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RECENT IMPORTANT DECISIONS

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ADMIRALTY—LIMITED LIABILITY STATUTES NOT IMPLIEDLY REPEALED BY MERCHANT MARINE ACT.—A tug boat's master was killed by a boiler explosion and suit was brought in a state court under the provisions of sec. 33 of the Merchant Marine Act. The owners of the tug petitioned for limited liability in the district court, but that court refused to enjoin the law action on the ground that sec. 33 of the Merchant Marine Act repealed the Limited Liability Statutes. The case came before the Supreme Court on a certificate of division of opinion from the circuit court of appeals. *Held,* that the Limited Liability Statutes were not repealed and that a law action under the Merchant Marine Act could be enjoined in limited liability proceedings. *In re East River Towing Co.* 45 Sup. Ct. 114.

It is well settled that statutes are not repealed by implication unless they are in irreconcilable conflict. *Petri v. Creelman Lumber Co.* 199 U. S. 487, 497. Sec. 33 of the Merchant Marine Act gives seamen suing for personal injuries an election of an action in admiralty or of an action in law supplemented by all U. S. statutes extending the common law rights of railway employees. It does not expressly repeal the Limited Liability Statutes. Comp. St. (1913) Sec. 8021-8027. These statutes provide that when the ship owner is not at fault, he may limit his liability to the value of the ship. The owner surrenders the ship and petitions the district court to enjoin the further prosecution of all claims in other courts. These claims are then adjudicated in the admiralty court, and the owner is discharged from further liability. Some of the lower federal courts thought that the Limited Liability Statutes were repealed because they conflicted irreconcilably with the Merchant Marine Act. *In re Charles Nelson Co.* 294 Fed. 926; *The El Mundo,* 294 Fed. 577. These courts argued that sec. 33 of the Merchant Marine Act gave seamen an election of remedies. Obviously, there could be no real election if the owner could get all law actions enjoined under the Limited Liability Statutes, hence the Limited Liability Statutes were repealed. However, *In re Charles Nelson Co.* 294 Fed. 926, was reversed in *Charles Nelson Co. v. Curtis,* 1 Fed. (2'd) 774, the circuit court of appeals taking the view that the Merchant Marine Act could be construed so as not to be in conflict with the Limited Liability Statutes. This is the view that the Supreme Court takes in the instant case. Congress probably never intended that seamen should have a law action at all events. If such an intention is read into the Merchant Marine Act, the Bankruptcy Act would be repealed also, as it might bar the law action. Elections of remedies have always existed since the Judiciary Act of 1789. It will be remembered that this Act saves to suitors their common law remedies where the common law is capable of giving them. The Limited Liability Statutes were not considered inconsistent with such elections. Since seamen already had an election of bringing a law action, subject however to the Limited Liability Statutes, it would seem probable that all Congress intended in the Merchant Marine Act was to extend the scope of the existing legal remedies. The rest of admiralty

jurisdiction was to be invoked and exercised as it had been from the beginning. *Panama R. R. Co. v. Johnson,* 264 U. S. 375. If the Limited Liability Statutes were repealed, the effect would be to give seamen much better rights than all other claimants. If Congress intended to create such a preferred class, it would probably have done so expressly and not by implication. The Merchant Marine Act was very carefully drawn up, and the statutes that Congress considered inconsistent were expressly repealed. If Congress intended to repeal the Limited Liability Statutes, it could easily have done so expressly, and as Congress did not do so, it is arguable at least that a repeal was not contemplated. Limited liability proceedings are not very common so that there is no substantial interference with the election given to seamen by the Merchant Marine Act if the position is taken that the Limited Liability Statutes are not repealed. The interpretation of the Merchant Marine Act adopted by the Supreme Court in the instant case seems therefore to be sound.

ALIEN PROPERTY CUSTODIAN—RETURN OF PROPERTY.—The plaintiff and appellant had a Swiss charter though its stockholders were largely German, at least during the war. It was engaged in business in Germany while hostilities were in progress. It transacted business in the United States during the fateful days of 1917 and 1918. To obtain the necessary licenses it had deposited about one million dollars worth of bonds with various state treasurers. These securities were seized by the alien property custodian one week after the armistice. In an action to recover these securities from the custodian, it was *held,* that their return could not be compelled. *Swiss National Insurance Company Ltd. v. Thomas W. Miller and Frank White,* U. S. Sup. Ct., Feb. 2, 1925.

There can be no question but that this sequestration was permissible since the enemy trade act expressly included any corporation incorporated in any country other than the United States and doing business within the territory of any enemy nation. Its appropriateness at the particular time when the war was practically though not theoretically at an end presents another question with which the courts, however, are not concerned. More than a year before the war officially terminated by the adoption of the peace resolution of July 2, 1921 (42 Stat. 105, 106 c. 40) Congress on June 5, 1920, amended the enemy trade act by providing among other things that if the owner of the seized property was "a *citizen or subject* of any nation or state or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or state or free city", the sequestered property was to be delivered back to him. The great question before the court was whether this Swiss Insurance Company was a citizen or subject within the meaning of this provision. The court by Chief Justice Taft in answering this question in the negative freely conceded that the term citizen or subject standing alone would be broad enough to include this particular claimant and even cited cases in support of this proposition. Its decision was based on the fact that there was an additional clause in the same enactment which provided for a return of seized property to *corporations* incorporated within any foreign country whose stock was at the time of the sequestration entirely owned by non-enemies and

was so owned at the time of the return. Said the court: "Had not clause 6 been inserted in the act, possibly the words citizens or subjects of clause 1 might have been held to include corporations; but with a specification of them as a separate class, it would violate an obvious sound rule to include them by construction in clause 1 also as citizens or subjects." The result is that the alien property custodian retains possession of this property though all reason for such retention had passed away. The construction of the court while perhaps technically correct seems to do violence to the spirit of the act. It overlooks the obvious fact that statutes are frequently loosely drawn and are not intended to be masterpieces of close application of logical principles. Relief will probably be sought by an amendment of the enemy trading act by Congress. The resulting tinkering with legislation to fit individual needs is one of the outstanding faults of our legislative system and deserves to be discouraged in every way possible. The decision will probably impede rather than expedite the liquidation of the enormous trust estate held by the Alien Property Custodian. If it should result in a *comprehensive* amendment of the enemy trade act it would of course prove to be a blessing in disguise. It is not surprising that the court was not unanimous in its holding. Justice McReynolds filed a long dissenting opinion in which he stressed particularly the intent and purpose of the enemy trade act to conserve and utilize enemy property upon a basis of practical justice and to prevent the owner from receiving benefits therefrom until after the war but without ultimate confiscation. He contends that the amendment of 1920 is entitled to receive a liberal construction in favor of the plaintiff. Those who are familiar with the history of the liberal construction of such famous legislative landmarks as the Statute of Uses or the Statute of Elizabeth concerning charities will readily see that the court, if it had yielded to the contentions of the plaintiff, would have been well within the general policy pursued in the construction of these old statutes. The case is of interest as bringing again into the foreground the question whether a corporation is really a separate entity apart from its stockholders or merely a giant partnership with the liability of the partners strictly limited. The prevailing opinion lays stress on the fact that most of the owners of the corporation resided in Germany during the war and thus leans toward the partnership theory. The dissenting opinion stresses the entity theory and regards the corporation as a citizen or subject of the country where it is incorporated, no matter who its stockholders might be. Perhaps this contrariety was not consciously felt by the writers of either opinion. Yet it is possible that it furnishes the key to the differences between them. C. Z.

APPEAL AND ERROR—HARMLESS ERROR—PRESUMPTION OF PREJUDICE.—Action on an insurance policy. The defendant sought to impeach the general good character of a material witness. No evidence of his general good character was presented. The judge, in charging relative to weighing the testimony of such witness, stated that the good character of the witness might be considered. On appeal it was *held*, that it could not be said that such error was harmless and appellant was entitled to a new trial. *Sandersville Oil Mill Co. v. Globe and Rutgers Fire Insurance Co.* (Ga. 1924) 124 S. E. 728.

The holding in this case indicates that the court considers an error as presumptively prejudicial unless the contrary is made to appear, and is an illustration of how the courts still cling to this doctrine which Wigmore denounces as having "done more than any other one rule to increase delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litiguous gambling". I WIGMORE ON EVIDENCE, 2nd ed., sec. 21. The history and development of this doctrine are dealt with in a note in 20 MICH. L. REV. 442. The doctrine finds a great deal of support, especially in the less recent cases. It has been often held that the giving of an erroneous instruction will be presumed to be prejudicial to the appellant and the burden of proof rests on the appellee to show affirmatively from the record that no prejudice resulted. *Cleary v. City R. Co.* 76 Cal. 240; *Stanley v. Taylor,* 160 Ia. 427. And it is similarly held when the error is in the admission of improper evidence. *National Biscuit Co. v. Nolan,* 138 Fed. 6. There are also the less extreme holdings to the effect that if the evidence improperly admitted or excluded was material prejudice will be presumed, *Sills v. Burge,* 141 Mo. App. 148, but if it was immaterial then the appellant must show prejudice. *Brown v. Western Union,* 92 S. C. 354. That the ruling in the instant case is mischievous is apparent. Amidon, "Quest for Error and Doing Justice", 40 AM. L. REV. 681; Wigmore, "New Trial for Erroneous Rulings on Evidence", 3 COL. L. REV. 433. But there is a practical difficulty of laying down any hard and fast rule that will not work hardship on the litigants in many instances, because of the fact that it is very difficult to estimate just what the result of the error has been. Perhaps the most satisfactory way of dealing with the problem would be to resort to the old orthodox common law rule stated in *Tyrwhitt v. Wynne,* 2 Barn. & Ald. 554, 559, to the effect that error apparent on the face of the record is not sufficient for ordering a new trial, but it must appear to the judges upon all the evidence that the truth had not been reached. Judge Story pointed the way in this country when he said, "If therefore upon the whole case justice has been done between the parties and the verdict is substantially right no new trial will be granted although there may have been some mistakes committed at the trial." *M'Lanahan v. Ins. Co.* 1 Peters (U. S.) 170, 183. This would at least obviate the requirement of infallibility on the part of the trial judge and would necessitate prejudice being perceived rather than presumed. The modern tendency is very distinctly in this direction as is evident from an examination of the more recent cases. *Del Visco v. Electric Co.* 235 Mass. 415; *Shelton v. Sydnor,* 126 Va. 625; *Smith v. U. S.* 267 Fed. 665. In many jurisdictions the disregarding of technical errors is made compulsory by statute. For these statutes and their effect see I WIGMORE ON EVIDENCE, *supra;* and 20 MICH. L. REV. *supra.*

AUTOMOBILES—LIGHTS.—In a prosecution for violation of a statute requiring all motor vehicles "in use on public highways" to display lights in a certain way, it was contended that since the defendant's car was parked at the curb it was not "in use" within the meaning of the statute. *Held,* that since the statute provided that the lights should be visible "in the direction in which

the motor vehicle is proceeding" it was evident that the legislature did not intend to include parked cars within the class. *Griffin v. McNeil* (Ia. 1924) 201 N. W. 78.

