RECENT CASES.

BROKERS—OWNER'S RIGHT TO TERMINATE AN EXCLUSIVE SALE CONTRACT FOR INDEFINITE PERIOD.—The defendant contracted to give the plaintiff the exclusive sale of his property, but no time limit was placed on the contract. A few weeks later the defendant sold the property to a customer procured through his own efforts. The plaintiff claims the commission specified in the contract of exclusive sale. *Held:* The plaintiff can recover, as the defendant had no right to terminate the contract before the expiration of a reasonable time. Harris v. McPherson *et al.*, 115 Atl. 723 (Conn. 1922).

The general rule seems to be that where the broker has no right of exclusive sale and an indefinite period within which to sell the property, the owner does not deprive himself of his right to sell the property. Hilling v. Darby, 71 Kan. 107, 79 Pac. 1073 (1905). Where the owner has given the broker the right of an exclusive sale for a definite period of time, many jurisdictions hold that the owner merely gives up his right to appoint another broker during the stipulated period, but that he does not give up his own right of making a sale. Dale v. Sherwood, 41 Minn. 535, 43 N. W. 569 (1889); Turner v. Baker, 225 Pa. 359, 74 Atl. 172 (1909). On the other hand, it has been held that the right of exclusive sale being in the broker for a definite period of time subjects the owner to liability for breach of contract where he himself makes the sale during the life of the contract. Carter v. Hall, 191 Ky. 75, 229 S. W. 132 (1920). The next phase of the question that presents itself is where the owner gives an exclusive right of sale for an indefinite period of time. Under these facts it is generally held "unless the contract of employment is coupled with an interest or given for a valuable consideration, the principal has the right in good faith to revoke the agency at will, at any time before the broker finds a purchaser." Smith v. Kimball, 193 Mass. 582, 79 N. E. 800 (1907); Anderson v. Shaffer, 87 Kan. 346, 124 Pac. 423 (1912). In one case the court intimated in a *dictum* that the owner cannot revoke the agency before the lapse of a reasonable time, but did not decide the question definitely. Alexander v. Sherwood Co., 72 W. Va. 195, 77 S. E. 1027 (1913). The contention that a broker is entitled to a reasonable time where he has an exclusive right of sale for an indefinite period has been expressly denied in a number of cases. Kelly v. Marshall, 172 Pa. 396, 33 Atl. 690 (1896); O'Hara v. Murray, 144 N. Y. App. 113, 128 N. Y. Supp. 1009 (1911). The last named cases seem to represent the weight of authority and are directly *contra* to the principal case. It seems unreasonable to hold that the mere addition of the word "exclusive" should deprive the owner of his inherent right to sell his property without a special agreement to the contrary. It is therefore submitted that the court erred in its holding in the principal case.

CHATTEL MORTGAGE—LIEN OF REPAIRMAN SUPERIOR TO A PRIOR MORTGAGE LIEN.—The mortgagor in possession of an automobile had repairs made and the repairman retained possession of the automobile claiming

that his lien for repairs was superior to a prior recorded chattel mortgage. *Held:* The lien of the artisan for repairs to a chattel, made at the request of the legal possessor, was superior to a prior recorded chattel mortgage. Johnson v. Yates, 110 S. E. 603 (N. C. 1922).

A mechanic's lien for repairs made to a chattel at the request of the mortgagor is subordinate to a prior recorded chattel mortgage provided the lien claimant had actual or constructive notice of the prior chattel mortgage Denison v. Shuler, 47 Mich. 598, 11 N. W. 400 (1882); Holt v. Schwarz, 225 S. W. 856 (Tex. 1920); Nesbitt Auto Co. v. Whitlock, 113 S. C. 519, 101 S. E. 822 (1920). Likewise a warehouseman's lien does not take precedence over a prior recorded chattel mortgage. Storm v. Smith, 137 Mass. 201 (1884); Werner Bros. Exp. and Storage Co. v. Donovan, 206 Ill. App. 11 (1918). Under Statutes giving a lien to a livery-stable keeper, such liens are subordinate to prior recorded chattel mortgages. Howes v. Newcomb, 146 Mass. 76 (1888); National Bank v. Jones, 18 Okla. 555, 91 Pac. 191 (1907). Since the mortgagor is not the agent of the mortgagee, the lien claimant is in no better position than a subsequent mortgagee, Sargent v. Usher, 55 N. H. 287 (1875); Lee v. Van Meter, 98 Ky. 1, 32 S. W. 137 (1895); and to allow the mortgagor to displace the mortgagee's prior lien would be an unjust violation of property rights. Howes v. Newcomb, *supra*. Pickett v. McCord, 62 Mo. App. 467 (1895).

Where the prior mortgagee consents to have the work done, then the subsequent lien is superior. Lynde v. Parker, 155 Mass. 481, 30 N. E. 74 (1892). Johanns v. Ficke, 224 N. Y. 513, 121 N. E. 358 (1918). And where the mortgagor has the use of the chattel, it has been held that this amounts to an implied assent by the mortgagee for the mortgagor to have repairs done, and that therefore the repairman's lien is superior to the prior chattel mortgage. Barrett Mfg. Co. v. Van Ronk, 212 N. Y. 90, 105 N. E. 811 (1914). Reeves & Co. v. Russell, 28 N. D. 265, 148 N. W. 654 (1914); Mortgage Securities Co. v. Pfaffman, 177 Cal. 109, 169 Pac. 1033 (1917).

The principal case follows the minority view and seems unsound for the reason that it makes it possible for the mortgagor to render worthless the security of the mortgagee, and is thereby an unjust violation of property rights.

CONSTITUTIONAL LAW—VALIDITY OF NEW YORK RENT LAWS AGAIN UPHELD.—A New York statute allows a tenant to hold over after the expiration of his lease and to have a "reasonable" rent determined by a commission as the basis of payment, irrespective of any agreement or contract between the parties. *Held:* The Act is constitutional. Edgar A. Levy Leasing Co. v. Siegal, 42 U. S. Sup. Ct. 289 (1922).

This case again affirms the constitutionality of the so-called "Emergency Rent Laws." The New York act had been declared constitutional in Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921); the District of Columbia Act in Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921).

