Michigan Law Review

Volume 22 | Issue 1

1923

RECENT IMPORTANT DECISIONS

RECENT IMPORTANT DECISIONS

AUTOMOBILES—RIGHT OF WAY AT STREET INTERSECTIONS.—An ordinance declared that of two vehicles approaching an intersection from different directions the one from the right had the right of way. D, driving from the right at excessive speed, struck P's automobile, which was crossing from the left. *Held,* that P might assume that D, though having right of way, would not approach the intersection at negligent rate of speed, and that P's failure to accord D precedence at the intersection was only evidence of contributory negligence. *Grant v. Marshall* (Sup. Co. of Del. 1923) 121 Atl. 664.

When an ordinance declares that the vehicle approaching the intersection from the right shall have the right of way over that coming from the left, it might be argued that the driver from the left acts at his peril whenever he attempts to cross before the car approaching from the right. Such an interpretation might be most effective for preventing accidents, besides considerably simplifying litigation. However, it would impose an unreasonable hardship to hold it negligence *per se* when at the time he started to cross it reasonably appeared safe to proceed. It is doubtful whether any cases have made such a strict application of the rule. The courts generally conclude, either from the context or the presumed intent of the framers, that the rule has application only where the cars are approaching from such distances and at such speeds as makes interference between them reasonably to be apprehended. *Virginia R. & P. Co. v. Slack Grocery Co.,* 126 Va. 685; *Lee v. Pesterfield,* 77 Okla. 317; *Bramley v. Dilworth,* 274 Fed. 267. From the foregoing, it follows that in the instant case, if the driver from the left could have crossed safely ahead of the car from the right but for the latter's unlawful speed, he was not guilty of contributory negligence unless he was under a legal obligation to make allowance for the other's excessive speed. If the driver from the left either was or should have been aware of the speed at which the other was approaching, he is legally bound to take it into consideration in determining whether or not the other should have precedence. *Brillinger v. Ozias,* 174 N. Y. S. 282; *Kinney v. King,* 47 Cal. App. 390; *Anderson v. A. E. Jenney Motor Co.,* 150 Minn. 358. But if he has neither actual nor imputed knowledge of the excessive speed of the vehicle from the right, he may assume that the latter is keeping within the lawful limit of speed. *Pilgrim v. Brown,* 168 Ia. 177; *Golden Eagle Dry Goods Co. v. Mockbee,* 68 Col. 312. It is submitted that most of the apparently conflicting decisions are due to the difference in the fact whether or not the driver from the left had knowledge, actual or imputed, of the other's excessive speed. If two cases cannot be reconciled on that score, it may be found that in one of the cases there was an ordinance requiring all drivers to slow down at intersections. The existence of such ordinance has been held to justify the driver from the left in assuming that the vehicle speeding from the right will reduce its speed at the intersection. *Whitelaw v. McGilliard,* 179 Cal. 349. See cases collected in 21 A. L. R. 974.

BANKS AND BANKING—DRAFT WITH FORGED INDORSEMENT OF FICTITIOUS INDORSEE.—Plaintiff arranged with an attorney, B, to make a loan to R, stated by B and believed by plaintiff to be owner of a lot on which a mortgage was to be given as security. In truth, there was no such person as R, the lot really belonging to B. A draft for the amount of the loan was drawn by plaintiff on defendant bank payable to the order of plaintiff, by her indorsed to R, and delivered to B for the supposed borrower, B turning over to plaintiff a bond and mortgage purporting to be executed by R. After indorsing the draft in the name of R, B received the amount thereof from defendant. In an action by plaintiff to recover the amount so paid by the bank, *held* (McLaughlin and Crane, JJ., dissenting) defendant liable. *Strang v. Westchester Co. Nat. Bank* (N. Y. 1923) 235 N. Y. 68, 138 N. E. 739.

If the attorney dealing *personally* with the drawer had represented himself to be another party and the draft had been drawn payable to or indorsed to the supposed payee or indorsee, the drawer thinking the person before her was such named payee or indorsee, the drawee in paying the draft to the fraudulent party generally would be held protected. *Boatsman v. Bank,* 56 Colo. 495; *McHenry v. Bank,* 85 Ohio St. 203 (cf. *Dodge v. Bank,* 20 Ohio St. 234, 30 *id.* 1); *First Nat. Bank v. Am. Ex. Nat. Bank,* 63 N. Y. S. 58, 170 N. Y. 88; *Land Title & Trust Co. v. Bank,* 196 Pa. 230, 211 Pa. 211; *Robertson v. Coleman,* 141 Mass. 231; *Central Nat. Bank v. Nat. Met. Bank,* 31 App. D. C. 391; *Montgomery Garage Co. v. Manufacturers' L. & I. Co.,* 94 N. J. L. 152. Many other cases to the same effect might be cited. See note in 22 A. L. R. 1228 *et seq.* The reasoning generally back of these decisions is: the drawer has a double intent; first, to make the instrument payable to the person before him, and secondly, to make it payable to the very person whom he supposes the person before him to be; the former intent being deemed the controlling one. Really, the name assumed is, for the purpose of that transaction, the name of the impostor. But not all courts agree with this view. *Tolman v. Am. Nat. Bank,* 22 R. I. 462. See also *St. Paul v. Merchants' Nat. Bank,* — Minn. —, 187 N. W. 516; *Harmon v. Bank,* 153 Mich. 73; *Simpson* v. R. Co., 43 Ut. 105, probably all distinguishable on their facts, hence not necessarily opposed to the general view. The doctrine of the principal case finds support in the somewhat analogous sales cases. See *Phillips v. Brooks,* [1919] 2 K. B. 243; 18 MICH. L. REV. 109; *Edmunds v. Merchants' Transportation Co.,* 135 Mass. 283. If the check or other instrument is not delivered by the drawer to the impostor personally, but to an agent, the cases quite generally hold the drawee not protected by its payment. See, for example, *Murphy v. Bank,* 191 Mass. 159. The principal case would seem to fall within this class. Whether the general rule should apply when the dealings with the impostor are by mail or telegraph the cases are not agreed. See *Emporia Nat. Bank v. Shotwell,* 35 Kan. 360; *Palm v. Wall,* 7 Hun. 317; *Mercantile Nat. Bank v. Silverman,* 132 N. Y. Supp. 1017, 210 N. Y. 567 (but cf. *Hartford v. Bank,* 142 N. Y. Supp. 387, 215 N. Y. 726). In such situations there would seem to be no such conflict of intentions as in the case of the impostor personally present, and the rule ought to be that the loss falls on the drawee who has paid. There seems to be such view in the sales cases. See *Cundy v. Lind-*

say, 3 A. C. 459. A distinction is also made where the payee is identified more particularly than by a mere name, *e. g.*, by some designation, description, or title. See *Mercantile Nat. Bank v. Silverman*, 132 N. Y. Supp. 1017; *Montgomery Garage Co. v. Manufacturers' L. & I. Co.*, 94 N. J. L. 152. Section 23 of the N. I. L. seems not to have affected the solution of the general question. *Montgomery Garage Co. v. Manufacturers' L. & I. Co., supra.*

BILLS AND NOTES—DEMAND CERTIFICATES OF DEPOSIT—WHEN OVERDUE.—In a case where an indorsee took a demand certificate of deposit payable without interest six months after it had been issued, it was *held* that the certificate was overdue, and consequently the indorsee was not a holder in due course. *Bower v. Waldron* (Iowa 1923) 192 N. W. 822.

