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BAILMENTS—CARRIERS—CONVERSION—TROVER BY BAILEE (A COMMON CARRIER) AGAINST A THIRD PERSON.—On the facts as stated by the court of last resort it is often difficult to discover why any action should ever have been thought of, and impossible to see how the judgment of the trial court should have been in favor of the preposterous claim of the plaintiff. Such seems to be the case of *Farmers' Cotton Oil Co.* v. *Atlanta & St. A. B. Ry. Co.* (Ala. 1918), 79 So. 387. Plaintiff carrier by mistake delivered cotton seed to defendant company. Defendant by mistake, not even negligent mistake it would appear, received and used the cotton seed and paid the freight. The consignor and his vendee called off the sale, and defendant paid to the consignee the full or agreed price for the seed. The carrier then demanded the seed of defendant, and without offering to return the freight money now brings trover!

That a bailee may in proper case sue a third person for conversion of the bailed chattel; that such bailee as agent may sue to recover back his principal's property delivered to a third person by mistake; that a carrier who delivers the goods to the wrong party is absolutely liable and may be sued in trover; and that one may be guilty of conversion though he acted in good faith, and without knowledge of the true ownership of the goods, are all principles too well settled to need citation of authority. See, however, Mr. Freeman's monographic note to *Bolling* v. *Kirby*, 90 Ala. 215, 25 Am. S. R. 789, and *Stephens* v. *Elwall*, 4 M. & S. 259, *Pacific Express Co.* v. *Shearer*, 160 Ill. 215. It may be admitted that a bailee may maintain detinue or trover against a third person who has fraudulently or wrongfully induced the bailee to deliver to him the goods of the bailor, or who receiving the goods innocently now wrongfully retains them. *Walker* v. *L. & N. R. Co.*, 111 Ala. 233. But this cannot be extended to a case like the present, where the third person has settled with both bailor and bailee all their just claims for the goods and their carriage.

BOUNDARIES — ACCRETION OR AVULSION. — In an action of ejectment the plaintiff's right to recovery turned on whether the land in question was in Arkansas. Prior to 1873 the principal and navigable channel of the Mississippi River swept in a curve toward Arkansas around the land in dispute; across the peninsula of Mississippi land formed by this curve there was a chute through which in times of high water some water flowed. Gradually this chute increased in volume of water carried and finally, after many years, it became the main channel. *Held*, that the state line had not moved to the chute, hence the land sued for was not in Arkansas. *Davis* v. *Anderson-Tulley Co.* (C. C. A., 8th Circ., 1918), 252 Fed. 681.

When the boundary line between states is a navigable stream the rule of the *thalweg* applies, and the line is the middle of the main navigable channel. *Arkansas* v. *Tennessee*, 246 U. S. 158. The same rule ought to apply as between private owners. In case of shifting of this line by accretion and

erosion the boundaries will shift. 17 MICH. L. REV. 95; *Gifford* v. *Yarborough,* 5 Bing 163; *Lovingston* v. *St. Clair County,* 64 Ill. 56. Where, however, by avulsion a river suddenly changes its course or land is suddenly left dry by the recession of the sea there is no change in boundaries. *Gifford* v. *Yarborough, supra; Arkansas* v. *Tennessee, supra.* In the principal case the change in the channel was accomplished slowly enough to meet the requirements of the rule regarding accretion and erosion, but there was neither accretion nor erosion, for the water did not gradually "creep" over the land. Although not strictly a case of avulsion the same reasons for the result in such cases led to a similar result here. See also *Washington* v. *Oregon,* 211 U. S. 127.

CARRIERS—PASSENGERS — NEGLIGENCE. — An apparently healthy passenger fell in stepping from the platform of a ship's companion way into a life boat, both boats being practically motionless. *Held,* it was not negligence for a seaman who steadied her when she began the step to let her go before she placed her foot on the thwart of the life boat. *Goode* v. *Oceanic Steam Nav. Co., Ltd.* (1918), 251 Fed. 556.