This raises an interesting question. The power of the state or a municipality to regulate on this subject generally, cannot be doubted. *Christy v. Elliott,* 216 Ill. 31; *Commonwealth v. Boyd,* 188 Mass. 79; *State v. Swagerty,* 203 Mo. 517. The real question is that raised by the court in the principal case when it says, "Was appellee's automobile in 'use' within the meaning of the statute while standing by the side of and parallel with the curbing in front of the residence where it had been temporarily stopped? That a motor vehicle may, in some circumstances, be in use although stopped upon the street as where the exigencies of traffic make it necessary, is probably true. * * * The fact that appellee intended later to continue his journey home in the automobile is not controlling. It was not at the time in question in *use* in the statutory sense." The same court in a case arising under the code provision that was supplanted by that under which the prosecution in the principal case arose, interpreted the phrase, "operated or driven upon the streets or public highways", not to apply to parked cars. *City of Harlan v. Kraschel,* 164 Ia. 667. In *State v. Bixby,* 91 Vt. 287, a case involving the interpretation of a similar statute, the court held that the word "operated" did not include cars parked at the curb. Much the same reasoning was used as in the principal case, for there the statute provided that the lights should be visible a certain distance *"in the direction from which such auto or motor vehicle is proceeding".* In the court's opinion, this latter provision was indicative of an intent on the legislatures part, to include only automobiles in actual use and operation. In a Utah case where a car was being used to tow a disabled one and the disabled car did not display lights according to a statute requiring cars in "use" to do so, it was held, "that it was the intention of the legislature in adopting the statute to limit its provisions to such cars as were actually being used on the public highways or streets, that is, to such as were being driven by their own power * * * and not to include every motor vehicle that may be moved in some manner on the streets or highways." *Musgrave v. Studebaker Bros. Co.* 48 Utah 410. In *Stroud v. Water Commissioners,* 90 Conn. 412, the word "operated" was held to "include such stops as motor vehicles ordinarily make in the course of their operation". This was a civil case for damages, however, and did not concern quite the problem presented in the other cases cited but does seem to indicate the one concession that the courts have made in their interpretation of the word "operation". In another tort case where a car was temporarily stopped the court held that the car did not cease to be "driven", saying that, "The statute must be read with reference to its plain spirit and intent." *Jaquith v. Worden,* 73 Wash. 349. In a prosecution under a statute using the word *"operated"* but which did not specify that the lights should be visible a certain distance "in which the vehicle was proceeding", the court held that the statute covered cases where the car made ordinary stops and was at rest temporarily. *Commonwealth v. Henry,* 229 Mass. 19. A survey of the cases would seem to indicate that where the statute uses such words or phrases as, *"operated", "driven",* or *"in use",* the courts will ordinarily construe them to not include

parked cars but will concede that they do include cars stopped momentarily for business purposes. It would seem then that unless there be a state statute or municipal ordinance which requires lights on automobiles in operation or "standing" on the streets, the authorities are powerless to prosecute anyone for parking without lights. This is especially true if the only statute or ordinance covering, in specifying the distance the lights shall be visible, uses the words, "in the direction in which the motor vehicle is proceeding." This seems to be a rather artificial interpretation and yet is perhaps correct. It would seem to call for a corrective ordinance by our municipal authorities.

BILLS AND NOTES—MEANING OF "COMPLETE AND REGULAR ON ITS FACE." —The plaintiff was the maker of the note in suit which bore interest at 6 per cent before maturity and 8 per cent thereafter. By statute the whole interest clause was void in contracts bearing a higher rate of interest after maturity than before. The defendant purchased the note without actual notice of the equities between the original parties to the note but the plaintiff contended he was not a holder in due course within the meaning of §52 of the Negotiable Instruments Law (previously adopted in that state) which provides that the note must be "complete and regular on its face." *"Held,* that there was nothing in the interest clause to indicate that the note did not come within the requirements of §52. *Allen v. Cooling* (Minn. 1924) 200 N. W. 849.

It has been suggested that as cases wherein the instrument is lacking in some of its essentials are cared for by §1 and 14 of the N. I. L. and as cases in which there is a discrepancy in terms or some mark of the intent of the parties differing from the terms of the note are controlled by theories of actual or constructive notice, there is no need to invoke §52 except in extraordinary cases such as the absence of federal revenue stamps. See 22 COL. L. REV. 159, based on *Lutton v. Baker,* 187 Ia. 753, since over-ruled in *Farmers' Savings Bank v. Neel,* 193 Ia. 685, and *Richardson v. Cheshire,* 193 Ia. 930. The courts have recently held in revenue stamp cases that §52 applies only to the condition and appearance of the note itself, its terms, execution, and indorsement, rather than to such collateral matters as revenue stamps. *Jordan v. Goodside,* 123 Me. 330; *Solomon Nat. Bank v. Birch,* 111 Kan. 283. It would seem that the latter view is correct as giving some real meaning to §52. Although these last two cases would eliminate application of this section to matters extraneous to the real terms of the contract, it is submitted that in some respects an instrument may be incomplete or irregular under §52 and still have all the requisites laid down in §1. A due date is not a necessary attribute of negotiable paper, for in its absence we may have a demand note, §7 N. I. L.; *Riddle v. Bank of Montreal,* 130 N. Y. S. 15. Yet if such date be incomplete as "on or before 4— after date" the note is not complete and regular. *In re Philpott's Estate,* 169 Ia. 555. And "on December 1, pay to the order of G. W. Laing" was regarded as incomplete and irregular in *United Ry. & Logging Co. v. Siberian Commercial Co.* 117 Wash. 347; 19 A. L. R. 506. Though this last decision may be questioned as an unreasonable interpretation of the due date as indefinite, there is no doubt that the problem falls within the purview of §52. If the note in the instant case were payable "with interest at .... per cent" under the authority

of the above cases it would not be complete and regular on its face. As every purchaser is bound to know the statutory provisions affecting the note, the interest clause would tend to impart notice of defects to him. *Farmers' Savings Bank v. Neel, supra.* Another recent case held that though a signature of the maker "the Chiatovich Ranch, by J. M. Chiatovich" might hold the purchaser chargeable with notice of the character of the maker's organization, still failure to disclose the exact identity of the maker whether corporation, partnership, or individual does not make the note incomplete or irregular. *W. M. Barnett Bank v. Chiatovich* (Nev. 1925) 232 Pac. 206. It is submitted that as the defect with which the purchaser is chargeable is in a minor part of the contract and does not affect the principal debt, that the instant case and *Bank v. Chiatovich, supra,* are correct in not construing interest clauses and exact definition of the maker as such incompleteness and irregularity within the meaning of §52 as to subject the purchaser to the equities arising as to the principal of the note.

BILLS AND NOTES—RENEWAL NOTE AS WAIVER OF DEFENSE OF FRAUD.—A note, procured by fraudulent representations, was transferred to plaintiff bank, which took with notice of the fraud. The maker consequently, with full knowledge of the fraud, executed a renewal note to the plaintiff. Upon appeal it was *held,* that the giving of the renewal note was not, as a matter of law, a waiver by the maker of the defense of fraud in the inception of the original note. Upon a second appeal, the court *held,* that it was bound by its decision upon the first appeal, although the doctrine there laid down had been expressly overruled since that decision. *Bank v. Bernard* (Ia. 1924) 201 N. W. 59.

The general rule is that, as between the original parties, and as against transferees who are not bona fide purchasers, a renewal note is open to all defenses which touch the consideration of the original note. 7 CYC. 880; 8 C. J. 444; *Bank v. Kellogg,* 4 S. D. 312; *Bank v. Westby,* 41 N. D. 276. This includes fraud. *Auld v. Walker,* 107 Neb. 676; *Kelly's Heirs v. Allen,* 34 Ala. 663; *Hunt v. Rumsey,* 83 Mich. 136. This defense, however, can be cured by a renewal under circumstances amounting to a waiver. 7 CYC. 881; 8 C. J. 444; *Roess Lumber Co. v. Bank,* 68 Fla. 324. Thus, the giving of a renewal note with knowledge, on the maker's part, of the fraud in the inducement of the original, is generally held to be a waiver of that defense. *Bank v. Jones,* 196 Ia. 1071 (referred to in the principal case as overruling the court's former view); *McGinnis v. McCormick,* 28 Ga. App. 144; *Stewart v. Simon,* 111 Ark. 358, Ann. Cas. 1916 A, 825, and note p. 826. In Iowa, even the defense of forgery of the original note may be waived by a renewal with knowledge thereof. *Bank v. Williams,* 143 Ia. 177. But where such renewal is made upon the assurance of the payee that he will sell the property for which the original note was given and relieve the makers, the fraud is not waived. *Strickland v. Graybill,* 97 Va. 602. On the other hand, where the renewal was to an assignee with notice of the original note, but upon the assurance of the original payees that certain defects in the consideration would be removed, the defense was waived. *Griffith v. Trabue,* 58 Tenn. (11 Heisk.) 645. So, if the maker,

when he renewed, had knowledge of facts which should have given him notice of the fraud, or if he could have discovered the fraud by the exercise of ordinary diligence, he waives that defense. *Padgett v. Lewis,* 54 Fla. 177; *Montfort v. Americus Guano Co.* 108 Ga. 12. But if the renewal note was also induced by fraudulent representations, it is not a waiver of the original fraud. *Culver v. Haggard* (Tex. Civ. App. 1923) 252 S. W. 1092. It is held, therefore, that the giving of a new note, unexplained, to the payee of the original note, is not conclusive evidence of waiver, even if the maker knew of his defense against the original note. *Wheelock v. Berkeley,* 138 Ill. 153. And the defense is not waived if, at the time the renewal is given, the maker states that he will resist suit to enforce payment thereof, or that he intends to rely upon his defense to the original note. *Trust Co. v. Kriebel,* 49 Cal. App. 614; *Bank v. Navins,* 70 Colo. 491. The defense of fraud in the original note is not open to the maker, however, as against a bona fide purchaser of the same, to whom a renewal note is given; 7 Cyc. 882; 8 C. J. 445; *Bank v. Halsey,* 109 Ala. 196; *Hopkins v. Boyd,* 11 Md. 107; *Goodwin v. Conklin,* 85 N. Y. 21; and the same is true where renewal paper issued to the original payee is transferred before maturity to a bona fide purchaser. *Davenport v. Stone,* 104 Mich. 521. However, where the renewal is to the original payee at the request of an innocent indorsee of original note, it does not waive the defense of fraud as against the former. *Sawyer v. Wiswell,* 91 Mass. (9 Allen) 39. For the effect of renewal of usury, see note in 13 A. L. R. 1213.