The time when demand paper matures is important in three particulars: first, in the matter of presentment so as to charge indorsers, etc.; second, in regard to the running of the Statute of Limitations; third, in respect to transfer so as to determine whether or not a purchaser is a holder in due course. There seem to be at least two types of demand instruments, the ordinary demand notes which are issued by borrowers and bank paper indicative of deposits. It was suggested in *Wolf v. American Trust and Savings Bank*, 214 Fed. 761, that as the customs of bankers and merchants were different, certificates of deposit and demand notes should be subject to different rules relating to the time when demand paper becomes overdue for purposes of transfer. In *National Bank of Fort Edward v. Washington County Bank*, 5 Hun. (N. Y.) 605, the court held a demand certificate which was transferred seven years after its issue was not overdue. The court said: "The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass book, is intended to represent moneys actually left with the bank for safekeeping, which are to be retained until the depositor actually demands them." The court in *Elliot v. State Bank*, 128 Ia. 275, expressed the opinion that certificates of deposit are not promissory notes, but are transactions peculiar to the banking business, the primary purpose of which is to protect the fund. The counsel for the defendant in *Tripp v. Curtenius*, 36 Mich. 494, contended that: "It may well be that as between private individuals a note payable on demand should be presented promptly, yet if money is deposited in a bank no inference of dishonor can be drawn from the fact that it is left there for a long time. It is the business of the institution to keep money on deposit." *Shute v. Pacific National Bank*, 136 Mass. 487, supports this view, for the court thought that certificates of deposit were issued with the design that they should be used as money and taken with as much confidence as the bills of the bank. But in the *Tripp* case, *supra*, the court held that a certificate was overdue which had been transferred twenty-eight months after its issue. And the court was emphatic in its denial of the defendant's contention, saying in effect that certificates of deposit are not intended for long circulation, and that to hold that demand paper of any sort could be circulated and used as bank notes would be contrary to the general policy of the banking laws. Accord, *Pierce v. State National Bank*, 215 Mass. 18. But in both these cases the certificates were payable with interest, and

this fact bears some weight with the courts. The fact that interest is payable shows an intent that it is to be a continuing security and that it is to be negotiated for some time. *Barough v. White,* 4 B. & C. 325; *Brooks v. Mitchell,* 9 M. & W. 15. The converse is true when no interest is payable. *Gregg v. Union Bank,* 87 Ind. 238. It is submitted, therefore, that certificates of deposit are intended to be more permanent than the ordinary demand notes, and hence should be subject to different rules. Sections 53 and 193 of the N. I. L. provide that in determining what is a reasonable time regard is to be had to the nature of the instrument; they therefore seem clearly permissive of the view suggested.

BUILDING RESTRICTIONS—EQUITABLE ENFORCEMENT—INDEFINITENESS.—In an action to enjoin the building of a two-family dwelling on a lot subject to the restriction that no building except for "cottage residence purposes" should be erected thereon, *held,* restriction was too indefinite and uncertain to be enforceable. *Jones et al. v. Mulligan* (N. J. Ch. 1923) 121 Atl. 608.

The general rule in the principal case is in accord with the orthodox view. "Courts do not favor restrictions upon the utilization of land, and that a particular mode of utilization is excluded by agreement must clearly appear." 2 TIFFANY, ed. 2, § 394; *Casterton v. Plotkin,* 188 Mich. 333. Accordingly, the erection of a two-family duplex house was held not a violation of a covenant forbidding a "community house." *Muller et al. v. Cavanaugh et al.* (N. J. Ch. 1923) 121 Atl. 339. Although the prevailing authority is with the above cases, building restrictions imposed in high-class residential districts should not be frustrated by strained construction or over-nice refinement of language. *Seibert v. Ware,* 158 N. Y. S. 229. A cottage in the popular sense is a small, simple abode for one family and not a two-family dwelling. It would seem that the court in the principal case had to give a rather unnatural and distorted interpretation to the word cottage in order to hold the restriction too indefinite to enforce.

CONSTITUTIONAL LAW—BEGINNING AND ENDING OF INTERSTATE TRANSIT.—P cut pulp-wood logs in certain Vermont towns for its mill at Hinsdale, New Hampshire. The logs were placed in the West River at these towns and thence floated down this river to the Connecticut and thence to the mill in New Hampshire. The logs over which this controversy arose were at that time in a boom at the mouth of the West River in Vermont some ten miles below the place where they were placed in the said West River. This boom was maintained for the purpose of directing the logs into the Connecticut River at such time as the second boom at Hinsdale would hold them against the river's high waters. While these logs were so held in the West River boom they were taxed as Vermont property. The court of that state, in upholding the tax, said that the floating of the logs down to this boom was all preparation for the final journey to the Hinsdale mill and that the interstate shipment did not begin until the logs left this boom for Hinsdale. In reversing this decision, the United States Supreme Court *held* that the interstate journey began at the towns on the West River where the logs were

placed in that river and that the interruption in the journey to promote the safety of the transit did not break the continuity of the journey. *Champlain Realty Co. v. Town of Brattleboro* (Adv. Op. 1923) 43 Sup. Ct. 146.

The points of time at which the question above arises are at the start, the completion, or at some intervening period preceding the final completion of the journey. *Coe v. Errol,* 116 U. S. 517, established that "goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation * * * until they have been shipped, or entered with a common carrier for transportation to another state, or have started upon such continuous route or journey" (page 527). In that case, getting logs down to the river and ready to start on their interstate journey was merely preliminary to that journey. So, also, cutting logs and placing them in a stream for purposes of preservation does not start them on their journey necessarily, even though the initial part of the journey is to be made on the storing stream. *Diamond Match Co. v. Ontonagon,* 188 U. S. 82. Though barges loaded with coal shipped from one state to another stop short of the final destination for the accommodation of the consignee's business, the goods have come to rest and are taxable by the state. *Pittsburgh & Southern Coal Co. v. Bates,* 156 U. S. 577; see also *Brown v. Houston,* 114 U. S. 622. Grain on a through shipment becomes a part of the mass of state property when it is removed from the cars for "mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing. * * *" *Bacon v. Illinois,* 227 U. S. 504. And where goods are stopped for purposes of redirecting to local or interstate orders they are taxable state property. *American Steel and Wire Co. v. Speed,* 192 U. S. 500; *General Oil Co. v. Crain,* 209 U. S. 211. But grazing sheep while en route through a state does not bring them within the property of the state. *Kelley v. Rhodes,* 188 U. S. 1. And in the principal case the purpose of interrupting the logs at the West River boom was held to be for the safety and convenience of transit, and this did not break the continuity of the interstate trip. It seems rather obvious that no hard and fast rule can be set out by which the beginning or the ending of the interstate journey can be determined. The particular facts in each case must be the guide, and as Mr. Chief Justice Taft said in the principal case, "Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption. * * *"

CONTRACTS—CONSIDERATION—LIABILITY OF GRATUITOUS BAILEE FOR BREACH OF PROMISE TO PROCURE INSURANCE.—D promised to store P's furniture gratuitously and to have it insured at P's expense. In reliance upon this promise, P delivered the furniture at D's warehouse. Later, without any neglect on D's part, the furniture was destroyed by fire. D had failed to obtain insurance for it. In an action by P for the value of the furniture, *held,* D's promise to procure insurance was supported by sufficient consideration. *Siegel v. Spear* (N. Y. 1923) 138 N. E. 414.

The court found consideration for D's promise to insure in the detriment suffered by P in parting with the possession of his furniture. In this it pur-

ports to follow the established rule in the law of bailments, that a gratuitous bailee is liable for misfeasance, *Coggs v. Bernard*, 2 Ld. Raym. 909; 6 C. J. 1118, and that a delivery of the goods is sufficient consideration for the bailee's promise in respect of them. *Herzig v. Herzig*, 122 N. Y. S. 440; *Sprinkle v. Brimm*, 144 N. C. 401. See WILLISTON ON CONTRACTS, § 138; O. W. HOLMES, THE COMMON LAW, p. 292. It is obvious, however, that in the principal case there really is no consideration, in the orthodox sense, for D's promise, for the delivery of the goods was not made in exchange for the promise to insure. See WILLISTON, *supra*, § 138; HOLMES, *supra*, pp. 196, 197, 292. It has been urged that the gratuitous bailee's liability arises independently of a contract: that it arises from his "undertaking" to do the act and his actual entry upon the undertaking: a reversion to the ancient theory of an action on the case induced by an assumpsit. Joseph H. Beale, "Gratuitous Undertakings," 5 HARV. L. REV. 222. Perhaps upon this view is based the rule that a gratuitous bailee is not liable for nonfeasance—*i. e.*, he is not liable for failure to perform his promise at all, he not having entered upon his undertaking (see HOLMES, *supra*, pp. 196, 197; BEALE, *supra*); although the reason usually given is that there is no consideration for the bailee's promise without an actual commencement of performance or without a delivery of goods. *Thorne v. Deas*, 4 Johns. (N. Y. C. L. Repts.) 84; *Rutgers v. Lucet*, 2 Johns. Cas. (N. Y.) 92; *Brawn v. Lyford*, 103 Me. 362. Although the delivery of goods has been held consideration for a voluntary promise to keep safely, *Jenkins v. Motlow*, 1 Sneed (Tenn.), 248, or to carry safely, *Coggs v. Bernard*, *supra*, or even to do a positive act, *Herzig v. Herzig*, *supra*, yet the parting with the possession of goods, as Judge Holmes points out, except in the rare case where a bargain is actually intended, does not constitute consideration for a promise to do anything at all in respect of them. HOLMES, *supra*, p. 291. On principle, then, it would seem that in the instant case D may be responsible, after accepting the furniture, for its safekeeping; but since he might have refused to receive it without liability, as that would have amounted to mere nonfeasance, so he should, on the same principle, be held to be without liability for failing to obtain insurance. The court distinguishes *Brawn v. Lyford*, *supra*, as a case of nonfeasance. In that case the voluntary bailee was held not liable for failure to act at all, although the bailor had left an insurance policy with him, which he (the bailee) promised to have transferred to the bailor on the books of the insurance company. In other cases in which the bailee has been held liable there was consideration for the storing, *Schroder v. Mauzy*, 16 Cal. A. 443, or the bailee obtained insurance but failed to observe conditions necessary to make the policy valid. *Wilkerson v. Coverdale*, 1 Esp. 75 (there was no delivery of goods at all here). In *Sprinkle v. Brimm*, *supra*, the gratuitous bailee was in reality held liable for his carelessness in attending to the shipment of goods left with him for that purpose, although it appears that he is being held accountable for non-performance of a promise to ship the goods and to send the bill of lading. It seems, then, that the bailee's liability, after receiving the goods, is only to care for them, HOLMES, *supra*, p. 197, and there being no element of negligence on D's part in the instant case, the decision on the facts, it is submitted, can only be justified on the theory that a detrimental

