YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

CRIMINAL TRIALS—PRESENCE OF THE ACCUSED.

The growing tendency of some of our courts to dispense with at least a few of the many rigid rules of criminal procedure is illustrated by the case of *Stoddard v. State,* 112 N. W. (Wis.) 453. In that case the court held that, though it was a felony case, it was not error to receive the verdict while the accused was out on bail. Thus the case stands for authority that the accused on trial for felony may waive his right to be present at the rendition of the verdict.

The general rule throughout the entire laws of criminal procedure is that after indictment found, nothing shall be done in the cause in the absence of the prisoner. *Bishop on Crim. Proced.,* Vol. I., Sec. 265. But this principle has been modified somewhat by the doctrine of waiver. It is as to the extent to which the waiver may be carried that the courts fail to agree. Nearly all of our courts allow one indicted for misdemeanor to waive the right of presence during trial. *United States v. Mayo,* Fed. Cas. No. 15, 754; *Warren v. State,* 19 Ark. 214. But when the case is for felony, most of our courts have adopted from the English decisions the rigid rule that the right to be present during the whole trial is absolute and inalienable. *Prime v. Commonwealth,* 6 Harris (Pa.) 103; *Andrew v. State,* 34 Tenn. (2 Sneed) 550; *Sneed v. State,* 5 Ark. 431.

The reason for the strength of this inflexible rule evidently came from the abuse of secret examinations, so common in the reign of the Stuarts. But as memory of such high-minded methods grew dim and our judges saw the administration of justice hindered in individual cases by the invoking of technical defenses, we find this doctrine

of waiver growing in strength. The principle seems first to have been applied in cases where the prisoner was voluntarily absent for a few moments during the admission of testimony. That this should be ground for a new trial seemed absurd on its face. The dictates of common sense overcame the abstract rules. In this same way we find the courts in a considerable number of our states extending the idea to cases where accused has oportunity to be present at the rendition of the verdict, but absents himself of his own free will. *Fight v. State,* 7 Ohio (Ham.) Rep. Part 1, p. 181; *Wilson v. State,* 2 Ohio State 319; *McCorkle v. State,* 14 Ind. 39; *Schlinger v. People,* 102 Ill. 245; *Hill v. State,* 17 Wis. 675. The two earliest of these cases, *Fight v. State* and *Wilson v. State,* on which the others more or less rely, were decided on the ground that the rule requiring the presence of the prisoner during every part of the trial, was one purely for the prisoner's own benefit and hence, a right which he could waive. If he can waive the right to trial altogether by pleading guilty, why can he not voluntarily be absent from some part of the proceedings? Where he is out on bail, some of the courts say that it is his duty to return to receive the verdict. Is it not absurd, then, that he should be permitted to take advantage of his own wrong and breach of duty, and thus defeat the ends of justice?

But the courts in the majority of our states refuse to follow this reasoning and repudiate the idea that a prisoner may waive the right of presence at the rendering of the verdict. *Prime v. Commonwealth, Supra; Andrew v. State, Supra.* These courts look beyond the individual prisoner in the individual case and consider the required presence of the accused as one of the bulwarks against the possibility of irregular court proceedings. It is on this ground that the judges, who oppose the encroachments of this doctrine of waiver on the stricter criminal procedure, stand. Chief Justice Smith, *dissenting* in *State v. Kelly,* 97 N. C. 409, stated the idea very clearly, when he said: "I am not disposed to relax those safeguards which the wisdom of past ages has provided for the security of persons charged with crime, while the modern tendency is manifested in some of the courts to dispense with them, upon the idea of waiver, because of the inconvenient necessity for a new trial, which an observance of them may render necessary. . . . Now, it is true, the conduct of the accused in his hasty departure, when the jury were about to deliver their verdict, the purport of which he seems to have anticipated, entitles him to no favor, but it is the importance and value of the principle which is sacrificed in giving effect to a verdict thus rendered."

