RECENT CASES

ATTORNEY'S LIEN—LIABILITY OF THE OBLIGORS ON AN APPEAL BOND FOR THE CHARGING LIEN OF AN ATTORNEY—The plaintiff, acting as attorney for *A*, procured a judgment against *A's* husband, *B*. Pending the appeal, *B*, in collusion with *A*, satisfied the judgment upon which the plaintiff had a lien for his services. The satisfaction was set aside by judicial action. *A* and *B* are now insolvent, and this is an action against the sureties on the appeal bond to recover the amount of the lien. *Held:* Plaintiff can recover. *Rabenstein v. Morehouse,* 128 Misc. 385, 219 N. Y. Supp. 560 (1926).

By common law, and in most states now by statute, an attorney has a charging lien for his fee and costs upon the judgment which he recovers for his client.[1] This lien, in most jurisdictions, amounts merely to a right to the equitable interference of the court to have the judgment held as security for his costs,[2] although in at least one state,[3] it has the same status as an equitable assignment of the judgment. Under the latter view of the charging lien, the attorney could recover in some states on the theory that the bond is security for the judgment, and the security passes to the assignee.[4] Other states hold the contract of surety to be entirely independent of the judgment and hence the assignee could not recover except upon a theory of beneficiary to the surety contract.[5] Under the former view of the status of a charging lien (and this seems to be the view taken in the principal case) the attorney should not be able to recover on any theory of contracts. He is not a party to the contract, and he was not intended by the parties to have any enforceable rights under the contract. His position is that of an incidental beneficiary.[6] Under a liberal construction of the statute which requires the filing of appeal bonds,[7] the bond may be said to redound by law to the benefit of anyone interested in the situation. This construction has been accorded to other official bonds, such as construction bonds.[8] It is submitted that the conclusion reached in the principal case is desirable and may be logically supported, not on a theory of contracts, but by such justifiable construction of these statutes.

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[1] 1 LOYD, CASES, CIVIL PROCEDURE (1910) 274n. For nature of retaining liens and charging liens see generally 2 R. C. L. 1063, 1069.

[2] Barker v. St. Quintin, 12 M. & W. 441 (1844); *In re* Humphreys, [1898] 1 Q. B. 520; Poole v. Belcha, 131 N. Y. 200, 30 N. E. 53 (1892); Matter of Regan, 167 N. Y. 338, 60 N. E. 658 (1901).

[3] Holison v. Watson, 34 Me. 20 (1853); Newbert v. Cunningham, 50 Me. 231 (1865).

[4] See cases cited in 2 BRANDT, SURETYSHIP (3rd ed. 1905) § 526.

[5] Moses v. Thorne, 6 Cal. 87 (1858); Chistrom v. Eppinger, 127 Cal. 326, 59 Pac. 659 (1899).

[6] ANSON, CONTRACTS, (Corbin's ed. 1919) § 291. *Cf.* Case v. Case, 203 N. Y. 263, 96 N. E. 440 (1911). As to enforcing beneficiaries' rights under a sealed contract see 1 WILLISTON, CONTRACTS (1924) § 401.

[7] CAHILL, NEW YORK CIVIL PRACTICE (1925) § 148 *et seq.*

[8] Equitable Surety Co. v. McMillan, 234 U. S. 448 (1913). For collection of similar cases see 49 L. R. A. (N. S.) 1175. For list of such statutes see ANSON, CONTRACTS, *op. cit.* § 301, n. 5.

BILLS AND NOTES—CONSTRUCTIVE ACCEPTANCE OF A CHECK BY RETENTION—The drawee bank held a check, forwarded to it by defendant bank, for more than twenty-four hours and then returned it unpaid. The drawee bank through its receiver brings this action to recover the amount of the check which defendant charged to its account. *Held:* Retention, without more, for twenty-four hours amounted to an acceptance by the drawee bank. *Clarke v. National Bank of Montana,* 252 Pac. 373 (Mont. 1926).

