to the effect that the *forum* must have a statute similar to the one under which the cause of action arose,[6] but it is not necessary that the statutes be identical.[7] It has been contended that the necessity for similarity is not intended to introduce a new element into the enforcement of action in tort committed elsewhere, but that similarity of statutes shows that enforcement of the foreign statute is not contrary to the settled public policy of the *forum* and that such similarity makes it possible for the courts of the *forum* to have proper machinery to enforce such a right.[8] From this willingness on the part of the courts of a particular *forum* to give effect to foreign statutes, dissimilar in a greater or less degrees to statutes of the *forum* on the same subject, inevitably resulted problems of conflicts of the laws of the several jurisdictions.

In an action for wrongful death, no cause of action can accrue to anyone except those given that right by the statute of the place where occurred the wrongful act causing death; hence no question arises as to whether the ultimate beneficiaries under the statute of the *forum* can maintain an action, if they are not given such right by the foreign statute. The question which does arise is whether, the party entitled to sue being a nominal party, trustee for the real beneficiaries, who are the same in both jurisdictions, such party shall be the one entitled by the *lex fori* or the *lex loci delicti.* It has never been denied and has often been asserted that action by the person

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[2] The Harrisburg, 119 U. S. 199 (1886); Bond v. Penna. R. R. 124 Minn. 195 (1914).

[3] 9 & 10 Vict., c. 93 (1846).

[4] In Penna. Acts April 15, 1851, P. L. 674, and April 26, 1855, P. L. 309.

[5] Knight v. West Jersey R. R., 108 Pa. 250 (1885); Anderson v. Louisville Ry. Co., 210 Fed. Rep. 689 (1914). But see Ash v. R. R., 72 Md. 144 (1890).

[6] Wooden v. R. R., 126 N. Y. 10 (1891); Slater v. Mexican R. R. Co., 194 U. S. 120 (1904).

[7] Dennick v. R. R., 103 U. S. 11 (1891); Higgins v. C. N. E. R. R., 155 Mass. 176 (1892).

[8] Wooden v. R. R., *supra,* note 6; Higgins v. C. N. E. R. R., *supra,* note 7, "If foreign law penal, or offends our own policy, or repugnant to justice or good morals, or calculated to injure this state or its citizens, or if no jurisdiction of parties who must be brought in to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, courts are at liberty to decline jurisdiction."

named in the foreign statute is proper[9] and, strong *dicta* say, necessary.[10] These *dicta* had been accepted as final until the case of *Stewart* v. *Baltimore & Ohio Railroad*[11] decided that, the real beneficiaries being the same, the nominal plaintiff might be the one named in the statute of the *forum*, because, since these statutes merely removed a common law obstacle to recovery for a recognized tort, and did not create a new cause of action, matters of remedy were still to be determined by the *lex fori*. The value of that case must be greatly lessened unless its results can be justified on other grounds, for there is a decided weight of opinion that these statutes create a new right of action, altogether unknown to the common law.[12] Before and since the Stewart case, it has been generally held that where right of action is given by both statutes to the administrator, the administrator appointed in the *forum* is a proper party to bring action,[13] but these cases went rather to the powers of an administrator over choses in action of the deceased which arose in a foreign jurisdiction, than to the question as to proper parties plaintiff to an action for wrongful death. The proper limits within which procedure of the *forum* may be invoked in enforcing statutes for wrongful death seem to have been set in *Teti* v. *Consolidated Coal Company*,[14] which contains an interpretation of *Stewart* v. *Baltimore & Ohio Railroad Company*[15] which, if adopted by the court that decided that case, will relieve the Stewart case of its most objectionable features. The Teti case divides this class of actions into two subdivisions, those where the right to maintain the action is given directly to

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[9] Wooden v. R. R., *supra*, note 6; Strait v. Yazoo & M. V. R. R., 209 Fed. Rep. 157 (1913).

[10] Usher v. R. R., 126 Pa. 206 (1889); Lower v. Segal, 59 N. J. L. 66 (1896).

[11] 168 U. S. 445 (1897). Action was here brought in the District of Columbia by the administrator there appointed of the deceased, who was killed in Maryland, by whose statute action must be brought in the name of the state to the use of the same persons beneficially entitled under the District of Columbia statute, which makes the administrator the proper party plaintiff. Directly *contra* to this case on almost identical facts, see Stone v. Groton Bridge Co., 77 Hun, 99 (N. Y. 1890).