Plaintiff made no claim that defendant owed any duty to assist her, but having volunteered to do so, he must exercise due care. That a person under no duty to act, who volunteers assistance will be held liable for injuries caused by his failure to exercise the proper degree of care is well recognized. *Black* v. *Ry. Co.,* 193 Mass. 448. In *Hanlon* v. *Central R. Co. of N. J.,* 187 N. Y. 73, this principle is emphasized. Defendant's servant assisted the plaintiff in alighting from a railway carriage and removed his support before she got down, causing a fall and the injury complained of. The court said, "The situation in this case it is true was not such as to suggest any serious danger to the plaintiff in leaving the car: but, when the conductor assumed to extend his aid in doing so, she had a right to accept it and rely upon his act as being a careful one." This position is approved in *Younglove* v. *Pullman Co.,* 207 Fed. 797 at 802; *Central of Georgia Ry. Co.* v. *Carlisle,* 2 Ala. App. 514; *Moody* v. *Boston & M. R. R.* 189 Mass. 277; *Nashville etc. R. Co.* v. *Newsome et ux* (Tenn. Nov., 1918), 203 S W. 33. In *Southern Traction Co.* v. *Reagor* (Tex.) 186 S. W. 272, the care to be exercised in such cases is characterized as of "the highest degree." It is submitted the generally accepted and correct statement is that the care to be exercised is such as an ordinary, prudent person would exercise under the same circumstances, the degree varying with the circumstances. *Ry. Co.* v. *Newsome et ux, supra.* The court apparently is not disposed to quarrel with this doctrine. It bases its decision on the proposition that the assistance was only for the purpose of helping plaintiff get started. No authority is cited in support of this distinction. None has been found. On the contrary, the cases seem to hold that the purpose is to assist in safely completing the matter in hand. *Black* v. *Ry. Co., supra; Younglove* v. *Pullman Co., supra,* at p. 802; *Hanlon* v. *Ry. Co., supra; Ry. Co.* v. *Marrs,* 27 Ky. L. Rep. 388. The decision stresses the fact that the step was an easy one, that the plaintiff was in apparent good health, that the harbor was calm, etc., creating the impression that the court

considered it as a mere perfunctory offer of assistance not expected to be seriously relied upon nor seriously extended. On this point, *Hanlon* v. *Ry. Co., supra,* would seem to be decisive. Defendant's conjectures on the extent to which the plaintiff intended to rely, or was relying on his assistance should have no weight in determining what reliance the plaintiff might safely place on the offer of assistance Defendant's act was the best evidence by which the plaintiff could regulate her conduct and having offered his service, he had no right to presume it unnecessary so long as the apparent need for it was as great as when offered.

CONSTITUTIONAL LAW—WOMEN AS GRAND JURORS.—The Constitution of Nevada provided that no person should be tried for a capital or other infamous crime except on presentment or indictment of a grand jury. Sec. 27, Art. 4, reads: "Laws shall be made to exclude from serving on juries, all persons not qualified electors of this state." An amendment to the Constitution extended to women the right to be qualified electors. The petitioner in a proceeding in prohibition alleged that he was indicted by a grand jury composed of men and women; and claimed that the indicment was invalid since the suffrage amendment did not operate to make women competent to serve on grand juries. *Held,* that the indictment was valid. Sec. 27, Art. 4, was intended by the framers of the Constitution, to substitute "qualified electors" for the common law qualifications that men only could serve. *Parus* v. *Dist. Court, etc.* (Nevada, 1918), 174 Pac. 706.

The prevailing opinion is hardly supportable. There is no need to resort to hairsplitting to justify the conclusion that the court violated one of the elementary rules of logic, namely, that an affirmative conclusion cannot be drawn from a negative premise. BODE, AN OUTLINE OF LOGIC, 71. The dissenting opinion very correctly declares that the article "is one of exclusion and not of inclusion," that there is "a wide difference between a statute or constitutional provision which imposes jury duty upon a class of persons and one which excludes all other persons except a designated class." The passage from Cooley cited by the dissenting judge points to the proper disposition of the principal case; it declares that the Constitution "is not the beginning of law for the state, but that it assumes the existence of a well understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." *Cooley on Constitutional Limitations* (6th ed.), 75. Thus, an act has been held unconstitutional which made possible a grand jury of ten men in contravention to the common law requirement of at least twelve men. *State* v. *Hartley, 22* Nevada 342, 28 L. R. A. 33; similarly, *Carpenter* v. *State* 4 How. (Miss.), 163, 34 Am. Dec. 116. Since the Nevada Constitution is silent on the question of the structure of the grand jury, the common law must be the source of information on the matter.

