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ACCORD AND SATISFACTION—ACCEPTANCE OF CONDITIONAL PAYMENTS.—BARHAM V. KIZZIA, 140 S. W., 6 (ARK.).—*Held,* that where a debtor sends a check to his creditor by mail to apply on a disputed claim, bearing on its face a statement that it is a "payment in full for all demands," the indorsement and collection of the check by the creditor renders it an accord and satisfaction, though the creditor immediately writes to the debtor stating that the check is accepted only in part payment and demanding the balance.

The authorities abundantly establish the rule that where a creditor having a disputed claim against his debtor accepts a smaller sum than the amount claimed, he cannot afterward maintain an action for the unpaid balance. *Fuller v. Kemp,* 138 N. Y., 231. And the same holds where the creditor collects a check sent him by debtor which recites that the check is "in full for all demands," *Baird v. United States,* 96 U. S., 430; *Ostrander v. Scott,* 161 Ill., 339; *Nassoiy v. Tomlinson,* 148 N. Y., 326; even though the creditor refuses to sign a receipt in full. *McGregor v. Construction Co.,* 188 Mo., 623. A protest on the part of the creditor gives no better ground for further claim. *Snow v. Griesheimer,* 220 Ill., 106. In *Robinson v. Detroit, etc., R. R. Co.,* 84 Mich., 658, it was held a question of fact for the jury. The case of *Canadian Fish Co. v. McShane,* 80 Neb., 551, is contrary to the majority holding. In *Day v. McLea,* 58 L. J. Q. B., 293, the court held that the mere keeping of a check sent "in full for all demands," is not conclusive evidence of an accord and satisfaction.

CARRIERS—ACTION FOR LOSS OF GOODS—LIMITATIONS APPLICABLE.—WILLIAMSON & Co. V. RAILWAY Co., 138 S. W., 807 (TEX.).—This was an action to recover the value of goods destroyed in transit by fire. *Held,* that an action against a carrier for non-delivery of goods without sufficient excuse is one for conversion, so that the statute of limitations for two years applies, notwithstanding the petition alleges a breach of contract.

The rule stated in the leading case seems to be well settled in Texas. *Railway Co. v. Clemons,* 19 Tex. Civ. App., 452. But several courts hold that the failure of a common carrier to deliver goods lost by it is not a conversion. *Golbowitz v. Express Co.,* 91 N. Y. Supp., 318; *Moses v. Norris,* 4 N. H., 304. This is certainly true if the goods were lost by the omission of the carrier, though the contrary is held where the goods were lost by the carrier's act. *Hawkins v. Hoffman,* 41 A. D., 767 (N. Y.). And many courts hold that, in an action against a common carrier for loss or non-delivery of goods, the plaintiff may bring an action on the case for the breach of duty, or an action for the breach of contract, at his election. *Mershon v. Hobensack,* 22 N. J. Law, 372; *Trust Co. v. Railway Co.,* 70 Fed., 764; *Catlin v. Adirondack Co.,* 11 Abb. N. C., 377 (N. Y.); *Smith v. Seward,* 3 Pa. St., 342. Several cases hold that an action against a carrier for failure to deliver goods is a contract action, and that the statute

of limitations as to torts does not apply to it. *Railway Co. v. Rosenburg,* 129 Ala., 287; *Railway Co. v. Neal,* 79 Tenn., 270. This was the decision where the goods were destroyed by fire. *Railway Co. v. Spann,* 40 So., 83 (Ala.). And where the allegations of the complaint support a contract or a tort action, if the action would be barred as a tort action, it will be treated as a contract action. *Railway Co. v. Sweet,* 63 Ark., 563.

DIVORCE—ALIMONY—DESERTION.—SUYDAM V. SUYDAM, 80 ATL., 1057 (N. J. CH.)—*Held,* if a husband be guilty of conduct amounting to a matrimonial offence that would constitute ground for a divorce or alimony his wife is justified in leaving him and the desertion thereby becomes his.