But the judges favoring a more liberal criminal procedure claim that this principle, which is so strongly clung to by many of our courts, is one for which there is no longer any necessity. The publicity of our modern life takes away the need of protecting the prisoner by means of numerous technicalities. So we see this doctrine of waiver growing in many of our states along with the movement toward a less frequent granting of new trials because of some slight technicality. The idea looks towards the leaving of more of the minor details of trial within the discretion of the trial judge. He is

in a position to know the ins and outs of the whole case and should be best fitted to determine the minor matters of procedure as they arise.

Of course there are disadvantages attending any loosening of our procedure. But despatch is an essential of justice just as is stability. It is a significant sign when public sentiment favors doing away with many of the technical protections thrown about the accused, and feels safe in looking for substantial justice at the hands of our judges. The allowing of a prisoner to waive, by mere voluntary absence or otherwise, his right to be present at the rendition of the verdict seems in line with this general trend of sentiment.

INTERSTATE COMMERCE—REBATES UNDER THE EILKIN'S LAW OF 1903.

Interstate commerce as coming within the purview of the constitutional provision that "Congress shall have power . . . to regulate commerce with foreign nations, among the several states and with the Indian tribes," has been the subject of various litigations, and perhaps equally as varied *dicta* by the courts. The judicial construction of this clause begins in 1824 with the case of *Gibbons v. Ogden;* wherein Chief Justice Marshall declared that the power to regulate, being the power to prescribe rules by which commerce is to be governed, is complete as vested in Congress and acknowledges no limitations other than as prescribed in the constitution. The line of demarcation between interstate and intra-state commerce being under the control of the individual state, was laid down by the "original package" rule, first stated in 1827 in the case of *Brown v. Maryland.* This line of difference involving the power of the state to legislate upon interstate commerce; in the absence of any regulation by Congress, not being decided, remained a *vexata quaestio* until 1851, when the jurisdiction of the state courts was confined to those questions of local interest included under police regulations, and that, too, only in the absence of any regulations by Congress. This view was not universally adopted. The Granger cases held state regulations of interstate rates valid in case of the absence of legislation by Congress. But in 1886 the Supreme Court of United States reversed the Supreme Court of Illinois in *Wabash R. Co. v. Ill.,* 118 U. S. 557, denying to the states the power to any such regulations whatever. In the same year the Tennessee drummer case denied the power of the state to impose any tax whatever upon interstate commerce. It was then in the absence of statutory regulations whatever, except the Act of 1866, Revised Statutes, Section 5258, authorizing the formation of continuous lines and through shipments by agreements, that the Interstate Commerce Act was passed on Feb. 4, 1887.

The wide diversity of opinions during the debates in Congress, giving rise to the caustic characterization of the act as one which "nobody understands, nobody wants, and everybody is going to vote for," was fully warranted by subsequent judicial interpretation of its provisions, especially as to what were the "substantially similar circumstances and conditions" of the fourth section. Subsequent

amendments have at least proved that it did not meet the demands of the situation, among which was the Elkin's Act of 1903, providing that, "Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebates, concessions or discriminations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

This Act was brought before the courts in the case of *United States v. The Standard Oil Co. of Ind.*, 155 Fed. 305, upon an indictment on 1903 counts, each charging the movement of one car of oil as an interstate shipment. The constitutionality of the Act was sustained against the contention of the defendant to the effect that: (1) the natural and inherent right to make a private contract was involved, (2) authorizing common carriers to fix such rates as when published shall become binding, is a delegation of legislative power, (3) judicial power vests in the commission in that it is to pass upon the ultimate reasonableness or unreasonableness of the rate charged, (4) the "commerce clause" of the constitution does not empower Congress to forbid and make criminal the act of defendant in accepting a rate less than that fixed and filed as required by the Act. The first contentions of defendant above was denied on the ground of the public character of railroads as declared by frequent holdings of the courts. *Louisville & N. R. Co. v. Brown*, 123 Fed. 946; *Commonwealth v. Interstate Consol. St. Ry. Co.*, (Mass.), 73 N. E. 530. The Supreme Court of United States has frequently ruled adversely to contention (2) of defendant. *Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866. *Railroad Commission Cases*, 116 U. S. 307. The courts have ruled against (3) above, in that common law remedies are not barred by the statute. *Gen. Sts.* 1901, section 5998. *Mo. Pac. R. Co. v. State*, 77 P. (Kan.) 286. Contention (4) of defendant is denied and the receiving of rebates thereby made a criminal offense on the ground that Congress, having the right to establish uniformity in rates, may adopt whatever remedial measures may be necessary to enforce them. Congress has primary power to protect interstate commerce. *Charge to Grand Jury*, 2 Sprague (U. S.) 279.