The preliminary problem involved in this case is to determine whether a check is presented for payment or acceptance. Logically, it would seem clear that the presentment is made for the purpose of payment and it is generally so considered.[1] If the court in the principal case adopted this view it is apparent that the case would not fall within the provisions of § 137 of the *Negotiable Instruments Law,* as adopted in this state[2] because this section only covers bills presented for acceptance. However, the court did consider the check as presented for acceptance, thus permitting the application of § 137. Then in construing the statute the court aligned itself with the Pennsylvania case of *Wisner v. First National Bank*[3] and held that there was an acceptance. According to this view the purpose of § 137 was to expedite action by the drawee in accepting or refusing a bill and to fix a definite time in which he should act so that if he did not accept or return the bill in twenty-four hours he was deemed to have accepted it.[4] Thus if the drawee should absolutely refuse to accept but should inadvertently hold the bill for twenty-four hours he has, under these cases, accepted the bill. Comparatively few courts give the statute this strained construction. The draftsman of the act took § 137 from a New York statute[5] which had been in force for many years. In construing this early statute the Court of Appeals of that state held that the refusal spoken of meant an affirmative act and that a mere omission to return where there was no demand was not a "refusal" within the statute[6] and this would seem to be the plain import of the language used.[7] It is submitted that a proper construction of the statute as it exists today should lead to the same result as that reached by the Court of Appeals.[8]

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[1] CRAWFORD, ANNOTATED NEGOTIABLE INSTRUMENTS LAW (4th ed. 1916) § 137; MORSE, BANKS AND BANKING (5th ed. 1917) § 404; NORTON, BILLS AND NOTES (4th ed. 1914) § 52 n. 68.

[2] "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same." MONT. REV. CODES (Choate, 1921) §§ 8543, 8544.

[3] Wisner v. First National Bank, 220 Pa. 21, 68 Atl. 955 (1908). *Accord:* State Bank v. Weiss, 46 Misc. Rep. 93 91 N. Y. Supp. 276 (1904); Peoples National Bank v. Smith, 134 Tenn. 175, 183 S. W. 725 (1916).

[4] This decision led to an amendment of the act by the Pennsylvania Legislature (Act of 1909, P. L. 169, PA. STAT. [1920] § 16129) which now makes a demand necessary.

[5] 1 REV. STAT. 769 § 11 (N. Y. 1829).

[6] Mattison v. Moulton, 79 N. Y. 627 (1880).

[7] CRAWFORD, *op. cit. supra* note 1.

[8] *Supra* note 8.

BILLS AND NOTES—NEGOTIATION OF A DEMAND NOTE WITHIN A REASONABLE TIME—*A* made a demeand note bearing interest payable to the order of his brother, *B*, to evidence an investment made by *B* with him. Four years and six months after its execution, the note was negotiated by the administratrix of *B* to *C* for value. *A* defended on the ground of payment through services. *Held: C* was a holder in due course as the note was not overdue when negotiated. *Gershman v. Adelman*, 135 Atl. 688 (N. J. 1927).

The courts have not attempted to fix any time as being a "reasonable time" after which a demand note is deemed overdue so as to let in defenses against one to whom it has been negotiated.[1] Section 193 of the *Negotiable Instruments Law* expressly provides that "in determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." The problem is a factual one, and the decision of one case goes but a little way in establishing a precedent for another.[2] However, the cumulative force of the decisions seems to indicate that the judicial yardstick as to reasonableness in the case of notes is a matter of months.[3] With demand notes bearing interest, some courts consider them as "continuing security" and within the contemplation of the parties not to be called in for some time.[4] In very exceptional cases, a year or two years has been regarded as "reasonable," but beyond that time, the courts have been chary to grant purchasers for value the favored position of a holder in due course. Accordingly, courts have not hesitated to hold that when demand notes have been out in circulation from two to three years[6] they were deemed overdue, and purchasers of such notes were not holders in due course. It would therefore seem that though the decision in the instant case is a permissible one, it contravenes the spirit of the adjudicated cases.