At the common law the word 'men' was usually used in connection with the designation of qualifications of grand jurors. Chitty speaks of "men free from all, etc." See *Edwards, The Grand Jury,* 60. Blackstone, speaking of grand juries, said: "Under the word *'homo'* also, though a name common

to both sexes, the female is, however, excluded *propter defectum sexus.*" COOLEY'S BLACKSTONE (4th ed.), 1123. Adjudicated cases are rare. There is a strong dictum in *Harlandy* v. *Territory,* 3 Wash. Terr. 131. The statute under which "all qualified electors and householders "were made competent to serve as grand jurors was declared unconstitutional because of defect of title; but Turner, J., there said: "When legislators have prescribed the qualifications of jurors, the qualification that they be males has always been implied . . . . and undoubtedly that which is implied would have been expressed if it had ever occurred to the members that a subsequent legislature would confer the elective franchise on women . . . . 'every statute must be construed in the light of the common law'." The point was later decided directly in a 1917 case. The Code read that a grand jury was "a body of men"; but it also provided that "words used in the masculine gender include the feminine and neuter." The court refused to admit women to the grand jury saying that men only could serve because "such was then the common law that women were incompetent to act as jurors." *People* v. *Lensen,* (Dist. Court of App., Cal.), 34 Cal. App. 336—followed without an opinion in *People* v. *Warner, ibid.* 804. Admitting for the sake of argument that women could not serve at common law the court in the principal case argues that "woman's sphere under the common law was a circumscribed one," that by "modern law and custom she has demanded and taken a place in modern institutions as a factor equal to man." The Constitution, however must be interpreted in the light of the common law as it existed at the time of the adoption of the Constitution. *State* v. *McClear,* 11 Nev. 39. Radical changes must be left to the people, otherwise the broadening scope of the common law would put a tool in the hands of opportunists to be used in the undermining of the Constitution.

DESCENT AND DISTRIBUTION—RIGHT OF WIDOW WHO KILLED HUSBAND.—Defendant was convicted of manslaughter for killing her husband. In an action to quiet title to certain land which had belonged to the victim it was *held* that under Sec. 3856 of the General Statutes of 1915 defendant had taken no interest in such lands as heir of her husband. *Hamblin* v. *Marchant* (Kans., 1918), 175 Pac. 678.

In *McAllister* v. *Fair,* 72 Kan. 533, 4 MICH. L. REV. 653, it had been held, following the more general rule, that in the absence of statutory provision governing the situation a murderer was entitled to succeed by inheritance to property of the victim. See further 7 MICH. L. REV. 160; 13 MICH L. REV. 336; 16 MICH. L. REV. 561. Shortly after the decision in the *McAllister* case the Kansas legislature provided that "Any person who shall hereafter be convicted of killing *** any other person from whom such person so killing *** would inherit the property *** belonging to such deceased person *** shall be denied all right, interest, and estate in or to said property," etc. (R. S. 1915, Sec. 3856). Conviction of manslaughter was held to be a conviction of killing and undoubtedly rightly so. Whether or not the statute should apply only to convictions of murder, as in California (*In re Kirby's Est.,* 106 *Cal.* 91 was a question for the legislature to decide.

EVIDENCE—ACCOMPLICE—SEPARATE CRIMES.—Defendant was indicted for the crime of receiving stolen property. Defendant asked for an instruction at the trial that the testimony of the thief should be treated with caution, on the ground that the uncorroborated testimony of an accomplice is entitled to diminished credibility. *Held,* that the instruction was properly refused since the two crimes were distinct—the witness could not be indicted for the same crime that defendant was indicted for. *Bailey* v. *State* (Fla., 1918), 79 So. 748.