CARRIERS—LIABILITY OF CONSIGNEE FOR FREIGHT IN CASE OF UNDERCHARGE BY THE CARRIER.—The agent of the plaintiff delivered the goods in question to the defendant upon payment of the charges then demanded. Defendant was the consignee and owner of the goods. Plaintiff sued him for the balance of the legal rate as published by the Interstate Commerce Commission. *Held,* that when the consignee accepted the goods from the carrier, he bound himself to pay the legal charges on the same. Since there was only one legal rate, that fixed by statute, defendant was liable for the unpaid balance. *Nashville & St. Louis Ry. Co. v. Gilliam* (Ala. 1924) 101 So. 889.

It is well settled that when a carrier quotes a lower rate than that published in accordance with the Interstate Commerce Act, or similar state statutes, it can demand the lawful rate before surrendering the goods. *Gulf, etc. Ry. v. Hefley,* 158 U. S. 98; *Southern Ry. v. Harrison,* 119 Ala. 539. Further, it can sue for the amount of the undercharge after the goods have been delivered. *Union Pac. Ry. Co. v. American Smelting and Refining Co.* 202 Fed. 720. But while the authorities agree that the carrier can and must collect the full amount of the legal rate, they are not in perfect harmony as to who is liable for the undercharge. It seems that in any event the consignor, because of his contractual relation with the carrier, is liable for any balance; since he must enter into the contract relation with constructive knowledge of the true rate. *St. Louis Southwestern Ry. Co. v. Gramling,* 97 Ark. 353; *Baltimore & O. S. W. Ry. v. New Albany Co.* 48 Ind. App. 647. Or, if the consignee is the owner of the goods at the time of delivery, the carrier is recognized as having the right to collect the undercharge from him,

on the ground of his liability for the legal freight charges as the owner. *Central of Georgia Ry. Co. v. Willingham,* 8 Ga. App. 817. But it is generally said that the liability of the consignee arises by the acceptance of the goods. As a matter of law, it appears that the only condition upon which the consignee is entitled to the delivery of the goods is the payment of the freight charges. *Western & Atlantic Ry. Co. v. Underwood,* 281 Fed. 891; *A. T. S. F. Ry. Co. v. Wagner,* 102 Kan. 817. Regardless of special contract with or misinformation by the carrier, the consignee is charged with knowledge of the legal rates fixed by statute, which determine the amount of the carrier's lien. In the words of the Supreme Court in *Pittsburg Ry. Co. v. Fink,* 250 U. S. 577, "The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier." *Waters v. Pfister & Vogel Co.* 176 Wis. 16; *Great Northern Ry. v. Hyder,* 279 Fed. 783. Nor can the consignee invoke the principle of estoppel against the right to collect the legal rate; for by the statute, he can rely only on the legal rate. Nor will the courts allow estoppel to become the means of avoiding the requirements as to equal rates. *Pittsburg Ry. Co. v. Fink,* 250 U. S. 577. Though it has been held, as in *Pennsylvania Ry. Co. v. Titus,* 142 N. Y. S. 43, that a consignee who is merely an agent of the shipper and known as such by the carrier is not liable for an unpaid balance, the later cases must be considered as overruling such doctrine. *York & Whitney Co. v. N. Y. C. Ry. Co.* 256 U. S. 406; *Western & Atlantic Ry. Co. v. Underwood,* 281 Fed. 891; *Pittsburg Ry. Co. v. Fink,* 250 U. S. 577. The obligation of the consignee seems properly to be regarded as a matter of law, and neither the relation of the consignee to the shipper nor the hardship in the individual case should defeat the liability. The purpose of the statute, as construed by the courts, being to prevent discrimination in rates, whether by agreement or mistake, it is difficult to see why we should ever recognize such agreement or mistake as a defense. *Central of Georgia Ry. Co. v. Willingham,* 8 Ga. App. 817; *Western & Atlantic Ry. Co. v. Underwood,* 281 Fed. 893; *A. T. & S. F. Ry. Co. v. Wagner,* 102 Kan. 817.

CONFLICT OF LAWS—MARRIAGE—RECOGNITION OF INDIAN MARRIAGES AND DIVORCES.—In an action by the three plaintiffs to recover the balance of the allotment of Ellen Proctor, their mother, a full blooded Creek Indian, they asserted that their father, Louis Proctor, also a Creek Indian, was never properly married to her, and consequently inherited none of her allotment. The facts of the case show that Louis Proctor was first married to the mother of Ellen Proctor by the Indian custom of cohabitation as man and wife; that later, he began to cohabit with Ellen Proctor, her mother continuing to live with them. Evidence showed that his conduct, all of which took place on the tribal reservation in conformance with the Indian customs, constituted a divorce from the mother of Ellen Proctor and a proper marriage to Ellen Proctor; from which the three plaintiffs were born. *Held,* that marriages and dissolutions thereof, according to Indian customs, will be upheld in the absence of federal laws rendering such customs invalid. The marriage of Ellen

Proctor with Louis Proctor being in accordance with their tribal customs will be recognized as valid and enforced as such in the courts of the state. *Proctor et al. v. Foster et al.* (Okla. 1924) 230 Pac. 753.

Authorities are almost unanimous in holding, as in the principal case, that marriages between tribal Indians in accordance with their Indian laws and customs are to be upheld when not forbidden by federal statute. *Yakima Joe v. To-is-lap,* 191 Fed. 516; *Wall v. Williamson,* 8 Ala. 48; *Moore v. Nah-con-be,* 72 Kan. 169; *Kobogum v. Jackson Iron Co.* 76 Mich. 498; *Oklahoma Land Co. v. Thomas,* 34 Okla. 681. Courts have likewise upheld such a marriage of a white man with an Indian woman, when both parties were living with the tribe and under its laws. *Morgan v. McGhee,* 24 Tenn. 13; *La Framboise v. Day,* 136 Minn. 239. This is not a recognition of the common law marriage, but of a marriage valid by the customs of the Indian tribe. *Buck v. Branson,* 34 Okla. 807. But if the parties are no longer living with the tribe and under its laws, a marriage by them will not be recognized as valid unless in conformance with the state laws. *State v. Ta-cha-na-tah,* 64 N. C. 614. Likewise, the validity of an Indian "divorce" by separation is recognized only when it occurs at such a time and place that the parties, whether or not one is a white person, are still subject to their tribal customs, not having placed themselves under the law and authority of any state. *Wall v. Williamson,* 8 Ala. 48. If they have removed from their tribal reservation to remain permanently without its boundaries, they are subject in all their actions to the law of that state in which they reside; and both marriage and divorce must be in conformance to its laws. On the general subject, see Goodrich on "Foreign Marriages and The Conflict of Laws", 21 MICH. L. REV. 743 at 761.

CRIMES—ALIBI—BURDEN OF PROOF.—In an indictment for arson the defense was an alibi. The trial judge instructed that the burden was on the defendant to establish such defense by a preponderance only, or greater weight of the evidence. *Held,* no error, since immediately after this charge the court instructed the jury to consider all the evidence offered, including that as to the alibi, in determining whether the evidence as a whole was sufficient to convince them of the defendant's guilt beyond a resonable doubt. *Copeland v. State* (Ga. 1924) 125 S. E. 781.

There is considerable confusion as to who has the burden of proof when the defense is an alibi. Some cases broadly assert with out qualification that the burden of proving an alibi is on the defendant. *U. S. v. Olais,* 36 Phil. Rep. 828. But the large majority of the courts follow up such an instruction with statements similar to that in the instant case, that the guilt of the accused must appear beyond a reasonable doubt from all the evidence offered. *State v. Pistona,* 127 Wash. 171; *Comm. v. Gutshall,* 22 Pa. Super. 269. These courts seem to be considering the alibi defense as a separate and distinct issue. If it is established beyond a reasonable doubt then the defendant is entitled to an acquital. *People v. Stoneking,* 289 Ill. 308. But if not clearly established the evidence will nevertheless be considered along with all the rest in determining the guilt of the accused. Thus, in *State v. Worthen,* 124 Ia. 408, the court says, "The rule is that an alibi as a distinct issue must be established by a

preponderance of evidence * * * but if the evidence in support thereof falls short, it is nevertheless to be considered by the jury and if upon the whole case, including evidence of the alibi, there is a reasonable doubt of the defendant's guilt, there should be an acquittal". The same doctrine is expressed in *State v. Watson,* 7 S. C. 63; and *State v. Hier,* 78 Vt. 488. It may be that the court in the instant case entertained some such doctrine or it may be that the court, while holding that the statement was wrong, considered the error as corrected by the added statement to the effect that the burden was on the prosecution to prove the guilt beyond a reasonable doubt. The former supposition would be more in line with the other Georgia decisions on the point, to the effect that the accused must prove his alibi to the satisfaction of the jury, *Kirksey v. State,* 11 Ga. App. 142, and that the alibi must be such as to exclude any possibility of the defendant's presence at the time and place of the crime. *Johnson v. State,* 59 Ga. 142. But regardless of the ground upon which the court justified the holding in the instant case, it seems wrong in principle. Although it is often held in similar instructions that the defect is cured by adding the caution that the accused must be found guilty beyond a reasonable doubt, all the evidence considered, *Odeneal v. State,* 128 Tenn. 60; *People v. Winters,* 125 Calif. 325; the better doctrine is *contra.* Thus Philips, J., in ruling on an instruction identical with the one in the instant case, says, "The vice was not, therefore, cured by adding the subsequent words. The two propositions embraced in the same paragraph are legally incongruous and were well calculated to confuse the understanding of the jury as to how they should apply the rule of reasonable doubt to a state of facts * * *". *Glover v. U. S.* 147 Fed. 426. The true theory would seem to be that the burden of proving every essential element of the crime is on the prosecution throughout the trial and this includes proving that the accused was then and there present at the time the act was committed. *Peyton v. State,* 54 Neb. 188. But when the prosecution has established its prima facie case, the defendant who is relying on an alibi, has then, not the burden of proving his alibi, but the burden of coming forward with evidence of an alibi to the extent of raising a reasonable doubt in the minds of the jury; that is, the defendant is called upon to produce evidence of his alibi and to establish it, not beyond a reasonable doubt, not by a preponderance of evidence, but to such a degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of his guilt. *Briggs v. People,* 219 Ill. 330; *State v. Thornton,* 10 S. Dak. 349. But strictly speaking the burden of proof in the defense of an alibi is never on the defendant. 5 WIGMORE ON EVIDENCE, 2nd ed. sec. 2512.