CONSTITUTIONAL LAW—CONFLICT BETWEEN POLICE POWER AND THE PROHIBITION OF IMPAIRMENT OF VESTED RIGHTS—ONE-MAN TROLLEY CARS—A city ordinance was passed authorizing the use of one-man trolley cars. The

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[1] Wethey v. Andrews, 3 Hill 582 (N. Y. 1842).

[2] Seavey v. Lincoln, 38 Mass. 267 (1838).

[3] Poorman v. Mills, 39 Cal. 345 (1870); Greer v. Downing, 176 Ill. App. 355 (1912); Fayette Nat'l Bank v. Meyers, 211 Ky. 185, 277 S. W. 292 (1925); Losee v. Dunkin, 7 Johns. 70 (N. Y. 1810); Barbour v. Fullerton, 36 Pa. 105 (1859).

[4] Brooks v. Mitchell, 9 M. & W. 15 (1841); Merritt v. Todd, 23 N. Y. 28 (1861).

[5] Tomlinson Carriage Co. v. Kinsella, 31 Conn. 268 (1863); Kirk v. Ball, 45 R. I. 93, 120 Atl. 165 (1923).

[6] Losee v. Dunkin, *supra* note 3; Finch v. Devanney, 240 Pac. 79 (Okla. 1925). In Greer v. Downing, *supra* note 3, the court said at 356, "We do not know of any case in which it has been held, that an indorsee of a demand note negotiated a *year* (italics mine) after its date, has been held to be a purchaser before maturity." But see *supra* note 5. The statement, however, shows the attitude of the courts.

street car company made the change and installation at great expense. A few years later the city passed another ordinance declaring the use of one-man trolley cars illegal. The company now seeks an injunction against the operation of the ordinance on the ground that it is unconstitutional, being a violation of the "due process clause"[1] and the constitutional provision against "impairing the obligation of contracts."[2] *Held:* Injunction granted. *City of Dayton v. City Ry.*, 16 F. (2d) 401 (C. C. A. 6th, 1926).

A rather unique doctrine prevails in Ohio, which treats municipal ordinances, when accepted by corporations, as binding contracts.[3] This may be justified by considering the ordinance as similar to a charter or franchise, or as an extension of the powers conferred under the original grant. The municipality, through its corporate powers derived from the state, acts as an agent to bind itself and the state on the contract.[4] In addition, the rights acquired under such ordinances are universally held to be vested property rights, which cannot be confiscated without due process of law.[5] The court in the principal case therefore concluded that the petitioner had not only a contract right but also a property right, both of which must be protected against infringement, in accordance with the provisions of the Constitution of the United States.[6] However, the police power of a state to protect the public health, safety, and morals takes precedence over contract and property rights, and cannot be divested by contract.[7] It would seem, therefore, that the municipality in this case, by invoking the aid of its police power to protect the safety of the public, should have been able to successfully defend this action and enforce its legislative powers. But the court in the instant case refused to recognize the need for the exercise of police power, due, probably, to the lack of evidence on this point. It is settled law in the Federal Courts

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[1] Sec. 1 of the Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

[2] Art. 1, sec. 10 (1) provides: "No state shall . . . pass any . . . law impairing the obligation of contracts."

[3] Railway Co. v. Carthage, 26 Ohio 631 (1881); City of Columbus v. Street Ry. Co., 45 Ohio 98 12 N. E. 651 (1887); Interurban Ry. Co. v. Public Utilities Commission, 98 Ohio 287, 120 N. E. 831 (1918).

[4] Walla Walla v. Walla Walla Water Co., 172 U. S. 1 (1898); City of Cleveland v. Cleveland Ry. Co., 194 U. S. 517 (1904); Blair v. Chicago, 201 U. S. 400 (1905); Columbus Ry. v. City of Columbus, 249 U. S. 399 (1918).

[5] Dobbins v. Los Angeles, 195 U. S. 223 (1904); Grand Trunk Ry. v. South Bend, 227 U. S. 544 (1912); BLACK, CONSTITUTIONAL PROHIBITIONS (1887) at 30 says, "They may be repealed provided no rights have been acquired nor any liability incurred in consequence of its passage, but where vested rights have been acquired under grants before the passage of a repealing law, such repealing law is unconstitutional"; BURDICK, THE AMERICAN CONSTITUTION (1922) § 189; COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890) 334; Willis, *Due Process of Law under the United States Constitution*, 74 U. OF PA. L. REV. 331 (1926).