[12] Ash v. B. & O. R. R., 72 Md. 144 (1890); Ohneavage v. Chicago City Ry. Co., 259 Ill. 424 (1913); *In re* Brennan's Account, 160 App. Div. 401 (N. Y. 1914); Centofanti v. Penna. R. R., 244 Pa. 255 (1914).

[13] Bruce v. R. R., 83 Ky. 174 (1885); Higgins v. R. R., *supra*, note 7.

[14] 217 Fed. Rep. 443 (1914). Action brought in New York by administrators there appointed for death in Pennsylvania of Teti and Dastoli, the former having left a widow and children, the latter a father and mother. By the Pennsylvania acts, the widow must bring action for herself and children, but parents of deceased sue in their own right. *Held:* The administrator of Teti is a proper party plaintiff, for by the New York statute, administrator recovers also as trustee for widow and children. But the administrator of Dastoli has no right of action, that being vested in the parents of Dastoli.

[15] *Supra*, note 11.

the one entitled in his or her own right to the recovery when had, and those where the party entitled to and does so in a representative capacity. The Stewart case is held to apply to the second class only, and, while it is admitted that there may be technical objections to applying the *lex fori* in such a case, the infinitely greater convenience in allowing the trustee entitled under the *lex fori* to proceed is grounds for disregarding the rule of private international law in that one narrow case. For the Stewart case to apply, then, the beneficiaries under both statutes must be the same, and under both, they must seek redress through a trustee of some sort. No one can possibly be prejudiced, except perhaps the logicians.

J. F. H.

LIQUOR LAWS OF PENNSYLVANIA—RETAIL LICENSE—NECESSITY—In the administration of the Brooks High License Law, which now regulates the sale of intoxicating liquors in Pennsylvania, no subject seems to have been more productive of difference of opinion and practice than the interpretation of the powers and duties conferred upon the Courts of Quarter Sessions of the various counties in the granting or refusing of licenses. The pivotal point of difference seems to lie in the question of "necessity", as involved in the regulatory statute. The statute provides that "the said Court of Quarter Sessions shall hear petitions . . . in favor of and remonstrances against the application for such license, and in all cases shall refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travelers".[1] It is clear that the act places the determination of the question of necessity within the discretion of the Court of Quarter Sessions and the appellate courts of the State have so held. In the recent case of *Gohn's License*[2] the order of the Court of Quarter Sessions refusing a license on the ground of lack of necessity was sustained, even though no remonstrances were filed against the application.

The leading case dealing with the question of necessity is that of *Schlaudecker* v. *Marshall*.[3] It is true that that case involved the interpretation of an earlier act than the one now in force; but the question of necessity was not changed by the later statute now controlling, so the decision of the court in the case mentioned is still applicable.[4] The Supreme Court, speaking through Mr. Justice Agnew, said:

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[1] Act of May 13, 1887, P. L. 108, §7.

[2] 57 Pa. Super. Ct. 160 (1914).

[3] 72 Pa. 200 (1872).

[4] *Cf.* Act of March 22, 1867, P. L. 40, §1.

"The discretion vested in the court is a sound judicial discretion; and to be a rightful judgment it must be exercised in the particular facts and circumstances before the court, after they have been heard and duly considered; in other words, to be exercised upon the merits of each case."

This interpretation of the powers conferred upon the Court of Quarter Sessions in granting licenses has been subsequently approved by both the Supreme and Superior Courts of the Commonwealth.[5] It being clear that the question of necessity is for the sound judicial discretion of the court, there remains the important question of determining what things shall control or influence such discretion. The act itself provides one method whereby the court may seek aid in this problem. It stipulates that the court shall hear petitions in favor of and remonstrances against the applications for licenses. These are not conclusive on the court, however.[6] They are for the information of the conscience of the court and for the sole purpose of determining whether the license in question is, or is not, a matter of public necessity.[7] It is not necessary that the petitioners and remonstrants should be voters; it is enough that they be citizens, whether male or female.[8] But such methods of determining the question of necessity are not compulsory on the court. In exercising its judicial discretion the court may act of its own knowledge and refuse a license, even though there is no remonstrance against it.[9] But if the court is without knowledge other than by the petition of the applicant, and there is no remonstrance, it would seem that the license must be granted.[10]

There has been considerable diversity of opinion among the courts of the State as to whether the term necessity refers to the license itself or to the hotel or eating house in connection with which the license is sought. But the Superior Court has distinctly said that not every place that may be necessary as a hotel or eating house for public accommodation is entitled as matter of right to be licensed to sell liquors if the other statutory requirements are complied with.[11]

The refusal of a license because of lack of necessity does not make the question of necessity *res judicata* upon the hearing of the

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[5] Reed's Appeal, 114 Pa. 452 (1886); Raudenbusch's Petition, 120 Pa. 328 (1888); Sparrow's Petition, 138 Pa. 116 (1890); Reznor Hotel Company's License, 34 Pa. Super. Ct. 525 (1907).