CRIMINAL LAW—FAILURE TO PREVENT A FELONY AS GROUND FOR CONVICTION FOR AIDING AND ASSISTING.—The accused was conductor of a train in one coach of which fifty-eight gallons of whiskey were transported, in such shape that he could not but have known of its presence. On an appeal from a conviction for knowingly transporting intoxicating liquor it was *held,* that the accused should have seen, as far as was reasonably within his power, that the law was observed on his train and the conviction was affirmed. *Powell v. U. S.* (1924) 2 F. (2d) 47.

Although some cases unreservedly state that there must be some affirmative word, act, or deed, by the accused, before he can be convicted of participating, or aiding and assisting in the crime, *Hicks v. U. S.* 150 U. S. 442; *Harper v. State,* 83 Miss. 402, it is conceded that no particular acts are necessary, *Jones v. State,* 174 Ala. 53, and no physical part need be taken in the crime, *Vogel v. State,* 138 Wis. 315, but merely consenting to the crime is sufficient to render the party an aider and abettor. *State v. Maloy,* 44 Ia. 104. In the instant case it can not be contended that the accused did not aid and assist in the commission of the crime, for although his assistance amounted merely to failing to interfere, nevertheless without such assistance the crime could not have been accomplished. The issue then must be, not the nature of the act, but whether there was a duty on the part of the accused to interfere in the commission of the felony. If there was such duty to act, then the accused was properly convicted for it is obvious that a criminal intent may be predicated upon the failure to act where duty requires. Thus, "Every negligent omission of a legal duty whereby death ensues, is indictable either as murder or manslaughter". 1 BISHOP CRIMINAL LAW, 8th ed., sec. 314. It is clear that the mere negative assent of a casual spectator who fails to interfere in the commission of a crime does not render him a party to the crime as an aider or abettor. *Jones v. People,* 166 Ill. 264. And for a very recent case see *State v. Covell,* (Ore. 1925) 232 Pac. 628. Thus an instruction that if the accused stood by during an assault on a woman and took no hand to prevent it, he was guilty as an accessory, was held erroneous. *State v. Fox,* 70 N. J. L. 353. And where the victim of a robbery called for help and a bystander replied that it was none of his funeral, there was no such neglect of duty as to render him liable as a participant or aider. *Golden v. State,* 18 Tex. Cr. App. 637. Even under a statute which provided that any party who stood by during the commission of a felony, without rendering such aid to prevent it as was within his power, was guilty as an accessory during the fact, it was held that one was under no duty to hazard his personal safety by such interference, and hence a man who stood by while a woman was being robbed was not guilty as an accessory. *Farrell v. People,* 8 Colo. App. 524. There are many such illustrations, but they are clearly distinguishable from the instant case. Here the accused was not a casual spectator, but a conductor in charge of the train and by the laws of the state a special police officer, empowered to make arrests, and like other officers, charged with enforcing and upholding the law. Clearly such officers owe a legal duty to interfere and attempt to prevent the perpetration of crimes, and their failure to do so renders them liable to criminal prosecution. *State v. Flynn,* 119 Mo. App. 712; *People v. Diamond,* 72 N. Y. App. Div. 281. Thus, as he owed a duty to prevent the commission of the felony, and by his failure so to interfere rendered such aid and assistance that the crime was successfully accomplished, it would seem that the decision of the instant case was correct in holding him guilty. A somewhat similar doctrine may be found in the Express Company cases where it was held that if the agents of the company knew, or had reason to know, that the packages delivered contained intoxication liquors the company was guilty of transporting liquor in violation of the statute. *Adams Express Co. v. Com.* 129 Ky. 420.

And also in those cases where a person, whose duty it is to guard property, leaves his post so as to facilitate the theft is held guilty as an accessory. *State v. Poynier,* 36 La. Ann. 572.

DEEDS—GRANTEE TEMPORARILY INSANE—WIFE AS AGENT WITH IMPLIED AUTHORITY TO ACCEPT.—A chattel mortgage was given to secure and extend time of payment of a prior unsecured obligation. The mortgagee being at the time temporarily insane, formal delivery of the deed was made to his wife, who remained at home taking care of his property. The mortgage was mailed to the county recorder for record and received just after the mortgagor took his own life. Attempted ratification of the acceptance by the mortgagee was ineffective, being made after the death of the mortgagor. *Held,* the law would presume a general authority in the wife to preserve the property of her husband, and the acceptance by her of the mortgage was therefore effective. *Barron v. McChesney* (Iowa 1924) 200 N. W. 197.

While the decision in the present case was based on an implication of agency in the wife for her husband, it would seem that it might have been supported by the general presumption of an acceptance by the grantee of a deed beneficial to him. This rule, well expressed in *Garnons v. Knight,* 5 Barn. & C. 671, is very largely followed in this country. *In re Bell's Estate,* 150 Iowa 725; *Clark v. Creswell,* 112 Md. 339; *Matheson v. Matheson,* 139 Iowa 511; *Diefendorf v. Diefendorf,* 8 N. Y. S. 617, approved in 132 N. Y. 100. That the rule extends to mortgages is well settled. *Atwood v. Marshall,* 52 Neb. 173; *Washington v. Ryan,* 64 Tenn. 622; *Breathwit v. Bank of Fordyce,* 60 Ark. 26, and has been often applied where delivery was to a third person. *Rhea v. Planters' Mutual Ins. Assn.* 77 Ark. 57; *Reynolds v. Black,* 91 Iowa 1. The refusal of some courts to make such an implication is vigorously expressed in *Welch v. Sackett,* 12 Wisc. 270. It is worthy of note that, while reaching conflicting results, the courts in both this case and *Garnons v. Knight, supra,* base their arguments on the erroneous premise that a deed is contractual in nature, making offer and acceptance necessary. This implies the dependence of acceptance on tender or delivery. Delivery, it is submitted, is an act of the grantor, unilateral in its nature, *Thatcher v. St. Andrew's Church,* 37 Mich. 263. Acceptance is a personal privilege of the grantee in the nature of disclaimer, either preventing the vesting of title, or operating to divest it. 2 TIFFANY ON REAL PROPERTY, 2d. ed. sec. 463. See I DEVLIN ON DEEDS, 3d. ed. sec 287. A court refusing to imply acceptance is forced to some such straining of the doctrines of agency as we have in the present case. In other jurisdictions the decision finds adequate support in the more general rule expressed above.

EQUITY—JURISDICTION IN MATTERS INVOLVING PERSONAL RIGHTS.—Defendant had "vamped" the plaintiff's husband so as to deprive the plaintiff of the love, support, and consortium of her husband, and it further appeared that defendant was insolvent. The lower court granted an injunction restraining the defendant from association or communicating with plaintiff's husband or interfering with the conjugal relations of plaintiff and her husband. On error,

held, (two judges dissenting), that such a decree was an unwarranted extension of equity jurisdiction. *Snedaker v. King* (Ohio 1924) 145 N. E. 15.

This decision is based on the theory often asserted by text-writers and courts, that the jurisdiction of equity is confined to the protection of "property rights" only, and does not extend to the protection of purely "personal rights". BISPHAM, PRINCIPLES OF EQUITY, 9th ed., p. 81. The court overlooked the fact that property rights were involved in the duty of the husband to support the wife; see OHIO GEN. CODE, sec. 7997; the term "property", in connection with equity jurisdiction, being used in the broad sense of interests of substance (touching the pocket-book,) as distinguished from interests of personality. Aside from that error, the rule asserted by the court, that equity can not act to protect personal rights, has been shown by modern writers to be arbitrary and unreasonable, having no more substantial foundation than the dictum of Lord Eldon in *Gee v. Pritchard,* 2 Swanst. 402. Long, "Equitable Jurisdiction to Protect Personal Rights", 33 YALE L. JR. 115. The rule continues to be asserted, but, as said in *Hawks v. Yancey* (Tex. 1924) 265 S. W. 233, it is known chiefly by its breach rather than its observance. True, most of the cases accomplish the desirable result without frankly declaring that they are enforcing personal rights—they find in the rights before them a nominal or fictitious property right. In this way equity has protected the clearly personal rights of health, reputation, feelings of affection and self-respect. See notes in 37 L. R. A. 783 and 14 A. L. R. 295. In some cases the courts have had the courage openly to repudiate the doctrine. *Ex parte Warfield,* 40 Tex. Cr. 413; *Witte v. Bauderer* (Tex. 1923) 255 S. W. 1016; *Stark v. Hamilton,* 149 Ga. 227. See also Pound, "Equitable Relief against Defamation and Injuries to Personality", 29 HARV. L. REV. 640; note, 18 MICH. L. REV. 335. Some writers and judges have mentioned the practical difficulty of enforcing a decree involving marital relations; but it seems that such considerations are not relevant to the question of jurisdiction in the technical sense of power, the expediency of granting injunctive relief being a matter of discretion for the trial judge to determine. *Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60. Furthermore, such an injunction seems no harder to enforce than the numerous decrees rendered in strike disputes and other cases. The true test of equity jurisdiction seems to be in the existence of a justiciable right for which there is not a full, adequate and complete remedy at law. 33 YALE L. JR. 115 It can hardly be contended that the remedy at law for alienation of affection is adequate—that money damages can fully compensate for the continual humiliation of the wife or restore the good name and reputation of the family. The legal remedy is particularly inadequate in the instant case by reason of the defendant's insolvency. Considered in the light of the above reasons, it seems that the majority opinion, that the vampire is entitled to continue her course unrestrained and that she is only subject to further suits for damages which she will be unable to pay, not only defeats justice, but is against the weight of modern authority.

EVIDENCE—SEARCH AND SEIZURE—ILLEGALITY.—In a recent case, federal officers, smelling narcotics, entered defendant's home in search of drugs.

While therein they found a quantity of whiskey and other intoxicants, which they seized. When the government attempted to use the seized liquor as evidence in a prosecution for violation of the prohibition act the court excluded it and *held,* that the officers were empowered to enter and search only with relation to the particular offense they had good reason to believe was being committed. The court said, "The odor of opium being detected was evidence that the anti-narcotic act was being violated, but that had no relation to the prohibition act and no right was present to search the premises for violation of that act." *U. S. v. Boyd,* 1 F (2d) 1019.