The principal case does not stress the emergency feature of the statute, to the extent that the prior decisions had done so. It affirms the principle that there is no impairment of the obligation of contracts, since the leases were made subject to a valid exercise of the state's police power.

The basis of rent charge is a "reasonable" rent. This the court held was a valid and enforceable standard. The Lever Act (c. 53, 40 Stat. 276) provided for the criminal prosecution of persons selling food at "unreasonable" prices. In U. S. v. Cohen Grocery Co., 255 U. S. 81 (1921) the court held such a standard vague and unconstitutional. In the principal case the court distinguishes the case on the ground that the Lever Act involved criminal prosecutions.

With this case the constitutionality of the Rent laws seems firmly established. In this connection *see*, "The Police Power and the New York Rent Laws," by George W. Wickersham, 69 U. of Pa. Law Review, 301; also, a note in 70 U. of Pa. Law Review 48.

Damages—Excessive Damages—New Trial.—In an action for damages for an injury to the knee, which partially incapacitated the plaintiff, the jury awarded the plaintiff $19,325 damages. The interest from this amount exceeded the earning capacity of the plaintiff prior to the injury. The trial court refused a new trial or a remittitur. *Held:* A new trial be granted. Gail v. Philadelphia, 272 Pa. — (1922).

The action of a trial court in granting or denying a motion for a new trial on the ground that the damages are excessive, is within the sound discretion of the court. Edwards v. Wiley, 218 Mass. 363, 105 N. E. 986 (1914): Devine v. St. Louis, 257 Mo. 470, 165 S. W. 1014 (1914); Dunlap v. Pittsburgh R. R., 247 Pa. 230, 93 Atl. 276 (1915). When a verdict has been approved by the trial court, appellate courts do not often disturb it. Yet if it is clear that there is no evidence or basis on which the amount allowed could properly have been awarded, an appellate court will set the verdict aside. Consolidated Grocery Co. v. Allman, 59 Fla. 230, 51 South. 928 (1910); Kickhoefer v. Hidershide, 104 Wis. 126; 80 N. W. 62 (1899); Birmingham R. R. v. Coleman, 181 Ala. 478, 61 South. 890 (1913). It is within this class of cases that the principal case falls.

Some courts, where excessive damages have been awarded, affirm the judgment, conditioned upon the plaintiff agreeing to a specified remittitur. Finch v. Northern Pacific R. R., 47 Minn. 36, 49 N. W. 329 (1891); Northern Chicago R. R. v. Wrixon, 150 Ill. 532, 37 N. E. 895 (1894). Only a few courts have extended this principle to a compulsory remittitur, compelling the plaintiff to accept a less amount and denying him the alternative of a new trial. Rice v. Crescent City R. R. 51 La. Ann. 108, 24 South. 791 (1899); Wichita & Colorado R. R. v. Gibbs, 47 Kan. 274, 27 Pac. 991 (1891). The United States Supreme Court has held that such a decree in a tort action violates the constitutional guaranty of trial by jury in Federal courts. Kennon v. Gilmer, 131 U. S. 22, 33 L. Ed. 110 (1888).

The principal case falls within the class of cases, as indicated above, where the appellate court will set aside an excessive verdict if there is no evidence upon which the amount could have been properly awarded. As such, it is in accord with general authority.

DIRECT CONTEMPT—ACCUSATION OF JUDGE IN REPORT OF GRAND JURY NOT PRIVILEGED.—In a report by the grand jury, charges were made that the presiding judge, to whom the report was submitted in open court, was guilty of conspiring to protect criminals, and a recommendation was added thereto that the said judge resign from his office. The grand jurors were each fined for contempt of court and an appeal was taken. *Held:* The court may punish a grand juror for an act which amounts to contempt, regardless of his intention. Also, the report of a grand jury which goes beyond its constituted authority is not privileged. Coons v. State, 134 N. E. 194 (Ind. 1922).

Direct contempt may consist of words or acts in the presence of the court, intimating that the judge is unfair. Field v. Thornell, 106 Iowa 7, 75 N. W. 685 (1898); Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151 (1904). An attorney may be in contempt for stating in a brief or otherwise that the court had improper motives in making certain decisions, and this even though there was no intention to be in contempt. *Ex parte* Smith, 28 Ind. 47 (1867); *In re* Chartz, 29 Nev. 110, 85 Pac. 352 (1906). A grand juror although not a part of the court, is an appendage thereto, and his position would seem to be analogous to that of an attorney.

Where the grand jury in a report to the district court made a statement concerning the misconduct of a public official, such statement, being beyond the scope of the duties of the grand jury, was held not to be privileged, and the grand jurors were held liable in actions of libel. Bennett v. Stockwell, 197 Mich. 50, 163 N. W. 482 (1917); Poston v. Washington A. & Mt. V. R. Co., 36 D. of C. App. Cas. 359 (1911). Although admitting that such a statement was not absolutely privileged, such a report has a qualified privilege and there cannot be a recovery in an action for libel unless the jurors acted with malice and in bad faith. Rector v. Smith, 11 Iowa 302 (1860). The question of privilege would seem to be the same in an action involving contempt and an action based on libel, and in libel actions the weight of modern authority denies even a qualified privilege where the grand jury acts beyond the scope of its authority.

In the principal case the grand jury acted under a purely statutory authority, which they clearly exceeded; consequently their report was not privileged in any way. It was an act of contempt committed in open court, and the weight of decided authority is that such an act is direct contempt even without any intention. The case is one of first impression, and although the decision seems to be severe, it is logical and in accord with analogous decisions.

ELECTIONS—PROPERTY QUALIFICATION OF VOTERS—CONTRACT TO PURCHASE LAND.—A, who was in possession of land under a contract to purchase, voted at an election of a director of a water district. The election was contested

on the ground that A was not qualified to vote under Wash. Rev. Code 1915, par. 6418, which entitles any person to vote ". . . who holds title to land or evidence of title to land. . . ." *Held:* A was entitled to vote. State *ex rel.* Holt v. Hamilton, 202 Pac. 971 (Wash. 1921).