Judicial authorities, although not in entire accord with the position taken by the main case, support it by weight of numbers. *Cattison v. Cattison,* 10 Harris 275 (Pa.); *Pierce v. Pierce,* 33 Ia., 238; *Hall v. Hall,* 25 Ky. L. R., 1304; *Johnson v. Johnson,* 125 Ill., 510. Better reason, however, and some judicial opinions uphold the more liberal view that ill conduct which will justify a desertion need not be such as would have authorized a judicial separation or divorce. *Lyster v. Lyster,* 111 Mass., 327; *Naulet v. Dubois,* 6 La. An., 403; *Gillinwaters v. Gillinwaters,* 23 Mo., 60. But, in Massachusetts, although the wife is justified in leaving the marital home, as stated above, the desertion does not become that of the husband. *Pidge v. Pidge,* 44 Mass., 257. And in Indiana the conservative view is adopted that the conduct causing the spouse to leave, in order to constitute a constructive desertion, must have been such as would itself have been a ground for an absolute divorce. *Barnett v. Barnett,* 27 Ind. App., 466. If the desertion is justified by the husband's misconduct, the fact that he supports his wife during the separation is not a bar to a divorce for desertion. *Magrath v. Magrath,* 103 Mass., 577. But leaving the marital home in consequence of mere warnings to leave, quarrels, or family unpleasantness is not, however, held a sufficient ground to constitute desertion on the part of the spouse who remains. *Rathbun v. Rathbun,* 76 Mich., 462; *Gains v. Gains,* 19 S. W., 929. But forcing the other party to leave by cruelty and abuse, held, to show desertion. *Harding v. Harding,* 22 Md., 337. Or by adultery at the marital home. *Marker v. Marker,* 11 N. J. Eq., 256. Although, if husband's adultery, because of which his wife leaves him, was at a place other than his home, it is held not to constitute desertion by him. *Lake v. Lake,* 65 N. J. Eq., 544.

DIVORCE—DESERTION—REVIVAL AFTER CONDONATION.—LAFLAMME V. LAFLAMME, 96 N. E., 62 (MASS.)—*Held,* that where the husband visited his wife where she was living after having deserted him, and remained for four days, when they cohabited as man and wife, there was a complete renewal of the marriage relation, and her subsequent refusal to accompany him to his home would not avoid the effect of his condonation.

In an action for divorce the period of time required by the statute must be continuous and not interrupted by any conduct constituting condonation. *Woolfolk v. Woolfolk,* 96 Ky., 657; *Dreisler v. Dreisler,* 69 N. Y. Supp., 326; *Holmes v. Holmes,* 44 Mich., 555. Where there is such inter-

ruption, a subsequent desertion does not revive the offence, so as to add the period before to that after. *Hitchcock v. Hitchcock,* 15 App., D. C., 81; *Ex Parte Aldridge,* 1 Sw. & Tr., 88. In general, cohabitation will constitute condonation, as in the principal case. *Reed v. Reed,* 62 Ark., 611; *Phelan v. Phelan,* 135 Ill., 445; *Rogers v. Rogers,* 67 N. J. Eq., 534. But *Kennedy v. Kennedy,* 87 Ill., 250, where there was cohabitation for one night and two days, and *Danforth v. Danforth,* 88 Me., 120, where the husband visited his wife and for two or three nights occupied the same bed, hold there was no condonation. These cases seem to hold that in desertion, unlike adultery, (see *Delliber v. Delliber,* 9 Conn., 233, and *Anonymous,* 6 Mass., 147), but as in cruelty, the mere fact of sexual intercourse alone will not constitute condonation. See *Gardner v. Gardner,* 2 Gray, 434, and *Cox v. Cox,* 5 N. Y. Supp., 367. However, condonation is less readily inferred against the wife than against the husband. *Miles v. Miles,* 101 Ill. App., 406; *Horne v. Horne,* 72 N. C., 530; *Wright v. Wright,* 6 Tex., 3. But it is well settled that acts implying neither cohabitation nor intercourse, such as visits to the children or living separately in the same house, will not condone the desertion. *Rie v. Rie,* 34 Ark., 37; *Stein v. Stein,* 5 Colo., 55; *Anshutz v. Anshutz,* 16 N. J. Eq., 162.

HUSBAND AND WIFE—ACTIONS FOR SEPARATE MAINTENANCE—ALLOWANCE OF ATTORNEY'S FEES.—KIDDLE V. KIDDLE, 133 N. W., 181 (NEB.).—*Held,* that it is the settled rule in this court that in a suit by a wife for separate maintenance, or for alimony alone, the court may at any time during the pendency of the suit make an allowance to the wife of a reasonable sum as suit money, including attorney's fees, to be paid by the husband as the court may direct.