This presents us with an interesting question. When a legal search is being made and evidence of another crime is discovered, how far should the courts go in excluding it as evidence obtained by illegal search and seizure? Just what is illegal search and seizure under such circumstances? In *People v. Preuss,* 225 Mich. 115, an officer armed with a warrant authorizing a search for stolen beans, discovered intoxicating liquor. It was held that the liquor could not be seized, for such a search was unreasonable. Apparently the theory on which the courts proceed is simply that any search or seizure not authorized by the warrant, or by the criminal offense being committed in the presence of the officers, is unreasonable. The Michigan court however, in *People v. Chomis,* 223 Mich. 289, has held that where an officer was lawfully in a near-beer saloon and saw a bottle with a suspicious label, which he summarily seized, it was not an unreasonable search and seizure. The Kentucky court in *Commonwealth v. Dincler,* (Ky. 1923) 255 S. W. 1042, in a case of similar nature, held to the contrary. In this latter case the officer held an invalid warrant it is true, but he was lawfully in the defendant's place of business, for no warrant was necessary to enter—he could have entered as any other citizen on business—and the discovery of the bottle would seem to have authorized his seizure. In *People v. Preuss, supra,* the court distinguishes its holding from that in *People v. Woodward,* 220 Mich. 511, by saying that in this latter case the officers, who had entered lawfully in an endeavor to quell a riot within, had merely seized liquor that was in plain sight on the table before them, whereas in the case then being considered, a search had been necessary. It would seem then, that where a lawful entry has been made, either with or without a warrant, a seizure of evidence of some crime other than that for which the entry was affected, is not in violation of the constitutional provision against unreasonable searches and seizures when the property so seized is fully disclosed to sight and hand. *People v. Woodward, supra; State v. Quinn,* 111 S. C. 174; *State v. McCann,* 59 Me. 383; *State v. Bradley,* 96 Me. 121. If a search be necessary, the discovery cannot be of use to the authorities however. The Kentucky court, which has gone a long way in its efforts to preserve the constitutional provisions against search and seizure, has held, that where an officer knocked at a door on a lawful mission and obtained a sight of liquor illegally possessed when the door accidently swung open at his knock, the officer may not even testify as to what he saw. *Simmons v. Commonwealth,* (Ky. 1924) 262 S. W. 972. The fourth amendment was intended to guarantee security against wrongful searches and seizures where there was an unlawful invasion of the sanctity of the house of the citizen, or a violation of the private

security of the person or property, by officers of the law acting under legislative or judicial sanction. *Adams v. N. Y.* 192 U. S. 585; *State v. Mausert,* 88 N. J. L. 286. It would seem therefore, that if a lawful entry has been made and evidence of some crime other than that mentioned in the warrant is discovered while a bona fide search for the property mentioned is being made, it would not be an unreasonable search or seizure. Of course if a search is being made for some article that could not, by any stretch of the imagination, be conceived to be in the place or location where the unexpected discovery of evidence is made, it could be said to have been found by an unreasonable search. In the principal case the lawful entry, coupled with the fact that a search for drugs would undoubtedly call for a close inspection of the premises, would seem to justify the conclusion that the discovery of liquor was a perfectly reasonable one and that its seizure was not the result of an unreasonable invasion of any constitutional right of the defendant.

INSURANCE—IS A SUBSTITUTED POLICY A NOVATION?—The Aetna Life Insurance Company issued a seven year term policy to Dunken on application made and accepted while the insured was domiciled in Tennessee. The policy contained a clause giving the insured an option to exchange the policy for a twenty payment life policy among others, the new policy to be issued with the same date and age as the original policy. Dunken moved to Texas where he exercised the option. The old policy was cancelled and a new one issued, the application for the new policy stipulating the sufficiency of the original application. After delivery of the new policy the insured died, and the insurance company refused to pay because of the non-execution of a loan contract to cover premium adjustments. Recovery on the policy plus statutory damages for unreasonable delay was allowed by the state courts on the ground that the second policy was a novation with the place of making in Texas, but in proceedings in error the United States Supreme Court *held,* that the second policy was not a novation, but a mere alternative performance of the original contract and governed by the law of Tennessee, its place of making. *Aetna Life Ins. Co. v. Dunken* (Dec. 15, 1924) 45 Sup. Ct. Rep. 129.

A novation is a mode of extinguishing one obligation by the execution of another, and the substitution of the new obligation for the old one, the effect being to discharge the original agreement. *McDonnell v. Ala. Gold Life Ins. Co.* 85 Ala. 401, 414; 1 PARSONS, CONTRACTS, 9th ed. p. 217; 3 WILLISTON, CONTRACTS, §1865. The question of whether a substituted policy under an option clause is a novation or merely an alternative performance of the original contract has arisen but few times. The weight of authority holds that there is not a novation. *Dannhauser v. Wallenstein,* 169 N. Y. 199; *Silliman v. International Life Ins. Co.* 131 Tenn. 303; *McDonnell v. Ins. Co. supra; Ins. Co. v. Dunken, supra.* The contrary view is taken by *People v. Globe Mutual Life Ins. Co.* 15 Abb. N. C. (N. Y.) 75; *Gans v. Aetna Life Ins. Co.* 214 N. Y. 326. A clause in the policy or a statutory provision permitting the issuance, on failure to pay further premiums, of a full-paid policy for the amount of insurance which the paid-in premiums would buy, would probably come as close to an alternative performance as any substituted policy. With reference

to such a full-paid policy it has been said that there is a continuation of the contract of insurance between the same debtor and creditor upon the same consideration, and there is no intention of the parties to make a new contract discharging the old one. *McDonnell v. Ins. Co. supra.* But in criticism of this position it may be said that the insured now has no rights under the original policy, the intent of the insurance company to that effect being shown by the cancellation of the original policy. The surrender of the rights under that policy is the consideration for the issuance of the new policy, evidencing a new contract of insurance. It is submitted that a full-paid substitute policy is a distinct and separate agreement discharging the original obligation, and hence a novation. *People v. Globe Ins. Co. supra.* In case of a substituted policy on an entirely different plan involving a different period of coverage, different premiums, and different risks, it would seem clear that the obligations of both parties are essentially and substantially different. *Gans v. Ins. Co. supra.* In *Silliman v. Ins. Co. supra,* an attempt was made to differentiate this case on the facts that the new policy contained a later date, and new age risk, but it is submitted these are but a part of the terms of the second policy, and not the only ones capable of creating such substantial change that the substituted policy constitutes a novation. Even if in the instant case the facts of the original application form the basis of the substituted policy, it is submitted that the different periods of coverage, different premiums, and different risk, together with destruction of rights under the first contract, as evidenced by the cancellation of the original policy, are enough to create a novation, with the place of making in Texas either on the theory that the original policy contains a standing offer completed by the exercise of the option in Texas, or that the offer of the insured is accepted when delivery of the new policy occurs in Texas. *Cf. Mutual Life Ins. Co. v. Liebing,* 259 U. S. 209. For a discussion of the effect of the instant case on the Conflict of Laws problem see 23 MICH. L. REV. 643.

MUNICIPAL CORPORATIONS — RIGHT TO EMPLOY COUNSEL IN DEFENSE OF OFFICERS ACCUSED OF CRIME.—Tax payers sought to enjoin the city from appropriating money for the employment of counsel to appear in defense of police officers charged with murder in making arrest; and to aid in the prosecution of other parties accused of killing an officer who was attempting to make an arrest. *Held,* that the municipality had no authority to grant public money in aid of an individual. *City of Corsicana v. Babb et al.* (Tex. Civ. App. 1)924 266 S. W. 196.

It is fundamental that public funds can not be used for private purposes. *Wright v. Walcott,* 238 Mass. 432. And in the instant case the court held there was no public purpose in employing counsel to prosecute the assailants of the officers when there was a state's attorney charged with such duty; and secondly there was not sufficient public interest to justify the employment of counsel to defend public officers accused of crime. There is little authority on the first proposition but what there is seems to support the holding in this case, it having been held that a county board has no power to incur expenses

by employing counsel to conduct criminal prosecutions. *Hight v. Monroe County,* 68 Ind. 575; *Ripley County v. Ward,* 69 Ind. 441. But the authority for the second proposition is by no means uniform. It is said to be within the discretionary power of a municipality to indemnify one of its officers against liability incurred by reason of any act done by him in the bona fide performance of his official duties; and the municipality has the right to employ counsel to defend the officer. 28 Cyc. 454. And Dillon says that a municipality can not assume the defense of a suit in which it has no interest but that it may appropriate money to indemnify officers against liability incurred in the bona fide exercise of their duties even though they have exceeded their legal authority; and that it may vote to defend suits brought against officers for acts done in bona fide exercise of their official duties. I DILLON ON MUNICIPAL CORPORATIONS, 5th ed., sec. 307. In *Cullen v. Carthage,* 103 Ind. 196, it was held that the town had sufficient interest in the matter to enable the trustees of the town to employ counsel to defend an action against a marshal for false imprisonment brought by a person arrested for violating an ordinance of the town. But in Illinois a city can not assume the expense of defending an action against a police officer to recover damages for false imprisonment. *City of Chicago v. Williams,* 182 Ill. 135. An almost identical problem is found in the right of the municipal corporation to reimburse its officers for necessary expenditures incurred in litigation resultant upon a bona fide exercise of their duties. In New York under statutory provisions similar to those in the instant case, it was held that the legislature could not authorize the reimbursement of expenses incurred by public officers in successfully defending themselves against charges of official misconduct. *Chapman v. N. Y.* 168 N. Y. 80. It was similarly held that such expenses were incurred for private purposes and could not be paid from public funds in *Gilbert v. Berlin,* 76 N. H. 470; *State v. Foot,* 151 Minn. 130. Where a mayor was held liable in an action for false imprisonment, it was held that the city was under no obligation to reimburse him, which he could enforce by an action at law, but the opinion indicated that it was discretionary with the town council so that they could reimburse him if they saw fit. *Gormly v. Town of Mt. Vernon,* 134 Ia. 394. And in a similar case it was held that the council might indemnify the mayor or other public officer, for otherwise the various public officers would perform their duties at the peril of individual responsibility for all their mistakes of law and fact, and if the officers were thus responsible they would be too cautious and timid in the exercise of their duties. *Sherman v. Carr,* 8 R. I. 431. *In Leonard and Others v. Inhabitants of Middleborough,* 198 Mass. 221 it was held that a town might appropriate money to reimburse a police officer for expenses incurred in defending himself in an action for malicious prosecution. See note on this case in 21 HARV. L. REV. 625. It was similarly held in *Messmore v. Kracht,* 172 Mich. 120, where cases holding to the contrary are distinguished. The weight of authority seems to be with this latter group of cases holding that it is within the discretion of the municipality to assume the cost of defending its officers against prosecution for acts done in the line of duty. This being so it is submitted that the same arguments apply

to the employing of counsel outright for such defense, and that the instant case is wrong in principle in its holding on this proposition.

NEGLIGENCE—LAST CLEAR CHANCE DOCTRINE—DUTY OF ENGINEER.—The plaintiff, while walking as a trespasser upon the tracks of the defendant railroad, stumbled and fell and was rendered unconscious by a blow on the head. While in this condition, a train passed over him causing severe injuries for which he sought damages. The plaintiff, relying on the doctrine of last clear chance, alleged that the engineer saw him on the track and realized or should have realized, in the exercise of ordinary care, his condition and peril in time to have avoided the accident. The defendant demurred; contending that the complaint did not state a cause of action because it did not aver that the engineer could have avoided the injury after the time when he actually realized that the object on the track was a human being. The demurrer was overruled and a judgment rendered for the plaintiff. *Held,* on appeal, that the judgment was correct. *Southern Ry. Co. v. Wahl* (Ind. App. 1924) 145 N. E. 523.