The doctrine of the principal case was applied in the case of State *ex rel.* Dillman v. Weide, 29 S. D. 109, 135 N. W. 696 (1912), where the statute allowed legal freeholders to vote, and the court held that a person in possession of land under a contract to purchase had the equitable estate and was a freeholder. Two other cases, where a man had to be freeholder to be a juror, allowed persons having equitable estates to serve. New Orleans, etc. Ry. Co. v. Hemphill, 35 Miss. 17 (1852); State v. Ragland, 75 N. C. 12 (1876).

A different rule, however, is followed in Directors of Fallbrook, etc. v. Abila, 106 Cal. 355, 39 Pac. 794 (1895), where a person in possession under a contract to purchase was held not entitled to vote as a "freeholder owning land." Also in *In re* the Realty Voters, 19 R. I. 387 (1898), and in Perry v. Morley, 16 British Columbia 91 (Canada 1911), the equitable owner of land was held not to be an owner within the statutes specifying that voters must be "owners of land." A grantee of a deed in escrow who was in possession of the land was held not entitled to vote as an owner in Hull v. Sangamon River Drainage District, 219 Ill. 454, 76 N. E. 701 (1906). The rule in England, which is that a person must be a legal and not an equitable owner in order to vote, was laid down in early cases. Jackson's Case, 2 Luder's Election Cases 427 (Eng. 1785); Freshwater's Case, 2 Luder's Election Cases 540 (1785); also the rule is laid down in Heywood, County Elections 65.

In the principal case the court said that the words in the statute, "evidence of title," were intended by the legislature to allow persons to vote who had written evidence of their right to acquire title. It is submitted that "evidence of title" and evidence of right to acquire title are not the same thing, and it is difficult to see how the court reached its conclusion by this reasoning. If, however, the court was correct in its conclusion that the two are the same, then under the statute two persons would be able to vote on the same land namely, the person having title, and the person having a contract to purchase.

EVIDENCE—RES GESTAE—LOSS OF ARTICULATION.—The appellant was convicted of the murder of a detective who was shot and rendered speechless for twenty or thirty minutes after the shooting. As soon as he could speak, he made a statement that a stranger shot him. He died about ten minutes later. *Held:* This statement was admissible as part of the *res gestæ*. Commonwealth v. Puntario, appellant, 271 Pa. 501 (1922).

It is well settled that statements made with respect to an act and contemporaneous therewith are admissible as part of the *res gestæ*. Wetmore v. Mell, 1 Ohio 26 (1851); Trenton Passenger Ry. Co. v. Cooper, 60 N. J. L. 219, 37 Atl. 730 (1897); Lewis' Adm'r. v. Bowling Green Gas Light Co., 135 Ky. 611, 117 S. W. 278 (1909).

Statements made immediately after the act has occurred so as to raise a reasonable presumption that the words spoken were spontaneous and not

induced by reflection or deliberation are also generally admitted as part of the *res gestæ*. Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527 (1904); People v. Leonardo, 199 N. Y. 432, 92 N. E. 1060 (1910); Palmer v. State, 187 Pac. 502 (Okla. 1920); State v. Dougherty, 228 S. W. 786 (Mo. 1921).

In England, the expression *res gestæ* appears to be more restricted, and includes only such facts or statements as are connected with the fact under investigation so as to be a part of it. Thompson v. Trevanion, Skinner 402 (Eng. 1693); Regina v. Foster, 6 C. & P. 325 (Eng. 1834). This restriction was particularly emphasized in Regina v. Bedingfield, 14 Cox Cr. C. 341 (Eng. 1879).

As to the admissibility of statements made by the injured party immediately upon his regaining consciousness there seems to be a conflict. Such statements were admitted as part of the *res gestæ* in Christopherson v. Railway Co., 135 Iowa 409, 109 N. W. 1077 (1907), and Britton v. Washington Water Power Co., 59 Wash. 440, 111 Pac. 20 (1910). In these cases the test was held to be spontaneity, and lack of deliberation. Such statements were held inadmissible, however, in Rogers v. State, 88 Ark. 451, 115 S. W. 156 (1908), and Bionto v. Illinois Central Ry. Co., 125 La. 147, 51 So. 98 (1910). In the latter cases, the courts seem to have adhered to the more restricted English view.

The spontaneity test seems to be a growing one in this country and appears to be the basis for the admission of statements made by a party as soon as he has recovered from some serious shock or suffering that has impaired his power of speech. Commonwealth v. Werntz, 161 Pa. 591, 29 Atl. 272 (1894); Eby v. Travelers Ins. Co., 258 Pa. 525, 102 Atl. 209 (1917). In Waldele v. N. Y. C. & H. R. Ry. Co., 95 N. Y. 274 (1884), however, the English view was followed and the communication of a deaf-mute injured in an accident, made to his brother, also a deaf-mute, half an hour after the accident and at the place where it occurred was held indmissible.

The statement in the principal case, regarded from the standpoint of spontaneity, meets the test. It seems almost incredible that one under such circumstances could form any plan during the time in which he could not speak, even though he were conscious until the moment he died.

FALSE IMPRISONMENT—AGENCY IN ARREST HELD FOR JURY.—The local agent of the defendant company was instrumental in causing the arrest and imprisonment of the plaintiff for stealing an automobile insured by defendant. *Held:* It was proper for the court to submit to the jury the question whether or not the agent acted within the scope of his employment, although the facts on this point were undisputed. Hines v. Fireman's Fund Insurance Co. *et al.*, 235 S. W. 174 (Mo. 1921).

The courts of some states hold that when the facts are undisputed, whether an agent's act was within the scope of his employment is always a question of law which the court must decide. Gulich and Holmes v. Grover, 33 N. J. L. 463 (1868); Hall v. Passaic Water Co., 83 N. J. L. 771, 85 Atl. 349 (1912); Doggett v. Greene, 254 Ill. 135 (1912).

But the better view is that it is a question for the jury except where not only are the facts undisputed but only one inference can fairly and reasonably be drawn from them. 2 Corpus Juris 961; Meechem, Agency, 2d Ed., Secs. 50 and 1982; South Bend Toy Manufacturing Co. v. Dakota F. & M. Insurance Co., 3 S. D. 205 (1892).