While most courts seem agreed that the testimony of an accomplice should be treated with suspicion if uncorroborated, they are not all agreed in the definition of 'accomplice'—especially where the act committed by the witness falls into a separate class of crime. The principal case, however, is with the weight of authority. A purchaser of liquor sold in violation of the law is not an accomplice of the seller. *Terry* v. *State,* 44 Tex. Crim. Rep. 411 (nor can he be convicted as an acessory), *Lott* v. *U. S.* 205 Fed. 28; the perjurer is not an accomplice of the suborner, *Stone* v. *State,* 118 Ga. 705, 98 Am. St. Rep. 145; the donor or offeror of a bribe is not the accomplice of the receiver, *State* v. *Durham,* 73 Minn. 150; *State* v. *Wappenstein,* 67 Wash. 502—*Contra, Ruffin* v *State,* 36 Tex. Crim. Rep. 565; the participants in an unlawful game of cards are not accomplices to one another where each could be convicted of the individual crime, *Com.* v. *Bossie,* 100 Ky. 151; nor is the purchaser of a lottery ticket the accomplice of the seller, *Boyd* v. *Com.,* 141 Ky. 247. In *State* v. *Kuhlman,* 152 Mo. 100 it was held, as in the principal case, that the thief is not the accomplice of the one who receives stolen goods. But in *People* v. *Coffey,* 161 Cal. 433, the strongest of the *contra* cases, it was held that the offeror of a bribe is the accomplice of the acceptor on the reasoning that an accomplice is "anyone concerned in the commission of a crime". The adherence to this broad definition renders it unnecessary to consider whether the crimes are distinct. The other test is whether the witness could have been convicted for the offense as principal. As far as the reason of the thing goes it does not appear why the fact that conviction cannot be had for the same crime should have the effect of making the testimony more competent; the witness might seek immunity for the crime which he has committed as an associate just as readily as he would seek immunity for a crime which he and the defendant had committed as principals. As long as they are associates in crime it can be of no consequence that the crimes are technically separated—the argument of the prevailing opinion is mathematical but hardly meritorious. It can be condoned only on the ground that there is some existing tendency to do away with this rule of corroboration of the testimony of accomplices. WIGMORE, Sec. 2057.

EVIDENCE—ADMISSIBILITY—UNLAWFUL SEARCH OR SEIZURE.—While travelling on a public highway defendant was stopped by a deputy sheriff who searched his automobile and took therefrom certain intoxicating liquors. The sheriff had no search warrant but had with him a copy of the state law which gave to the sheriff the right of search without a search warrant where he had probable cause to suspect that intoxicating liquors were being trans-

ported within the state of Idaho by means of automobile, truck, wagons, etc. Before trial the defendant petitioned for the destruction of the liquor and for an order that the same should not be used as evidence against him on the ground that the statute under which the sheriff acted was unconstitutional as contrary to the search and seizure clause of the state constitution. The petition was denied and the defendant was convicted. The Supreme Court admitted that the statute was unconstitutional but *held* that the evidence was not rendered inadmissable by reason of its having been disclosed by an unlawful search or obtained by an unlawful seizure. Conviction affirmed. Morgan, J., dissenting. *State* v. *Anderson* (Idaho, 1918), 177 Pac. 125.

The state and federal courts are in direct conflict on this question of the admissibility of evidence obtained in violation of the search and seizure clauses of the state and federal constitutions. By a great number of decisions the state courts have admitted such evidence. The Supreme Court of the United States, on the other hand, has vigorously denied admissibility in the few cases that have arisen. It is submitted that the two views cannot be reconciled but that they can be explained as a necessary consequence of the widely different demands put upon the two governments. The states are beset with the demand for a thorough and searching police system which will insure a maximum of apprehension of all crimes committed. It is a serious problem of local government to be able to deal effectively with the vast number of crimes that are committed within its jurisdiction. While the states have generally followed the federal constitution in their inclusion of a bill of rights with its search and seizure clauses and clauses against self-incrimination they seemed to realize, also, that here was an immunity which might seriously hinder police administration. As a result we have in the Idaho constitution a clause permitting arrest without warrant where the officer has information which prompts him to believe that a public offence is being committed. It is apparent, then, why the state courts should be willing to blink at the search and seizure clause, admit the evidence, *Williams* v. *State*, 100 Ga. 511, and tell the criminal to seek his redress against the sheriff. The rule that collateral issues will not be raised is, consequently, strictly followed. Professor WIGMORE is thoroughly in accord with this point of view. Sec. 2183, 2263-4. The federal government, however, is not troubled with that vast number of criminal cases which is a characteristic feature of the state administration. Its problem of police administration is, comparatively speaking, an insignificant one. The danger of procrastination through the raising of collateral issues is far less serious. Furthermore, the Supreme Court has been more astute to protect the fundamental guarantees of the Constitution. The history of that court indicates that it has refused to close its eyes to a violation of any of these rights or to relax in the realization of these rights merely because a collateral issue would be raised. "The efforts of the courts and their officials to bring the guilty to punishment," says Mr. Justice DAY in *Weeks* v. *U. S.*, "praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

