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VENDOR AND PURCHASER—DEFICIENCY IN ACREAGE—REMEDY.—STRAUSS V. NORRIS, ET AL., 79 ATLANTIC, 611 (N. J.).—*Held*, that where through innocent mistake a vendor represented a tract of land as containing 82 acres, "more or less," and it was found to contain but 69, the purchaser, being ignorant of the deficiency, could sue in equity for reimbursement, the words "more or less" not being regarded as including a considerable variance.

The case under discussion is in accord with the modern rule that if there is little variance in acreage under a sale by the acre, "more or less," there shall be no adjustment, but if the discrepancy is great the injured party may recover in equity. 1 *Sugden on Vendors*, 369; *Couse v. Boyles*, 4 N. J. Eq., 212; and the English courts now agree with this. *Hill v. Buckley*, 17 Vesey, 401, but this is allowed only when the sale is explicitly designated as by the acre, *Barnes v. Sealey*, 2 Duer., 570; and some courts give relief only in case of gross mistake. *Quesnel. v. Woodlief*, 2 Hen. & Mun., 173 note. There are, however, many cases at common law which hold that when a sale has been completely performed, there can be no suit brought for adjustment on the ground that the vendee has had opportunity to protect himself by examination of the lands. *Evans v. Edmunds*, 13 C. B., 777, unless there is fraud. *Hart v. Swaine*, 7 Ch. D., 42; *Arkwright v. Newbold*, 17 Ch. D., 301. As far as the American decisions go regarding the expression "more or less," some courts hold as small difference ground for relief, as of 5 acres. *Stevens v. McKnight*, 42 Ohio, 341; *Wilson v. Randall*, 67 N. Y., 328; *Tarbell v. Brownson*, 103 Mass., 341, while others do not. *Weart v. Rose*, 16 N. J. Eq., 290.

GUARDIAN AND WARD—STAY—ACTION V. GUARDIAN—"AGENT."—PARKER V. WILSON, 137 S. W., 926 (ARK.).—*Held*, that a statute providing that no stay of action or judgment against any collecting officer or attorney at law or agent for delinquency in his duties shall be allowed does not apply to an action against a guardian, he not being an "agent" within the meaning of the statute. McCulloch, J., *dissenting*.

In accord with the case under discussion is the proposition often laid down that agency rests upon a contract. 2 *Kent Comn.*, 612; *Whitehead v. Tuckett*, 15 *East*, 400, and that statutes such as this are to be strictly construed. *Waller v. Harris*, 20 Wend. (N. Y.), 562; 1 *Story's Comn. on Const. Law*, § 407, 424, for the object of such reading is to bring sense into the statute, not sense out of it by introducing new material. *McCloskey v. Cromwell*, 11 N. Y., 602. The term *"agent,"* however, is of broad significance and a natural guardian has been held able to make an affidavit as agent for a minor. *Wilson v. Mo-no-chas.*, 40 Kans., 648, and an agent has been held to be one who undertakes to transact business for another and to render an account thereof, not necessarily in contract. *Metzger v. Huntington*, 139 Ind., 501; *Felsh v. Lindsay*, 115, Mo., 1.

JUSTICES OF THE PEACE—JUDGMENTS—REVIVAL.—AIRY V. SWINFORD, 136 S. W., 728 (Mo.).—*Held*, that where a statute provided that no judgment

of a justice of the peace should be revived after 20 years from its rendition, there being no provision that absence would suspend such statute, that a judgment rendered in 1883, the defendant being absent thereafter from the jurisdiction till 1902, would not have been revived in 1908, even at common law.

