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RECENT CASES

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CRIMINAL LAW.

Betting on Election.—Rich v. *State*, 42 S. W. Rep. 291 (Tex.). Defendant proposed to bet $25 on an election and the other party to the bet put up $5, agreeing that they should be forfeited if the remaining $20 were not put up within a specified time. The $5 were forfeited to the defendant. *Held*, that such action did not constitute a betting on an election. "A bet is a wager and the betting is complete when the offer to bet is accepted" (*State* v. *Welch*, 7 Port. 465).

Indictment—Abatement—Presence of Stenographer in Grand Jury Room. —State v. *Bates, et al.*, 48 N. E. Rep. 2 (Ind.). The mere presence of a stenographer at the examination of witnesses before a grand jury, for the purpose of taking evidence on which the indictment is to be founded, furnishes no ground for abating the indictment, unless accused has been prejudiced thereby. The statute (sec. 1724, Burns' Rev. St., 1894) expressly gives the grand jury the right to appoint one of their own number to take down the evidence given before them, and preserve it for use in the prosecution. But there is no statute authorizing any other person to remain in the room and take the evidence in short hand, nor any statute prohibiting it. In the federal courts, which also are subject to no such statute, the presence of a stenographer does not invalidate the indictment (*U. S.* v. *Simmons*, 46 Fed. 65; also, *Courtney* v. *State*, 5 Ind. App. 356, 32 N. E. 335). In *State* v. *Clough*, 49 Me., on p. 576, the court said: "The mere fact that a stenographer was present when an indictment was found would not render it void." But see contra, *State* v. *Bowman*, 38 Atl. 331, a Maine case, reported on page 91, Vol. VII., No. 2, YALE LAW JOURNAL.

Invalidity of Sentence—Omission of Hard Labor—Habeas Corpus—Extent of Relief Granted.—In re Christian, 82 Fed. Rep. 199. Petitioner had been convicted under Section 5392 of the Revised Statutes of the United States, which imposed as a penalty fine and imprisonment at hard labor, and was sentenced to pay a fine and to imprisonment, "hard labor" being omitted from the sentence. Held, that petitioner should be released on habeas corpus, but without prejudice to the right of the United States to have him properly re-sentenced, even though he had partly satisfied the sentence by payment of the fine. In *Harman* v. *U. S.*, 50 Fed. 922, Caldwell, J., said: "It seems probable that if the plaintiff had sought relief from the void sentence, after suffering part of the punishment, by habeas corpus, his discharge would have been absolute and final." See *Ex parte Lange*, 18 Wall. 163; *In re Johnson*, 46 Fed. 477. This dictum seems to be disproved in *In re Bonner*, 154 U. S. 243, 14 Sup. Ct. 323. Other cases are *Medley, Petitioner*, 134 U. S. 175, 10 Sup. Ct. 384; *Savage, Petitioner*, 134 U. S. 176, 10 Sup. Ct. 389; also, *Ex parte Friday*, 43 Fed. 916.

View by Jury—Conversation with Passer-by.—State v. *Perry*, 27 S. E. Rep. 997 (N. C.). *Held*, that although the fact that the jury, without leave of

the court, went to view the scene of the crime, may not be ground for a new trial; yet a new trial will be granted because, while so doing, they interrogated a passer-by as to the identity of a certain house, whose distance from the scene of the crime was material. There is a difference of opinion between the authorities as to whether the prisoner must accompany the jury in their inspection of the premises ("Thomp. Trials," sections 886, 887); but all concur that evidence cannot be taken on such occasions. The settled practice is for the court to appoint "showers," but merely for the purpose of pointing out the locality ("Thomp. Trials," sec. 914; "Bailey, Proc." 228; *State* v. *Lopez*, 15 Nev. 407). While there is conflict upon the point, it has been held, as in *People* v. *Hope*, 62 Cal. 291, that the bare fact of the jury having visited the scene of a capital offense, with the trial of which they are charged, though made without leave of the court, is not *per se* ground for a new trial. Some prejudice must appear, as in the present case. *State* v. *Tilghman*, 33 N. C. 513.

Aggravated Assault—Instructions to the Jury.—Grayson v. *State*, 42 S. W. Rep. 293 (Tex.). A jury was charged that if the evidence tended to show that the assault was made with premeditated design, and by the use of means calculated to inflict great bodily injury, the defendant was guilty of an aggravated assault. *Held*, erroneous. An assault and battery, to become aggravated, must result in serious bodily injury or such an injury as is attended with danger.