[6] *Supra* notes 1 and 2.

[7] Atlantic Coast Line v. Goldsboro, 232 U. S. 548 (1913); Hadacheck v. Los Angeles, 239 U. S. 394 (1915); Norfolk Ry. v. Public Service Commission, 265 U. S. 70 (1923); BURDICK, THE AMERICAN CONSTITUTION (1922) § 194.

that police power regulation is unenforceable if arbitrary or unreasonable.[8] It is submitted, therefore, that this court, having discretionary authority to determine what is arbitrary and unreasonable, was not satisfied that the safety of the public was in jeopardy, nor that the exigency of the situation required the enforcement of the second ordinance so as to cause serious financial loss to the petitioner.[9]

CONSTITUTIONAL LAW—VESTED RIGHTS—EFFECT OF THE RETROACTIVE CONSTRUCTION OF A STATUTE REGULATING PROCEDURE—An award for permanent disability was rendered in April, 1921, under the Illinois Workmen's Compensation Act of 1913,[1] which allowed eighteen months for review by the Commission. Nine months later, the statute was amended,[2] allowing unlimited time for modification where the employee was subsequently found able to work. Under the latter statute, a modification in the award was made four years after the date of the original decree. It was contended that the statute could not, for constitutional reasons, be considered retrospective and hence after eighteen months the award must be considered final. *Held:* The statute related to a matter of procedure, did not invade any vested right of the plaintiff, and, hence, was properly construed retrospectively. *Smolen v. Industrial Commission,* 154 N. E. 441 (Ill. 1926).

The dissenting opinion treated the award as immediately vesting a right in the employee which could not be impaired by a retrospective construction of the statute. Unquestionably it would be unconstitutional to give retroactive effect to the statute in such a manner as to impair a vested right.[3] A right is vested when its enjoyment, present or prospective has become the property of a particular person as a present interest.[4] There is no vested right in a statutory procedure for review.[5] Hence, statutes which merely deal with procedure are given retroactive effect.[6] In the principal case, the award being still subject to review at the time of the statutory change, it can hardly be said that the award had become *res judicata.* It follows that a vested right in the compensation award had not yet accrued. Further, it is submitted, the change simply dealt with a matter of procedure, not of substantive rights. The principal case, therefore, can be supported from either angle.

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[8] Louisville v. Cumberland Co., 225 U. S. 430 (1911); Great Northern Ry. v. Minnesota, 238 U. S. 340 (1915); Sullivan v. City of Shreveport, 251 U. S. 169 (1919).

[9] This case is especially interesting in view of the fact that on April 6, 1927, the House Committee on Electric Railways reported for passage to the Pennsylvania Assembly the Hricko Bill which prohibits the operation of "one-man" trolley cars in Pennsylvania.

[1] ILL. REV. STAT. (Cahill, 1925) c. 48, § 219.

[2] ILL. REV. STAT. (Cahill, 1925) c. 48, § 208.

[3] Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554 (1903); Matter of Pell, 171 N. Y. 48, 63 N. E. 789 (1902).

[4] Pearsall v. Great Northern Ry. Co., 161 U. S. 646 (1895).

[5] Stephens v. Cherokee Nation, 174 U. S. 445 (1899); Blonde v. Minominee Lumber Co., 106 Wis. 540, 82 N. W. 552 (1900).

[6] Devine's Case, 236 Mass. 588, 129 N. E. 414 (1921); Lane v. White, 140 Pa. 99, 21 Atl. 437 (1891).

CONTRACTS—SILENCE AS ASSENT TO AN OFFER—The defendant's salesman received an order from the plaintiff with the provision that it was subject to the defendant's approval. The order was forwarded to the defendant, and the latter retained it for some time without notifying the plaintiff of its approval or rejection. The plaintiff sued to recover damages for breach of contract. There was no evidence of previous dealings. The court charged the jury that the fact that the defendant kept the order without approving it or notifying the plaintiff of its disapproval would amount to an acceptance. *Held:* Charge correct.[1] *Hendrickson v. International Harvester Co.*, 135 Atl. 702 (Vt. 1927).