For a classification of the cases which apply the doctrine of last clear chance, see 21 MICH. L. REV. 586; 55 L. R. A. 418. In the instant case, the engineer actually saw an object on the tracks but did not at the outset realize its character. What is the duty which the law imposes under such circumstances, the violation of which will make the railroad liable for damages under the doctrine of last clear chance? The court in the principal case answered this question by holding that the engineer, upon seeing the object, became bound to find out what it was and to stop the train if necessary to avoid an accident. The defendant contended, on the other hand, that no duty to stop arose until the engineer actually realized that the object was a human being. If the argument and holding of the court is carried to its logical conclusion, there is a duty imposed upon the engineer in every case to slow down or stop whenever he sees an object on the tracks regardless of what it may be. This seems undesirable as a matter of public policy and business expediency because it unreasonably interferes with the management and efficient operation of railroads. Such a position is not supported by the authorities. *Goodman's Admr. v. Louisville & N. R. R. Co.* 116 Ky. 900; 2 L. R. A. (N. S.) 498. On the other hand, some support may be found for the contention of the defendant. *Louisville, H. & St. L. R. Co. v. Hathaway's Ex'tx,* 121 Ky. 666; *Tucker's Admr. v. Norfolk & W. R. Co.* 92 Va. 549. However, neither of these positions seems wholly satisfactory. The real question in every case should be whether the engineer as a reasonable man should have realized, from the facts before him, that there was a likelihood of danger. 5 IA. L. BUL. 36, 41; *Southern Ry. Co. v. Bailey,* 119 Va. 833. *Morbey v. C. & N. W. R. Co.* 116 Ia. 84. Cases may arise in which the engineer should appreciate the peril of the situation from the moment he first sees the object on the track. Or he may not, in a particular case, be charged with notice of the impending danger until he actually realizes that the object is a human being. But the moment when his obligation and duty to stop arises does not necessarily coincide with

either of these occasions. This must be determined from a thorough examination of all the facts bearing upon the question. It includes a consideration of locality, view, weather conditions, the access of the public to the tracks at this place, the proximity of houses, the likelihood that persons may be trespassing there, the belief of the engineer as to the character of the object, the reasonableness of this belief, the attentiveness of the engineer, and many other like factors all material to the question as to whether or not the engineer upon becoming aware of the presence of the object there, should have realized, as a man of ordinary prudence that the situation was one of danger. *Missouri P. R. Co. v. Prewitt,* 59 Kan. 734; *Meeks v. Southern P. R. Co.* 56 Cal. 513; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Hyde v. Union P. R. Co.* 7 Utah 356; *Louisville & N. R. Co. v. Spicer's Adm.* 187 Ky. 601; *B. & O. R. Co. v. Fidelity Storage Co.* 2 F (2nd) 310. The allegations in the instant case were sufficient to justify a judgment for the plaintiff on the demurrer but the reasoning by which this result was reached is questionable as an accurate expression of the doctrine of last clear chance.

PROCEDURE—CRIMES—PLACE OF DEATH IN MURDER.—In a prosecution for murder the indictment charged that the appellant "on the 18th day of September 1922 at and in Vanderbaugh county in the state of Indiana did then and there unlawfully etc. kill and murder Wesley Holder * * *of which mortal wounds the said Wesley Holder did then and there languish until the 19th day of September A. D. 1922 and died". Defendant moved to quash the indictment on the ground that the place of death was not specifically alleged and the circuit court overruled this motion. *Held,* that the place of death in an indictment for murder is a material allegation and must be stated with sufficient certainty; that the words "then and there languish until the 19th day of September A. D. 1922 and died" meant that he did languish and die in Vanderbaugh county and that the indictment was sufficient. *Alderson v. State* (Ind. 1924) 145 N. E. 572.

At the early common law the place of death in an indictment for murder was essential to show jurisdiction in the court. 1 CHITTY CRIMINAL LAW 220-223. Some authorities say that it also served a further purpose of giving the defendant notice of the nature of the accusation against him. Statutes in England early regulated venue in cases of homicide and these statutes have been either substantially reenacted or held to be a part of the common law in most of the United States. *Com. v. Macloon,* 101 Mass. 1, 9. It is obviously clear that these statutes destroy the fundamental purpose of the allegation of place of death — to show jurisdiction. In view of this fact the majority of the state courts have held such an allegation to be no longer essential. *State v. Bowen,* 16 Kan. 475; *State v. Baldwin,* 15 Wash. 15; *State v. Montes,* 22 N. M. 530; 3 L. R. A. (N. S.) 1019 (note). Indiana has decided that this averment served also to give the accused descriptive notice of facts essential to enable him to prepare his defence and to enable the court to know what judgment to pronounce. *Brockway v. State,* 192 Ind. 656. Such is the view in South Carolina and in the federal courts. *State v. Coleman,* 17 S. C. 473;

Ball v. U. S. 140 U. S. 118. The Indiana court concedes that under the Indiana statute (Burns, 1914 Stat. sec. 1877) this allegation is superfluous for the purpose of showing jurisdiction. *Brockway v. State, supra.* Did the allegation of place of death at common law serve as descriptive of the offense in the sense of giving the defendant the particulars of the crime to prepare his defense or to plead the judgment in bar of another indictment for the same offense? If in an indictment there is an allegation that death occurred at a particular place in the county where the indictment was found and the evidence shows that it occurred at another place but in the same county, the variance is not fatal. *Carlisle v. State,* 32 Ind. 55; 2 Hale's P. C. 291. If the place of death is a fact material to allege in order to give defendant the particulars of the offense, then it would not be sufficient to say it occurred in a certain county but it would be necessary to allege that it occurred at a certain place in a certain county and a substantial variance should be fatal. The decision in *Carlisle v. State, supra,* hardly supports the result in the present case. Why should the place of death be a substantial allegation when the reason for its existence has long since been wiped out? The varied and technical requirements of common law pleading are not in vogue in this age when they serve no end. This is the view of the majority of the state courts and it is submitted that it is the sounder doctrine. See also *Roberson v. State,* 42 Fla. 212; *Albright v. Territory,* 11 Okl. 497.

PUBLIC SERVICE CORPORATIONS—PAST LOSSES AS AN ELEMENT FOR CONSIDERATION IN RATE MAKING.—In a suit to enjoin the Public Utilities Commission from enforcing its order denying an increase in the plaintiff's rate schedule, the plaintiff contended that it was entitled to have included in the computation of value for the rate base a sum of $80,000 as development cost. *Held,* deficiency of income in past is not reasonable value upon which the company is entitled to a fair return. *Reno Power, Light, & Water Co. v. Public Service Comm.* (Nev. 1923) 298 Fed. 790.

The question of allowing remuneration for past deficiencies, cost of development, or going concern value is one concerning which there is considerable confusion. "There is no element included in the total valuation of utility property concerning which there is a greater difference of opinion or more controversy and indefinitiveness with regards to methods of its evaluation." FLOY ON VALUATION OF PUBLIC UTILITY PROPERTIES, p. 26. The courts are generally agreed that there is something in excess of the mere structural or "bare bones" value of the plant which should be included in its evaluation for rate purposes. *Omaha v. Omaha Water Co.* 218 U. S. 180; *Gloucester Water Supply Co. v. Gloucester,* 179 Mass. 365. The federal court decisions show no definite policy as to this item. In *Knoxville v. Knoxville Water Co.* 212 U. S. 1, it was assumed without deciding that an item for going concern value had been properly included in the valuation. But in *Galveston Electric Co. v. Galveston,* 258 U. S. 388, it was specifically held that going concern value and development cost were not to be included in the base value for the purposes of determining the rate. It was however indicated that the utility may be

allowed a higher rate of return on money invested in the enterprise in order to make up for the lean years coincident with establishing the business as a going concern. And this view is finding considerable support at present, as indicated by Mr. Ryall in his article, "The Principle of Reparation Applied to Rate Regulation" 23 MICH. L. REV. 223. Just what going concern value is has not been satisfactorily determined by the courts. It is not the equivalent of good will however. *Wilcox v. Consolidated Gas Co.* 212 U. S. 19; *Town of Bristol v. Bristol Waterworks,* 23 R. I. 274. If it is not good will it would seem that it must of necessity be the cost of development, but such is not the case as is obvious from the holdings of the courts, for while generally agreed that going concern value is properly included in valuation for rate purposes, they are almost equally agreed that early losses or cost of development can not be properly included. *Spring Valley Water Co. v. San Francisco,* 165 Fed. 667; *Galvesten v. Galveston Electric Co. supra.* There is however considerable authority for the inclusion of early losses in the rate base. *Hill v. Antigo Water Co.* 3 Wis. Ry. Comm. Rep. 623, 711; *Pioneer Telephone Co. v. Westenhaver,* 29 Okla. 429. In the light of these cases the instant case seems wrong in principle, for although it allowed $500,000 as a separate item for going concern value, it specifically denied the inclusion of early losses as a proper item of valuation for rate purposes. It would seem that going concern value is comprised only of uncompensated losses for early years. It was so held in *King's County Lighting Co. v. Willcox,* 210 N. Y. 479. And if going concern value is to be allowed as an element of valuation, it should be for uncompensated losses sustained in the first years of establishing the business, and it should be measured by these losses alone. WHITTEN ON VALUATION OF PUBLIC UTILITIES, sec. 617.

SALES — EFFECT OF ACCEPTANCE ON BREACH OF CONDITION PRECEDENT. — Plaintiff contracted to sell and deliver to defendant for use in his foundry, one car of 72 hour Connelsville coke, a recognized grade of coke prepared for use in foundries. A car containing 36 tons was delivered. Defendant unloaded and used from 12 to 18 tons within the period of a month, and then sent a sample of the delivered coke back to the plaintiff alleging that it was 48 hour coke, an inferior grade, and refused to accept the shipment. Suit being brought for the contract price, defendant counterclaimed for breach of warranty of quality. The trial court instructed the jury that defendant had a right of inspection and that it was a question of fact whether the use of the coke was necessary for inspection or amounted to an acceptance. If the former, they should hold for the defendant. A verdict was returned awarding defendant $438.43 damages. On appeal, *held,* that the finding of the jury on the question of acceptance was not sustained by the evidence, and that therefore the decision should be reversed. *Iron Trades Product Co. v. Murray Tool etc. Co.* (Okla. 1924) 230 Pac. 703.