Burglary—Allegation in Indictment as to the Ownership of Property.—Lamater v. *State*, 42 S. W. Rep, 304 (Tex.). In an indictment for burglary it was alleged that an entry was made into a school building with intent to steal certain property belonging to the janitor of the building. The court charged the jury that, "A person who is in the direct control of a house, and exclusive management and control of property, is, for the purposes of law, the occupant of such house and owner of such property." *Held*, such charge was authorized, notwithstanding the general property was shown to be in the pupils'.

CARRIERS.

Connecting Carriers—Duties—Limitation of Liability—Through Shipments.—Bird et al. v. *Southern R'y Co.*, 42 S. W. Rep. 451 (Tenn.). Plaintiff consigned a box of fruit trees to a place by a route covering parts of three connecting and distinct lines of railway. When the intermediate carrier delivered the trees to the ultimate carrier, the latter immediately informed the intermediate carrier that the destination was a prepay station and that they would not forward the trees until all charges were paid. Thereupon the intermediate carrier took no action for eighteen days, as a consequence of which the trees became worthless. Intermediate carrier held liable. An intermediate carrier is entitled to any exemption contained in a bill of lading issued by the initial carrier, *Halliday* v. *R'y Co.*, 70 Mo. 159; but such exemption does not relieve him from responsibility for his own negligence. The intermediate carrier was charged with a duty to inform either the shippers or the initial carrier that the destination was a prepay station and in not doing so was guilty of negligence.

Carriers—Who are Passengers.—McNulty v. *Penn. R. R. Co.*, 38 Atl. Rep. 524 (Penn.). Plaintiff's husband contracted with the defendant company to do certain work upon a bridge on its line of railway, the company agreeing to pay him $1.20 per day and to transport him to and from his home to the

place where the work was to be performed. While being thus transported he was killed by a freight train crashing into the rear of the passenger car in which he was riding. *Held*, in an action by the plaintiff to recover for the death of her husband, that when the deceased entered the train for carriage he ceased to be an employee, but, under the contract, became a passenger. Consequently the rule regarding co-employee did not apply and therefore the negligence of the engineer of the freight train in causing the collision did not relieve the company. But see *Baltimore & P. R. Co.* v. *Jones*, 75 U. S. 439, Chase's Cases on Torts, p. 223.

Carriage by Sea—Exceptions in Contract—Negligence—Jettison of Cattle.—Compaina de Navigacion La Flecha v. *Brauer et al.*, 18 Sup. Ct. Rep. 12. In an action in admiralty against a steam navigation company, it appeared that a certain number of cattle were received under a bill of lading stipulating that they were to be "at owner's risk; steamer not to be held liable for accident to or mortality of the animals, from whatever cause arising." During the trip the vessel encountered some rough weather and the master and crew, becoming panic-stricken, drove overboard 126 head of cattle. Such action appearing from the testimony to be unnecessary and due to the incompetency of the crew, *held*, that there could be a recovery. The ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods. An exception, in a bill of lading, of perils of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from one of those perils, to which the negligence of himself or his servants has contributed. *N. J. Steam Nav. Co.*, v. *Merchants B'k*, 6 How. 344. *Transportation Co.* v. *Downer*, 11 Wall. 129. A similar English case is that of *Lenro* v. *Dudgeon*, 17 Law T. (N. S.) 145.

CONTRACTS.

Landlord and Tenant—Coal Leases—Interpretation—Liability of Lessee for Royalty.—Wright et al. v. *Warrior Run Coal Co.*, 38 Atl. Rep. 491 (Pa.). Plaintiff leased to defendants certain coal lands. The lease provided for the payment of a royalty of fifteen cents per ton for all coals mined above the size of chestnut coal, seven and one-half cents for the chestnut, and nothing on the smaller sizes. At the time of the making of the contract there were mined and marketed in that locality seven sizes of coal, including the chestnut. Of the total amount produced, fifteen per cent. was chestnut and nine per cent. smaller, both of which were the incidental product of preparing the other sizes. The demand was greatest for the larger sizes, and very slight for the chestnut. After a few years the demand for the larger sizes diminished, and for the smaller sizes increased to such an extent that it became profitable to produce a greater proportion of smaller coal. In preparing this by breaking up the larger sizes a greater proportion of chestnut and smaller coal was necessarily produced, which also found a profitable market. In an action by the plaintiffs to recover a royalty on the increased production of the chestnut and smaller sizes, the court held that for all chestnut above fifteen per cent, and smaller coal above nine per cent, the average of each produced at the creation of the contract, the lessee should pay a royalty of fifteen cents per ton. Mitchell, J., (dissenting) held the royalty should not be allowed, inasmuch as it was in effect "making a new contract for the parties, in the light of subse-

quent events, in place of the one they made for themselves." In his opinion the lessees could have reduced the whole production of the mines to the smallest size on which the full royalty was paid, and still not be liable for an increased royalty on the incidental product.