reliance on a promise is sufficient consideration for it. The New York Court of Appeals has gone far in this direction. See *De Cicco v. Schweizer,* 221 N. Y. 431. That many courts, "in the interest of the sanctity of promises," have shown an inclination to favor this theory of consideration, see 20 MICH. L. REV. 649. Some courts uphold voluntary promises, upon which the promisee has relied to his detriment, on a basis of estoppel; but the weight of authority clearly favors the idea of consideration as the *quid pro quo* of the promise. WILLISTON, *supra,* § 139.

CONTRACTS—STATUTE OF FRAUDS—AGREEMENT PARTLY WRITTEN.—Decedent, before his death, made an oral agreement with the plaintiff to pay her five hundred thousand dollars in return for her promise to "be engaged" to him. He gave her a check for seventy-five thousand dollars, but before she could cash it he died, thus automatically revoking the bank's authority to pay the check. In an action by the plaintiff to recover the amount of the check from decedent's executors, *held,* among other things, that, although the agreement was within the Statute of Frauds, the promise embodied in the check could be "extracted from the transaction"; that, since it was in writing, it could be enforced; and that "where as here there is a distinct engagement, which is the subject of the suit, the writing need only relate to such engagement." *Guild v. Eastern Trust and Banking Co.* (Maine 1923) 121 Atl. 13.

The court relies for its decision upon *Rand v. Mather,* 11 Cush. (Mass.) 1. That case is in turn based upon the English case of *Wood v. Benson,* 2 Cromp. & J. 94, and it undoubtedly represents the established authority on the point it involves. See BROWNE ON STATUTE OF FRAUDS, ed. 5, § 139 ff. It is submitted, however, that there is a vital distinction between the principal case and the cases represented by *Rand v. Mather,* and that the decision in the principal case is an undue extension of the authorities upon which it is based. Those authorities hold simply that, where one part of an entire promise is within the Statute of Frauds, it does not prevent the plaintiff from enforcing another part to which the statute does not apply. That rule does not apply in the principal case, where the *entire promise* was within the statute, for there is no part of the promise to which the statute does not apply. Furthermore, in the cases relied upon the plaintiff had fully performed, whereas, if we treat the contract in the principal case as the court did, namely, as one in consideration of marriage, the plaintiff had not performed at all. In fact, it is difficult to see why the death of the other party to the marriage contract did not discharge the entire agreement because of impossibility of performance. It seems that the court placed too much reliance upon *Rand v. Mather,* and in doing so it ran counter to the strong line of authorities which hold that, where the statute requires a contract to be in writing, it cannot be enforced unless every essential element of the contract is contained in the memorandum. See WILLISTON ON CONTRACTS, § 575. Where, as in the principal case, a negotiable instrument has been given in part performance of an oral contract which is within the Statute of Frauds, the courts are inclined to regard the instrument itself as a separate and distinct obligation enforceable as such in spite of the statute. See for such cases 21 MICH. L. REV. 346.

COURTS—SUPERINTENDING CONTROL OF SUPREME COURT OVER INFERIOR COURTS.—Section 86 of the constitution of North Dakota reads as follows: "The Supreme Court * * * shall have a general superintending control over all inferior courts under such regulations and limitations as may be supplied by law." An application was made by the attorney general for a supervisory writ against the district court requiring it to reinstate certain indictments connected with the Scandinavian-American Bank failure. *Held,* that the power of superintending control could be exercised whether the district court was acting within its jurisdiction or not, but that since the statute regulated the action complained of, the power of superintending control was thereby withdrawn under the constitutional provision above quoted. *State ex rel. Shafer, Atty. Gen., et al. v. District Court of the Third Judicial District in and for Ransom County et al.* (N. D. 1923) 194 N. W. 745.

Practically all the states in the union have provided for this power of superintending control in one manner or another. The most common constitutional provision is like that in the instant case, except that the phrase "under such regulations and limitations as may be supplied by law" is omitted. See MICH. CONST., Art. VII, § 4; MO. CONST., Art. VI, § 3; N. M. CONST., Art. VI, § 3; WISC. CONST., Art. VII, § 3; OKLA. CONST., Art. VII, § 2; ARK. CONST., Art. VII, § 4; LA. CONST., Art. 94; IOWA CONST., Art. V, § 4; ALA. CONST., Art. VI, § 140; KY. CONST., § 110; N. C. CONST., Art. IV, § 8. Probably the leading line of cases interpreting this clause is in Wisconsin, beginning with *Attorney General v. Blossom,* 1 Wisc. 277, and going through *State ex rel. Umbreit v. Helms,* 136 Wisc. 432. In many states this power is inferred from the constitutional grant of authority to issue writs of *quo warranto, mandamus, certiorari, procendendo,* and *supersedeas.* See *Miller v. Sacramento County Supervisors,* 25 Cal. 93; *Faut v. Mason,* 47 Cal. 7; *Hollister v. Lucas County District Judges,* 8 Ohio St. 202; *Cunningham v. Squires,* 2 W. Va. 422. In many of the eastern states the power has been inherited directly from the King's Bench and transferred to the state courts by royal ordinance, provincial statute, or state constitution. See *In re Steinway,* 159 N. Y. 250, which traces the power of the supreme court in New York state back to the Act of May 6, 1691; *State, Dufford, Prosecutor, v. Decue,* 31 N. J. L. 302, tracing the power of the New Jersey supreme court to an ordinance of the first provisional governor. For a general view of the subject, see 51 L. R. A. 33, note, and 20 L. R. A. N. S. 942, note. There seem to be only four states besides North Dakota whose constitutional provisions have the phrase "regulations and limitations as may be supplied by law," *viz.*: Colorado, Art. VI, § 2; Wyoming, Art. V, § 2; South Dakota, Art. V, § 2; and Montana, Art. VIII, § 2. Montana seems to be the only state in which this phrase has been thoroughly considered. In *State ex rel. Whiteside v. First Judicial District Court,* 24 Mont. 539, the supreme court held that the legislature had no power to decrease either its appellate power or its power of superintending control. In *Finlen v. Heinze,* 27 Mont. 107, they held that the word "limitations" referred to limitations of time alone—either the time within which, or the time of the trial at which, the litigant might invoke their aid—and that the word "regulations" referred to procedure by means of which the power should be set in motion and in obedience to

which it might be exercised. In *State ex rel. Sutton v. District Court of the Second Judicial District et al.*, 27 Mont. 128, they held flatly that if Section 2183 of their Code of Civil Procedure was a declaration that the action of inferior courts could be reviewed on *certiorari* alone, it was to be considered as unconstitutional in withdrawing from the supreme court both its appellate and superintending control jurisdiction in all cases but those which could be brought up by *certiorari*. That position of the Montana court seems rather far removed from the instant case, which reconizes a thirty-five year old statute as binding the supreme court on the ground that it was a regulation and limitation which had been supplied by law.

COVENANTS FOR TITLE—INCUMBRANCES—VISIBLE BURDENS.—The defendant by deed of general warranty conveyed land to the plaintiff. Though the covenants were without exception, there was, in fact, an outstanding easement in a telephone company to maintain on the premises forever a telephone line and transformer. These were installed in plain view and occupied a relatively small area. Both parties knew of their existence. The plaintiff sued upon the covenant against incumbrances in the deed. It was *held* that an easement obviously and notoriously affecting the physical condition of the land is not a breach of a general covenant against incumbrances, whether the easement is private or public. *Chandler v. Gault* (Wis. 1923) 194 N. W. 33.