[6] Sparrow's Petition, *supra*, note 5.

[7] Reed's Appeal, *supra*, note 5.

[8] Reed's Appeal, *supra*, note 5.

[9] Raudenbusch's Petition, *supra*, note 5; Mitchell's License, 48 Pa. Super. Ct. 406 (1911); Gohn's License, 57 Super. Ct. 160 (1914).

[10] Kelminski's License, 164 Pa. 231 (1894).

[11] Reznor Hotel Company's License, *supra*, note 5; Raudenbusch's Petition, *supra*, note 5.

application of the same person for the same premises in a subsequent year; but the court may consider it in connection with the other relevant facts established at the hearing or known to the court, particularly if the conditions be unchanged.[12] The grant of a license for the same premises during the previous year or for several preceding years is a fact more often in evidence, since the great majority of applications are for renewals. The appellate courts seem not to have expressly determined the weight to be given to such evidence. In one case the Superior Court said that "the granting or refusal of license in previous years is not conclusive, and, under some circumstances, it ought to have little, if any, weight in the determination of the application before the court".[13] Among the Courts of Quarter Sessions there is a diversity of opinion as to the weight which should be given to the fact that an application is for a renewal. Some courts have said that the fact that a place has been heretofore licensed is prima facie evidence of its necessity.[14] But the better opinion, in view of the fact that the statute in question is an act "to restrain and regulate the sale of liquors" would seem to be that enunciated by Judge Hare, who held that "every renewal is a new grant and the applicant must make out his case with the same precision whether he is coming for the first or the twentieth time."[15]

When the Court of Quarter Sessions has heard or decided an application its whole duty is performed and it is not required to give the reasons for its decision.[16] Being an exercise of its judicial discretion, the finding of the court hearing an application will not be considered on appeal.[17] Upon appeal the presumption arising from a regular record is that the court below refused the license for a legal, and not for an arbitrary reason;[18] and this presumption cannot be rebutted by an argument from the evidence that the court ought to have reached a different conclusion.[19]

It seems clear, therefore, that the grant of a license to sell intoxicating liquors depends primarily upon the question of whether such license is necessary for the accommodation of the public and the entertainment of strangers and travelers; that the determination of this question rests exclusively in the sound judicial discretion of the court to which application for a license is made; that for

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[12] Reznor Hotel Company's License, *supra*, note 5.

[13] Reznor Hotel Company's License, *supra*, note 5.

[14] *In re* Rief's License, 2 Leh. V. 400 (1887); Howell's Application, 10 Pa. Dist. Rep. 504 (1901).

[15] Eick's License, 17 Pa. C. C. 50 (1895).

[16] Kilgore & Company's License, 13 Pa. Super. Ct. 543 (1900).

[17] Reed's Appeal, *supra*, note 5; Raudenbusch's Petition, *supra*, note 5; Nolan's License, 47 Pa. Super. Ct. 551 (1911); Mitchell's License, *supra*, note 9.

[18] Shearer's License, 26 Pa. Super. Ct. 34 (1904); Mitchell's License, 48 Pa. Super. Ct. 406 (1911).

[19] McCrory's License, 31 Pa. Super. Ct. 192 (1906).

the information of its conscience, the court may hear petitions for and remonstrances against the granting of a particular license, but not necessarily, as it may act of its own knowledge; that the term "necessity" refers to the license to sell liquors, and, by the better view is to be considered in each case *de novo,* whether the application be for a new license or for a renewal; that since the act is an act "to restrain and regulate" the sale of liquors and directs the court to "refuse" the license when it is not necessary, the burden is on the applicant to establish such necessity to the satisfaction of the judicial discretion of the court.