It is difficult to see how the implied powers of a local insurance agent can be so extensive as to include the power of arresting one suspected of having stolen goods insured by the insurance company. In Larson v. Fidelity Life Association, 71 Minn. 101 (1898), a sub-agent sued the insurance company for false arrest and malicious prosecution on a charge of embezzling defendant's funds. The action had been brought aginst the plaintiff and his arrest caused by the defendant's local agent. The court held the defendant not liable and said that although in this case the local agent might have acted to protect himself from loss, even if he acted solely in his principal's interest, it was beyond the scope of his employment. Also in Mathews v. The Insurance Co., 64 Ill. App. 280 (1896), the defendant company was held not liable for the trespasses of its agents on the destroyed property in furtherance of the defendant's business, the court believing that the agent's acts were beyond the scope of their authority.

The only fair and reasonable inference that can be drawn in the principal case seems to be that the local agent was not within the scope of his employment in obtaining the plaintiff's arrest and imprisonment, even though by such acts he may possibly have been attempting to recover the automobile. The facts being undisputed, if this inference only can fairly and reasonably be drawn, the court should have decided as a question of law that the defendant was not liable.

HOMICIDE—SPRING GUNS.—The defendant, to protect his property and not his life, set a spring gun in an unoccupied house intending to kill anyone who broke in and entered. The deceased who was killed by the gun entered merely out of curiosity. The jury found a verdict of manslaughter. *Held:* No error. Self-defense is not available as a defense. State v. Green, 110 S. E. 145 (S. C. 1921).

According to the earlier common law, the setting of a spring gun was not in itself unlawful, and if a person was killed by it while attempting a felony, no criminal liability was incurred. 13 R. C. L., sec. 155; Deane v. Clayton, 7 Taun. 489 (Eng. 1817); Hott v. Wilkes, 3 Barn. & Ald. 304 (Eng. 1820). But, except in the case of dwelling houses, this rule has been changed in England by the Statutes of 14 & 15 Vict. c. 19, s. 4 and 54 & 55 Vict. c. 69, s. 1. One reason advanced by the English courts for the rule was that the attempted felonies were themselves punishable by death. This does not apply to the United States, however, where few felonies are so punishable. And the later American cases hold that if a homicide results from the discharge of a spring gun the person setting the gun is liable to indictment for murder or manslaughter, on the ground that life may be taken only in the protection and preservation of life and not where mere property rights are at stake. Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1 (1877); State v. Marfaudille, 48 Wash.

117, 92 Pac. 939, 14 L. R. A. (N. S. 1907). A few courts have held it lawful to set spring guns to prevent burglary even of a warehouse or shop, Gray v. Combs, 7 J. J. Marsh. 478 (Ky. 1832); State v. Moore, 31 Conn. 479 (1863); but this view has been expressly disapproved in State v. Barr, 11 Wash. 481, 29 L. R. A. 154 (1895), where, however, the court said that there might be an exception in the case of dwelling houses due to the danger to the lives of the inmates.

The defendant in the principal case was in no danger of losing his life or receiving serious bodily injury, his purpose was merely that of protecting his property, not his life, and since the house was unoccupied he was clearly indictable either under the American rule or the English rule as changed by Statute.

INFANTS—RIGHT TO RECOVER FOR PRENATAL INJURY.—The plaintiff was injured eleven days before birth through the defendant's negligence. *Held:* The plaintiff has no right of action because he was not in existence as a being at the time of the injury. Drobner v. Peters, 133 N. E. 567 (N. Y. 1921).

A child *en ventre sa mere* has generally been accorded property and inheritance rights as if he were actually born. He may inherit under a will or laws of descent and he may have an injunction and a gurdian. Biggs v. McCarthy, 86 Ind. 352 (1882); McArthur v. Scott, 113 U. S. 340, 28 Law Ed. 1015 (1885); Deal v. Sexton, 144 N. C. 157, 56 S. E. 691 (1907); 1 Bl. Comm. 118 (Lewis' Ed. 1902). He has also the statutory right to sue for the death of a parent caused by another although the parent died before the child's birth. The George and Richard (Eng. 1871) 24 Law Times 717; Texas and Pacific R. Co. v. Robertson, 82 Texas 657, 17 S. W. 1041 (1891). Whenever it is for his benefit a child *en ventre sa mere* is considered as born. Doe v. Clarke, 2 H. Bl. 399, 126 Eng. Rep. R. 617 (1795).

Notwithstanding these rights children are generally held to be incapable of suing for injuries to their persons suffered before birth. The rule that for all purposes beneficial a child *en ventre sa mere* is in being has not been extended beyond the property rights of such a child. Walker v. Great Northern Railway Co., 28 L. R. 69 (Ir. 1891); Dietrich v. Northampton, 138 Mass. 14 (1884); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704 (1901); Buel v. United Railways Co., 248 Mo. 126, 154 S. W. 71 (1913). In Nugent v. Brooklyn Heights R. Co., 139 N. Y. S. 367 (1913) a child *en ventre sa mere* was recognized as an entity capable of suing for a tort and O'Brien, C. J., in Walker v. Great Northern Railway Co. *supra* left the point open in case of a wilful tort.

Recovery has been refused because the injury occurred at such an early period of gestation that the child could not at that time have been born capable of living, leaving the case of a child that could be born viable undecided. Lipps v. Milwaukee Electric Railway Co., 164 Wis. 272, 159 N. W. 916 (1916). This distinction is not drawn where the property rights of an unborn child are involved. Harper v. Archer 12 Miss. 99 (1845), but in order

to insure proper proof of the cause of injury it would be reasonable to hold that a child becomes a person able to sue for torts to itself when it can be born viable. 26 Yale Law Journal 318 (1917).

The inability of a child to recover for prenatal injuries works an extreme hardship; it is an instance of an injury for which there can be no recovery. The mother cannot recover for the lifelong suffering under which the child must labor. Prescott v. Robinson, 74 N. H. 460, 69 Atl. 522 (1908), Nugent v. Brooklyn Heights R. Co., *supra*.