There is no doubt that generally an offeree need not reply to offers, and his silence and inaction cannot be construed as an assent to the offer.[2] However, in certain cases, failure to speak may amount to evidence of assent where a duty arises to speak, either because of the relation of the parties, their previous dealings, usage of trade, or other circumstances.[3] Not infrequently the existence of previous dealings is held to give rise to a duty on the part of the offeree to seasonably repudiate orders taken by his salesman subject to his approval so as to prevent an acceptance by silence.[4] This is on the ground that the conduct of the offeree in the previous dealings justifies the offeror in understanding silence as assent, and if he so understands, a contract results. But the principal case presents what appears to be an original offer to one with whom there had been no previous relations, and consequently there are no circumstances which afford a basis for inferring assent to the offer from the mere silence of the offeree.[5] The principal case seems opposed to both authority and reason, and an unjustified departure from the general rule applicable.[6]

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[1] The judgment of the lower court was reversed and the case remanded for other reasons. The court at 705 expresses itself as follows: "When one sends out an agent to solicit orders for his goods, authorizing such agent to take such orders subject to his (the principal's) approval, fair dealing and the exigencies of modern business require us to hold that he shall signify to the customer within a reasonable time from the receipt of the order his rejection of it, or suffer the consequence of having his silence operate as an approval."

[2] 1 WILLISTON, CONTRACTS (1924) § 91.

[3] Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495 (1893); May Co. v. Menzies Shoe Co., 184 N. C. 150, 113 S. E. 593 (1922) (usage of trade); Cole-McIntyre-Norfleet Co. v. Halloway, 141 Tenn. 679, 214 S. W. 817 (1919).

[4] *Ibid.*

[5] Metzler v. Harry Kaufman Co., 32 App. D. C. 434 (1909); Senner & Kaplan Co. v. Gera Mills, 185 App. Div. 562, 173 N. Y. Supp. 265 (1918). In Gould v. Cates Chair Co., 147 Ala. 629, 41 So. 675 (1906), the court held that where the salesman had taken an order subject to the principal's approval, silence for over a month did not amount to acceptance or estop the principal from urging nonacceptance even though he had accepted and filled a previous order.

[6] THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONTRACTS (1925) § 70 (1) provides that "Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others: . . . (c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or

REAL PROPERTY—RESTRICTIVE COVENANT—CONSTRUCTION—The plaintiff purchased a plot of ground subject to a restrictive covenant which in effect provided that not more than two dwelling houses could be erected upon it. The purchaser contemplated erecting a six-story apartment house, and brought this proceeding for a declaratory judgment as to the scope of the restriction. *Held:* The covenant does not prohibit the erection of an apartment house. *Satterthwaite v. Gibbs*, 135 Atl. 862 (Pa. 1927).

If the language of a restrictive covenant, when considered with the context and all the circumstances, is of doubtful meaning, it will be construed against, rather than for the covenant.[1] Where the covenant is to use land for residence purposes only, the erection of an apartment house is generally allowed.[2] But where the building to be erected is restricted to a dwelling house, some courts prohibit the erection of an apartment building.[3] On a similar covenant, other courts refuse to prohibit the erection of an apartment building.[4] The court in *Voorhees v. Blum*,[5] had to consider the following covenant, "the grantee shall not build upon the property any building or structure except a single detached dwelling house to cost not less than $10,000." It was there decided that an apartment building could be erected. The decisions, therefore, narrow themselves down to the question: Whom do the courts desire to favor? Those courts that favor the grantee maintain that the covenant was designed to prevent plural structures rather than plural users, and support their view on the ground that all doubt should be resolved in favor of the free use of land.[6] The courts that favor the grantor declare that the re-

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inaction was intended by the offeree as an expression of assent, and the offeror does so understand. *Illustration: B*, through salesman, has frequently solicited orders for goods from *A*, the orders to be subject to *B's* personal approval. In every case *B* has shipped the goods ordered within a week and without notice to *A*. *B's* salesman solicits and receives another order from *A*. *B* receives the order and remains silent. *A* relies on the order and forbears to buy elsewhere for a week. *B* is bound to fill the order."