R. M. G.

NEGLIGENCE—LIABILITY OF WATER COMPANIES IN CASE OF FIRE—It is a general rule of wide application that a municipality is not liable for property destroyed by fire on account of its failure to furnish an adequate supply of water.[1] When a municipal corporation undertakes to furnish water to be used as a protection against fire, it acts in a governmental capacity, and is no more responsible for failure in that respect than it would be for failure to furnish adequate police service.[2] But a problem of much difficulty arises in relation to hydrant supply to a city for extinguishment of fires when there is a contract between the water-works and the municipality in which it is provided that a certain pressure shall be maintained. In a late case in the Supreme Court of Canada,[3] there was a suit by a householder in a municipality against the water company supplying the district, *seeking* to recover damages in his own right for the failure to supply sufficient water to extinguish the fire which destroyed his premises. By its contract with the municipality the water company undertook to maintain a defined water pressure for fire purposes. The court held that no right of action arose out of such a contract in favor of the taxpayer.

The great majority of American courts hold that the taxpayer has no direct interest in such agreements and, therefore, cannot sue in contract.[4] Neither can he sue in tort, because in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action.[5] But in Kentucky, North Carolina and Florida the courts have reached a different con-

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[1] Tainter v. Worcester, 123 Mass. 311 (1877); Wendel v. City of Wheeling, 28 W. Va. 233 (1886).

[2] German Alliance Insurance Company v. Home Water Company, 226 U. S. 220 (1912).

[3] Belanger v. Montreal Water & Power Co., 50 Can. Sup. Ct. 356 (1914).

[4] Wainwright v. Queen County Water Co., 78 Hun, 146 (N. Y. 1894); House v. Houston Water Works Co., 88 Tex. 233 (1895); Thompson v. Springfield Water Company, 215 Pa. 275 (1906).

[5] Nicherson v. Bridgeport Hydraulic Co, 46 Conn. 24 (1878); Fitch v. Seymour Water Works, 139 Ind. 214 (1894).

clusion. They hold that such a contract is for the benefit of the taxpayers, who may sue either for its breach or for a violation of the public duty which was thereby assumed.[6] The argument for the citizen is briefly put in a North Carolina case:[7] "There can be no real contention that the plaintiff, a citizen and taxpayer, and one of the beneficiaries in the purview of this contract cannot prosecute this action. He is the real party in interest. He is taxed with payment of his *pro rata* of the annual rent. The town cannot maintain this action for the loss sustained by him by reason of the defendant's failure to perform the provisions of the contract. For this injury the plaintiff alone can sue. The same principle has been often affirmed, to wit, that the beneficiary of a contract, though not a party to it, nor expressly named therein, can maintain an action for a breach of such contract causing injury to him, if the contract was made for his benefit." One of the most forcible arguments to the contrary is contained in a leading Texas case:[8] "It is not true, that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public."

By far the most usual line of reasoning upon which the water company is held not liable, is that the citizen is not in any proper sense the beneficiary of the obligation on the part of the water company to the municipality.[9] It has been attempted in several cases to base the action against the water company on the theory of tort, so as to avoid the difficulties incident to an action on the contract. But this theory has received little support from the courts.[10] It is to be noted, however, that the tort theory has been adopted by three States.[11] A *dictum* in *Guardian Trust Company* v. *Fisher,*[12] in the Supreme Court of the United States is to the effect that an action of tort lies against the water company, but a later case clearly shows the present position of the court to be to the contrary.[13]

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[6] Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340 (1889); Correll v. Greensboro Water Supply Co., 124 N. C. 328 (1899); Muggee v. Tampa Water Works Co., 52 Fla. 371 (1906).

[7] Jones v. Durham Water Co., 135 N. C. 553 (1904).

[8] House v. Houston Water Works Co., 88 Tex. 273 (1895).

[9] Ukiah City v. Ukiah Water & Imp. Co., 142 Cal. 173 (1904); Allen & Curry Mfg. Co. v. Shreveport Water Co., 113 La. 1091 (1905).

[10] Fowler v. Water Works Co., 83 Ga. 219 (1889); Fitch v. Seymour Water Co., 139 Ind. 214 (1894).

[11] Fisher v. Greensboro Water Supply Co., 128 N. C. 375 (1901); Springfield Fire Ins. Co. v. Graves County Water Co., 120 Ky. 40 (1905); Muggee v. Tampa Water Works Co., 52 Fla. 371 (1906).

[12] Guardian Trust Co. v. Fisher, 200 U. S. 57 (1905).

[13] German Alliance Insurance Co. v. Home Water Co., *supra,* note 2.