The decision in the principal case follows an almost unanimous line of authorities. These cases beginning with Dietrich v. Northampton, *supra*, base their decisions upon the fact that there are no previous cases in the common law which allow an infant to recover for injuries suffered in its mother's womb. It is submitted, however, that in view of the property rights accorded such a child in the common law, it would have been logical, to recognize the personal rights of the child. If the incidents to a living entity are recognized, the entity itself should be. It appears that the courts have overlooked the principles of the common law in their search for strict precedent. Nugent v. Brooklyn Heights R. Co. *supra*.

PRACTICE—JUDGMENT NOTWITHSTANDING THE VERDICT.—The plaintiff sued on a promissory note. There was no motion for a directed verdict by either party. The jury brought in a verdict in favor of the defendant and the plaintiff moved for a judgment *n. o. v.* The trial court ordered judgment for the plaintiff on his motion and the defendant appealed. *Held:* Judgment *n. o. v.* can be ordered by the court on motion of either of the parties, even though no motion had previously been made for a directed verdict. Merchants' State Bank of Velva v. Streeper, 186 N. W. 98 (N. D. 1921)

At common law the plaintiff could on motion obtain a judgment *n. o. v.* where the defendant had put in a plea in confession and avoidance which was insufficient in law to constitute a defense, on the theory that the issues settled by the verdict were wholly immaterial. Slocum v. N. Y. Life Insurance Co., 228 U. S. 364 (1913); Hurt v. Ford, 142 Mo. 283, 36 S. W. 671 (1897). The rule has been generally relaxed either by statute or judicial interpretation so that in most states today either party can obtain such a judgment. Beaver v. Bower, 24 Ky. 882, 70 S. W. 195 (1900); Kirk v. Salt Lake City, 32 Utah 143, 89 Pac. 458, *semble*, (1907); McCoy v. Jones, 61 Ohio 119, 55 N. E. 219 (1899). Most courts limit the scope of such a judgment to defective pleadings, Hurt v. Ford, *supra*, and some states have expressly so limited it by statute, Beaver v. Bower, *supra*, McCoy v. Jones *supra*. However in a few jurisdictions statutes have been passed permitting either party to obtain such a judgment where on all the evidence that person is clearly so entitled. Cruickshank v. St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958 (1899); Aetna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436 (1903); Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 599 (1906). In Minnesota and Pennsylvania under their respective statutes the courts have held that a judgment *n. o. v.* can only be entered where the party making the motion had previously asked the court to direct a verdict. Fleisher v. St. Paul Apartment House

Company, 186 N. W. 232 (Minn. 1922); American Car & Foundry Co. v. Alexandria Water Co., 231 Pa. 529, 70 Atl. 867 (1908).

The North Dakota statute, under which the principal case was decided, was taken verbatim from the statute in Minnesota, Richmire v. Andrews Elevator Co., 11 N. D. 453, 92 N. W. 819 (1902), and in express terms provides that a judgment *n. o. v.* might be entered where at the close of the testimony a motion had been made "by either party to the suit requesting the trial court to direct a verdict in favor of the party making such a motion," which request was refused. The case would seem to be contrary to the express words of the statute, and under this decision the rule is different in North Dakota from that in force in other states having similar statutes.

RAILROADS—CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE DRIVER AT CROSSING.—DUTY TO LOOK AND LISTEN.—The plaintiff in driving his automobile over the railroad crossing looked in one direction and relied upon Lewis, a passenger seated beside him to look in the other. The plaintiff's automobile was struck by the defendant's engine which approached from the direction in which the passenger was keeping watch. *Held:* the plaintiff is guilty of contributory negligence and cannot recover, the duty to look and listen being one which cannot be delegated to a passenger. State *ex rel.* Hines v. Bland, 237 S. W. 1018 (Mo. Feb. 1922).

There is no unanimity of the courts as to what acts of caution and observance are required of an automobile driver crossing railroad tracks, so as to relieve him from contributory negligence.

The more liberal view and the more logical it appears is to require of him such care and prudence as an ordinarily prudent man would exercise under like circumstances, including the use of his faculties of sight and hearing. Pendroy v. Great Northern R. Co., 17 N. D. 433, 117 N. W. 531 (1908); Dickinson v. Erie R. Co., 81 N. J. L. 464, 81 Atl. 104 (1911); Nicoll v. Oregon-Washington R. Co., 71 Wash. 409, 128 Pac. 628 (1912).

The principal case it seems, however, represents a more stringent view which holds that there is a positive duty to exercise those sense faculties—to look and listen—and failure to do so is of itself contributory negligence. Kelsay v. Missouri-Pacific R. Co., 129 Mo. 362, 30 S. W. 339 (1895); Gray v. Chicago R. Co., 155 Ill. App. 428 (1910); Chase v. New York Central R. Co., 208 Mass. 137, 94 N. E. 377 (1911).

Other courts have gone still further and have imposed a duty not only to look and listen but to stop as well. Brommer v. Penna. R. Co., 179 Fred. 577, 103 C. C. A. 135 (1910); Bush v. Phila. & R. R. Co., 232 Pa. 327, 8 Atl. 409 (1911); Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 So. 641 (1912).

Most exacting of all is the rule, as laid by the Pennsylvania Courts, which requires the driver not only to stop, look and listen, but in addition, where the view is obstructed, to alight from his vehicle and go forward to a point where he can see. Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. 610, 6 Atl. 238 (1886); Kinter v. Penna. R. Co., 204 Pa. 497, 54 Atl. 276 (1903); Bistider v. Lehigh Valley R. Co., 224 Pa. 615, 73 Atl. 940 (1909).

This principle has met with little favor outside of Pennsylvania, however, it being generally held that no such extra duty is imposed upon the traveler. Kelly v. St. Paul R. Co. 29 Minn. 1, 11 N. W. 67 (1881); Georgia P. R. Co. v. Lee, 92 Ala. 262, 9 So. 230 (1890); Vance v. Atchison R. Co., 9 Cal. App. 20, 98 Pac. 41 (1908).