In general, the covenant against incumbrances is held to be broken by the existence of any outstanding easement which diminishes the value of the land conveyed. See 8 AM. & ENG. ENCY. OF LAW, ed. 2, p. 122. In the case of highways, there is a conflict of authority as to whether the existence of a highway constitutes a breach. Probably the general view is that highways are not incumbrances within the meaning of the covenant. See 12 MICH. L. REV. 596; 15 C. J. 1275. Rawle, in COVENANTS, ed. 5, at § 82, takes a contrary view. But where the easement is private instead of public, the overwhelming weight of authority is opposed to the principal case. In the case of highways, the reason given for not including them within the covenant was that they are presumably a benefit to the land and also that the purchaser could be presumed to have taken them into consideration in adjusting the price that he agreed to pay. From this it would appear that the courts would exclude those easements that are a benefit and include those that are not, even though they are of a public nature. This reasoning would apply in the case of a levee. *Lallande v. Wentz*, 18 La. Ann. 289. It is doubtful if it would apply to the telephone line and transformer in the principal case or to an elevated railroad, yet in *Bacharach v. Von Eiff*, 74 Hun. (N. Y.) 533, an elevated railroad was held not to be within the covenants. Apparently, the courts are not entirely satisfied with the presumption arising from the apparent benefit. Probably the true reason for the distinction between public and private easements is to be found in the fact that most public easements are withdrawn either expressly or impliedly from the operation of the covenant—some being so obviously not within the covenant that it seems folly to express the fact. Where this is so, and it is most often in the case of public easements, there is some reason for excepting them from the covenants and the courts are justified in carrying

construction to its extreme limits to give effect to the apparent intention of the parties. But it is dangerous to extend this doctrine into the field of private easements; for, if this were generally done, the covenants are destroyed in the very cases in which they are designed to give protection. The principal case may be free from this criticism in that the easement is of a quasi-public nature, even though the court makes its rule broad enough to include private easements.

EVIDENCE—ASSUMPTION OF FACT IN CHARGE TO JURY.—Defendant was on trial charged with having violated a statute declaring an act of sexual intercourse by a male over sixteen years of age with a female under that age to be rape and providing a certain penalty. The age of the defendant was admitted as sixty-three years. Prosecutrix and her father testified that the prosecutrix was under sixteen years of age. This testimony was uncontradicted and unexplained and the witnesses were unimpeached, nor were there any circumstances in the other evidence or in the personal appearance of the prosecutrix that would make the fact improbable. The judge instructed the jury that the age of the defendant had been established by his admission, that the age of the prosecutrix had been established by the evidence, and that the only fact that they must find to return a verdict of guilty was the commission of the act. *Held,* that the instructions of the trial judge were erroneous and that the state is not justified in assuming the existence of a fact, though testified to by witnesses having knowledge of the fact and who are uncontradicted. *State v. Lanto* (N. J. 1923) 121 Atl. 139.

The age of the prosecutrix was a material fact, and if it should have been submitted to the jury for their finding a failure to do so was reversible error. It is the duty of the judge to determine questions of law as to the admissibility of evidence and also to determine facts which must be determined as conditions precedent to the admission or exclusion of evidence. It is the duty of the jury to pass on the probative effect of such evidence in establishing the facts in controversy after such evidence is admitted. WIGMORE, ed. 2, § 2549. A number of courts do adhere to this rule strictly, and in these jurisdictions a failure to allow the jury to pass on the existence of a material fact would be reversible error. *State v. Pitman* (N. J. 1922) 119 Atl. 438. This is true even though the witness may be unimpeachable for truth and integrity, on the theory that the testimony of the witnesses may be true as to their knowledge of the fact or memory of the fact, but the memory of man is fallible, and it is error to deny the jury the right to pass on the existence of the fact from the evidence admitted. *Schmidt v. Marconi Wireless Telegraph Co. of America,* 86 N. J. L. 183. Perhaps a greater number of the courts, although admitting the general provinces of the court and the jury as set out above (WIGMORE, ed. 2, § 2549), say that the jury are not the soles judges of the facts and that unimpeached, uncontradicted testimony in regard to a fact is at least prima facie evidence of the existence of the fact, and that the jury cannot disregard it, and consequently the court is justified in directing a verdict in accordance with such evidence. *U. S. v. Wiggins,* 14 Pet. 334; *Skillern v. Baker,* 82 Ark. 86. This rule as applied by these courts is tempered, however, by the additional rule that where circumstances in the case show that there is bias,

prejudice, or that it is improbable that the fact exists for logical or physical reasons, then the question should be submitted to the jury for their finding. *Davis v. Judson,* 159 Cal. 121, 113 Pac. 147. It would seem that the application of the latter rule would ordinarily get the better result. It has always been the rule in criminal prosecutions never to make a presumption against the defendant, but rather to presume that he is innocent, and each material fact must be proved beyond a reasonable doubt before there can be a conviction. Logic rather than leniency has been the rule in civil cases. It is submitted that the recognition of this difference in the theory of the two types of case will explain at least a part of the apparent inconsistencies in the opinions.

EVIDENCE—BURDEN OF PROOF IN CONTESTED WILL CASE.—In a will contest, the principal allegation of the contestant being a lack of mental capacity on the part of the testator, it was *held* that the burden of proof of the mental soundness of the maker of the will is not on the proponent, but that "there is a burden, at all times, on the contestant to establish the contrary." *In re Cooper's Estate* (Iowa 1923) 194 N. W. 218.

Admitting that the court was able to cite innumerable precedents for its position, it is submitted that the contrary doctrine, which represents the law in England on the point and, probably, the weight of authority in this country, is supported by sound legal reasoning. Governing statutes quite universally require wills and codicils to be the handiwork of a testator of mental soundness in order that the instruments may be given any legal effect as wills. It would therefore appear that the testator's capacity should be regarded as "an essential fact in the proponent's claim." 5 WIGMORE ON EVIDENCE, ed. 2, § 2520. "The burden of establishing sanity and freedom from undue influence should be upon the proponent. * * * It may well be said that insanity and coercion are not affirmative defenses to be alleged and proved by the heir, but must be negatived by those who insist on the will." Professor Joseph Warren, 33 HARV. L. REV. 559. The "presumption of sanity" theory has assisted the proponent by furnishing him with a prima facie case. When we read of the extension of this assistance, as in the instant case, so that "at all times, throughout the case" the burden is on his adversary, we are led to question whether it can be accounted for entirely by the simple fact that there is a conflict of opinion on this point. It is submitted that it is possible to explain the increasing number of decisions on this side of the question by analogy to a similar situation in criminal cases where the accused pleads insanity. "Judicial experience," says Mr. Wigmore, "has led many courts to place the burden of proof on the accused who claims insanity." Mental capacity being an essential element of intent, and intent similarly essential to the state's case, cold logic would relieve the accused of this burden. But experience, practical expediency, has caused a decided shift in the attitude of the courts on the subject. Has the new theory, perhaps almost unconsciously, been taken over into the field of contested wills? This explanation may at least better satisfy those who look askance at the apparent deviation from the rules in parallel cases, where presumptions of law may assist a party litigant to the extent of granting him a prima facie case, but where the *burden of proceeding with the evidence* shifts

back to him on the introduction of evidence tending to rebut the presumption. "He, to whose case proof of the fact covered by the 'presumption of law' is essential, is not permanently relieved of the burden of proving it." 2 CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE, § 1021. Those who view the decisions as merely additional instances of an illogical conclusion will agree with Professor Warren, *supra*, who says these decisions "fall into the common error of failing to distinguish clearly between the burden of going forward with evidence and the burden of establishing the issue."

EVIDENCE—IMPEACHMENT OF WITNESS BY EVIDENCE OF GENERAL REPUTE. —In a liquor prosecution based on evidence secured by S, a hired detective from the city of A, the court allowed C, a character witness who had made a trip to A for the purpose of investigating the character of S, to testify as to the general reputation of S in the community in which S lived. C did not live in that community, nor had he known S, so far as the report discloses, except as a detective hired by a body of persons who were interested in having the liquor law enforced. *Held*, the evidence was properly admitted. *State v. Steen* (N. C. 1923) 117 S. E. 793.