Note to Joint Payees—Transfer of Interest—Liability.—Bond v. *Holloway*, 47 N. E. Rep. 838 (Ind.). Defendant, one of two joint payees of a negotiable note, by a writing on the back thereof, assigned over his interest to his co-payee, who in turn sold the note to plaintiff's decedent. *Held*, that the assignment was a mere transfer of assignor's interest, and not an unrestricted and unqualified indorsement. The case appears to be a novel one, and no decisions directly in point are cited. The common law rule that where two persons, not partners, were payees of a promissory note, an indorsement by both was necessary to pass title (2 Pars. Bills and N. 4) has been modified in many jurisdictions to the effect that a part of a written contract may be assigned. *Grover* v. *Ruby*, 24 Ind. 418; 2 Story Eq. Jur., §1044. But such assignment has nowhere been held to be an unqualified indorsement. On the contrary, it has been held in such a case that the co-payee, or his assignee, cannot maintain an action on the assignment as an indorsement. 1 Daniel Neg. Inst. p. 629; *Carrick* v. *Vickey*, 2 Doug. 653, note; *Foster* v. *Hill*, 36 N. H. 526; Chit. Bills 57. In Michigan the negotiable character of a promissory note is destroyed by an indorsement by a payee transferring only his interest to another. *Amiba* v. *Yeomans*, 39 Mich. 171. But see *Vincent* v. *Horlick*1, Camp. 442; *Hailey* v. *Falconer*, 32 Ala. 536; *Lyman* v. *Clark* Mass. 235; *Rich* v. *Lord*, 18 Pick. 325. In the present case the language of the assignment shows only an intention to transfer defendant's interest in the note, and is not an indorsement which charged him as indorser under the law merchant. This fact being patent upon the face of the writing, all subsequent purchasers were chargeable with notice thereof.

Beneficial Associations—Change of Beneficiary.—Fischer v. *Fischer*, 42 S. W. Rep. 448 (Tenn.). A beneficiary in a life insurance policy paid the assessments on the policy for several years. The insured then caused the policy to read in favor of another beneficiary in his place. *Held*, such action was permissible when not in violation of the by-laws of the company. The rights of the holder and beneficiary are to be found in the laws of the company or order, and no interest does or can rest in a beneficiary so as to defeat this right.

DIVORCE.

Decree—Prohibition of Use of Husband's Name—Injunction.—Blanc v. *Blanc*, 47 N. Y. Sup. 694. A decree granting a divorce between husband and wife, which also provided that the defendant should be prohibited from using her husband's name, or any part of it, cannot be attacked collaterally in a suit between the same parties on the ground of want of jurisdiction of the court to decree such a prohibition. Such a decree is valid, and where the wife subsequently uses her husband's name for theatrical purposes, though not in private life, she may be fined for contempt of court, though she used the name under advice of counsel. Where the decree of divorce is still in effect, an injunction restraining the divorced wife from using her former husband's name, will be denied as unnecessary.

Subsequent Award of Alimony—Jurisdiction—Effect of Marriage of Defendant.—Hekking v. *Pfaff*, 82 Fed. Rep. 403. Plaintiff, a resident of South Dakota, had obtained a decree of divorce in the courts of that State against defendant, a resident of Massachusetts and not under the jurisdiction of the court granting the divorce. No alimony was allowed by this decree. Defendant thereafter married again, and plaintiff subsequently obtained leave to have the decree opened, and filed an amended bill alleging grounds for alimony that had arisen since the original decree. In an action brought on a decree thereby obtained granting alimony, *held*, that the latter decree was void, and that defendant's subsequent marriage did not prevent him, either as a ratification, waiver or estoppel, from denying the jurisdiction or authority of the court to open the decree and award alimony against him.

CIVIL RIGHTS.