To rule at all that the failure to stop, look and listen constitutes contributory negligence *per se*, it is submitted, is both unfair and illogical; if the plaintiff exercises ordinary care such as a prudent man would use, that should be enough, Pendroy v. Great Northern R. Co., *supra*. If he is careful by looking in one direction and relying upon a passenger to watch in the other, as the plaintiff in the principal case did, he should not be precluded from recovery.

The courts, it appears, in the penurious infancy of the American railroads, desired to give them the widest protection, in order to encourage their development and hence the inflexible stop, look and listen dogma. Now that the railroads have grown up, however, it seems that the rule may very well be discarded.

SALES—CONDITIONAL SALE—RESERVATION OF TITLE.—The vendor of gas casing and pipe, expressly stipulated in his contract of sale that title should not pass to the vendee until certain notes given for the unpaid remainder of the purchase price were paid. *Held:* The title vested in the vendee at the time of the transaction and the vendor, his sale unrecorded, cannot recover the goods from a subsequent mortgagee of record. Tague v. Guaranty State Bank of Drumright, 202 Pac. 510 (Okl. 1921).

Where there is in a contract of sale an express reservation of title in the vendor, until the full purchase price is paid, it is generally held that title does not pass until that condition is performed. Burnett v. Pritchard, 2 Pick. 512 (Mass. 1824); Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285 (1886); Bundage v. Columbus Machine Co., 143 Mich. 10, 106 N. W. 397 (1906). Even where there is such reservation of title, however, it is often difficult, the courts have admitted, to determine just what the parties intended; whether they intended to make a completed sale giving to the vendor a mortgage on the property for the payment of the purchase price or whether the transaction was intended as a sale on condition. The H. C. Grady, 87 Fed. 232 (1898); Studebaker Bros. Co. v. Man, 13 Wyo. 358, 80 Pac. 151 (1904). This intention must be gathered, as in the construction of all contracts, not only from the language of the parties, but from their conduct and all of the attendant circumstances of the transaction, as well. Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160 (1880); Gerow v. Costello, 11 Colo. 560, 19 Pac. 505 (1888); Rodgers v. Bachman, 109 Cal. 555, 42 Pac. 448 (1895). The mere fact that the parties inserted an express condition into the contract denying the legal effect of the transaction will not avail to nullify their ruling intention as shown by the entire arrangement. Murch v. Wright, 46 Ill. 487 (1868); Palmer v. Howard, 72 Cal. 293, 13 Pac. 858 (1887).

Conditional sales, although the courts insist that they are entirely lawful, Zuchtman v. Roberts, 109 Mass. 53 (1871); Sanders v. Keber, 38 Ohio

St. (1876); Mosely v. Shattuck, 43 Iowa 543 (1876) are not looked upon with much favor, because of their potential possibility of injuring innocent purchasers and encumbrancers of the vendee. Schweitzer v. Tracy, 76 Ill. 345 (1875); Stadtfield v. Huntsman, 92 Pa. 53 (1879); Singer Mfg. Co. v. Smith, 40 S. C. 529, 19 S. E. 132 (1893). In Pennsylvania a reservation of title in a contract under which goods are delivered to the vendee is void as against the creditors of the person in possession, if the contract is not essentially one of a bailment. Morgan Electric Company v. Brown, 193 Pa. 351, 44 Atl. 459 (1899); *In re* Tice, 139 Fed. 52 (1905); 35 Cyc. 678. Again, in Texas, by statute, a reservation of title to secure the payment of the purchase price is void and the transaction is treated not as conditional, but as an absolute one, with a chattel mortgage in the vendor. Crews v. Harlan, 99 Tex. 93, 87 S. W. 656 (1905).

This tendency to frown on conditional sales and regard them as transactions in which title passes immediately to the vendee, is clearly exhibited by the principal case. The purpose of this is no doubt to protect innocent purchasers and creditors of the vendee and as such is worthy, but the protection should not be so far extended, it is submitted, as to interfere with the rights of the vendor and vendee to specify the terms of their contract as they wish.

STATUTE OF LIMITATIONS—WAIVER.—The maker by a provision in a note waived all benefits of the statute of limitations. *Held:* the waiver is void since it is for an indefinite time. First Nat. Bank v. Mock 203 Pac. 272 (Colo. 1922).

The courts which hold waivers of statutes of limitations for an indefinite time void do so upon the assumption that such statutes are for the peace and welfare of society; and so attempts to disregard them are against public policy like attempts to avoid the usury statutes. Crane *et al.* v. French, 38 Miss. 503 (1860); Kellog v. Dickinson, 147 Mass. 432, 18 N. E. 223 (1888); Wright v. Gardner, 98 Ky. 454, 35 S. W. 1116 (1895). "It would be flying in the face of the statute." Mutual Life Ins. Co. v. United States Hotel Co., 144 N. Y. S. 476 (1913). On the other hand some courts interpret limitation statutes to be purely for the benefit and repose of individuals and not to secure objects of policy or morals. Accordingly, thy declare that a person may be estopped for all time from availing himself of such a personal defense just as he may fail to plead it at any particular suit. Quick v. Corlies, 39 N. J. L. 11 (1876); Mann v. Cooper, 2 App. Cas. 226 (D. C. 1894); State Trust Co. v. Sheldon, 68 Vt. 259, 35 Atl. 177 (1895). Most courts, however, though enforcing the waiver through estoppel limit the term of the estoppel. Thus indefinite waivers made after the statute has begun running against the obligation will estop the obligor only for the length of the statutory period counted as from the date of waiver. Armstrong v. Levan, 109 Pa. 177, 1 Atl. 204 (1885); Joyner v. Massey, 97 N. C. 148, 1 S. E. 702 (1887); Wells, Fargo v. Enright, 127 Cal. 675, 60 Pac. 439 (1900). Where the promise to waive is contemporaneous with the creation of the obligation it was held in Pennsylvania

that the statutory period during which the obligation could be sued upon was merely doubled. Hoffman v. Fisher, 2 Weekly Notes Cases 17 (Pa. 1875).