It is universally conceded that a witness to be qualified as an impeaching witness must have adequate knowledge of the general reputation of the witness for truth and veracity in the vicinity in which he lives. The question in the instant case concerns the means by which this knowledge of general reputation was obtained. A witness may not say that he has been told that the witness had a good or bad character in the community. *Kimmel v Kimmel*, 3 Serg. and R. (Pa.) 336. Reputation is of slow formation, and its tenor can be adequately learned only by a residence in the place, not by a visit of inquiry. WIGMORE ON EVIDENCE, ed. 2, § 692; 4 CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE, § 3315; GREENLEAF, EVIDENCE, ed. 16, § 461d, par. 3; *Gaines v. Relf et al.*, 12 How. 472, 555; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; *Mawson v. Hartsink and others*, 4 Esp. Rep. (Eng.) 103; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *Young v. Corrigan*, 208 Fed. 431; *Reid v. Reid*, 17 N. J. Eq. 101. A witness who had known the impeached party fifteen years, and also knew many who knew him, was held competent. *People v. Seldner*, 62 App. Div. (N. Y.) 357. Hearing a person's character discussed by two or three persons or upon two or three occasions wa held insufficient. *Com. v. Rogers*, 136 Mass. 158; *Matthewson v. Burr*, 6 Neb. 312. Depositions of seven witnesses who had had occasion to know the witness in the community in which he was staying for three months was not admitted as testimony in *Waddingham v. Hulett*, 92 Mo. 528, 533. An impeaching witness who had made a trip to another city and had talked with some twenty persons in the impeached witness's community was held incompetent. *Tingley v. Times Mirror Co.*, 151 Cal. 1. It is submitted that the views as expressed by Justice Stacy, in the dissenting opinion of the case, represent the logical and convincing weight of authority. The general test is whether the witness "knows" the general reputation of the impeached. The argument that the court uses, namely, that C was better able to testify than would be a casual acquaintance of S, is beside the point. A casual acquaintance would not be allowed to testify unless

he "knew" the general reputation of the impeached. Was it true, in this case, that the witness spoke "of his own knowledge," or was he drawing a conclusion from opinions given to him by acquaintances of S? How can we be sure that a casual investigator has sought out representative people who are acquainted with the reputation of the impeached? Would it not be possible, by selecting a certain class of those living in the community, to obtain sufficient information to form a "knowledge" of the reputation of the impeached for truth and veracity or for falsehood, whichever the one investigating desired to show? It was held in *Bonaparte v. Thayer,* 95 Md. 548, that one who knows the reputation for truth and veracity of a witness among his business associates, but not among his general associates, is not qualified to testify as to his general reputation. The testimony admitted in the North Carolina case was purely hearsay. It was a knowledge gained by inquiring from those whom the investigator thought knew the general reputation of the impeached, and anyone's guess from similar facts would have done just as well. There was better evidence, which the court does not ignore, but it was not possible to obtain it, said the court. Yet that would seem a poor excuse for creating a precedent so inherently dangerous in its possibilities.

EVIDENCE—OPINION OF NON-EXPERT WITNESS WITHOUT FACTS UPON WHICH THE OPINION IS PREDICATED.—In a contest over a will the opinion of a witness for the contestants, who was not an alienist, as to the sanity of the deceased was *rejected* because the witness had not detailed the facts to the jury upon which he based his opinion. *In re Cooper's Estate* (Iowa 1923) 194 N. W. 218.

Generally speaking, it may be said that opinion is the exclusive province of the jury and that witnesses will not be allowed to invade such province. *Foster v. Murphy & Co.,* 135 Fed. 47. Although a witness may relate facts to the jury, it is for the jury to form an opinion concerning the facts to be proved. *Ogden v. People,* 134 Ill. 599. Where the jury can be put into a position of equal advantage with the witness for forming an opinion, the opinion of the latter will not be admitted. *Withey v. Pere Marquette R. Co.,* 141 Mich. 412. But where the opinion of the witness is formed from a variety of simultaneously occurring facts which are so complicated or so numerous that they cannot be clearly detailed to the jury in a manner that will enable them to draw a fair inference from the facts, such opinion is admissible, and it is for the cross-examination to develop the foundation for the opinion. *Atwood v. Atwood,* 84 Conn. 169. A non-expert witness will be allowed to express an opinion upon an issue of sanity only after he has testified to acts upon which his opinion is based. *Auld v. Cathro,* 20 N. D. 461; *Hilmer v. West. Travelers Accident Assn.,* 86 Neb. 285; *Re Christiansen,* 17 Utah, 412; *Sheehan v. Kearney,* 82 Miss. 688. The test applied in *Newcomb's Ex'or v. Newcomb,* 96 Ky. 120, is that if the court is satisfied that the witness has had an opportunity by observation or association to form an opinion as to the sanity of the testator, then the opinion is admissible without specific facts upon which such opinion is based. *Hardy v. Merrill,* 56 N. H. 227; *Hathaway's Adm'r. v. Nat. Ins. Co.,* 48 Vt. 335; *Estate of Brooks,* 54 Cal. 471, are in accord with

this view. While some courts have rejected opinions only as to the ultimate fact to be proved (*Peacock v. Wis. Zinc Co.*, 188 N. W. 641, the better considered decisions make no distinction between the ultimate and merely evidential facts. *American Agricultural Chemical Society v. Hogan*, 213 Fed. 416; *Poole v. Dean*, 152 Mass. 589; *Taylor v. Kidd*, 72 Wash. 18. It is submitted that there is a real difficulty at times in detailing facts in a manner which would enable the jury to form a fair opinion and that hence the test applied in *Newcomb's Ex'or. v. Newcomb, supra*, would produce a desirable result. See also 21 MICH. L. REV. 221, 43 WASH. L. REV. 472, and 3 WIGMORE ON EVIDENCE, ed. 1, § 1924.

EVIDENCE—PRESUMPTIONS NOT EVIDENCE.—Defendant with eight others was charged with robbery with violence and conspiracy to commit crime. Before the trial of defendant, four of the eight pleaded guilty. The state offered the record of the conviction of the above parties upon their pleas of guilty to the crime charged in the information to prove that the robbery was in fact committed at the time and place stated in the information. The object of the state was to use the presumption resulting from the above facts as an element in the proof of the guilt of the accused. *Held*, erroneously admitted as evidence. *State v. Gargano* (Conn. 1923) 121 Atl. 657.

This holding is in accord with the general weight of authority. The nature of presumptions being a rule of law, it cannot be weighed with facts. 5 WIGMORE, EVIDENCE, ed. 2, § 2491, says: "It is a fallacy to attribute an artificial probative force to a presumption," and in Vol. 5, ed. 2, § 2511, Wigmore says: "No presumption can be evidence." THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW, p. 563, states the rule very conclusively: "But in no case is there a weighing, a comparison of probative quality, as between evidence on one side and a presumption on the other." Also, see *Ogden v. State*, 12 Wis. 592; *State ex rel. Detroit F. and M. Ins. Co. v. Ellison*, 268 Mo. 239. In *Vincent v. Mutual Reserve Fund Life Assn.*, 77 Conn. 281, 58 Atl. 963, a rule is laid down that a presumption has no probative force or effect and is not entitled to be weighed and considered with evidence in the final determination of the issues of fact. This doctrine overruled an earlier case in the same state, *Barber's Appeal*, 63 Conn. 393, which stated that the presumption of law in favor of mental capacity was of probative force in favor of the proponents of a will. *Barber's Appeal, supra*, had high authority to support it in *Coffin v. U. S.*, 156 U. S. 432, and 1 GREENLEAF, EVIDENCE, ed. 16, § 34, which states that legal presumptions of innocence are to be regarded as evidence. Though a presumption may throw the burden of proceeding upon the opposing party (5 WIGMORE, ed. 2, § 2491; *Vincent v. Mutual Reserve Fund Life Assn., supra*), it would seem that the general trend of modern authority disallows its use as evidence. See 13 MICH. L. REV. 504; 8 COL. L. REV. 127; THAYER, PRELIMINARY TREATISE, pp. 551 to 576, inclusive.

FALSE IMPRISONMENT—JUSTIFICATION OF DETENTION OF A RESTAURANT PATRON.—P, a patron of D's restaurant, after paying her check was detained thirty minutes by D's servants, through a mistake of the cashier, while an

investigation was carried on to determine the fact of payment. *Held,* the reasonableness of the detention, under the circumstances, was a question for the jury. Judgment for the plaintiff. *Jacques v. Childs Dining Hall Co.* (Mass. 1923) 138 N. E. 843.