Some few cases seem to maintain that the citizens should be regarded as the sole beneficiaries of the contract,[14] but the difficulty of that view is that the performance was promised the municipality and was not by the terms of the contract to be made to citizens individually. It would seem that when the greatest latitude is allowed a person who is not a party to a contract to sue upon it as a beneficiary, there is still the condition that the plaintiff must be a direct beneficiary as distinguished from one who is merely collaterally or incidentally benefited.[15] If the performance by the water company in furnishing water for fire protection runs directly and physically to the inhabitant, then the water company may be liable both in contract and tort. On the other hand, if the performance runs directly and physically to the municipality alone, then the inhabitant is only incidentally and collaterally benefited and there should be no recovery in either contract or in tort. It is submitted that the latter view is the only sound one, under the facts of the principal case. While it is true that the water company is a public service corporation which might in fact enter the public calling of furnishing water for fire protection to the inhabitants directly, for use by the inhabitants in person, yet it has not in fact done so when it merely undertakes to furnish the city with water as a part of the equipment of the municipal fire department. The result may seem very violent when the inhabitant is not allowed to sue, but it would seem that the only way in which a default to the citizen could be worked out would be to show that the obligation created really runs to the citizens individually; but it is more obviously made to the municipality as an entity.

G. W. K.

WATERS—RIGHT TO PROTECT AGAINST FLOOD WATERS—URBAN PROPERTY—An interesting question arose in the recent case of *Smeltzer* v. *The Borough of Ford City*[1] as to the right of a property owner—in this case a municipality—to build a dike or embankment on his land to prevent the flood waters from a nearby stream from flowing over it. In the case mentioned the dike sought to be enjoined was not upon the banks of the stream, nor even upon the land of a riparian owner, but was located some three hundred feet back from the channel, and was within the borough limits of the defendant. The plaintiff's lot was across the stream and outside the borough limits. The effect of the embankment was to cause the flood waters to overflow the plaintiff's land during flood times to a

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[14] Terrell v. Louisville Water Co., 127 Ky. 77 (1907); Jones v. Durham Water Company, *supra*, note 7.

[15] National Bank v. Grand Lodge, 98 U. S. 123 (1878); Crandell v. Payne, 154 Ill. 627 (1895).

[1] 92 Atl. Rep. 702 (Pa. 1914).

depth four feet greater than had previously been the case at like periods. The court decided that the defendant was within its rights in so warding off the flood waters and that an injunction would not lie.

The solution of the question involved would seem to be found in determining the nature of flood waters—whether they are to be treated as surface waters and so subject to the rules applicable to such waters, or whether they are still to be regarded as part of the main stream from whose banks they have temporarily escaped. While the rights of property owners relative to surface waters is fairly well settled in most jurisdictions, and the same is true of the rights of riparian owners to deal with the waters of a stream, the question involved in the principal case, namely, the rights of others than riparian owners to deal with flood waters a considerable distance from the main channel of a stream, seems to have been rarely adjudicated.

As to surface waters there are two distinct rules, generally designated as the civil law rule and the common law rule. By the former rule, which would seem to prevail in the majority of jurisdictions, the lower and servient tenement must receive the waters which flow naturally from the dominant estate.[2] By the rule of the common law, however, there is no servitude on the lower tenement and the owner thereof may do as he pleases with his property regardless of the effect upon surface waters.[3] Under this rule no legal right of any kind can be claimed *jure naturae* in the flow of surface water, so that neither its detention, diversion or repulsion is an actionable injury, even though damage ensue.[4]

As to the rights of a riparian owner to deal with the waters of a stream it is undoubtedly the general rule that he cannot restrain a stream from overflowing its banks in such a way as to cause superabundant water, in times of flood, to flow upon or injure the lands of adjacent riparian owners.[5] This principle has been recognized and approved by the Pennsylvania courts.[6]

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[2] Herbert v. Hudson, 13 La. 54 (1838); Cranson v. Snyder, 137 Mich. 340, 100 N. W. Rep. 674 (1904); Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. Rep. 163 (1905); Pohlman v. Ry. Co., 131 Ia. 89, 107 N. W. Rep. 1025 (1906). See also Gray v. McWilliams, 21 L. R. A. 593 (1893) and note.