In England and in most of the United States, the allowance of suit money and counsel fees to the wife in actions for separate maintenance is treated as a common-law right, where not granted by statute. *Fitzgerald v. Fitzgerald,* 5 Eng. Ecc., 472; *Larkin v. Larkin,* 71 Cal., 330; *McGee v. McGee,* 10 Ga., 477; *Wagner v. Wagner,* 36 Minn., 239. *Contra, Kelley v. Kelley,* 161 Mass., 111; *Sanford v. Sanford,* 2 R. I., 64, and *Therkelsen v. Therkelsen,* 35 Or., 75, holds that under statute allowance is not permitted. And the weight of American authority holds, contrary to the English rule, that the attorney can not recover from the husband. 2 *Bish. on M. & D.,* Sec. 388; *Shelton v. Pendleton,* 18 Conn., 417; *Ray v. Alden,* 50 N. H., 82; *Wing v. Hurlburt,* 15 Vt., 607. *Contra, Glenn v. Hill,* 50 Ga., 94; *Ottaway v. Hamilton,* 3 C. P. D., 393. The allowance is generally granted as a matter of course, a *prima facie* case being a prerequisite. *Litowich v. Litowich,* 19 Kan., 451; *Dougherty v. Dougherty,* 8 N. J. Eq., 540; *Bardin v. Bardin,* 4 S. D., 305. But it may be denied where the wife has means, or the husband is destitute. *Brady v. Brady,* 144 Ala., 414; *Kenemer v. Kenemer,* 26 Ind., 330; *Coad v. Coad,* 40 Wis., 392. *Contra, Lumpkin v. Lumpkin,* 78 Ill., 324; *Mangels v. Mangels,* 6 Mo., App., 481; and *Rawson v. Rawson,* 37 Ill. App., 491, holds that the wife's adultery will bar her right, but the better rule is that after showing probable cause the

merits of the case will not enter. *Cupples v. Cupples,* 31 Colo., 443; *Frith v. Frith,* 18 Ga., 273; *Porter v. Porter,* 41 Miss., 116. Such allowances are made at the discretion of the court, and may be for any time from commencement to dismissal of the suit, including appeals, but not after termination adversely to the wife. *Ex Parte Winter,* 70 Cal., 291; *Holleman v. Holleman,* 69 Ga., 676; *Newman v. Newman,* 67 Ill., 167. So also he is liable, in the absence of condonation, if the suit is dismissed. *Weaver v. Weaver,* 33 Ga., 172; *Waters v. Waters,* 49 Mo., 385; *Chase v. Chase,* 29 Hun., (N. Y.) 527.

LIMITATION OF ACTIONS—ESTOPPEL—AGREEMENT TO WAIVE.—SMITH V. DUPREE, 140 S. W., 367 (TEX.).—*Held,* that where, prior to the expiration of limitations, the plaintiff requested payment, and defendant, on special occasions importuned plaintiff not to sue, agreeing that he would not plead limitations against the debt, on which request and promise plaintiff relied and forbore to sue, defendant was estopped, on being sued after limitations had run, to plead the statute.

The rule stated in the leading case has been often approved. *Bridges v. Stevens,* 132 Mo., 524; *Bancroft v. Roberts,* 91 N. C., 363; *Holman v. Bridge Co.,* 117 Ia., 268. But mere indulgence by the creditor at the request of the debtor does not estop him from pleading the statute. *Hill v. Hilliard,* 103 N. C., 34. Some cases hold an agreement not to plead the statute is void as against public policy. *Nunn v. Edmiston,* 9 Tex. Civ. App., 562; *Wright v. Gardner,* 98 Ky., 454. At least this is true if the waiver is for all time. *Crane v. French,* 38 Miss., 503. In some states the agreement operates as an acknowledgement of the debt, and must be in writing. *Hodgdon v. Chase,* 29 Me., 47; *State Loan Co. v. Cochran,* 130 Cal., 245; *Shapley v. Abbott,* 42 N. Y., 443. It has also been held that the agreement must be made before the statute has run. *Trask v. Weeks,* 81 Me., 325. And there must be a valid consideration for the promise. *State Loan Co. v. Cochran,* 130 Cal., 245. In *Holman v. Bridge Co.,* 117 Ia., 268, it is held that such an agreement may operate by way of estoppel to plead the statute, though it does not amount to a valid contract. But in *Shapley v. Abbott,* 42 N. Y., 443, the contrary is held on the ground that, since the representation is not one of fact, the maker can not be estopped by it.