232 U. S. 383, 393. There are but few state courts following this view. *Town of Blacksburg* v. *Beam,* 104 S. C. 146, L. R. A. 1916 E. 714; *Iowa* v. *Sheridan,* 121 Ia. 164, where the court said that to allow the evidence would be to "emasculate all constitutional guaranty and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures". The Georgia Court of Appeals refused to follow, for a time, the leading case of *Williams* v. *State, supra,* and declined to admit such evidence. *Underwood* v. *State,* 13 Ga. App. 206. But the later decisions have returned to the conventional state view. *Hornbuckle* v. *Town of Decatur,* 18 Ga. App. 17. While there is apparent conflict, then, it appears that each view is justified under the circumstances peculiar to the jurisdiction. They were nearly in accord when *Adams* v. *U. S.* was decided, but *Weeks* v. *U. S., supra,* removed all doubts and asserted the theory of non-admissibility in the most vigorous terms.

EVIDENCE OF NEGLIGENCE—PROXIMATE CAUSE.—In *Todd* v. *Traders' and Mechanics' Insurance Company* (Mass. 1918), 120 N. E. 142, plaintiff brought his action to recover on a fire insurance policy for destruction by fire of certain buildings. The fire which destroyed the buildings accidentally caught from one set by plaintiff without getting permission of the fire-warden as the law required. Defense was made that because the fire was set in violation of law the plaintiff's cause of action was defeated on the theory of contributory negligence.

It would seem that the case was disposed of when it was determined, in accord with the universally recognized rule, that the ordinary fire insurance policy protects the insured against his own negligence, but the court discusses the question of whether violation of law is evidence of negligence to defeat a cause of action, itself founded in negligence. It well states the doctrine that "the mere fact that he, (plaintiff), was violating a statute or ordinance when injured does not necessarily prevent his recovery. Such violation is considered evidence of negligence on the part of the violator, as to all consequences that the statute was intended to prevent". The court concluded that the failure to get the fire-warden's permission was a mere attendant circumstance of his injury and not a proximate contributing cause, and applying the above principle overruled the defense There is plenty of authority in Massachusetts as well as elsewhere, to justify the recognition of the principle and its application. *Moran* v. *Dickinson,* 204 Mass. 559; *Bourne* v. *Whitman,* 209 Mass. 155; *Hughes* v. *Atlantic Steel Co.,* 136 Ga. 511. One is impressed with the rapidity with which things now move in that once conservative, puritanic state of Massachusetts. One is almost impelled to wonder whether the nimble-minded Celt may not have his hand on the throttle. It is but three short decades ago that a sin-sick sinner over-anxious for his soul's welfare, took to the highway with his good horse and carriage to attend a religious meeting on Sunday. He hitched his horse to the fence by the roadside and while he was at his devotions another recklessly injured Dobbin and the carriage. The court which pronounced this opinion in *Todd* v. *The Insurance Co.* told the refreshed sinner that because his horse and carriage had reached the place of injury by having been driven there on

Sunday in violation of law, he was remediless. If the poor sinner's soul was lost it would be a pertinent question, whether this opinion was the proximate cause. *Lyons* v. *Desotelle,* 124 Mass. 387. Two years earlier the same court took occasion to tell a provident head of a family that a railway company could run over him with impunity because forsooth, he walked the public highway on Sunday in search of shelter for his wife and children. *Smith* v. *Boston & M. R. R.,* 120 Mass. 490.

SPECIFIC PERFORMANCE—NEGATIVE COVENANT—CONTRACT OF EMPLOYMENT. —Complainant induced defendants to enter into contracts with him whereby they agreed to enter the service of complainant for two years from July 1, 1918, and not to be concerned directly or indirectly in any other business during the period of the contracts. Defendants at the time of making the contracts were employed by the Driver-Harris Co., a corporation engaged in important war work for the government. Complainant had been a director of the Driver-Harris Co., but owing to disagreement with other directors, had withdrawn and was about, as he alleged, to establish a rival company. There was evidence tending to show that complainant's main purpose in making the contracts was to withdraw essential employees from the Driver-Harris Co. and thus to injure its business. Complainant brought three bills against defendants to restrain them from working for the Driver-Harris Co. in violation of the negative covenants. *Held,* complainant is not entitled to relief. *Driver* v. *Smith et al.* (N. J. Ch. 1918), 104 Atl. 717.