Any interference with a person's liberty by a demonstration of physical force which induces submission thereto is imprisonment. *Palmer v. Main Central R. R. Co.,* 92 Me. 399; *McAleer v. Good,* 216 Pa. 473; BIGELOW ON TORTS, ed. 8, 340. In the instant case the court assumes that if P had not paid her check D could legally have detained her until a settlement could be arranged, but if P had paid her check D detained her at his peril. The legality of detainment of patrons who are suspected of not having paid their checks depends on the legality of arrests without warrant by private citizens. In no case are these arrests legal except where a crime has been committed. 5 ENC. L. & P. 460. It seems necessary, therefore, to attach some crime to P's actions in order to make her detention legal. Construing the facts as against P in their most infamous light, supposing she had not paid her check, the crime of obtaining food under false pretenses is the gravest charge that could be brought against her. Her check being but thirty cents, this crime would be a misdemeanor under the laws of Massachusetts. GEN. LAWS OF MASS., 1921, Ch. 266, § 30, Ch. 274, § 1. A private citizen may not arrest for misdemeanor without a warrant, unless authorization is specifically given by statute (no such statute existing in Massachusetts), except where the misdemeanor is a breach of the peace, and is committed in the presence of the one arresting. *Cook v. Hastings,* 150 Mich. 289; *Com. v. Wright,* 158 Mass. 149; *Scott v. Eldridge,* 154 Mass. 25; *Baynes v. Brewster,* 2 Q. B. (Eng.) 375; 5 C. J. 414. This misdemeanor was committed in the presence of D's servants, but was it a breach of the peace? A breach of the peace, according to Bouvier, is "A violation of public order; the offense of disturbing the public peace." BOUVIER'S LAW DICTIONARY. The concept of *vi et armis,* disturbance of public order, seems to be contained in a technical breach of the peace. *State v. White,* 18 R. I. 473; *Davis v. Burgess,* 54 Mich. 514; *State v. Clark,* 64 W. Va. 625. It is self evident that the act apparently committed by P in the instant case did not constitute a breach of the peace, and therefore it is submitted that the Massachusetts court went farther than was necessary when it said that if P had not paid her check D could legally have detained her, for it appears on principle and authority that even where P refuses to pay D cannot legally detain her against her wishes without a warrant. *Krulevitz v. Eastern R. R. Co.,* 143 Mass. 228.

JUDGMENTS—DISMISSAL ON THE MERITS.—This was an action to recover damages for the death of the deceased, alleged to have been caused by the defendant's negligence. In a former action for the same injury the plaintiff's own evidence had shown that the deceased was guilty of contributory negligence. A New York statute placed the burden of proving contributory negligence on the defendant. At the end of the plaintiff's proof the defendant had moved for dismissal on the ground, among others, that the deceased was guilty of contributory negligence. An order had been entered directing the

dismissal and judgment accordingly. Neither the order nor the judgment had stated that all of the reasons advanced by the defendant for dismissal were adopted or approved, although the order recited the grounds upon which the motion was made. To the present action the defendant pleaded *res judicata*. Section 1209, New York Code of Civil Procedure, provided, "A final judgment, dismissing the complaint, either before or after a trial, * * * does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits." *Held*, the judgment of dismissal at the close of plaintiff's case was not a bar to the present action, because it was not shown by the express declaration nor did it appear by the judgment roll that the judgment was rendered on the merits. *Lehigh Valley Railroad Co. v. Qucreau* (U. S. C. C. App.) 289 Fed. 767.

A dismissal at the end of the plaintiff's case is regarded in New York as caused by a failure of proof, and therefore it is not on the merits and is not a bar to a future action. *Ploxin v. B. H. R. Co.*, 261 Fed. 854. But where the judgment is directed after the defendant has rested his case and there is a mere varying of reasons assigned for recovery in the second action, the cause of action remains the same and the prior disposition of the case is a bar to the future action. *Nawyalis v. Philadelphia & Reading Coal and Iron Co.*, 270 Fed. 93. A dismissal of complaint in a law action under the Code is equivalent to a non-suit. *Peterson v. Ocean Electric Railway Co.*, 214 N. Y. 43. The supreme court of Montana, under a code provision similar to that of New York, and in a case identical on the facts, held that a judgment was not upon the merits because of a failure expressly to so declare or enter upon the judgment roll. *Bennetts v. Silver Bow Amusement Co.*, 65 Mont. 340. It is not sufficient that the court can draw the legal conclusion that the judgment was rendered on the merits. *Glass et al. v. Basin & Bay State Mining Co.*, 34 Mont. 88, 95. The court in *Genet v. Delaware & Hudson Canal Co.*, 170 N. Y. 278, points out the weakness of such a formal test of *merits* as is applied by the New York statute, saying that it often happens through the omission of counsel to request the court to incorporate into the order that the complaint was dismissed upon the merits, or the neglect of the court to insert such a provision, that a plaintiff is not cut off from bringing a new action, although the intention was to make a final disposition of the case. Without questioning the correctness of the decision in the principal case, the weakness of any formal test of *merits* is made apparent. An examination of substance rather than of form should be the basis for determining the effect of a judgment. As stated in *Moch v. Superior Court*, 39 Cal. App. 471, "this question (dismissal on the merits) is to be determined, not on the basis of any single word or phrase used, but upon a consideration of the entire 'judgment,' together with the pleadings and the findings." That the formal test applied to dismissal on the merits has not been satisfactory may be inferred from the amendment to the New York Code, Vol. 2, § 1209; 4 Laws of New York, 1920, p. 174. The new test, although still a formal one, is much broader in its scope.

MINES AND MINERALS—SUBJACENT SUPPORT—LIABILITY OF SUBJACENT OWNER FOR INJURIES TO BUILDINGS.—The defendant removed pillars from sub-

jacent coal strata, with the result that the plaintiff's land subsided and buildings were injured. These buildings had been erected subsequent to the conveyance of the coal strata. *Held,* that damages were assessable for the injury to the buildings. *Ohio Collieries Co. v. Cocke* (Ohio 1923) 140 N. E. 356.

The owner of the surface undoubtedly has a natural right to the support of the land in its natural condition. *Humphries v. Brogden,* 12 Q. B. 739; *Burgner v. Humphrey,* 41 Ohio St. 340. Plainly, however, there is no such natural right of support to artificial structures such as buildings. The right of support for such depends upon grant, prescription or reservation which results in a servitude in the nature of an easement. BIGELOW ON TORTS, ed. 8, p. 437. A general grant of the subjacent strata implies a reservation of the right to the support of the land in the condition existing at the time the title to the mines and that to the surface came into separate hands. *Richards v. Jenkins,* 18 L. T. R. N. S. 437. In the principal case damages were assessed for certain farm buildings built after the lease of the subjacent strata had been made. This is equivalent to saying that the easement by implied reservation will include support for all structures which would ordinarily be used upon such land. This is the view taken by Bigelow (*ante*), and is suppoted by a dictum of Kelly, C. B., in the case of *Richards v. Jenkins, ante.* So also *Gumbert v. Kilgore,* 6 Atl. 771. The rule, of course, would not include unusual structures not fairly within the contemplation of the parties at the time the subjacent stratum was conveyed. It would seem that the court has taken a broad and reasonable view, and in this connection it is interesting to note that Ohio is one of those states which in general imply the *reservation* of an easement only in case of strict necessity. *Meredith v. Frank et al.,* 56 Ohio St. 479.

NEW TRIAL—FAILURE TO NOTIFY COUNSEL OF TRIAL DATE—DILEMMA OF NON-RESIDENT ATTORNEY.—The defendant's attorney resided in Kansas City. On October 2, he addressed a letter to the clerk of the court of Tulsa County, Okla., where his case was to be tried, requesting the clerk to advise him by wire at the latter's expense of the date set for the hearing. Because of the clerk's failure to notify the attorney, the court entered a default judgment against his client on November 2, neither the attorney nor his client being present. *Held,* a motion to vacate judgment was properly denied. *Colley v. Sapp* (Okla. 1923) 216 Pac. 454.

It is the general rule that "the absence from trial, without sufficient excuse, of counsel for the unsuccessful party is not ground for a new trial." *Mehnert v. Thieme,* 15 Kans. 368; *Staunton Coal Co. v. Menk,* 197 Ill. 369; 29 CYC. 858. The difficulty lies in determining what is a sufficient excuse. It is a matter lying in the court's discretion, *Downing v. Klondike Mining and Milling Co.,* 165 Cal. 786; *Van Casteel v. Hutchins,* 119 N. Y. S. 170; *Southern Minnesota Investment & Loan Co. v. Livingston,* 117 Minn. 421, which may be exercised narrowly or liberally. In *Griffin v. O'Neil,* 47 Kans. 116, the defendant asked for a new trial, basing the request on an alleged accident consisting in his failure to receive a telegraph message in time to attend trial. The court denied a new trial, ruling that the alleged accident

was a miscarriage of defendant's chosen agent, the telegraph company, and that a mere failure of defendant's agent was not an accident. It is always a serious problem with a non-resident attorney to arrange for notice of the calling of his case. If he has other business he cannot be expected to give it up in order personally to watch the course of the docket. He, as well as the judge, is an officer of the court, and he should be required to do no more than exercise such care as modern business conditions make reasonable. Proper arrangements with a suitable resident agent might well be deemed to constitute such care, and the technical rule of responsibility for the neglect of one's agent might be deemed inconclusive as applied to an attorney. Such seemed to be the view of the court in *Kentucky Journal Publishing Co. v. Brock,* 140 Ky. 373, where it was held that the defendant was entitled to a new trial on the ground of accident or surprise when, on account of failure to receive a telegram, he was unable to reach the place of trial until after the jury had rendered a verdict. The Supreme Court of the United States, in *Davidson v. Lanier,* 131 U. S. (Appx.) LXXII, in holding that a motion for dismissal as against a non-resident attorney would not be entertained without proof of notice sufficient to enable him to arrange his business and travel to Washington for the hearing, suggests the equity in the position of the non-resident attorney. The test of diligence should be harmonized with the conditions under which attorneys must necessarily conduct their business.