MANDAMUS—COMPELLING CONSTRUCTION OF RAILROAD—PETITIONER.—PEOPLE V. UNITED TRACTION CO., 130 N. Y. SUPP., 477.—*Held,* a private person, not interested otherwise than as one of the public, cannot have *mandamus* to compel a street railroad company to build its franchise, the grievance which he would attempt to redress being a public and not a private injury, for which only the state may sue. Betts, J., *dissenting.*

The authorities are not in harmony as to the right of an individual to enforce a public right or to compel the performance of a public duty by *mandamus.* In some states a private individual, having no interest

except as one of the community, is not entitled to the writ. *Mitchell v. Boardman,* 79 Me., 469; *State v. Charleston Light & Water Co.,* 68 S. C., 540. Yet, other courts hold, that if the act affects the people at large or any class of people, any member may move for a *mandamus* to enforce a public duty. *Union R. R. Co. v. Hall,* 91 U. S., 354; *Loader v. Brooklyn Heights R. Co.,* 35 N. Y. Supp., 996; *Florida Cent., etc., R. Co., v. State,* 31 Fla., 482. Of course, if a private person has a peculiar and a special interest in enforcement of right, he can maintain the action. *Southern Express Co. v. R. M. Rose Co.,* 124 Ga., 581; *Robbins v. Bangor, etc., R. Co.,* 100 Me., 496. But, if the right or duty affects the State in its sovereign capacity as distinguished from the people at large, the proceedings must be instituted by the proper public officer. *People ex rel Sherwood v. Bd. Canvassers,* 129 N. Y., 360. The fact that a public officer is entitled to institute proceedings does not defeat the right of a specially interested individual. *State v. Bloom,* 19 Neb., 562. Or, even without such interest, if the public officer is absent or declines to move, the individual may do so. *People v. State University,* 4 Mich., 98. But, in all cases *mandamus* will be denied where there is other adequate remedy. *State v. Kinkaid,* 23 Neb., 641.

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.—GALE V. HELMBACHER FORGE & ROLLING MILLS CO., 140 S. W., 77 (Mo.)—*Held,* evidence that a servant, injured through use of an improper apparatus, worked with it, knowing it to be unsafe, is evidence of his contributory negligence.

Where a servant continued work with knowledge, actual or constructive, of dangers which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence. *Watts v. Boston Tow Boat Co.,* 161 Mass., 378; *Schulz v. Rohe,* 149 N. Y., 132. There is a distinction between knowledge of defects and knowledge of the risks resulting from such defects, and a servant is not chargeable with contributory negligence if he merely knows that defects exist, but does not know, or cannot know by exercise of ordinary care, that there is danger. *Hartrich v. Hawes,* 202 Ill., 334; *Murphy v. City Coal Co.,* 172 Mass., 324. However, it has frequently been held that a servant after learning of the risks, is entitled to time and opportunity for making complaint; *Fordyce v. Edwards,* 60 Ark., 438, that he may continue in the employment a reasonable time for the remedy of defects and the removal of danger; *McCabe v. Montana Cent. Ry. Co.,* 30 Mont., 323, and that his failure to complain or quit work does not charge him with assumption of risk or contributory negligence where his services are hired for a limited time and he has no right to terminate his contract at will. *Poirier v. Carroll,* 35 La. Ann., 699. Where a defect or danger is caused by the master's negligence, and is known or ought to be known, by him, he cannot rely upon the servant's failure to make complaint or quit work after learning thereof. *Seaboard Mfg. Co. v. Woodson,* 98 Ala., 378.

SALES—CONDITIONAL SALES—DESTRUCTION OF PROPERTY—POSSESSION OF SELLER—RECOVERY OF PRICE.—HOLLENBERG MUSIC CO. v. BARRON, 140 S. W., 582 (ARK.).—*Held,* that where a contract for the sale of a piano reserved title in the seller, and on default the seller took possession to hold the piano until payment was made, the destruction of the piano by fire, without the seller's fault, while in his possession, did not deprive him of his right to recover the balance of the price.

The court in this case confessed its inability to cite a case where the precise question involved had been previously decided. *Williston on Sales,* pp. 306, 562, favors the application of principles established in analagous cases. In *La Valley v. Ravenna,* 78 Vt., 152, the recovery of the purchase price of property, sold and delivered on condition that the title should not pass until full payment was made, was allowed, although without the fault of the purchaser the property was destroyed before the price fell due. Where the property was delivered, and yet the title and right of possession were to remain in the vendor as security, its loss leaves the vendee still liable. *Osborn v. South Shore Lumber Co.,* 91 Wis., 526. Where the seller retained possession of the goods at the buyer's request, their loss without negligence on the part of the seller falls upon the buyer. *Whitlock v. Auburn Lumber Co.,* 145 N. C., 120. If the vendee refuses to take the goods, the vendor may store them as bailee, give notice of the fact, and then sue for the contract price. *Hobeler v. Rogers,* 131 Fed., 43. The same principle is illustrated where the seller repossesses himself of property fraudulently obtained and thereby preserves his lien for the price without recission. *Ames v. Moir,* 130 Ill., 582.