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[1] American Unitarian Association v. Minot, 185 Mass. 589, 71 N. E. 551 (1904); Kitchen v. Hawley, 150 Mo. App. 497, 131 N. W. 142 (1910); Cole v. Seamonds, 87 W. Va. 19, 104 S. E. 747 (1920).

[2] McMurtry v. Phillips Investment Co., 103 Ky. 308, 45 S. W. 96 (1898). *Contra:* Burton v. Stapely, 4 Ohio N. P. (N. S.) 65 *aff'd.*, 74 Ohio 461, 78 N. E. 1120 (1906). See 45 L. R. A. (N. S.) 726 at 737 (1913), note.

[3] Powers v. Radding, 225 Mass. 110, 113 N. E. 782 (1916); Bohn v. Tyrol Investment Co., 178 Mo. App. 1, 160 S. W. 588 (1913). Skillman v. Smathehurst, 57 N. J. Eq. 1, 40 Atl. 855 (1898). See 4 THOMPSON, REAL PROPERTY (1924) § 3378.

[4] Kimber v. Adman [1900] 1 Ch. 412; Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556 (1893); Pank v. Eaton, 115 Mo. App. 171, 89 S. W. 586 (1905).

[5] 274 Ill. 319, 113 N. E. 593 (1916). For comment see 65 U. OF PA. L. REV. 196 (1916).

[6] *Supra* note 1. "In this country real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence, it is contrary to the well recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use; and hence, in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee, all doubts should as a general

triction was intended to preserve the private and residential character of the property.[7] In the principal case, where the covenant did not expressly prohibit the erection of an apartment building, it is submitted that the court properly refused to imply a prohibition.

SALES—IMPLIED WARRANTY OF QUALITY—FOOD FURNISHED IN RESTAURANT—Plaintiff was served unwholesome food in defendant's restaurant, and as a result was made ill. Action was brought for the damages resulting upon the theory that the defendant impliedly warranted that the food was fit to eat. *Held:* That there was no implied warranty under § 15 of the *Uniform Sales Act. Nisky v. Childs Co.*, 135 Atl. 805 (N. J. 1927).

By the weight of authority, numerically at least, a restaurant keeper, hotel keeper, or proprietor of any public eating house is not an "insurer" of the quality of the food which he serves to be consumed upon the premises.[1] There is, however, very strong authority supporting the proposition that an implied warranty of wholesomeness does exist in such a transaction.[2] The majority view rests upon the foundation that the service of food in a restaurant or hotel does not constitute a sale, and this was the basis of the decision in the principal case. In these decisions reliance is had upon the statement of an able authority that an inkeeper "does not sell but utters his provision",[3] and that "an innkeeper is not an 'insurer' of the quality of the food that he serves, but would be liable for knowingly or negligently furnishing bad or deleterious food."[4]

Little aid can be had from the early common law, for although it is stated that there was absolute liability on the innkeeper for the quality of food supplied to his guests,[5] this is declared to have been the result of statute.[6] But

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rule, be resolved in favor of a free use of property and against restrictions." Hutchinson v. Ulrich, 145 Ill. 336, 342, 34 N. E. 556, 557 (1893).

[7] Koch v. Corruflo, 77 N. J. Eq. 172, 75 Atl. 767 (1910); Levy v. Schreyer, 27 App. Div. 282, 50 N. Y. Supp. 584 (1898).

[1] Valeri v. Pullman Co., 218 Fed. 519 (S. D. N. Y. 1914); Travis v. Louisville, etc., R. R., 183 Ala. 415, 62 So. 851 (1913); Loucks v. Morley, 39 Cal. App. 570, 179 Pac. 529 (1919); Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Rowe v. Louisville, etc., R. R., 29 Ga. App. 15, 113 S. E. 823 (1922); Bigelow v. Maine Central R. R., 110 Me. 105, 85 Atl. 396 (1913).