PROCESS—SERVICE ON SOLICITING AGENT OF FOREIGN RAILROAD COMPANY. —In an action for damages to potatoes shipped in Manitoba, service was made under a Minnesota statute providing that "any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state may be served with summons by delivering a copy thereof to such agent." *Held,* that the court did not have jurisdiction. *McNeill & Scott Co. v. Great Northern R. Co.* (Minn. 1923) 194 N. W. 614.

That the business carried on by a foreign corporation in the state is entirely interstate in character does not relieve the corporation from the ordinary process of the state courts. *Int. Harv. Co. v. Kentucky,* 234 U. S. 579. And it seems that less is required to constitute "doing business" under statutes providing for service of process than under those imposing restrictions on the transaction of business. *Tauza v. Susquehanna Coal Co.,* 220 N. Y. 259; *Atkinson v. United States Operating Co.,* 129 Minn. 232; 36 HARV. L. REV. 327. Earlier Minnesota decisions allowed the above statute a broader operative effect. *Armstrong Co. v. N. Y. C. & H. Ry. Co.,* L. R. A. 1916E 232 and note; 6 MINN. L. REV. 309. But in a recent case where (1) plaintiff was not a resident of Minnesota, (2) the transaction out of which the action arose was not made in the state, (3) the cause of action did not arise in the state, and (4) the railroad had no line in Minnesota, the United States Supreme Court held that this statute imposed an unreasonable burden on interstate commerce and so was invalid under the commerce clause of the United States Con-

stitution. *Davis v. Farmers' Coöp. Equity Co,* 67 L. Ed. Adv. Ops. 613. Where the transaction upon which the action is founded is entered into within the state (*Int. Harv. Co. v. Kentucky, supra;* 32 HARV. L. REV. 871), or the plaintiff is a resident of the state (*Chambers v. B. & O. R. Co.,* 207 U. S. 142; *Canadian N. Ry. Co. v. Eggen,* 252 U. S. 553; *Denver & R. G. R. Co. v. Roller,* 100 Fed. 738), service on a soliciting agent should be effective.

TAXATION—DEDUCTION OF FEDERAL INHERITANCE TAX BEFORE ASSESSMENT OF ESTATE FOR STATE INHERITANCE TAX.—The federal inheritance tax having been levied on an estate, the state tax commission refused to deduct the amount of the federal estate tax from the total estate for the purpose of assessment for the state inheritance tax. Plaintiff paid the entire amount under protest and sued to recover the tax on the amount of the federal estate tax. *Held,* that the federal tax should first have been deducted, as the state inheritance tax was a succession tax. *Tax Commission ex rel. Price, Atty. Gen., et al. v. Lamprecht* (Ohio 1923) 140 N. E. 333.

There is a decided conflict on this question, but the principal case represents the weight of authority. ROSS ON INHERITANCE TAXATION, § 284; *State v. Ferris,* 53 Ohio St. 314, 30 L. R. A. 218; *Corbin v. Townshend,* 92 Conn. 501; *In re Estate of Miller,* 184 Cal. 674; *People v. Pasfield,* 284 Ill. 450. A number of states, however, have refused to allow the deduction. *Matter of Estate of Sherman,* 222 N. Y. 540; *Estate of Week,* 169 Wis. 316; *Hazard v. Bliss,* 43 R. I. 431, 23 A. L. R. 826. The basis of the decision in the principal case is that the federal tax is a debt and so should be deducted as any other debt before computing the state tax. See also *Matter of Gall, Adm'x,* 182 N. Y. 270; *Allen v. Allen's Adm'x,* 18 Ohio St. 234. Other cases have held that the federal tax is an "expense of administration," and so deductible. *Corbin v. Townshend, supra; State v. Probate Court,* 139 Minn. 210. On the other hand, one state has refused to deduct expressly on the ground that the federal tax is not named in the statute as a debt or expense of administration. *In re Sanford,* 188 Ia. 833. What is probably the majority of the cases base the decision on the ground that the state tax is on the right or privilege of succession, and, as the amount of the succession is reduced by the federal tax, so should the amount taxed for state purposes be reduced. *In re Estate of Roebling,* 89 N. J. Eq. 163; *State v. Ferris, supra.* The soundest view held in those states which refuse to allow the deduction is that as the tax is on the transaction of the passing of the property, the measure of the property should be its value at that time, viz., at death. *State v. Pabst,* 139 Wis. 561; *Week's Estate, supra.* Another basis is that the tax is on the power to transmit and not the property transmitted. *Hazard v. Bliss, supra,* Sweeney, J., dissenting. To say that the federal tax is either a debt or an expense of administration would seem to beg the question and lead to the dilemma of calling the state tax a debt or expense as well. Although some cases have suggested that the federal tax attaches prior to the state tax, and so should be subtracted, *Old Colony Trust Co. v. Burrell* (Mass. 1921) 131 N. E. 321, it would seem that "The question is not one of precedence. * * * It is in substance one of justice and in form one of construction, and in cases where construction is necessary

which involve double taxation, the law should be construed against the government." Holmes, J., in *Hooper v. Shaw*, 176 Mass. 190. See also 18 MICH. L. REV. 161; 34 HARV. L. REV. 441; 27 YALE L. JR. 1055; 28 *ib.* 194, 517.

TORTS—RECOVERY FOR BREACH OF CRIMINAL STATUTE.—An ordinance required abutting landowners to remove snow and ice from adjacent sidewalks, subject to a fine for failure to do so. Defendant failed to remove the snow and ice and the plaintiff slipped and fell, sustaining an injury as a result. *Held*, plaintiff could not recover. *Sewall v. Fox* (N. J. 1923) 121 Atl. 669.

At common law it was well settled that there was no duty on the part of abutting owners to keep adjacent sidewalks free from ice and snow or even in repair. *Kirby v. Boylston Market Association*, 14 Gray (Mass.) 249; *Heeney v. Sprague*, 11 R. I. 456; *Vandyke v. City of Cincinnati and Harbeson* 1 Disney (Ohio) 532. Subject to constitutional limitations, it is competent for legislatures to lay upon lot owners or occupiers, directly or by authorized ordinance, the duty to keep adjacent sidewalks in repair and free from ice and snow, and to enforce obedience by fines and penalties. *City of Rochester v. Campbell*, 123 N. Y. 405; *Goddard, Petitioner*, 16 Pick. (Mass.) 504; *contra, Gridley v. City of Bloomington*, 88 Ill. 554. And in some states it is competent to impose a liability to private actions for injuries received from such defects. *Hay v. City of Baraboo*, 127 Wis. 1; 2 SHEARMAN AND REDFIELD ON THE LAW OF NEGLIGENCE, ed. 6, § 343. Since there is no duty at common law, the plaintiff to prevail must show the power and intent of the municipality to impose a liability to private actions. But it is a dubious and dangerous thing for courts to speculate as to unexpressed legislative intent and create private remedies by implication. It would be imputing to the ordinance what it did not say, to provide a civil liability where only a fine is imposed. Nor would it be a reasonable implication. See Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 331. Ordinances of this nature are not intended for the benefit or protection of individuals comprising the public, but are intended for the benefit of the municipality as an organized government. *Fielders v. North Jersey Street R. R. Co.*, 68 N. J. L. 343. The instant case is both sound on principle and in accord with authority.

TORTS—SLANDER OF PERSON HOLDING AN OFFICE OF HONOR.—Statements were made by a priest to his congregation that the trustees were "Liars, hypocrites, traitors and Judases," and that there were no books or records showing where moneys of the congregation had gone, with the question, "Where did the money go?", all being part of one address. The plaintiff conceded that there was no imputation of a crime. *Held*, that the words imputed a lack of fidelity, honesty, and integrity in the plaintiff in discharge of his duties as trustee of the congregation, tending to disgrace him and disparage him as such officer, and were actionable *per se;* that the question as to the money charged slovenly bookkeeping only and was not actionable *per se. Fitzgerald v. Piette* (Wis. 1923) 193 N. W. 86.