The question of rebates, though perhaps for the first time the subject of legislation in the Interstate Commerce Act, is by no means a new one to the American courts. The more general term, discrimination, as involving rebates, has for a long time been the subject of litigation. There are *dicta* in the English cases and many cases may be found to sustain this view, that at common law, common carriers were bound to make reasonable, but not equal charges, and that one of whom a fair compensation was exacted had no cause of complaint because another obtained a similar service for less. *Branley v. Southeastern R. Co.*, 12 C. B. (N. S.) 63, 75; *Oxlade v. N. E. Ry. Co.*, 40 Law & Eq. 234. So it has been usual in English railroad charters to insert clauses expressly requiring reasonable facilities to be afforded to all on equal terms and enacting special remedies for unjust discriminations. *McDufee v. Portland & Rochester R.*, 52 N. H. 430. So the "equality clause" in 8 and 9

Vict. .c 20, section 9, that tolls shall be charged equally to all persons and after the same rate in respect to all goods of the same description passing over the same portion of the same line under the same circumstances supplements whatever defect there may have been in the common law in the prohibition of unreasonable discriminations.

The most recent decisions which have passed upon the obligations of railway companies to the public have been almost uniform in following the principles of the common law, not only prohibiting discriminations, but requiring the strictest impartiality in the conduct of their business, as declared by Supreme Court of U. S. in 1901, in *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Pierce on Law of Railroads,* p. 498. Since, upon the question of discrimination, this Act is in the main only an enumeration of the common law provisions, its purpose was the prevention of a specific violation of the imposition of specific penalties. We find then that Judge Tandis follows the real spirit of the Act in exercising the discretion entrusted to the judiciary by imposing a fine of $29,240,-000 upon the defendant. This discretion is not a power which may or may not be exercised acording to the peculiar inclination of the particular occupant of the bench, but is a part of the duty of the judge as a trial court. *Goodwin v. State,* 51 S. E. (Ga.) 598.

IS THE ACTION BY A DEPOSITOR AGAINST A BANK FOR WRONGFUL REFUSAL TO HONOR A CHECK, EX CONTRACTU OR EX DELICTO?

While all courts are agreed that when a bank has sufficient funds of a depositor in its possession to honor the depositor's checks drawn on it, and such funds are not subject to any lien or claim, the bank is liable to an action by the depositor for its neglect or refusal to honor his checks, *Wiley v. Bunker Hil National Bank,* 183 Mass. 495, yet they are far from being in harmony as to whether the action is one *ex contractu* or one *ex delicto.*

In the recent case of *Lorick v. Palmetto National Bank of Columbia,* 57 S. E. (S. C.) 527, the plaintiff brought action against the defendant Bank for damages for wrongfully refusing to honor the plaintiff's check. Pending the suit the plaintiff died, and the suit was continued in her behalf by her administrator. The question arose whether the action was one *ex contractu* and survived to the administrator, or whether it was one *ex delicto* and did not. The court held that, although the plaintiff had attempted to bring her action in tort and had failed, yet she should not be deprived of her relief on account of the technicality, and as she had stated facts sufficient to constitute a cause of action *ex contractu* she was entitled to pursue her relief in that form of an action, and such right of action survived to her administrator.