The view taken in the principal case that an indefinite waiver is void appears to be the better one. Limitation statutes prevent stale claims which tend to encourage perjury and fraud; furthermore stale claims interfere with the repose of society. Union Central Life Ins. Co. v. Spinks, 119 Ky. 261, 86 S. W. 615 (1904). The theory of estoppel as used by courts enforcing the waiver is difficult to support. A person can only be estopped by his representations as to existing facts and not by his promise to do something in the future. Shapely v. Abbott, 42 N. Y. 449 (1870). The fact that it is optional with a person to plead a defense is no argument for upholding a contract by which he binds himself forever not to plead it. Crane v. French, *supra.*

It is intimated in the principal decision that, if the waiver had not been indefinite but for a limited time, it might have been enforced. It is submitted that if it is contrary to public policy to waive the statute indefinitely it is so when it is waived for any length of time. In either case the statute is avoided.

THIRD PARTY BENEFICIARY CONTRACTS—ASSENT OF BENEFICIARY NECESSARY TO ESTABLISH PROMISOR'S LIABILITY.—The corporation in which the defendant is a stockholder assumed all the obligations of its predecessor and a few months later gave the note sued on to the creditor of the predecessor, who indorsed it to the plaintiff. If the defendant's liability were considered as accruing at the time of the assumption of the debt the statute had run, but ih had not run if the period were computed from the date of the note. The defendant pleaded the statute of limitations. *Held:* There was no liability on the part of the defendant to the creditor until the note was given and accepted since the beneficiary did not accede to the contract before that time. More v. Hutchinson, 203 Pac. 97 (Cal. 1922).

The decision in the principal case, that an overt act of acceptance is necessary to create the promisor's liability, finds support in quite a few jurisdictions. Ramsdale v. Horton, 3 Pa. 330 (1846); Straghorn v. Webb, 2 N. C. 199 (1855); *In re* Isaacs *et al.;* 13 Fed. Cases 148 (Col. 1873); Blake v. Atlantic National Bank, 33 R. I. 464, 82 Atl. 225 (1912). However, some courts take a middle ground, in that, although they require an assent by the third party, they presume an acceptance in a "sole beneficiary" contract. Williamson-Stewart Paper Company v. Seaman, 29 Ill. App. 68 (1887); Waterman v. Morgan, 114 Ind. 237, 16 N. N. 590 (1888). On the other hand, it has been held, as contended for by the dissenting justice in the instant case, that "the law operates upon the acts of the parties, creates the duty, establishes the privity and implies the promise and obligation on which the contract is grounded" so that no acceptance is necessary. Tweedale v. Tweedale, 116 Wis. 517, 93 N. W. 440 (1903); Washer v. Independent Mining & Development Company, 142 Cal. 702, 76 Pac. 654 (1904); Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056 (1906).

It seems that the majority of American jurisdictions favor the view that the immediate parties to a third party beneficiary contract may rescind at any time before the third party assents, Trimble v. Strother, 25 Ohio St. 378 (1874); Gilbert v. Sanderson, 56 Iowa 349 (1881); People's Bank & Trust Company v. Weidinger, 73 N. J. L. 433, 64 Atl. 179 (1906); however, there is respectable authority to the contrary. Henderson v. McDonald *et al.*, 84 Ind. 149 (1882); Bay v. Williams, 112 Ill. 91 (1884); Starbird *et al.* v. Cranston, 24 Colo. 20, 48 Pac. 652 (1897). It is submitted that if the courts holding the majority view were confronted with the issue presented in the principal case they would be compelled to decide that assent is necessary to establish the obligation while those holding the minority view would come to the opposite conclusion.

The decision of the principal case is consistent with the ordinary rules governing contracts. The majority view was based on the ground that "a contract for the benefit of a third person, like any other contract, requires an acceptance; and until such acceptance is manifested in some manner no rights creating a corresponding liability in favor of such party can arise." It therefore seems that as far as the third person is concerned the transaction amounts to a mere offer.

TRIAL—INTERROGATORIES SUBMITTED TO THE JURY AFTER THE RETURN OF THEIR VERDICT.—The court submitted several questions to the jury, on the return of their verdict, as to the grounds on which they predicated it. *Held:* This practice is unnecessary and objectionable. Riley v. O'Connell, 116 Atl. 89 (Conn. 1922).

In many states statutes provide that it is mandatory on the court to submit interrogatories to the jury when it is requested by one of the parties, Benton v. St. Louis & San Francisco Railway Co., 25 Mo. App. 155 (1887); Bower *et al.* v. Bower *et al.*, 142 Ind. 194, 41 N. E. 523 (1895); Larson v. Leonardt, 8 Cal. App. 226, 96 Pac. 395 (1908); while in other states it is discretionary with the court. For a full discussion of this, see Clementson's Special Verdict, C. 3. However in the New England states, especially, in the absence of a statute the court may at its discretion submit interrogatories to the jury before they go out. Walker v. Sawyer, 13 N. H. 191 (1842); Cullum v. Colwell, 85 Conn. 459, 111 Atl. 788 (1912). It has been held that the consent of both parties is necessary to give the court this power, Walker v. Sawyer, *supra*, while in McMasters *et al.* v. The West Chester County Mutual Ins. Co., 25 Wend. 379 (1841), this was done over the objection of one of the parties and approved of on appeal.

The practice of the court to interrogate the jury, on the return of their verdict, upon what they predicated it probably had its origin in Massachusetts. Dorr v. Fenno, 12 Pick. 520 (Mass. 1832). This practice was soon adopted in Maine and New Hampshire. Smith v. Putney, 18 Me. 87 (1841); Smith v. Powers, 15 N. H. 546 (1844). In England, however, the power of the court to require the jury to answer through their foreman, in what particular way they found certain questions, is denied. Mayor of Devizes v. Clark, 3 Ad. & El. 506 (Eng. 1835). It is surprising to note that a *dictum* in a later Massa-

chusetts case, Hannum *et ux.* v. The Inhabitants of Belchertown, 36 Mass. 311 (1837); seems to be inconsistent with the general Massachusetts view on this subject and quite consistent with the decision of the principal case: "The secrecy of the deliberations and discussions of the jury and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions."