[2] Greenwood v. Thompson Co., 213 Ill. App. 371 (1920); Friends v. Childs Co., 231 Mass. 65, 120 N. E. 407 (1918); Smith v. Carlos, 215 Mo. App. 488, 247 S. W. 468 (1923); Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924).

[3] BEALE, INNKEEPERS (1906) § 169, quoting from Parker v. Flint, 12 Mod. 254 (1701).

[4] *Op. cit. supra* note 3, § 302. Peculiarly enough, in the jurisdiction where Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253 (1896), was decided, which case is cited by Professor Beale to sustain this proposition, Greenwood v. Thompson Co., *supra* note 2, stands as an authority against the learned writer. The court in the latter case carefully distinguishes Sheffer v. Willoughby.

[5] Y. B. 9 Hen. VI 53. And see Burnby v. Bollett, 16 M. & W. 644, 647 (1847).

[6] BENJAMIN, SALES (5th Ed. 1906) 632, n. 2. It is also stated there that these statutes were swept away by the Repealing Act, 7 & 8 Vict. c. 24 (1844-45).

authorities to the effect that the transaction between the restaurant keeper and his guest does constitute a sale are not lacking.[7] Moreover, the reasoning of the majority view does not seem to conform to the modern conception of the transaction in this day of the cafeteria, the automat, and the *a la carte* service. It has been said that the transaction constitutes a sale with an implied license to consume the food on the premises. With this in mind, the reason for the prevailing view seems unconvincing. It is almost uniformly recognized at common law that in every sale of food by a retail dealer for immediate consumption there is an implied warranty of wholesomeness.[8] Even under § 15 (1) of the *Uniform Sales Act,* which does not distinguish between sales of food and other goods, demanding the reliance of the buyer upon the skill and judgment of the seller,[9] the requirements for the existence of an implied warranty would seem to be satisfied.[10] The purchase of the food utilized in a public eating house and its preparation are wholly in the hands of the proprietor and his agents, and the customer has no opportunity to inform himself as to its fitness for the use for which it has been prepared. The patron, by implication, has apprised the proprietor of the purpose for which the food is intended. On principle and authority, therefore, the result ought to be the same under the facts of the principal case as where the food is sold by a retailer for immediate consumption. Public policy has been urged as a strong reason in favor of an implied warranty in the transaction between restaurant keeper and guest.[11] But the New Jersey Court of Errors and Appeals turned a deaf ear to this argument.

TORTS—CONTRIBUTORY NEGLIGENCE—MEN REQUIRED TO WORK NEAR STREET TROLLEY TRACKS—Plaintiff, one of a gang of city employees repairing asphalt streets, brought an action for injury sustained while thus engaged, when struck by one of the defendant's trolley cars. The evidence was that plaintiff looked for a car when he started to clean out a hole near the trolley tracks, and was not struck until after he had thrown out three pieces of asphalt. The motorman knew the gang was working in the block but neither sounded his gong nor slowed up the speed of his car when passing the men. *Held:* The question of the plaintiff's contributory negligence was properly

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[7] Commonwealth v. Worcester, 126 Mass. 256 (1879) (intoxicants served with meals); People v. Claire, 221 N. Y. 108, 116 N. E. 868 (1917) (same served with meals held to be a sale thereof); Commonwealth v. Miller, 131 Pa. 118, 18 Atl. 398 (1890) (oleomargine served with meals held to be a sale thereof).

[8] 24 R. C. L. 195.

[9] Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918).

[10] Friends v. Childs Co., and Temple v. Keeler, both *supra* note 2. In Nisky v. Childs Co., the principal case, Lloyd, J., said: "It may fairly be assumed that the appellant in the present case by implication appraised (*sic*) the respondent that the oysters were to be eaten, and if the transaction constituted a sale of the oysters within the purview of either the common or statute law, then there would seem to have been a warranty, and the respondent would be liable."