The general common law rule is in accord with the case under discussion and holds that the statute begins to run from the time of accrual and may not be suspended. *Brown v. Houdlette,* 10 Me., 407; *Goodwin v. Wells,* 76 Iowa, 774; *Whiting v. Leakin,* 66 Md., 255; and so it has been held that inability to serve sentence on a defendant will not suspend the statute, *Amg. v. Watertown,* 130 U. S., 320, though in some jurisdictions the absence of a judgment debtor is taken into consideration somewhat. *Alston v. Hawkins,* 105 N. C., 3; *Kline v. Kline,* 20 Pa. St., 506; *Miller v. Smith,* 16 Wend, (N. Y.), 310. It has, however, been held that inability to sue, caused by *vis major,* stopped the running of the statute, though such an exception was not noted in the statute itself, *Braun v. Sauerwein,* 10 Wall (U. S.), 223; and some states recognize exceptions in cases of necessity, *Hill v. Phillips,* 14 R. I., 93, as where there was a debt due a British subject and the Revolutionary War prevented its collection, *Hopkirk v. Bell,* 3 Cranch (U. S.), 454, or where a debtor becomes the administrator of his creditor's estate, then the statute is suspended during the period of administration, *Norres v. Hays,* 44 La. Ann., 907, or where an infant, being seduced, would have had to bring suit in another's name, *Watson v. Watson,* 53 Mich., 168, and the English courts suspend the running of the statute in case there was no court in which the plaintiff might bring his action. *Graham v. Nelson,* 5 Humph. Term R., 605.

INTOXICATING LIQUORS—BURDEN OF PROOF—JUSTIFICATION.—BELL V. STATE, 137 S. W., 670 (TEXAS).—*Held,* that under a statute providing that where facts constituting an offense are proven, it devolving then upon the accused to establish matters of justification or excuse. The state is not bound, in a prosecution for selling liquors, to show that accused did not have a license for selling under prescription and thereunder make the sale, for it is a matter within the peculiar knowledge of the accused. Davidson, P. J., *dissenting.*

The general American rule holds that where the subject matter of a negative averment in an indictment is a matter peculiarly within the knowledge of the defendant and relied on by him as an excuse or justification, the burden of proof as to such averment is on him. *Burrill on Cir. Ev.,* 728; *Wharton on Cr. Law,* § 709, nor need the ground of defence be connected necessarily with the transaction on which the indictment is founded, *Commonwealth v. McKie,* 1 Gray (Mass.), 65; *Stewart v. Ashley,* 74 Mich., 189, and so when confessions of prisoners were introduced without showing that they were not obtained by improper representations the burden of proof to show that they were involuntary rested upon the accused. *Rufer & Egner v. State,* 25 Ohio, 470; 1 *Greenl. on*

Ev., § 78, 79, 816. But some courts make an exception in case a *prima facie* case is made out by one side, holding that it must be rebutted to entitle the other to a verdict. *State v. Patterson*, 45 Vt., 316; *Heinemann et al. v. Heard et al.*, 62 N. Y., 455. The case under discussion, moreover, is in opposition to the rule that every ingredient of an offense must be set out by proper averment in an indictment. *Chitty's Crim. Law*, pp. 281-282; *Rex v. Horne*, 2 Cowp., 682, and it has been held that the legislature cannot authorize the courts to dispense with the allegations of material facts, thus rendering the statute in the case under consideration unconstitutional. *People v. Berberich*, 2 *Parker Crim. Rep.*, 329; *State v. Webster*, 5 Halst., 293, and if such facts are omitted no offense is stated. *Williams v. State*, 42 Miss., 328; *State v. McCormick*, 22 Tex., 301.

STREET RAILROADS—COLLISION—BURDEN OF PROOF.—ST. JOHN V. RHODE ISLAND COMPANY, 79 ATLANTIC, 1101 (R. I.).—*Held*, that a driver of a vehicle, struck by a street car, has the burden of proof to show exercise of care by himself and negligence by the company's employees which caused his injury.

