RECENT CASES.

BILLS AND NOTES—MATERIAL ALTERATION—INDORSER'S LIABILITY—The defendant indorsed a note with the payee's name left in blank, intending it to be discounted by the maker for the latter's accommodation. The maker inserted the name of one McDonald as payee, but on McDonald's refusal to discount the note, the words, "or bearer," were added by the plaintiff's cashier at the maker's direction. The plaintiff then discounted the note, which was subsequently protested for non-payment. *Held:* Under the Negotiable Instruments Law, Sec. 124, providing that "where a negotiable instrument is materially altered without the assent of all the parties liable thereon, it is avoided . . .," the plaintiff could not recover the amount of the note from the defendant. Nat. Bank v. Wood, 95 S. E. 140 (S. C. 1918).

The N. I. L., Sec. 14, provides that "where an instrument is wanting in any material particular, the person in possession thereof has *prima facie* authority to complete it by filling up the blanks therein," and, further, that "in order that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accord with the authority given. . . ." The maker of the note in the principal case had *prima facie* authority, therefore, to fill in the name of a payee. Since the whole purpose of the note was that it should be discounted, no particular payee can be taken to have been contemplated by the indorser. If the maker had originally filled in the note to bearer, that note would have been enforcible, since it was filled in strictly in accord with the implied authority. The fact that the words, "or bearer," were subsequently added should have made no difference, in view of the purpose of the note and the authority given the maker, and it is on this reasoning that the dissenting opinion in the principal case is founded.

However, the view taken by the majority of the court in the principal case was that the note became complete on the insertion of McDonald's name as payee, and the addition of the words, "or bearer," was an alteration. But section 16 of the N. I. L. provides that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." The indorser's contract on the note, therefore, was not complete, as the court asserted, when McDonald's name had been inserted. Consequently the addition of the words, "or bearer," should not have avoided the note on that ground. It is true that the doctrine of the avoidance of a note by a material alteration has been held to apply to the case of an accommodation indorser, where the alteration was made in the paper before delivery by the maker to the payee, both before and since the adoption of the N. I. L. McGrath v. Clark, 56 N. Y. 34 (1870); Jones v. Bangs, 40 Ohio St. 139 (1883); Bank v. Barnum, 160 Fed. 245 (1908). But in all such cases the term of the note which was altered had been definitely fixed before the indorsement was made, and was not left in blank with authority in the holder to supply that term as necessity demanded. Obviously

in such cases a real change of the indorser's contract resulted; in the principal case no change in the indorser's contract—to be liable to any payee named by the maker—resulted. If, under section 16 of the N. I. L. the indorser's contract was revocable until delivery of the note to the payee, then clearly that power of revocation, in so far as the designation of the payee was concerned, had vested in the maker, since he had authority to supply the name of any payee he found necessary, and his addition of the words "or bearer" was merely an exercise of that power of revocation, and of the right to supply the necessary payee. There was therefore no such alteration as should have avoided the note.

Before the adoption of the N. I. L. such a change in the terms of a note as was made in the principal case would not have avoided the instrument. The rule, apart from the act, has been stated to be that where an instrument was delivered with a material part in blank, there was an implied authority in the holder to insert what was necessary to make the instrument speak according to its intended purpose. Van Etta v. Evanson, 28 Wis. 33 (1871); Mackey v. Basil, 50 Mo. App. 190 (1892); Montgomery v. Dresher, 90 Neb. 632 (1912). This is the only rule necessary for a decision of the case, because the maker, by adding the words, "or bearer," inserted only what was necessary to make the note speak according to its intended purpose, *i. e.*, what was necessary for its discount. It is not surprising, therefore, to find that in cases almost identical on their facts with the principal case, such an addition was held not to avoid the indorsement. Mich. Bank v. Eldred, 9 Wall. 544 (U. S. 1869); Hepler v. Mt. Carmel Savings Bank, 97 Pa. 420 (1881). Under these decisions, together with the wording of the N. I. L., the conclusion of the principal case seems at the least to be open to question.

CIVIL RIGHTS—PLACES OF PUBLIC ACCOMMODATION, RESORT, OR AMUSEMENT—The plaintiff was excluded from a saloon because he was a negro. He sued for the statutory penalty under N. Y. Civil Rights Law, Sec. 40, Laws of 1913, ch. 265, which prohibits a proprietor of any place of public accommodation, resort, or amusement from excluding anyone on the ground of race, creed, or color, and defines such place to include any inn, tavern, or hotel, conducted for the entertainment of guests, . . . and any restaurant, eating house, barber shop, theatre, or music hall. *Held:* A saloon is not included. The statute, being penal, must be strictly construed and limited to places similar to those mentioned. Gibbs v. Arras Bros., 118 N. E. 85 (N. Y. Ct. of Appeals 1918).