Some decisions are based upon the nature of the wrong done; that is, the breach of contract, or the tort. Others are based upon the extent of the injury; that is, the measure of damages in either case. There are three different opinions as to the nature of such an action. Some courts hold that it is strictly an action *ex contractu.* This view obtains in California, Kansas, Kentucky, Massachusetts and Nebraska. Others hold that the action is one essentially *ex*

delicto. This is the rule in Georgia, Illinois, Minnesota, Pennsylvania and Tennessee. The third view is that an action lies either in contract or tort, which obtains in New York, and, by the recent case, in South Carolina.

The English courts have a rather peculiar theory of such an action, as is shown in the pioneer English case on the subject, *Marzetti v. Williams*, 1 Barnewall & Adolphus Reports, 415. The court in this case held that, although it is immaterial whether the action be in form, in contract or in tort, yet it is substantially founded on the implied contract between the bank and the depositor. Damages were allowed as for breach of contract. The court was aware, too, of the injury to the depositor's credit. This decision has been followed by the English courts except in the case of *Rolin v. Steward*, 18 Jur. Pt. 1, p. 536, where the court said the action was one in tort.

These cases are based on the theory that when a person deposits money in a bank he thereby immediately assumes a relation with the bank which is fixed and determined by law. This relation is that of debtor and creditor, and that only. If the depositor has sufficient funds in the bank, which are not subject to any liens or claims, the law implies a contract on the part of the bank to pay out these funds upon the depositor's orders and according to his directions. When the depositor has sufficient funds in the bank to meet the check and the bank, without authority, wrongfully refuses or neglects to honor the same, a right of action immediately accrues to the depositor for the breach of the implied contract. The bank is liable to the extent and for the same reason that other persons are liable for the nonperformance of their contracts. As to the measure of damages the courts have generally adopted the rule set forth in the case of *Hadley v. Baxendale*, 9 Ex. 353, and awarded compensation for such damages which may fairly and reasonably be considered as naturally arising from the breach of the contract according to the usual course of things. *Wiley v. Bunker Hill National Bank, supra; Kleopfer v. First National Bank*, 65 Kans. 774.

The decisions that such an action is properly one *ex delicto* are the result of an entirely different line of reasoning. The great natural right which every government recognizes and protects is that of personal security, by which one is entitled to complete immunity from attack and injury. Thus is one's reputation made secure, and he who deservedly stands in good repute has the right to, and it is the duty of all others, which may be enforced in all jurisdictions, to abstain from interfering with the uninterrupted enjoyment of a good reputation. When a bank wrongfully refuses or neglects to honor a depositor's check, it thereby charges him with insolvency, dishonesty, or bad faith, and not only injures his reputation, but also impairs his credit. There is something more than a mere breach of the contract implied by law between the parties. To impute insolvency to a trader is a most effectual way of slandering him and is actionable, and he can recover general damages therefore. *Schaffner v. Ehrman*, 139 Ill. 109; *Svendsen v. State Bank of Duluth*, 64 Minn. 40; *J. M. James Company v. Continental National*

Bank, 105 Tenn. 1. And it is immaterial whether the depositor is a natural person or corporation. *Metropolitan Supply Company v. Garden City Banking Company,* 114 Ill. App. 318.

It is objected by some courts that as a corporation cannot speak except through its agents, it cannot be guilty of slander, the agents themselves being personally liable in such cases. *Eichner v. Bowery Bank,* 24 App. Div. 63 (overruled). But such courts fail to see the analogy between oral slander and slander by act or deed. The latter is just as effective as the former in accomplishing the same ends. *J. M. James Company v. Continental National Bank, supra.* It is also objected in a great many cases that the refusal is not malicious, and as malice is the gist of slander, there is no slander. Though the wrong is unintentional, the refusal to pay was intentional and without just excuse, and legal malice will be presumed. *Schaffner v. Ehrman, supra; Metropolitan Supply Company v. Garden City Banking Company, supra.*

There is another ground upon which the decision that such an action is properly one *ex delicto,* is based. It is the broad ground of public policy. A bank is a quasi-public corporation whose duty imposed by the government by charter, is to safely hold all moneys deposited therewith. Banking facilities are absolutely essential to business, and banks would have the public at their mercy were the damages for their wrongful refusal to honor a check limited to those resulting from a mere breach of contract. A rule of this kind might hinder commerce. *First National Bank of Lock Haven v. Mason,* 95 Pa. St. 113; *Patterson v. Marine National Bank,* 130 Pa. St. 419.