The defendants interposed a preliminary objection that the granting of an injunction would interfere with work necessary to the federal government in the conduct of war. The government did not seek to intervene directly, but defendants introduced into evidence letters from General Sibert and others to the effect that the enforced withdrawal of the defendants from the Driver-Harris Co. would be highly detrimental to the interests of the government. Lane, V. C., refused to consider this argument. "It would", he said, "be an intolerable situation if each court before whom the rights of individuals were litigated, were permitted to determine whether relief should be granted or withheld upon its opinion whether the granting of an injunction would aid or injure the government in its war activities. * * *" No cases precisely in point were cited but reliance was placed on *Broadbent* v. *Imperial Gas Co.,* 7 De G. M. & G. 436, and *Rowland* v. *New York Stable Manure Co.,* 88 N. J. Eq. 168. Though the doctrine of these cases has often been brought into question (*e g. Richards Appeal,* 57 Pa. St. 105), the position of the court seems sound. The federal government has under war legislation ample power to protect itself, and so long as it does not exercise this power, there seems no reason why a court of equity in ordinary litigation should consider whether its decree will affect governmental activities or not.

In denying relief to complainant, the court reached a result inevitable upon the principles of equity. Complainant failed to show that the defendants could render him service of an unique quality; his remedy at law was adequate. But further it appeared that his purpose in making the contracts was primarily to damage the Driver-Smith Co. Equity is

not a punitive system and relief is always denied when it will merely make trouble for a defendant without conferring any real benefit upon a complainant. Moreover a court of equity will not lend itself to the furtherance of schemes of which it disapproves. *Edwards* v. *The Allouez Mining Co.*, 38 Mich. 46; *Foll's Appeal*, 91 Pa. St. 434. Due recognition of these principles is taken by the court, but it proceeds to suggest other grounds which are scarcely tenable. It is stated that the Driver-Harris Co. had a property right in the services of the defendants (although they were only employees at will), and that an injunction will never be granted if it will destroy a property right. The use of the term "property right" is unfortunate. Whatever be the effect of *Lumley* v. *Gye*, 2 E. & B. 216, and *Quinn* v. *Leathem*, (1901), App. Cas. 495, it has never been supposed that an employer has any property right in the services of employees at will. Cf. *Beekman* v. *Marsters*, 195 Mass. 205. Again, it is intimated (p. 724), that as the injunction would not insure performance of the positive stipulations in the contract, relief should not be given. This is but to revive the outworn criticism of *Lumley* v. *Wagner*, 1 De G. M. & G. 205, and coming from so able a court as that of New Jersey cannot fail to excite surprise.

TAXATION — INCOME — DIVIDENDS RECEIVED BY HOLDING COMPANY FROM SUBSIDIARY CORPORATIONS.—Petitioner was a holding company owning all the stock in certain corporations except qualifying shares held by directors. These companies under the management of petitioner carried on a large business. "The subsidiary companies had retained their earnings, although making some loans *inter se*, and all their funds were invested in properties or actually required to carry on the business. * * *. In January, 1913, the petitioner decided to take over the previously accumulated earnings and surplus and did so in that year by votes of the companies it controlled." In a suit to recover a tax levied upon these dividends as income under the Act of Oct. 3, 1913, c. 16, Sec. II (38 Stat. 114, 166), *held*, reversing the Circuit Court of Appeals, the tax was improperly levied. *Gulf Oil Corporation* v. *Lewellyn*, Adv. Ops. U. S. Sup. Ct., Dec. 9, 1918.

The decision in this case by the Circuit Court of Appeals was noted in 16 MICH. L. REV. 202. The general subject is discussed at length in 16 MICH. L. REV. 232. In the following cases the Supreme Court has disposed of some of the most difficult problems arising out of this general situation. *Lynch* v. *Turrish*, 247 U. S. 221; *Southern Pac. Co.* v. *Lowe*, 247 U. S. 330; *Lynch* v. *Hornby*, 247 U. S. 339.