The result of the above decision is that where the buyer has accepted the defective goods, after an opportunity to inspect, he is precluded thereafter from counterclaiming in damages. Among the states in this country, the

question whether a given representation is a part of the description merely, and therefore a condition precedent, or amounts to a collateral warranty, is by no means uniformly settled. For an excellent statement of the true rule, see Lord Abinger's statement in *Chanter v. Hopkins,* 4 M. & W. 399; *Pope v. Allis,* 115 U. S. 363; 2 MECHEM ON SALES, § 1206 *et seq.* It is frequently of the utmost importance, however, to determine that question. For instance, many courts say that an acceptance with knowledge of the breach of condition precedent on the part of the seller, waives all claim for damages by the buyer. *Jones v. McEwan,* 91 Ky. 373; *Studer v. Bleistein,* 115 N. Y. 316; 5 L. R. A. 702; 2 WILLISTON ON SALES, § 489, and cases collected. *Contra, English v. Spokane Comm. Co.* 48 Fed. 196; *Hodge v. Tufts,* 115 Ala. 366. The doctrine illustrated by the last two cases is consistent with the law applicable to ordinary contracts. 2 WILLISTON, CONTRACTS, § 702. Often what may have been, before acceptance, a condition, becomes afterwards, it is said, an implied warranty, which will survive. *Morse v. Moore,* 83 Me. 473. Mr. Waite says: "Consequently it is possible for courts to give mouth honor to a rule that no right of action for damages from breach of conditions will survive acceptance of the goods, and yet in fact allow action for breach of what even they themselves would call a condition if the buyer had chosen to reject the goods as tendered, but what, for the purpose of allowing the action, they do choose to call a 'warranty'." WAITE ON SALES, p. 175. Acceptance with knowledge of breach of an implied collateral warranty ordinarily does not work a waiver. *Talbot Paving Co v. Gorman,* 103 Mich. 403; *Best v. Flint & Newton,* 58 Vt. 543. *Contra,* in at least one state, perhaps more. *Henderson Elevator Co. v. North Georgia Milling Co.* 126 Ga. 279. The fact of acceptance by the buyer may be very good evidence that the goods complied with the contract, or that the buyer accepted them in full satisfaction of performance by the seller, but it is hard to see why it should be deemed as a matter of law, to amount to a waiver. In a state where rescission is not allowed for breach of a collateral warranty, but where an acceptance with knowledge waives a breach of a condition precedent, the buyer is placed in a precarious situation. If the title to the goods has passed the buyer must accept, or be liable himself for breach of contract, and then seek compensation for breach of warranty by counterclaim when sued for the purchase price. If title has not passed he must reject the goods or he thereby waives any rights he may have had for breach of a condition precedent. Whether title has passed or not of course depends on whether the representation was a condition precedent or a collateral warranty. If the former, it has, if the latter it has not. The ordinary business man would have trouble in determining that question. Lawyers frequently miss it. Oklahoma, where the instant case was decided, has followed the rule first stated. *Brown v. Baird,* 5 Okla. 133; *Brown v. Davidson,* 42 Okla. 598.

TELEGRAPH COMPANIES — MENTAL SUFFERING — EFFECT OF STIPULATIONS WHICH ATTEMPT TO LIMIT THE LIABILITY OF THE COMPANY. — Sec. 4951, Comp. Stat. of Oklahoma, 1921, made telegraph companies liable for mental suffering caused by the negligence of the company in delivering telegrams.

The defendant failed to deliver a telegram sent to another point in the state, which contained the following message, "Ida passed away at 3 p. m. to-day with pneumonia, wire if ean come." An action was brought under the Oklahoma statute. The printed blanks of the company provided that its liability should be limited to $50.00. A judgment for $958.33 was given and on appeal it was *held,* that in an action of this kind a stipulation limiting liability was invalid. *W. U. Tel. Co. v. Hankins* (Okla. 1924) 230 Pac. 857.

In the states which accept the doctrine allowing a recovery for mental suffering apart from physical injury a judgment is limited to such damages as should have been contemplated from the contents of the message. 23 MICH. L. REV. 311. But in death and sickness cases, the companies are usually held to be charged with notice that such damages may be reasonably expected. 25 YALE L. JOUR. 680. Hence, a recovery in the instant case would be easy except for the stipulation in the contract purporting to limit the extent of the company's liability. At least since the enactment of the amendment to the Interstate Commerce Act (Act. Cong. June 18, 1910 c. 309) by which telegraph companies were classed as common carriers, the validity of such stipulations as applied to interstate messages has been almost universally accepted. 18 MICH. L. REV. 559; 20 MICH. L. REV. 445; 22 MICH. L. REV. 602; *W. U. Tel. Co. v. Esteve Bros. & Co.* 41 Sup. Ct. 584; *Kirsch v. Pos. Tel. Cab. Co.* 100 Kan. 250; *W. U. Tel. Co. v. Lee,* 174 Ky. 210; *Poor v. W. U. Tel. Co.* 196 Mo. App. 557. For a contrary view prior to the *Esteve case, supra,* see *Bowman & Bull Co. v. Postal Tel. Cab. Co.* 290 Ill. 155. The federal rule, however, is not controlling in intrastate message cases and the authorities within the several states are in a state of confusion and chaos on this subject. Various rules are applied. Some courts distinguish between mere delay and no delivery at all, upholding the limitation in case of the former but not the latter. *Beatty Lumber Co. v. W. U. Tel. Co.* 52 W. Va. 410. Others hold the provision valid as limiting liability for unrepeated messages, but not when there is an agreement that they shall be repeated. *W. U. Tel. Co. v. Henley et al.* 157 Ind. 90. Others make it depend upon whether the action is *ex contractu* or *ex delicto* in character, and find it valid only if it is the former. *Webbe v. W. U. Tel. Co.* 169 Ill. 610; 19 HARV. L. REV. 474. Others predicate the validity upon whether or not the sender had notice of the limitation. *Harris v. W. U. Tel. Co.* 121 Ala. 519. Some distinguish between cases of slight negligence and those in which the defendant is grossly negligent. *Pierce Co. v. W. U. Tel. Co.* 177 N. Y. S. 598. Some allow reasonable limitations but will not allow the company to absolve itself entirely from a duty of care. *W. U. Tel. Co. v. Jones,* 95 Ind. 228. Some states by statute forbid such stipulations. *W. U. Tel. Co. v. Beals et al.* 56 Neb. 415. Many recognize their validity when the public character of the service involved is disregarded. JONES, TELEGRAPHS AND TELEPHONES, ed. 2, sec. 370. When tangible property is conveyed by a common carrier, provisions limiting liability are usually upheld because the rate charged for the service is thereby reduced and there is consideration for the limitation agreement. But this does not

apply when the action is predicated upon a theory of negligence. 28 HARV. L. REV. 550; *Lusk et al. v. Durant Nursery Co.* 77 Okla. 288. This discussion is sufficient to indicate the variety of rules employed in the different states. However, even though the theories evolved are of uncertain effect, a majority of the courts and legal writers seem reluctant to recognize the validity of stipulations limiting liability, and in a majority of the cases involving intrastate messages, they are held invalid. JONES, TELEGRAPHS AND TELEPHONES, ed. 2, sec. 368, 377; 28 HARV. L. REV. 550; 28 L. R. A. (N. S.) 490; *Des Arc Oil Mill v. W. U. Tel. Co.* 132 Ark. 335, 6 A. L. R. 1081; *W. U. Tel. Co. v. Bailey* (Tex. Civ. App. 1916) 184 S. W. 519; *Shawnee Milling Co. v. Post. Tel. Cab. Co.* 101 Kan. 307; *Warren-Godwin Lumber Co. v. Pos. Tel. Cab. Co.* 116 Miss. 660. There are considerations of policy which make such a rule seem desirable. A telegraph company furnishes services to the public and owes a special duty of care and diligence because of that fact. The public has a special interest in the proper performance of this duty. Also, one who sends a telegram is acting under duress and coercion in entering the contract, because he must submit to the regulations imposed by the company or he cannot obtain the services to which he is entitled as a member of the public. Consequently, it would seem inconsistent with the best interests of the public to permit a company of this kind to limit its liability and in effect absolve itself from the duty of care which the situation normally requires. This seems particularly forceful in the instant case because the liability for mental suffering was created and imposed only by virtue of the statute. To recognize the validity of the stipulation under such circumstances is to avoid in a substantial measure the very purpose for which the statute was passed. Consequently, the result of the principal case seems sound both upon authority and principle. *W. U. Tel. Co. v. Adams,* 87 Ind. 598; *W. U. Tel. Co. v. Cobbs,* 47 Ark. 344. For a striking illustration of the confusion of different courts within the same state upon a question as to the effect of slight or gross negligence upon such stipulations, see *Priester v. W. U .Tel. Co.* (Ala. 1924) 102 So. 372 (Ct. of App.), 376 (Sup. Ct.).

TORTS—DAMAGES FOR SHOCK CAUSED BY FEAR OF IMMEDIATE PERSONAL INJURY TO ANOTHER PERSON.—The defendant's motor lorry which had been negligently left with engine running at the top of a hill in a narrow street, ran down the street and hit the plaintiff's child, seriously injuring it. Plaintiff's wife, the child's mother, who was standing near by received a mental shock as a result of the accident from which she died ten days later. The plaintiff sued under Lord Campbell's act for death of his wife. The trial court directed the jury that unless the death of the wife was the result of shock produced by fear of harm to herself as contrasted with shock produced by fear of harm to her child, the plaintiff could not recover. On appeal, *held,* that plaintiff could recover if he established that the shock resulted from what his wife either saw or realized by her unaided senses, and not from something which someone told her and if the shock was due to a reasonable fear of immediate

personal injury, either to herself or to her children. *Hambrook v. Stokes Bros. Ltd.* (Ct. of App. 1924) 41 T. L. R. 125.