New York allows the action to be brought either *ex contractu* or *ex delicto,* for the same reasons that other states permit the one or the other to be brought. The earlier New York courts favored solely an action *ex contractu. Brooke v. Tradesmen's National Bank,* 23 N. Y. Supp. 802; *Eichner v. Bowery Bank, supra.*

But the present doctrine is recognized in the cases of *Borroughs v. Tradesmen's National Bank,* 33 N. Y. Supp. 864; *Davis v. Standard National Bank,* 50 App. Div. 210; *Clark Company v. Mount Morris Bank,* 85 App. Div. 362; *Citizen's National Bank v. Importers' & Traders' National Bank,* 119 N. Y. 195.

Although, previous to the recent South Carolina decision, New York was the only state in which such a rule obtained, still it seems the most equitable and just rule. The wrongful refusal of a bank to honor a depositor's check involves not only the right arising from the contract implied by law between the parties, but also the natural right to security in his reputation. Such an act by the bank is a violation of both rights at one and the same time. The depositor is wronged, and is entitled to his remedy regardless of the form of the action by which he seeks to obtain it, and he should not be deprived of his remedy for having brought his action in one form if he has stated facts sufficient to constitute a cause of action in the other form. The New York rule not only satisfies the requirements of good pleading, but it also does that which is of far greater importance, in that it removes the technicalities of pleading and makes the redress to the depositor for the violation of his right, to which he is so justly entitled, most certain and secure.

REPRESENTATIONS AND WARRANTIES.

In a recent case, *Morley v. Consolidated Mfg. Co.*, 81 N. E. 63, the Massachusetts court has applied the rule of *caveat emptor* more strictly than hitherto. In making this ruling, the court has departed from certain authorities which have had occasion to deal with the exact words and phrases, used by the salesman in the case considered. In this case, the plaintiff purchased a machine, paying therefor about half the price of a new one of the same make, fully understanding that it had been used as a demonstrating car, but the salesman had said that "it was in first-class condition, and all right." The machine was used by the plaintiff about two months when the crank-shaft broke and materially damaged the engine. He endeavored to recover back the purchase price, relying on the assertions of the salesman, but the Supreme Court denied his right to do so, stating that "There was no express warranty. All that was said as to the value and nature of the machine was mere seller's talk." Further than that, the court denied that there was any implied warranty.

If the decision is correct in that the words do not amount to a warranty, it necessarily follows, in the absence of fraud on the part of the vendor, that the strict rule of *caveat emptor* must apply, in which case the vendee is considered to have assumed the risk of the durability of the crank-shaft and cannot recover the purchase price from the vendor.

Wilson v. Lawrence, 139 Mass. 318, relied upon by the court, was a case for breach of warranty in the sale of a piano, which was ordered by the plaintiff, although he had not demanded one of any particular class or quality, and the court held that in the absence of any definite description of the instrument ordered the defendants were bound only to furnish a piano which was merchantable and salable and not one which should be free from future defects. This case does not seem to bear as directly on the words used in the main case as some others to be noticed. Indeed, one distinction between the two cases is that the automobile was purchased, it seems, under circumstances which gave the vendee the opportunity of personal inspection, while the order in the other case was sent to the factory, and no specific article was in the minds of both parties, so that the representations of the salesman of the automobile were as to one particular machine which the vendee contemplated buying. This would give the result that the representations of the salesman as to the automobile could not possibly apply to any other machine, while there existed more or less uncertainty as to the piano which was the subject of sale in the other case. The general rule that goods sold by sample must correspond accurately and exactly has been strengthened by statutes in many states, and fraud is presumed by setting up the receipt of goods different from those ordered by sample.