There can be no question that the principles of construction announced by the court are sound. See Cecil v. Green, 161 Ill. 265 (1896), where a soda water fountain, and Burks v. Bosso, 180 N. Y. 341 (1905), where a bootblack stand, were held not to be included in the statute, on the same principles of construction as those announced by the court in the principal case. Still it would seem that a saloon ought to be included in the statute. The word tavern seems sufficiently near to a saloon to enable the court to hold a saloon a place of the same type as those mentioned. In fact a tavern has been held to be synonymous with a bar-room or a drinking shop. *In re* Schneider, 8 Pac. 289 (1884).

There were two previous cases in New York which had held a saloon to be a place of public accommodation, both of them in the Appellate Term of the Supreme Court. Babb v. Elsinger, 147 N. Y. Supp. 98 (1914); Tobias v. Riehm, 162 N. Y. Supp. 976 (1917). While of course these cases were not binding on the Appellate Court, it seems curious that the court did not even refer to them. Outside of New York it has been held that a saloon is not a place of public refreshment or amusement, Rhone v. Loomis, 74 Minn. 200 (1896); nor a place of public accommodation or amusement, 61 Ohio State 388 (1899).

It has been held that only places of amusement which are licensed by the state, as of course a saloon usually is, are included in "places of public amusement." Commonwealth v. Sylvester, 95 Mass. 247 (1866); Bowlin v. Lyon, 67 Iowa 536 (1885). *Contra,* Faulkner v. Solazzi, 79 Conn. 541 (1907), which holds that only those places which were impressed with a public interest at common law are included. In all of these last cases, there was no list of special places mentioned to which the statute applied.

PROPERTY—RENT NOTES—ARE THEY PERSONALTY OR REALTY?—A statute provided that when the holder of a note had not listed it for taxation as personalty, as a penalty, he could not recover on it. A tenant gave his landlord notes for the rent of a certain property, the notes maturing when the installments of rent were due. The landlord failed to list them for taxation before they were due. *Held,* the landlord could recover on them. Notes given for rent to accrue in the future are realty, not personalty, while in the owner's hands. Poss v. Albert, 200 S. W. 976 (Tenn. 1918).

It has been held that notes given for rent to accrue are realty which passed to the devisees of the realty, and not personalty, out of which a widow's allowance might be set aside. Combs v. Combs, 131 Tenn. 66 (1915). Exactly the contrary conclusion as to the nature of the notes was reached in a very similar case over the distribution of a decedent's estate in Kentucky. Penn's Exr. v. Penn's Exr., 120 Ky. 557 (1905). The reasons there given were that had the deceased sold the notes the cash would have been personalty, and it could not be contended that the purchaser of the notes could not have collected on them as personalty. It is submitted that the notes should be considered personalty. They are not, and do not represent the rent; they are merely collateral security for the rent, and, therefore, cannot be deemed realty any more than any other form of personal property could be deemed to be converted into realty because it was deposited as security for rent.

It is held that notes for rent to accrue pass with the reversion if in the possession of the landlord when the sale of the reversion is made. Beebe v. Coleman, 8 Paige's Chan. (N. Y.) 392 (1840); Tubb v. Fort, 58 Ala. 277 (1876); Watkins v. Duvall, 69 Miss. 364 (1891); Allen v. Smith, 72 Miss. 689 (1895). This means that the rent is not severed by merely making a note for it. A *dictum* in Wilcoxon v. Donelly, 90 N. C. 245 (1894), is *contra.*

The cases holding that the notes pass with the reversion go on the ground that since before severance of the rent, the rent is an incident of the reversion, so are the rent notes. In fact it is said that the sale of the reversion carries with it the title to the rent notes, Beebe v. Coleman, *supra.* The rea-

soning must be that the notes and the rent for which they are the security are so bound together by express contract that when the rent passes the notes must pass also. This reasoning appears to be supported by the cases holding the converse of this proposition, namely, that indorsement of the notes is a severance of the rent. Ellis v. Foster, 54 Tenn. 131 (1872); Cheatham v. Beck, 96 Ark. 230 (1910).