TELEGRAPH COMPANIES AS CARRIERS OF MONEY.—The Carolinas furnish two recent cases on a very common undertaking of telegraph companies, on which strangely enough there are few decisions in the books, *i. e.* on the duties and liabilities of telegraph companies as carriers of money. *Reaves* v. *Western Union Tel. Co.* (S. C. 1918), 96 S. E. 295, and *Lehue* v. *ib.* (N. C. 1918), 96 S. E. 29. Both were actions for damages for failure to transmit promptly money sent by a husband to his wife at a station where no money order office was maintained, and the payment had to be made through a bank. The latter case was one in which the mother of the wife was ill, and

died before she reached her, but this fact was not known when the telegram was sent. The other was based on a telegram beginning "Brother dead." The one sought damages for mental anguish, the other punitive damages.

By a narrow construction it has been held generally that the telegraph company is not a common carrier, though it is in a public employment. *Tel. Co.* v. *Griswold,* 37 Ohio St. 301. By constitutional provision or statute it is often made so, and the *Reeves* case holds that the provision in the South Carolina constitution is merely declaratory of the common law. This is not the weight of authority. Both cases rightly hold that a telegraph company is not bound to establish a money order office at a place where the business does not warrant it, but that it may undertake to deliver money by telegraph, and if so it must live up to its contract. This it did in the *Lehue* case *because* it stipulated to use a bank to make payment, and that it would not be liable for the negligence of the bank. In the *Reaves* case the company undertook the service and was liable for the failure to deliver in the time promised. There seems to be little difference in the liability of the telegraph company for the transmission of money and of messages. In each case, perhaps, nothing is actually carried, but the effect of the undertaking is the same. It is sometimes said that a contract to transmit money is a business transaction, and the measure of damages is to be the same as for breach of a commercial contract. Hence there can be no recovery for mental anguish caused by failure to send money, even in states permitting such recovery on death messages. *Robinson* v. *W. U. Tel. Co.,* 114 Ky. 504. But this has been denied, *W. U. Tel. Co.* v. *Wells,* 50 Fla. 474, 111 A. S. R. 129 *n,* and is not followed in Kentucky in *W. U. Tel Co* v. *Sisson,* 155 Ky. 624, in a case where the agent knew the telegram was to enable a son to secure the necessary money to reach his father's bedside, the latter being at the point of death. The telegram on its face did not show this. The recent case of *W. U. Tel. Co.* v. *Bowen* (Ala. 1917), 76 So. 985 is to the same effect, and so apparently are both the cases under review, the *Reaves* case saying punitive damages might be recovered for failure to deliver the money where the telegram showed on its face the purpose—"Brother dead", and the *Lehue* case refusing the recovery of damages for mental anguish because there was no evidence the agent knew of the mother's illness or death.

WILLS—JURISDICTION IN PROBATE PROCEEDINGS.—In *Iowa* v. *Slimmer,* U. S. Sup. Ct. Dec. 9, 1918, the State of Iowa, with a view to the ultimate collection of $13,750 in taxes against the property of Abraham Slimmer, deceased, sought an order to ensure the dismissal of Minnesota probate proceedings, meantime asking an injunction restraining such proceedings, pending the suit. The bill alleged that the deceased died in Iowa, where he had been domiciled many years, leaving notes and Liberty Bonds valued at $550,000, nearly all in the custody of his son in Minnesota. For at least five years this son had custody of the notes of deceased, in pursuance of a conspiracy to defraud the State of Iowa of taxes. Probate proceedings were started by the son in Minnesota, and by the State of Iowa in Iowa. On the ground that at least for purposes of inheritance taxes probate proceedings might be

had in Minnesota, and also because the Minnesota court had power to distribute under the will the property located there even though decedent was not a resident of Minnesota, the relief was denied.