To consider the effect of the words as used by the defendant, *Richardson v. Grandy*, 49 Vt. 22, seems to be quite analogous to the main case. There, a piece of machinery was sold by the defendant to the plaintiff which was admittedly second-hand, but was to

"be equal in all respects to a new one of the same kind," and the court held this to be a sufficient warranty for the plaintiff to maintain an action upon. The court said: "While it is true that representations descriptive of the thing sold, or which may be taken as expressive of the opinion of the vendor, do not necessarily import a warranty, yet, where representations are made by the vendor of the quality of the thing sold, or its fitness for a particular purpose, if intended as a part of the contract of sale, and the vendee makes the purchase, relying upon such representations, they will in law constitute a contract of warranty." It seems entirely reasonable to suppose that the buyer of the automobile relied on the representations that it was all right and in first-class condition, when it was expressly so stated, even though it was a second-hand machine.

No doubt the authorities all agree upon the general rule that mere words of praise or commendation, or which merely express the vendor's belief, judgment, or opinion or estimate do not constitute a warranty, *Benj. on Sales,* 7th Ed. p. 664; *Long on Sales,* 2nd Am. Ed. p. 125, but there is a very strong line of authorities which hold that a positive affirmation of a material fact, as fact, intended to be relied on as such, and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant it or not and the intention is immaterial.

In *Potomac Steamboat Co. v. Hardlan & Hollingsworth Co.,* 66 Md. 42, there was a contract to build a steamboat, the machinery of which was "to be of the best material and the workmanship first-class." Yellott, J., said in delivering the opinion of the court: "It may not be denied that an express affirmation of quality intended to operate on the mind of the vendee as an inducement to make a purchase, and so operating constituted a warranty. The rule of law is that any affirmation of the quality of the article, made at the time of the sale, intended as an assurance of the fact stated and relied on and acted on by the purchaser, will constitute an express warranty.

The Kentucky Court by Judge Holt has said: "A review of the cases as to what constitutes a warranty, exhibits much learning and diversity of opinion. Indeed, they cannot all be reconciled." Here he cited an early case in which the rule was laid down that a mere representation or affirmation, however positive, as to the character or condition of an article, could not constitute a warranty and commented upon this rule in these words: "It adhered to form rather than reason, and the argument was of doubtful legal morality." And again he said: "business and trade forbid much technicality. Warranties enter largely into the trade of the country and it is proper and best for its fairness and promotion that the language used by those so engaged should in law receive its common acceptation, and be construed as ordinarily understood by them. One man is selling his horse to another and when particularly asked, he says, 'he is all right,' would not the purchaser understand this as embracing the question of soundness and would not the vendor be understood as thereby saying to him in effect: 'he is sound?'" *McClintock v. Emick, Stoner & Co.,* 87 Ky. 160.

Application of the dictum of Judge Holt to the case in question

leads to the fact that the words "all right" and "in first-class condition" should be construed as an assertion which the maker should be willing to answer for, provided such would be the usual business meaning.

In an English case Lord Holt was quoted as correctly saying that "an affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended," *Pasley v. Freeman,* 3 T. R. 57, and the Massachusetts court may have had evidence before it which would show that the words were not intended to have binding effect, or the jury may have so determined, but the question whether the buyer relied upon the statements is not discussed in the opinion. The court may have felt that the circumstances showed that the vendee could not have relied upon the salesman's word in which case the court was following the strict rule frequently laid down by English and American decisions.

However this may be, if the vendee had placed confidence and reliance on the words "first-class condition" and "all right," the decision means that "seller's talk" is favored by the courts and the ordinary purchaser would be unsafe in attempting to rely on anything short of a written guarantee or an unequivocal statement from the vendor. We believe that the ordinary understanding of the words used would mean that the seller intended to be answerable and that any other construction would give him an undue advantage over the purchaser.