TRESPASS—DAMAGES—CUTTING AND REMOVAL OF TIMBER.—BAILEY v. HAYDEN, ET AL., 117 PAC., 720 (WASH.).—*Held,* that where a trespasser cuts and removes standing timber, the owner, if the removal be unintentional, can recover only the value of the timber when standing, but, if the removal be intentional, the owner may recover as damages the value of the timber enhanced by the labor of the trespasser.

When the trespass has been committed unintentionally, the majority of the cases hold the measure of damages to be, not the value of the trees as such, but the damage done to the land by their destruction, or the difference between the value of the land before and after their removal. *Thompson v. Moiles,* 46 Mich., 42. There is authority, however, for holding the value of the trees considered separate and distinct from the land as the proper measure of damages. *Smith v. Gonder,* 22 Ga., 353. The value of timber is to be ascertained by the price paid in the vicinity, and not at a distant market, *Coxe v. England,* 65 Pa. St., 212, and at the time when cut, and not by striking an average of value taken through several years. *Schlater v. Gray,* 28 La. Ann., 340. The measure of damages for the wilful or intentional cutting of timber on another's land is the enhanced value of the property when finaly converted to the trespasser's use. *U. S. v. Homestake Min. Co.,* 117 Fed., 481. When the cutting is

impelled by malice or gross negligence, or attended with circumstances of aggravation, exemplary damages are usually recoverable under statute, in most cases treble damages are allowed. *Simpson v. Woodward,* 5 Kan., 571; *Gates v. Comstock,* 113 Mich., 127. Wisconsin has an exceptional statutory rule, namely, that the damages for timber or trees wrongfully cut on the land of another are the highest market value thereof in whatever state the timber may be put by the party cutting at the time of the action. *Webster v. Moe,* 35 Wis., 75.

WITNESSES—PRIVILEGED COMMUNICATION—ATTORNEY AND CLIENT.—IN RE TRAINER, 130 N. Y. SUPP., 682.—*Held,* that a client's communication of an address to an attorney, while consulting him in a professional capacity, for the purpose of enabling the attorney to communicate with him, is a "privileged communication," which the attorney cannot be compelled to disclose when the relation of attorney and client has ceased, and the information is sought in litigation to which the client is not a party.

In general, every communication which the client makes to an attorney in a professional capacity is confidential, and the attorney cannot be permitted, nor the client compelled, to disclose it. *Werdell v. Gray's Harbor, etc., Co.,* 115 Cal., 517; *Struckmeyer v. Lamb,* 75 Minn., 366; *Vogel v. Gruaz,* 110 U. S., 311. But as this rule has a tendency to prevent full disclosure of the truth, it is generally strictly construed. *Turner's Appeal,* 72 Conn., 305; *Goltra v. Wolcott,* 14 Ill., 88; *Foster v. Hall,* 12 Pick. (Mass.), 89. But *Wade v. Ridley,* 87 Me., 368, holds *contra,* that it should be liberally construed. And there are exceptions to the general rule, as when attorney and client are engaged in a wrongful act, or the attorney is a witness to his client's will. *Butler v. Fayerweather,* 91 Fed., 458; *Matthews v. Hoagland,* 48 N. J. Eq., 455; *Dudley v. Beck,* 3 Wis., 274. So an attorney may testify as to the identity or as to the handwriting of his client. *White v. State,* 86 Ala., 69; *Com. v. Bacon,* 135 Mass., 521; *Gower v. Emery,* 18 Me., 79; *Thomson v. Perkins,* 57 N. Y. Supp., 810. *Contra, Parkins v. Hawkshaw,* 2 Stark., 239. And it has been held that an attorney must disclose his client's address. *Panisbotham v. Senior,* L. R., 8 Eq., 575; *Alden v. Goddard,* 73 Me., 345. *Contra, Harris v. Holler,* 7 Dowl. & L., 319; *Heath v. Crealock,* L. R., 15 Eq., 257. The better rule seems to be that an attorney is not protected from making such disclosures because the address became known to him in his professional character, unless communicated to him by the client in professional confidence for the purpose of obtaining advice. *Ex Parte Campbell,* L. R., 5 Ch., 703; *Re Arnot,* 60 L. T. N. S., 109; *Havana City Ry. Co. v. Ceballos,* 56 N. Y. Supp., 360. But in all these cases where disclosure has been allowed, it has been during the pendency of the action to which the client was a party. See *Carnes v. Platt,* 36 N. Y. Super. Ct., 361; *Hooper v. Harcourt,* 1 H. Black., 534.