[3] Gibbs v. Williams, 25 Kans. 214 (1881); Walker v. R. Co., 165 U. S. 593 (1897); Cox v. R. Co., 174 Mo. 588, 74 S. W. Rep. 854 (1903); Parks v. Newburyport, 76 Mass. 28 (1857); Dickinson v. Worcester, 7 Allen, 19 (Mass. 1863); Bowlsby v. Speer, 31 N. J. L. 351 (1865). *Cf.* note, 21 L. R. A. 593 (1893).

[4] Bowlsby v. Speer, *supra*, note 3.

[5] Ferris v. Dudley, 78 Ala. 124 (1884); Burke v. Sanitary Dist., 152 Ill. 125, 38 N. E. Rep. 670 (1894); Keck v. Venghause, 127 Ia. 529, 103 N. W. Rep. 773 (1905); Parker v. Atchison, 58 Kans. 29, 48 Pac. Rep. 631 (1897); Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429 (1886).

[6] Hays v. Hinkleman, 68 Pa. 324 (1871); Brown v. Ry. Co., 183 Pa. 38 (1897); Taylor v. Canton Twp., 30 Pa. Super. Ct. 305 (1906).

With regard to surface waters the Pennsylvania courts have drawn a clear distinction between cases arising in towns and cities and those arising in the country districts. In the latter case the rule of the civil law is followed.[7] But where the question arises in the improvement of a town or city lot or municipal change of grade it is equally as clear that the common law rule will be applied.[8]

The situation in the principal case was a complicated one to which no single one of the above principles would apply. The defendant, so far as the report of the case shows, was not a riparian owner, the dike in question being some three hundred feet from the bank of the stream, and there being an intervening proprietor; the waters sought to be warded off were not ordinary surface waters, but flood waters from the nearby stream; the relative situation of the lands of the plaintiff and defendant respectively was not such as to make the rules as to surface waters applicable; finally, the defendant was a municipality, the dike was within the borough limits, while the land of the plaintiff was not.

By the weight of authority where a stream is subject to periodic overflow, the flood waters at such times are not to be considered as surface waters, but as part of the natural watercourse.[9] It would seem, therefore, that in dealing with such waters the ordinary rules applicable to riparian owners would apply. Considering the principal decision from that viewpoint its holding is contrary to the general rules as to riparian rights. We have seen, on the other hand, that in Pennsylvania the common law rule as to surface waters prevails in the grading or alteration of town or city lots and streets.[10] And this holds true in the case of a municipal improvement as well as to an alteration by an individual lot owner.[11] It would seem by analogy to this rule that the court in the Ford City case reached its decision, although it does not expressly say so. While treating the case *de novo* and without citation of authority the court says "it would be unreasonable to prevent the owners of low lands from elevating their property for the purpose of protecting it from injury and damage from floods. . . . Between the method of raising the level of individual lots and the building of a dike which will protect the entire area concerned we can see no essential difference in principle." The court further said that there was no servitude on lands

[7] Kauffman v. Griesemer, 26 Pa. 407 (1856); Miller v. Laubach, 47 Pa. 154 (1864); Hays v. Hinkleman, *supra*, note 6; Rhoads v. Davidson, 133 Pa. 226 (1890).

[8] Straus v. Allentown, 215 Pa. 96 (1906); Reilly v. Stephenson, 222 Pa. 252 (1908); Wilson v. McCluskey, 46 Pa. Super. Ct. 594 (1911); Robino v. No. Sewickley Twp., 48 Pa. Super. Ct. 68 (1911).

[9] Jones v. Seaboard Air Line R. Co., 67 S. C. 181 (1903); Ry. Co. v. Hamlet Hay Co., 149 Ind. 344 (1897); Crawford v. Rambo, *supra*, note 5.

[10] *Supra*, note 8.

[11] Straus v. Allentown, *supra*, note 8; Robino v. No. Sewickley Twp., *supra*, note 8.

near a stream to other adjoining lands lying upstream, but equally as low, or lower, to carry off, without interference, flood waters, and that "such an overflow is properly to be regarded as the advance of a common enemy, to be resisted by each proprietor as best he may". Whatever the basis of the decision, it establishes the right of other than riprarian owners to deal with flood waters in towns and cities. From the viewpoint of public policy the decision is unquestionably a sound one, for, as the court says, to hold otherwise would be to prevent the inhabitants of lower lands in a town or city from protecting themselves and their property from overflow; and such persons would be obliged to permit their property to remain on the natural surface, subject to periodic overflow and inundation, without power to protect it or raise it out of reach of flood waters. It is interesting to speculate, however, what the court would have done had the case arisen entirely in a country district.

R. M. G.