The case under discussion is opposed to the weight of American authority, which holds that under such circumstances all a plaintiff need show is his right to be on the tracks. *Anniston Elect. Co. v. Elwell*, 144 Ala., 317, and that the defendant was negligent in the performance of its duty. *Donohue v. Wilmington City R. R. Co.*, 4 Pennew. (Del.), 55; *Goldrick v. Union R. R. Co.*, 20 R. I., 128, and that such negligence was the proximate cause of his injuries. *Philbin v. Denver City Tramway Co.*, 36 Colo., 331; *Citizens' R. R. Co. v. Marvel*, 161 Ind., 506. Nor need the complaint set forth that the defendant's employees were acting in the line of their duty, but merely that the defendant by its agents negligently ran the car. *Indianapolis Union R. Co. v. Waddington*, 169 Ind., 448. In some jurisdictions, however, contributory negligence must be negatived, if other averments in the complaint suggest the inference of the plaintiff's want of care. *Robinson v. Western Pac. R. Co.*, 48 Cal., 409; *Street R. Co. v. Wolthenins*, 40 Ohio St., 376; *Texas R. Co. v. Murphy*, 46 Texas, 306. Some states, moreover, hold that the plaintiff must aver at all events that he was free from contributory negligence. *Potter v. Ft. Wayne*, 43 Ind. App., 427; *Mayo v. Boston R. R. Co.*, 104 Mass., 137; *Thompson v. Flint*, 57 Mich., 300, unless the other allegations show want of negligence on his part; *Indianapolis St. R. Co. v. Robinson*, 2 Ind., 586, or the suit is for personal injuries or death, *Cleveland R. Co. v. Wisehart*, 161 Ind., 208, and in one state failure to allege want of contributory negligence may be cured by verdict, *Gerke v. Fancher*, 158 Ill., 375; *Chicago R. Co. v. Hazzard*, 26 Ill., 373; and other states, although they require contributory negligence to be negatived, do not require want of it to be alleged when the additional facts do not suggest it. *Brockett v. Fair Haven R. Co.*, 73 Conn., 428; *Michigan So. R. Co. v. Lautz*, 29 Ind., 528.

MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.—LANDERS V. QUINCEY, O. & K. C. R. Co., 137 SOUTHWESTERN, 605 (KAN.).—*Held,* that where in an action for injuries to a section hand from a hand car, the evidence showing that the car had been in practically the same condition for a long time before and after the accident, evidence that the car was in a bad condition after the injury was admissible.

There is a conflict of opinion among the courts as to the proposition under consideration, some holding that if the condition of an appliance is substantially the same before and after an accident, evidence of that condition is admissible as bearing on its condition at the time of the injury, *Keim v. R. R. Co.,* 90 Mo., 314; *Wharton's Crim. Ev.,* § 767; *Gandy v. C. & Northwestern R. Co.,* 30 Iowa, 422; and the English courts are in accord, *Aldrige v. Great Western R. R.,* 3 M. & G., 515; *Piggott v. Eastern R. R. Co.,* 10 Jurist, 571, and so when a house was burned by sparks from an engine, evidence that they had fallen often before was held admissible, *Sheldon v. Hudson River R. R. Co.,* 14 N. Y. 218. Other American states, however, hold that in actions for injuries evidence of the condition of a railroad line before and after the accident was properly exluded, *Reed v. R. R. Co.,* 45 N. Y., 574, and proof that fires were set in woods by sparks from engines before and after a given fire was not admitted as showing negligence at that particular time, *R. R. Co. v. Yeiser,* 8 Pa. St., 366, and even when no given time was alleged was such evidence admitted, *Balt. & Susque. R. R. Co. v. Woodruff,* 4 Md., 254, and one state admits such proof, but confines the evidence to the immediate locality of the accident, *Ry. v. Huntley,* 38 Mich., 537.

JURISDICTION—ASSUMPTION BY COURT OF EQUITY—EXTENT.—SPENCE V. MINER, SHERIFF ET AL., 131 N. W., 1044 (NEB.).—*Held,* that where a county court appointed a guardian for the estate of an insane person, it is his duty to take entire charge of the estate, as an officer of court, and in so doing he vests the court with exclusive original jurisdiction.

The case under consideration is in accord with the doctrine that when equity assumes jurisdiction of an estate, it takes the whole and not a part of the administration, and thus vests itself with exclusive jurisdiction, *Winslow v. Leland,* 128 Ill., 304, and so it has been held that a court may thus determine exclusively the equitable rights of a ward, *Commonwealth v. Roser,* 62 Pa., 436; *McCreery's Appeal,* 31 P. L. J. (O. S.), 230. The case, however, is in conflict with the general rule that an incompetent may be sued at law after inquisition and the appointment of a guardian. *Beverley's Case,* 4 Coke, 124; 1 *Tidd's Practice,* 93, note b; 1 *Arch. Practice,* 25; for the existence of a guardian does not take away such a defendant's legal capacity to be sued, *Sterling v. Schoolcraft,* 2 Barb. (N. Y.), 153; *Ibbotson v. Lord Galway,* 6 Term. R., 133; *Cock v. Bell,* 13 East, 355, though the guardian must be joined in the action and leave of court obtained, *Williams v. Cameron,* 26 Barb, (N. Y.), 172; *Niblo. v. Harrison,* 9 Bosw. (N. Y.), 668.