It is not denied by the court in the instant case that no precedent can be found in England for its holding, but certainly that fact alone should not condemn it. Indeed, the doctrine that no recovery can be had for physical injuries due to fright without impact which was declared almost simultaneously in England and New York (*Victorian Ry. Comm. v. Coultas,* 13 A. C. 222, 226 (1888); *Lehman v. Brooklyn City R. Co.* 47 Hun. (N. Y. 1888) 355, seems to owe its origin to the mere fact that up to that time no such recovery had been allowed. Such a doctrine if given universal application, would put an end to the growth of the law by judicial decisions. In England, Scotland, and Ireland, the rule of the *Coultas* case *supra,* has been repudiated. *Dulieu v. White & Sons* [1901] 2 K. B. 669, is the leading English case. The American courts have not all followed the English development, however, and the rule of the *Lehman* case, *supra,* prevails in many states *Ewing v. Pittsburg etc. R. Co.* 147 Pa. St. 40; *Mitchell v. Rochester Ry. Co.* 151 N. Y. 107; *Spade v. Lynn & Boston R. Co.* 168 Mass. 285. *Contra, Huston v. Borough of Freemansburg,* 212 Pa. 548. See 3 L. R. A. (N. S.) 49. The *dictum* in *Dulieu v. White & Sons, supra,* which formed the basis for the lower court's instructions in the instant case, limited recovery to injury from fright caused by fear of immediate physical injury to the person injured, as distinguished from fright caused by injury to a third person, on the theory that A. has no duty not to shock B's nerves by negligence toward C. The same limitation has been adopted by the courts in this country which allow recovery for fright without impact. *McGee v. Vanover,* 148 Ky. 737; *Buckman v. Gt. Northern R. C.* 76 Minn. 373; see also 77 AMER. ST. REP. 871. It is to be noted, however, that the principal case is not without precedent on this side of the water. A married woman has been allowed to recover for nervous shock caused by fright at injury or threatened injury to her husband, *Watson v. Dilts,* 116 Iowa 249, to her child, *Ala. F. & I. Co. v. Baladoni,* 15 Ala. App. 316, to her property, *Lesch v. Gt. Northern R. Co.* 97 Minn. 503, or to negro servants, *Hill v. Kimball,* 76 Tex. 210. It is submitted that the dictum in the *White* case, *supra,* was not called forth so much because A. owed B. no duty not to frighten him by negligence toward C., as by the hesitancy of Kennedy, J. to "open the door" to what he feared would be a multitude of suits . Mr. Justice Atkin, in the instant case answers this argument by the statement that during the last thirty years in England, less than a half dozen cases arising out of direct shock have been reported, and adds that it is hardly probable that shocks to bystanders will outnumber them. A close analogy to the result in the present case is that where A. is held liable to B. who is injured in an attempt to rescue C. whom A. has negligently put in a position of danger. See *Eckert v. Long Island R. Co.* 43 N. Y. 502, also cases collected in the note to that case in 1 BOHLEN, CASES ON TORTS, 345. The general question on the right to recover for injury due to fright without impact has been the subject of numerous extended articles. For the best discussion of the reasons for the origin of the rule see, Bohlen's article in 41 AMER. L. REG. 141. For a chron-

ological arrangement of the authorities, se Throckmorton in 57 AMER. L. REV. 828. For a discussion of the physical effect of fright and the possibility of measuring it, see Goodrich in 20 MICH. L. REV. 497. Those questions have purposely been omitted from this note. The court in the instant case, in overruling the dictum of the *White* case, and extending recovery one step farther, has, it seems, simply added another support to the maxim that for every wrong there should be a remedy. A recent West Virginia case reaching the same result, after an elaborate review of the authorities, is *Lambert v. Brewster,* (W. Va. 1924) 125 S. E. 244.

TORTS—DUTY TO A TRESPASSER DISCOVERED IN A PERILOUS POSITION—LAST CLEAR CHANCE DOCTRINE.—While accompanying her husband, an employee of the defendant railway, about his business in an automobile, and while thus in the position of a trespasser, the plaintiff was injured when the car was struck by a switching train through no fault of the defendant's servants. When the train was stopped the plaintiff was found underneath the automobile which was jammed between the train and a building closely adjoining the track. Having decided the only way to extricate the plaintiff was by removing the pressure on the car, the train crew moved the train and in so doing inflicted additional injuries on the plaintiff. In answer to the contention of the plaintiff that the train crew owed her a duty of due care after they had discovered her in a helpless position, the court *held,* that this contention was in effect asking an application of the last clear chance doctrine which has no bearing on the case, and that the only duty owed the plaintiff as trespasser was the duty not to cause her willful or wanton injury. *Rainey v. Oregon Short Line Ry. Co.* (Utah 1924) 231 Pac. 807.

The rule of last clear chance is correctly applied only in those cases where the negligence of both parties has been shown, to permit the plaintiff to recover despite his own negligence. See *Indianapolis Traction & Terminal Co. v. Croly,* 55 Ind. App. 543; *Goodrich,* "Applications of Last Clear Chance Doctrine," 5 IA. L. BULL. 36. For discussion of cases see 21 MICH. L. REV. 586. The defendant not having been negligent in this case clearly does not come within the scope of the doctrine. Further if the doctrine does not apply to the acts of the defendant which brought about the perilous position of the defendant, it can not be applied to subsequent acts tending to relieve that situation. *Stenshorn v. City Electric Ry. Co.* 159 Mich. 82. The court is clearly correct on this point but it is submitted that the instant case goes astray when it says that the standard of due care to the discovered trespasser in a helpless condition can not be applied, and that the only duty owed the plaintiff is to refrain from willfully injuring her. There is a direct conflict of authority whether there is a legal duty on the party causing the injury, though free from legal liability, to extricate the injured trespasser from his helpless and dangerous position. It has been held that these duties are moral and humanitarian only and unenforceable by the courts. *Griswold v. B. & M. R. R. Co.* 183 Mass. 434; *Union Pac. R. Co. v. Cappier,* 66 Kan. 649; *Riley v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 160 S. W. 595. On the other hand a long

line of authorities has consistently said that the person causing the injury owes a legal duty to the injured trespasser based on obligations of humanity to help extricate him from his peril. *N. C. R. Co. v. Price,* 29 Md. 420; *Whitesides v. So. Ry. Co.* 128 N. C. 229; *Amer. Car & Foundry Co. v. Inzer* (Ind. App.) 86 N. E. 444; *Dyche v. V. S. & P. R. Co.* 79 Miss. 361; *Slater v. I. C. R. Co.* 209 Fed. 480; BEACH, CONTRIB. NEG. 2nd ed. § 215; 2 THOMPSON, NEG. 2nd ed. § 1744. There would seem to be many good arguments in favor of this latter view. See 69 L. R. A. 513, note; Warner, "Railway's Duty to Injured Persons," 7 CAL. L. REV. 312, 315. In the instant case, whether under a legal duty or not, the defendant did assume the task of aiding the plaintiff and the question remains as to what duty of care he then owes the injured person. It has been held that even in this situation the only duty is to refrain from willfully injuring the helpless person. *Griswold v. Ry. supra; Riley v. Ry. supra.* But once having assumed the task the defendant must perform it in a proper manner and without negligence. *Gates v. C. & O. R. Co.* 185 Ky 24. The standard of due care under the circumstances is also suggested by *Ry. v. Price, supra; Dyche v. Ry. supra; Slater v. Ry. supra; N. O. & N. E. R. Co. v. Humphreys,* 107 Miss. 396. To hold the negligent rescuer liable only for his willful acts would seem pretty harsh to the helpless injured party who can not object to what is being done, and the duty of due care would most reasonably secure his safety. The peculiar emergency under which the defendant must act is clearly one of the circumstances under which his due care must be decided. Although the same result would probably have been reached in this case under both rules, the act of the trainmen being due care under the circumstances of the emergency, it is submitted the court erred in applying the test of willful injury rather than due care where the trespasser was found in a helpless condition.

WILLS—REFORMATION OF MISTAKES.—In his will the testator gave a life estate in 220 acres of land to his wife, this being the home place later described in his gift to the children of his daughter Josephine. To the children of his daughter Mary, the testator devised certain land, describing it by metes and bounds, which, he stated, contained in all 221 acres. To the children of Josephine were given 220 acres of land, described by metes and bounds, the whole comprising the home place. By extrinsic evidence it was shown that the land described in the calls for metes and bounds conflicted with the calls for quantity. *Held,* that the latent ambiguities could be shown by extrinsic evidence, and having established the conflict it was competent for the courts to strike out the false words; that gathering the intent from the whole will, the call for quantity was intended to be controlling; and that if there was enough left after the false words were stricken out for the court to be able to determine from the calls for quantity and the remaining true calls for distance what land was the subject of the gift, the will could then be given effect. *Brown v. Ray* (Ill. 1924) 145 N. E. 676.

The intent of the testator is the basis for construing a will, and that intent is to be discovered from the whole will, and the will alone. Although

metes and bounds usually control calls for quantity, a particular description does not prevail over a general one if the general description harmonizes with the manifest intention and clearly effectuates the purpose of the grant. *Gilbert v. McCreary*, 87 W. Va. 56; *Cummins v. Riordon*, 84 Kan. 791; 9 C. J. 207, citing *Jones v. Burgett*, 46 Tex. 284; *Eaton v. Knapp*, 29 Me. 120; *White v. Luning*, 93 U. S. 514. Here then we have a call for quantity which by the intention of the testator controls the conflicting description by metes and bounds, and the question is how to give effect to this intention. It has often been said that a latent ambiguity may be exposed by extrinsic evidence. *Patch v. White*, 117 U. S. 210; *Stieglitz v. Migatz*, 182 Ind. 549; *Flynn v. Holman*, 119 Ia. 731; *Scarlett v. Montell*, 95 Md. 148; *Webster v. Morris*, 66 Wis. 366. The cases go far to establish the proposition that if such latent ambiguity consist of a misdescription, the courts may strike out the conflicting words, giving effect to the gift if the object can be discovered from the remaining description. *Patch v. White, supra; Taylor v. McCowen*, 154 Cal. 798; *Eagle v. Oldham*, 116 Ark. 565; *Albury v. Albury*, 63 Fla. 329; *Trustees v. May*, 201 Mo. 360; *In re Johnson's Estate* (Utah 1924) 228 Pac. 748. The Illinois courts are even more technical. *Decker v. Decker*, 121 Ill. 341; *Huffman v. Young*, 170 Ill. 290; *Graves v. Rose*, 246 Ill. 76; *Abens v. Kennedy* (Ill. 1924) 145 N. E. 100. In fact *Stevenson v. Stevenson*, 285 Ill. 486, holds that if the will is clear on its face no words may be struck out. As the whole will of the testator must be in writing, the courts in the above cases say they can not add so much as a single word to the will, as amounting to a reformation. Such a position would seem unduly technical. The effect of the ingenious computations indulged in by the court in the instant case serve only to arrive at the same place which could have been reached directly by the addition of a few words. Several cases have held, and it is submitted with reason, that where the intent of the testator is clear from the face of the will, the courts may enlarge the language, and discard, supply, change, or transform the words to carry out that intent. *Cecil v. Cecil*, 161 Ky. 419; *Dillard v. Dillard* 95 S. C. 86; *Seligman v. Seligman*, 151 N. Y. S. 889; *Bender v. Bender*, 226 Pa. 607; *Neely v. Brogden* (Tex. Com. App. 1922) 239 S. W. 192; *In re Ehler's Will*, 155 Wis. 46. When we consider that deeds and other executed instruments may be reformed in equity, and that the same thing is done to wills through extrinsic evidence in fraud cases, it is thought that a better result might be obtained by frankly inserting the correct words in the place of those stricken out as false description, although the courts still say that equity will not reform a will.