[11] Perkins, *Unwholesome Food,* 5 Iowa L. Bull. 6, 86, at 96 (1920).

submitted to the jury. *Chew v. Philadelphia, etc., Co.*, Superior Court of Pennsylvania decided March 3, 1927.

The Pennsylvania courts have often criticised modifications of the common law rule of contributory negligence,[1] but have, in many cases, attained the same result[2] as those courts that modify the doctrine, by holding the plaintiff not guilty of any contributory negligence when "due regard is given to all the circumstances of his position."[3] The principal case is an adaptation of this procedure to a new type of case, *viz.*, one involving men required to repair streets at or near street trolley tracks. Their negligence must be determined with due regard to the fact that workmen must perform faithfully the services required of them, which prevents the constant watching for approaching cars, operated by persons who know of their presence. The Court in the principal case, in so holding, applied the law as developed in *Van Zandt v. Philadelphia, etc., R. R. Co.*,[4] regarding the degree of care required of workmen, engaged in building a bridge at or near steam railway tracks, whose presence is known to the operators. No previous Pennsylvania cases have defined the exact degree of care required of such workmen. But three prior cases indicated a lesser degree of care was required of men engaged in maintaining and constructing public works.[5] There are few decisions in other states on the exact holding of the principal case. The decisions of the Wisconsin Courts are in confusion.[6] New York[7] is in accord with the principal case; also the one New Jersey case.[8] It would seem, therefore, that Pennsylvania is leading the way in modifying the common law rule of negligence, as well as its traditional economic policy for the protection of business at the expense of the individual, in favor of persons whose quasi-public duties require them to occupy positions of danger.

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[1] Railroad v. Norton, 24 Pa. 465 at 469 (1855); Reeves v. Del., etc., R. R., 30 Pa. 454 at 465 (1858); Calaivissa R. R. v. Armstrong, 49 Pa. 186 at 193 (1865).

[2] SHEARMAN & REDFIELD, NEGLIGENCE (6th ed. 1913) 251.

[3] Reeves v. Del., etc., R. R., *supra* note 1; Philadelphia, etc., R. R. v. Spearin, 47 Pa. 300 (1864); Diehl v. Lehigh R. R., 254 Pa. 404, 98 Atl. 1061 (1916).

[4] 248 Pa. 276, 93 Atl. 1010 (1915).

[5] Owens v. Peoples R. Co., 155 Pa. 334, 26 Atl. 748 (1893) (plaintiff was engaged in laying pipes under defendant's trolley tracks); O'Malley v. Scranton Traction Co., 191 Pa. 410, 43 Atl. 313 (1899) (plaintiff was engaged in laying cement between rails of a street railway); Craven v. Pittsburg R. Co., 243 Pa. 619, 90 Atl. 361 (1914) (plaintiff, a street cleaner, was pushing his cart).

[6] *Accord:* Turtenwald v. Wisconsin, etc., Co., 121 Wis. 65, 98 N. W. 948 (1904); Dinan v. Chicago, etc., R. R., 164 Wis. 295, 159 N. W. 944 (1916); Jurkoric v. Chicago, etc., R. R., 166 Wis. 266, 164 N. W. 993 (1917). *Contra:* Milwaukee v. Milwaukee, etc., Co., 165 Wis. 338, 161 N. W. 745 (1917); Yellick v. Milwaukee R. R., 168 Wis. 562, 170 N. W. 941 (1919).

[7] Ominger v. New York, etc., R. R., 4 Hun. 159 (N. Y. 1875); Depaolo v. Third Ave. R. R., 55 App. Div. 566, 67 N. Y. Supp. 421 (1900); O'Connor v. Union R. R., 67 App. Div. 99, 73 N. Y. Supp. 606 (1901); Wells v. Brooklyn, etc., R. R., 67 App. Div. 212, 74 N. Y. Supp. 196 (1901); McGrath v. Metropolitan, etc., R. R., 47 Misc. 104, 93 N. Y. Supp. 519 (1905).

[8] Daum v. New Jersey, etc., R. R., 69 N. J. L. 1, 54 Atl. 221 (1903).