If the notes are indorsed before the sale of the reversion, the indorsee can recover on them against the tenant. Leonard v. Burgess, 16 Wis. 42 (1862). The vendee of the reversion cannot under such circumstances collect the rent from the tenant. Ellis v. Foster, 54 Tenn. 131 (1822); Abrams v. Sheehan, 40 Md. 446 (1874); Alabama Co. v. Oliver, 78 Ala. 158 (1884). This is true even though the vendee of the reversion had no notice of the indorsement. Kimball v. Walker, 71 Ill. App. 309 (1897); Cheatham v. Beck, 96 Ark. 230 (1910). It is submitted that the true rule should be, despite these authorities, that the rent passes to the vendee of the reversion, if he had no notice of the prior indorsement of the rent notes by his vendor, so that he could recover from the tenant. The tenant's right to reimburse himself for the two recoveries against him, would then be over against the landlord. It is held, however, that the rights of the vendee of the reversion are against his vendor instead of the tenant. Alabama Co. v. Oliver, *supra;* Cheatham v. Beck, *supra.*

It is difficult to see why the vendee of the reversion, where he did not know that the rent had been severed, should be forced to sue his vendor instead of the tenant. He has a right to expect to receive the rent as an incident of the reversion, and should not be required to inquire of the tenant whether notes had been given for the rent or not. The mere fact that the tenant would be required to pay twice is not a controlling objection if the tenant has a right over against his landlord. If the rent notes were retained by the landlord after the sale of the reversion, and indorsed by him to a holder for value, without notice, and before maturity, it cannot be doubted that, on the principles of negotiability, the holder could recover from the maker; yet the vendee of the reversion would also undoubtedly have a right to collect the rent from the tenant, for the rent not being severed at the time of the reversion passed with the reversion. The courts do not seem as yet to have passed on that question, but it is hardly likely that they would prevent either the indorsee or the vendee of the reversion from recovering against the tenant, in order to protect the tenant from double liability, when to do so they would have to violate one or the other of two well-established principles.

TORTS—INJURY WHILE ATTEMPTING TO PROTECT OTHERS—LIABILITY—The defendant telephone company negligently allowed a broken wire to dangle from one of its poles on a public highway. The broken wire received a heavy charge from contact with an electric light wire. The plaintiff's intestate, with full knowledge of the danger, but exercising due care, attempted to remove it to a place of safety and was accidentally killed. *Held:* The defendant was liable in damages. Workman v. Telephone Co., 166 N. W. 550 (Neb. 1918).

As to trespassers and licensees, the obligation of a party using highly charged electric wires is, generally speaking, no greater than to do them no

wilful or wanton injury, and such a party is not liable to them for defective wiring. Riedel v. W. Jersey, *etc.*, R. Co., 177 Fed. 374 (1910); Hickok v. Auburn Light Co., 200 N. Y. 464 (1911); Stansfield v. C. & P. Telephone Co., 123 Md. 120 (1914). Similarly, a volunteer cannot recover damages ordinarily if he, with full knowledge of the danger, voluntarily exposes himself to it. Trauenthal v. Gaslight Co., 67 Mo. App. 1 (1896); Wood v. Diamond Elec. Co., 185 Pa. 529 (1898); Anderson v. Light Co., 64 N. J. L. 664 (1900). However, if a volunteer acts in an effort to protect life, and takes proper precautions to avoid injury to himself, then, though the danger to others is not immediate, he is not to be held guilty, as matter of law, of such contributory negligence as to bar recovery. Bourget v. Cambridge, 156 Mass. 391 (1892); Dillon v. Light Co., 179 Pa. 482 (1897). The same rule has been held applicable where the attempt of the volunteer was to protect his property. Coal Co. v. Patchford, 5 Kans. App. 150 (1897).

The social value of such efforts of a volunteer has been similarly recognized in other instances. Thus it is well settled that to risk one's safety to save another's life, where the danger is impending, is not contributory negligence *per se*, provided the attempt was not made under such circumstances as to constitute rashness. Eckert v. Long Island R. Co., 43 N. Y. 502 (1871); W. Chic. Ry. Co. v. Liderman, 187 Ill. 463 (1900); Ry. Co. v. Lynch, 69 Ohio St. 123 (1903). The principal case represents a logical extension of this established rule in so far as recovery was there allowed the volunteer, although the peril was not imminent and no human life was in immediate danger. An interesting exception to the general doctrine exists, by which the volunteer cannot recover damages where it was his negligence in conjunction with the defendant's, that endangered the life he was attempting to save. Airline Ry. Co. v. Leach, 91 Ga. 419 (1893); De Maly v. Morgan Co., 14 So. 61 (La. 1893).