Civil Rights—Restaurant Keepers—Colored Guests—Master and Servant.—Bryan v. *Adler*, 72 N. W. 368 (Wis.). A Wisconsin statute makes restaurant keepers liable to the person aggrieved, for refusal, or aiding or inciting a refusal to anyone of every race and color, the full enjoyment and privileges of their restaurant. Under such a statute, a restaurant keeper is liable to a colored guest whom the waiter refused to serve on account of his color, even though the restaurant keeper did not aid nor incite the refusal, but had in fact commanded the waiter to serve the guest and had afterward discharged him for the refusal. It is well settled that a master is liable for an injury done by a servant, whether through negligence or malice, when engaged in the discharge of a duty which the master owes to the person injured. *Croker* v. *Railway Co.*, 36 Wis. 657. Compensatory damages may be recovered without the master ratifying the act. *Spalding* v. *Railway Co.*, 33 Wis. 582; but it is otherwise if exemplary damages are sought to be recovered. *Bass* v. *Railway Co.*, 39 Wis. 636.

Racing Association—Rules of Jockey Club—Reasonableness—Amusements.—Grannan v. *Westchester Racing Ass'n*, 47 N. E. Rep. 896 (N. Y.). Defendant had ruled plaintiff off the turf and excluded him from attendance at a subsequent race, for which he had purchased a ticket, because of a bribe offered by him to jockeys in a race, in violation of a rule of the jockey club, declaring such act a dishonest practice and violation of its rules. Defendant was an association organized under Ch. 570, Laws 1895, which licensed it to conduct races for a stake upon condition that all running race meetings should be conducted by it subject to the reasonable rules of the jockey club. *Held*, that the rule in question is not unreasonable; is not a restriction upon the rights of the public in a franchise enjoyed by the association; violates no contract, takes away no property, and interferes with no vested right. Also, that the exclusion of an offender is not limited to the particular day on which the offense occurred, and that such exclusion is not violative of Laws 1895, c. 1042, relating to the equal rights of all persons at places of amusement, etc. Compare *Civil Rights Cases* 109 U. S. 3, 3 Sup. Ct. 18.

MISCELLANEOUS.

Corporations—Appropriation of Assets—Individual Indebtedness.—Mt. Verd Mills Co. v. *McElwee*, 42 S. W. Rep. 465 (Tenn.). Defendant received from his brother, the secretary and treasurer of an incorporated com-

pany, several small checks in settlement of his (the secretary's) indebtedness, and drawn in his official capacity. The checks were charged to defendant and the company sued to recover value. *Held*, defendant was liable. The rule that one partner cannot give a partnership check without the assent of the other partners, in payment of his individual debt, as found in *Rogers* v. *Betterton*, 93 Tenn. 630, 27 S. W. 1017, applies in this case.

Negligence of Attorney—Liability—Measure of Damages.—Fay v. *McGuire, et al.*, 47 N. Y. Supp. 286. The defendants, who were attorneys, represented to plaintiff, their client, that a mortgage which they had obtained for him upon certain property was a first lien. Plaintiff foreclosed and took a purchase-money mortgage from the purchaser. The purchaser subsequently made a contract to sell the property, but could not until he had paid certain prior incumbrances and liens on the property, which the defendants had not discovered. He claimed, and the plaintiff paid him half the sum expended in clearing the property. *Held*, that defendants were liable to the plaintiff, who was entitled to be put as nearly as possible in the position which he would have occupied if his mortgage had been a first lien. The measure of damages was the sum paid in removing prior incumbrances.

Copyright—Subjects of Copyright—Price Catalogue.—J. L. Mott Iron Works v. *Clow et al.*, 82 Fed. 316. Plaintiffs, who were manufacturers of plumbers' supplies, had issued an illustrated catalogue of their wares, which was largely copied by defendants, a rival concern. . Held, that an injunction would not lie to restrain defendants from further publication of their catalogue, as the original cuts were of articles which could not be the subject of artistic treatment, and the letter-press was confined to a description of the wares, and of no artistic merit, and hence not entitled to be copyrighted. The object of the constitutional provision is to promote the dissemination of learning by protecting works which promote general knowledge in science and useful arts. It is not intended as a protection to traders in the particular manner in which they may shout their wares. In *Hotten* v. *Arthur*, 1 Hem. & M. 603, the court ruled in favor of the copyright of a catalogue of curious books, not on the ground that it was an advertisement, but that it contained original matter. But in *Cobbett* v *Woodward*, L. R., 14 Eq. 407, an injunction was denied where the catalogue infringed contained engravings of furniture, with remarks of description. This case was flatly overruled in *Maple & Co.* v. *Junior Army & Navy Stores*, 21 Ch. Div. 369. The Supreme Court of the United States, however, has expressly approved of *Cobbett* v. *Woodward*, *supra*. See *Baker* v. *Selden*, 101 U. S. 99, 105; *Clayton* v. *Stone*, 2 Paine 382, Fed. Cas. 2872. See, also, *Jeweler's Mercantile Agency* v. *Rothschild*, 39 N. Y. Supp. 700, reported in Vol. VI., No 1, of the YALE LAW JOURNAL.