The case involves both taxation and jurisdiction in probate proceedings. Generally speaking personal property may be taxed at its *situs*, or at the domicil of the owner, or both. *Buck* v. *Beach*, 206 U. S. 392. The *situs* for this purpose in the case of notes is generally the jurisdiction in which the payment of the notes must be enforced, and not the place where the notes may be deposited, as they are not the property but only evidence of it. It is not unconstitutional, however, to impose inheritance taxes on such property in the state where the notes are deposited. The principal case relies on *Wheeler* v. *New York*, 233 U. S. 434. Bonds and notes secured by mortgages may be taxed also at the *situs* of the security. *Overby* v. *Gordon*, 177 U. S. 214. Doubtless by appropriate proceedings the property in the principal case can be reached by the taxing power of the state of Iowa. *Bristol* v. *Washington Co.*, 177 U. S. 133. Wills may be probated at the domicil of the deceased, and also at the *situs* of the property, if such property is located in a foreign state. Only by comity can probate proceedings in one state have any effect in another. Whether a finding of domicil of the deceased by one court can be collaterally attacked in another is in dispute. To allow this question to be raised in different courts and before different juries would lead to embarrassing results, as has been well pointed out in the monographic note 81 Am. State Rep. 548. See also *Horton* v. *Dickie*, 217 N. Y. 363, Ann. Cas. 1918 A 611 and note, holding that Ohio proceedings were not conclusive upon persons in New York who were not parties to the proceedings. In denying the State of Iowa relief by restraining the Minnesota court the instant case seems in accord with all the cases.

WORDS AND PHRASES—WHAT IS "FOOD"?—An information was preferred against defendant under the Food Hoarding Order, for hoarding tea. The Order defined "food" as including "every article which is used for food by man, or which ordinarily enters into the composition or preparation of human food." *Held*, tea is not food, and the information will not lie. *Hinde* v. *Allmond* (1918), 87 L. J. K. B. 893.

The court was of opinion in the principal case that the Order was aimed at those articles which are taken into the system as nourishment, and the purpose controls the meaning to be attached to the words used. A similar case was *Merle* v. *Beifeld*, 194 Ill. App. 364, where the court held that milk was a food or a drink depending on whether it was served as part of a meal with eatables or was served alone, this distinction being deemed necessary to carry out the presumed purpose of a contract for commissions on sales of drinks. See also *Leavett* v. *Clark* (1915), 3 K. B. 9, which held that an information for stealing winkles would lie under a section of the Larceny Act referring solely to fish, because it had been held for thirty years, following *Caygill* v. *Thwaite*, 49 J. P. 614, that a crayfish was a fish, and the court could not distinguish between a crayfish and a winkle in respect to its "fish-

iness". The plodding layman may be pardoned if he sometimes loses contact with the rapidly moving "judicial front" in the matter of legal definitions.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—TRAVELING MAN.—Decedent, employed by defendant to travel about soliciting business, finished his work for the week on Saturday. On Sunday morning in endeavoring to reach his home by crossing a river in a skiff, the railroad being flooded, he was drowned. In proceedings for compensation under the statute, *held,* claimants, decedent's dependents, were entitled to recover, death having come to decedent by accident "arising out of and in the course of employment." *State* v. *District Court* (Minn., 1918), 169 N. W. 274.

Many times have questions arisen as to whether injuries received on the way to or from work were such as to come within the above quoted provision of Workmen's Compensation Acts. Generally such injuries have not been considered to have arisen in the course of the employment. It is in each case a question of fact as to when the employee enters upon or leaves his employment. *Hills* v. *Blair,* 182 Mich. 20, 26. The right to compensation is not limited to those situations in which the injury was received while the employee was actually doing his work. As said by one court, "The employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment." *Hills* v. *Blair, supra.* In this connection the fact as to the injury being received while on or off the employer's premises has been deemed of weighty though not controlling importance. See *Hoskins* v. *Lancaster,* 3 B. W. C. C. 476; *Sundine's Case,* 218 Mass. 1; *Stacy's Case,* 225 Mass. 174; *Ocean Acc. etc. Co.* v. *Industrial Acc. Co.,* 173 Cal. 313; *Hornburg* v. *Morris,* 163 Wis. 31. In the case of commercial travelers there are strong reasons for deeming them in the course of their employment from the time they leave home in the morning, until they return in the evening, for they are hired to travel. The principal case is in accord with *Dickinson* v. *Barnak* (C. A.) 124, The Law Times 403 (1908). *Cf. Donahue's Case,* 226 Mass. 595; *Hopkins* v. *Michigan Sugar Co.,* 184 Mich. 87. Of course if the commercial traveler has abandoned his employer's business and is on an enterprise of his own there should be no recovery. In the principal case decedent was not engaged in any project of a personal nature other than the effort to complete a journey undertaken in the furtherance of his master's business.