Such inquiries after the verdict has been returned are not subject to exception and are entirely discretionary with the court. Spurr. v. Inhabitants of Shelburne, 131 Mass. 429 (1881). However, it is error for the court to ask the jury questions and then prepare a verdict for them in open court to be affirmed by them, for there a comparison of views is impracticable. Kenny v. Habich *et al.*, 137 Mass. 421 (1884). It goes without saying, that in no jurisdiction has either party the absolute right to have interrogatories submitted to the jury after their return of the verict. Burleson *et al.* v. Burleson *et al.*, 28 Texas 383 (1866); Hairgrove v. Millington, 8 Kan. 480 (1871).

There is no doubt but that trial by jury in civil cases is declining in public esteem and that this dissatisfaction is due in part, at least, to the fact that the jurors do not abide by the rule so often repeated by Coke: "*Ad quæstiones legis non respondet juratores,*" but on the contrary too frequently are swayed by what they think the law ought to be and therefore their verdict does not depend on the facts as found. It is submitted that a wider scope of the court's power in presenting interrogatories to the jury would remedy this misconduct.

In view of the fact that the practice resorted to in the instant case has been followed in, at least, one other case in this state without objection, Frazier v. Harvey, 34 Conn. 469 (1867); it is notable that the court in the principal case refused to sanction it and especially since the practice of asking interrogatories, both before and after verdict, found such favor in her sister states.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—REGULAR COURSE OF BUSINESS.—The claimant, a skilled mechanic, engaged in business for himself, was employed by X, operating an oil well, to repair an engine used to run a pump. While waiting for an employee of X to transport him to his own shop, where it was necessary to have a cylinder rebored, claimant, for some unknown reason, stepped into an adjoining pumphouse, and was killed. *Held:* The widow is not entitled to compensation, as the employment was casual and not in the regular course of X's business. Callihan v. Montgomery, 272 Pa. 56 (1922).

The English and most of the American compensation laws expressly exclude casual employees from their protection. Harper on Workmen's Compensation, Sec. 114. The language of exclusion in the English act, "whose employment is of a casual nature" has been construed to refer to the kind of service done by the employee rather than to the duration of service. Knight v. Bucknill, 6 B. W. C. 160 (Eng. 1913). In Pennsylvania and many other states, however, workmen are excluded whose "employment is casual in character." This change of phraseology has narrowed the scope of such acts

and made the exemption depend, not on the nature of the work performed, but on the nature of the contract of employment. *In re* Gaynor, 217 Mass. 86, 104 N. E. 339 (1914).

Ordinarily, an employment is casual when it is for a single day, *In re* Krug, 220 Mass. 290, 107 N. E. 959 (1915); or by the hour; Op. Atty. Gen., on Minn. Wk. Comp. Act, Bul. 11, p. 20; but not where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of the continuance for a reasonable time. Sabello v. Brazileiro, 86 N. J. L. 505, 91 Atl. 1032 (1914). Workmen are engaged in "casual employment" when they are employed only "occasionally," "irregularly" or "incidentally," as distinguished from those employed "regularly" and "continuously." Chicago, etc. R. R. Co. v. Industrial Com., 284 Ill. 573, 120 N. E. 508 (1918). Another test is whether or not the employment is for a limited and temporary purpose. Western Union Tel. Co. v. Hickman, 248 Fed. 899 (C. C. A. 1918).

To prevent compensation in Pennsylvania, the employment must not only be "casual in character," but "outside the regular course of the business of the employer." Article 1, Sec. 104 of Compensation Act, P. L. 1915, p. 736; Tarr v. Hecla Coal Co., 265 Pa. 519; 109 Atl. 224 (1920). Some statutes use the above terms disjunctively. Holbrook v. Olympia Hotel Co., 200 Mich. 597, 166 N. W. 876 (1918). In construing "regular course of business of the employer," the court in the principal case declared it to refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transactions in that business, such as, now and again, repairing the premises, appliances, or machinery used therein. The decision seems correct and in accord with the law of those jurisdictions whose statutes are worded similarly.

WORKMEN'S COMPENSATION—DOCTRINE OF INDEPENDENT CONTRACTOR NOT APPLICABLE.—The claimant, whose regular occupation was farming, agreed to cut a large quantity of timber for the defendant company at a certain rate per thousand feet. The company had a right to demand that the timber be cut according to specifications, but had no control over the method or means by which it was to be done. The claimant engaged his son to help him, paying him, himself. *Held:* The claimant was an "employee" within the meaning of the Workmen's Compensation Act. McDowell v. Duer, 133 N. W. 839 (Ind. App. 1922).

Independent contractors are not employees within the meaning of the Compensation Acts in most jurisdictions. Anofsky v. Industrial Comm., 290 Ill. 521, 125 N. E. 286 (1919); Connolly v. Industrial Accident Comm., 178 Cal. 405, 160 Pac. 239 (1916); Smith v. State Workmen's Insurance Fund, 262 Pa. 286 (1918). Generally speaking, an "independent contractor" is one who exercises an independent employment and contracts to do a piece of work according to his own method, without being subject to the control of the employer, save as to the results of his work. Honnold on Workmen's Compensation, Vol. 1, Sec. 66. The test of the relationship of employer and em-

ployee is the right to the general control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an Independent Contractor and a servant or agent. Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385, 158 N. W. 875 (1916). In the principal case the court declares that the doctrine of "independent contractor" has no place in the law of workmen's compensation and should be eliminated in considering whether or not the relationship of employer and employee exists. This is opposed to the great weight of authority; Pennsylvania, in particular, laying great stress on the element of "control." Kelly v. Del., Lacka. & W. R. R., 270 Pa. 426, 113 Atl. 419 (1921). In the opinion of the court, the contract was one merely for services, and since claimant never held himself out as a contractor in the line of work he was doing for the defendant company, it was reasonable to consider him as a workman within the meaning of the act. While the court seems justified in departing from the stricter rule followed in most states, and in construing the word "employee" liberally, its decision in the principal case seems erroneous. The fact that it was a contract to do a definite amount of work, that claimant was not paid wages, that he had the right to employ helpers, that he used his own tools, and had the control over the manner and means by which the cutting was to be done all show that the contract was not for "services," and therefore, not within the Compensation Laws.