Where the volunteer acts to protect property, his right to recover for injuries is somewhat more uncertain. It seems one is entitled to run some risk in attempting to protect property without being held guilty of contributory negligence as matter of law, provided there is no reckless exposure of person to danger. Wasmer v. D. L. & W. R. Co., 80 N. Y. 212 (1880); Lorenz v. Burlington, *etc.*, Ry. Co., 115 Ia. 377 (1902). The volunteer is not bound in such cases to anticipate any negligence on the defendant's part rendering the danger immediate. Campbell v. Chic., *etc.*, Ry. Co., 108 Minn. 104 (1909). But if the danger was apparent, and the attempt could not be made with safety, no recovery can be had. Roll v. Ry. Co., 15 Hun 496, affirmed, 80 N. Y. 647 (1880); Deville v. S. Pac. R. Co., 50 Cal. 383 (1875). The underlying principle of these decisions seems to be that the risk of a remote danger may be run in the protection of property, but not the risk of an evident and immediate danger.

TORTS—LIABILITY TO A TRESPASSER ON THE PREMISES OF A THIRD PARTY—The plaintiff was injured by the electric light wires of the defendant, negligently left lying on the premises of another person. The plaintiff was a trespasser on the premises of the third party at the time of the injury. *Held:* The plaintiff could not recover. The accident did not happen where the pub-

lic had a right to be, and, therefore, the defendant owed no duty to the plaintiff. City of Henderson v. Ashby, 200 S. W. 931 (Kan. 1918).

The court cited and relied upon the case of Rodgers' Admr. v. Union Light, Heat and Power Co., 123 S. W. 293 (Kan. 1909). But in that case the plaintiff was a trespasser not as to third parties merely, but as to the defendant itself, and the court expressly put the case on that ground. Of course it is well settled that an electric company is not liable to one who is a trespasser as to it. Kiser v. Colonial Coal & Coke Co., 79 S. E. 348 (1913); State v. Chesapeake & Potomac Tel. Co., 123 Md. 120 (1914); Denison Light & Power Co. v. Patton, 154 S. W. 540 (Tex. 1913); Hickok v. Auburn Light Co., 200 N. Y. 464 (1910). *Contra*, Blackburn v. R. R. Co., 180 Mo. App. 548 (1914), where a house mover was injured by grasping defectively insulated wires over a street, to allow a house he was moving to pass under.

As to whether an electric company should be liable to one who, while not a trespasser to the company, is a trespasser on the premises of a third party at the time of his injury, there is a decided split. Wherever there is any likelihood of persons trespassing, the company is liable. Guinn's Admr. v. Delaware & Atlantic Tel. Co., 72 N. J. L. 276 (1905), where the plaintiff was in an open field which the public were accustomed to cross; Daltry v. Media Electric, *etc.*, Co., 208 Pa. 403 (1908), where the plaintiff was a boy playing in a vacant lot; Benton v. N. C. Public Service Co., 165 N. C. 354 (1914); Mullen v. Wilkes-Barre, *etc.*, Co., 38 Pa. Super. Ct. 3 (1909), in both of which cases the plaintiff climbed a tree, an act which it was held the company should have expected. In all of these cases the company is held liable on the ground, first, that since electricity is a highly dangerous agency the company is bound to a high degree of care; second, that the plaintiff was not a trespasser as to it; and third, that his presence could be reasonably anticipated. If the presence of the plaintiff can be reasonably anticipated, the company has no good reason for escaping liability. See Southern Bell Tel. Co. v. McTyer, 137 Ala. 601 (1903), where the defendant was held liable for an injury to a customer of the owner of the premises, though the owner had consented to the act of negligence which caused the injury.

Not all the cases which hold the company liable can be explained on the ground that the presence of the plaintiff at that place was to be anticipated. See Lynchburg Tel. Co. v. Booker, 103 Va. 595 (1905). Where the company is itself a trespasser it cannot relieve itself of liability because the plaintiff also was a trespasser to third parties. Wittleder v. Citizens' Electric Illuminating Co., 62 N. Y. Supp. 297 (1900); Davoust v. Alameda, 149 Cal. 69 (1906).

Generally, where the presence of the plaintiff could not be anticipated the company is not liable. Augusta R. R. Co. v. Andrews, 89 Ga. 653 (1892); Keefe v. Narragansett Electric Lighting Co., 21 R. I. 575 (1898); McCaughna v. Owosso & C. Electric Co., 129 Mich. 407 (1902). This is true even though the defendant is clearly negligent, Cumberland Tel. & Tel. Co. v. Martin, 116 Ky. 554 (1903); and even though the plaintiff was a licensee on the premises of the third party, and not a trespasser. Hector v. Boston Electric Light Co., 161 Mass. 558 (1894); Gross v. South Chicago R. R. Co., 739 Ill. App. 217 (1897); Greenville v. Potts, 107 S. W. 50 (Tex. 1908).