Slander is actionable *per se* (1) where the words charge the plaintiff with commission of certain crimes; (2) where they impute to him a contagious or

loathsome disease; (3) where they disparage him in the way of his office, profession or trade. ODGERS, LIBEL AND SLANDER, ed. 5, p. 39. Due to the concession of the plaintiff that no crime was imputed, the slander charged in the principal case falls under the third head. And here a distinction is drawn between offices of honor and offices of profit. Charges of misconduct in either an office of honor or profit are actionable *per se*. ODGERS, LIBEL AND SLANDER, ed. 5, p. 54. "Words imputing want of integrity, dishonesty or malversation to anyone holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se*." *Booth v. Arnold* [1895], 1 Q. B. 571; *Livingston v. McCartin*, [1907] Victorian L. R. 48. But if the imputation is but one of unfitness for the office, the words are only actionable *per se* if spoken of one holding an office of profit. *Alexander v. Jenkins*, [1892] 1 Q. B. 797, said that where "the conduct charged be such as would enable him to be removed from or deprived of that office" the action can lie. This same court also commented that the distinction above noted is by no means satisfactory, but felt that they ought not to extend the limits of actions of this nature beyond those laid down by their predecessors. So it seems that the court in the principal case, holding as it does that a charge of unfitness of one holding an office of honor is actionable *per se*, has gone beyond the decided authority. But its decision is highly satisfying to one's desire for justice which calls for obliteration of those artificial distinctions.

TRUSTS—REMEDY IN CASE OF PASSIVE TRUST OF PERSONALTY.—Testator bequeathed $1,000 upon trust for his daughter with the provision that upon her death it should go to her heirs. Before the death of the beneficiary the fund was invested in a land mortgage, and later, in satisfaction thereof, the land was conveyed to the trustee. After the beneficiary's death the trustee also died, without having conveyed the title to the heirs under the will. Both the daughters and the husband of the beneficiary claimed as her heirs; but by law of Connecticut which controlled the will the husband is not an heir of the wife. In an action of ejectment, the plaintiff deraigned title from the daughters, while the defendant claimed through a deed from the husband. Kansas Civil Code, § 619, provides that one who has an equitable title may maintain ejectment. *Held*, plaintiff could maintain the action, for the daughters were the equitable owners of the land when they conveyed their interest to him, the trust at that time being passive and executed. *Gibson v. Boynton* (Kan. 1922) 210 Pac. 648.

In arriving at its decision the court concluded that the acceptance of the land by the trustee in satisfaction of the mortgage debt did not alter the character of the trust, and that it still was a trust of personalty. While a loan of trust funds on real mortgage does not change the character of the funds nor constitute an investment in real estate, *Milhaus v. Dunham*, 78 Ala. 48; *Zimmerman v. Fraley*, 70 Md. 561, it is difficult to see why, in principle, the acceptance of the land did not thereafter constitute the trust one of realty. Regarded as realty, the legal title of the trustee would have ceased *ipso facto* upon the death of the beneficiary, and, in accordance with the view of many courts, the grantors of the plaintiff would have become automatically the hold-

ers of the legal title. *Temple v. Ferguson*, 110 Tenn. 84; *Meacham v. Steele*, 93 Ill. 135. Consequently, the plaintiff could then have prevailed in this action as holder of the legal title. On the other hand, accepting the court's conclusion that it was personalty, the trust, upon the death of the trustee, vested in his executor or administrator. *Schenck v. Schenck*, 16 N. J. Eq. 174. As the trust was then passive, equity would have, upon application of plaintiff's grantors, terminated the trust and vested legal title in them. *Hill v. Hill*, 90 Neb. 43; *Fox v. Fox*, 250 Ill. 384. Not having done this, the legal title remained in the executor of the dead trustee, and all that the plaintiff's grantors were able to convey was their equitable interest in the land. Sole justification for the decision must therefore be found in Section 619 of the Civil Code, *supra*. If the judgment in ejectment can be regarded as equivalent to a voluntary conveyance by a trustee or as a decree in chancery, the decision results in terminating a trust of personalty in an unusual manner.

WILLS—PRESUMPTION OF UNDUE INFLUENCE.—In a contested will case the instructions of the lower court included the statement that "it is the law that where a party who receives a gift, by will or otherwise, occupies a position of trust and confidence toward the one who makes the gift, that fact will warrant an inference or presumption that such gift or will was induced by undue influence." On appeal, *held*, that this instruction was reversible error. *In re Simmons' Estate* (Minn. 1923) 194 N. W. 330.

The facts in this interesting case present what is probably as favorable a situation as proponents of the theory advanced by the lower court could wish for in apparent support of their position. There was execution of one will in 1911 by a testatrix who, later in that year, was adjudged insane; the appointment of the proponent-beneficiary as legal guardian; restoration to legal competency in 1915, and the grant of a power of attorney to the beneficiary, who attended to the business affairs of the testatrix; the destruction of the earlier will and execution of the one in question in 1916, both, to be sure, naming the proponent as executrix, but the later one increasing her legacy as well as naming her residuary devisee—an ideal situation for those who advance the argument that "the rule that undue influence may never be presumed is subject to an exception in those cases in which a legacy is given by a testator to his confidential adviser, guardian, or other person sustaining toward him any fiduciary relation." 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, ed. 2, § 32. And yet, it is submitted, the final decision is most sound and has authorities, many decisions, logic, and, withal, expediency to sustain it. The lower court might have taken the position, already chosen by many courts, that the peculiar relationship of the testator and executrix was a fact of evidential value, to which the jury might attach the weight it saw fit, and only that. It chose, however, so to phrase its instructions as to assist the contestant by furnishing him with a prima facie case. With the almost universal rule, as to burden of proof in undue influence cases, applying in this jurisdiction, as it did, the upper court was forced to take cognizance of the full effect of the phraseology of the instructions. The rule as to gifts *inter vivos*, which the lower court sought to enforce, does not apply to wills. SCHOULER ON WILLS,

ed. 3, § 246. "In spite of some uncertainty and lack of harmony in the decisions, it is undoubtedly a sound rule, sustained by a majority of cases, that the existence of confidential relations * * * is not enough, taken alone, to raise a presumption of undue influence." 1 UNDERHILL, LAW OF WILLS, § 145. In *Hall v. Hall,* L. R. 1, P. & D. 481, Sir J. P. Wilde says: "To make a good will, a man must be a free agent; but all influences are not unlawful. Persuasions, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, * * * these are all legitimate and may be fairly pressed on the testator. On the other hand, pressure of whatever character, * * * if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made." May we not question, with justice, the apparent tendency of some courts to under-emphasize this distinction between *mere* influence and *undue* influence? "One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of a sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence." Justice Brewer, in *Beyer v. LeFevre,* 186 U. S. 114, 125. Do we not stray far afield when we presume, from the mere fact of confidential relationship, *undue* influence on the part of the beneficiary? Is it not a fairer inference that, as the court puts it in the instant case, "in some relationships it is the expected, the natural thing"?

WORKMEN'S COMPENSATION LAW—ADJUSTMENT OF RIGHTS WHERE INJURY IS CAUSED BY THIRD PARTY.—The Massachusetts Workmen's Compensation Act provides that where an employee is injured by the negligent act of a third party he has the option to proceed at law against the third party for damages or against the subscriber for compensation *under the act.* The defendant agreed that if the plaintiff would sue the third party the defendant, in the case of failure of such suit, would pay the plaintiff compensation. The plaintiff sued the third party and failed to recover. In an action on this contract, *held,* such contract was in violation of the act and therefore illegal and void. *Coughlin v. Royal Indemnity Company* (Mass. 1923) 138 N. E. 395.

In construing a statute, the expressed or implied intent of the lawmakers is the law. *Susznik v. Alger Logging Co.,* 76 Ore. 189. And in the search for this intent the statute is to be considered as a whole. *Post v. Burger & Gohlke,* 216 N. Y. 544. It has been held that the purpose of the above cited clause in the Massachusetts act is to protect the third party from double liability and to allow the plaintiff to accept payment from his employer, whereupon the employer will be subrogated to the rights of his employee. See *Kelly v. Greany,* 216 Mass. 296; *Turnquist v. Hannon,* 219 Mass. 560. In some states this subrogation is merely by the general terms of the statute (*Albert Albrecht v. Whitehead,* 200 Mich. 109), while in others the statutes expressly

provide that the making of a claim against an employer shall operate automatically as an assignment of the cause of action. *Anderson v. Miller Scrap Iron Co.,* 176 Wis. 521. If such is the purpose of the clause under consideration, it is difficult to see why the contract is illegal and void. A case decided under the Scottish act, which has a clause similar to that of Massachusetts, seems to support the legality of the above contract. The employee accepted money from the employer under a contract by the terms of which the money was to be returned to the employer in case the employee succeeded against the third party, or to be accepted as full compensation in the event of failure. The court held that this arrangement did not constitute the exercise of the option because, *by the terms of the contract,* the employee showed no intention at the time of contracting to exercise this option. *Wright v. Lindsay,* 49 Scot. L. R. 210. It would seem that if the above agreement had been declared illegal, as in the Massachusetts case, the acceptance of the money by the employee would have constituted an election.