Auction—Representations—Description of Incumbrance.—Blanck v. *Sadler*, 47 N. E. Rep. 920 (N. Y.). Plaintiff purchased premises, at a public auction, which were stated to be subject to a mortgage of a certain amount, at a certain rate of interest and having a certain time to run. No further representations as to the terms of the mortgage were made at the time. On subsequently looking up the title plaintiff discovered a clause securing payment of the mortgage in gold coin, "of the present standard of weight and fineness." *Held*, two judges dissenting, that this clause did not constitute such a variance from the incumbrance described as to justify purchaser in rejecting the title. He was notified of the existence of the mortgage, but made no inquiry as to

whether it contained special terms. In view of the fact that the government is pledged to maintain the parity of treasury notes and silver and gold coin, it cannot be assumed, that if the contract is completed any additional burden will be imposed upon the plaintiff by this clause. The dissenting opinion maintains that a contract to pay for property, or the taking subject to an obligation, are assumed to be dischargeable in any kind of legal tender (*Juilliard* v. *Greenman*, 110 U. S. 421, 4 Sup. Ct. 122). The sale in the present case was at the Real Estate Exchange, which is attended by a large number of bidders. If it was intended to sell the property subject to a mortgage not payable in legal tender, it should have been so stated in the terms of sale. Any other rule would compel bidders to search titles before they could safely bid at the exchange.

Action for Fraud—Evidence—Competency—Declaration Showing Intent.—Zimmerman v. *Brannon*, 72 N. W. Rep. 439 (Iowa). Statements by defendants as to the condition of a lot of hogs they were attempting to sell, made to former prospective purchasers, may be shown by plaintiff, a subsequent purchaser, in an action alleging fraud in the sale of the hogs, as evidence of the seller's intent in making representations to him. And when defendants falsely stated that the hogs came from one stock-yard, when in fact they came from another where there had been hog cholera, it may be shown in an action for fraud as evidence of the defendant's knowledge of the condition of the hogs.

Navigable Waters—Bridges—Eminent Domain.—U. S. v. *City of Moline*, 82 Fed. Rep. 592. Congress may assume jurisdiction over a navigable river lying wholly in one State, and may order obstructions to navigation therein removed, even though these obstructions have been authorized by the State. This right does not *per se* exempt the government of the United States from the duty of making just compensation for such property rights as are taken. *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 13 Sup. Ct. 622. But a stipulation in the grant of a franchise to maintain a toll bridge over such river, that the legislature may at some future time direct a draw to be placed in the bridge, implies that the change shall be made without compensation by the State, and inures to the benefit of the United States, once Congress has declared the river within its jurisdiction.

Estates in Expectancy—Grant—Agreement to Convey—Consideration —Family Settlement.—In re Lennig's Estate, 38 Atl. Rep. 466 (Pa.). Decedent left a will wherein she bequeathed her whole estate to a daughter and two granddaughters. Appellant, a son of decedent, claims one-third of the fund as trustee for his children, by virtue of a paper duly executed by the three legatees during the life of testatrix, the contents of the will being known to all parties at the time. This paper was in effect an agreement that the fund should be divided into three parts, one part to go to the daughter, another to the two granddaughters, the third to appellant as trustee. *Held*, that an estate in expectancy is not the subject of a grant, and that an agreement to convey such estate is not enforceable as a contract, in the absence of a valuable consideration. The agreement in the present case is not such valuable consideration, as being a family settlement, there being no controversy, or dispute, or adverse title. Neither did the agreement of appellant with legatees that he or his children would not further solicit testatrix to make a testamentary disposition in their favor constitute such valuable consideration.