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RECENT CASES

CARRIERS—STIPULATION IN PASSENGER TICKET LIMITING LIABILITY FOR LOSS OF BAGGAGE—NEGLIGENCE.—COOPER V. NORFOLK, SOUTHERN RY. CO. ET AL., 77 S. E. REP. (N. C.), 339.—*Held,* that a stipulation in an intrastate passenger ticket that "baggage liability is limited in value, unless a greater value has been declared and excess charges paid," is invalid, where the carrier was negligent.

In general there is no distinction between the baggage of a passenger and ordinary goods, as to the rights of parties to enter into contracts limiting the liability of the carrier. *Hutchinson on Carriers,* 3rd Ed., §1297. The decision in the principal case is in harmony with the rule obtaining in most jurisdictions that a carrier may limit its liability for baggage by stipulation in a passenger ticket, except for losses due to its own negligence; *Williams v. Central Railroad of New Jersey,* 93 App. Div. (N. Y.), 582; *Thomas v. Southern Ry.,* 131 N. C., 590; *Jacobs v. C. R. of N. J.,* 208 Pa., 535; although some require that a reduced fare or other consideration be given. *Robert v. Chi. & Alton R. Co.,* 148 Mo. App., 96. The stipulation must be reasonable; *Weinberger v. Compagnie Generale,* 146 Fed., 516; *Rose v. Northern Pacific Ry.,* 35 Mont., 70; and notice must usually be brought home to the passenger; *C. R. of N. J. v. Wiegand,* 75 Fed., 370; *Black v. A. C. Line Ry.,* 82 S. C., 478; although it may be presumed. *Aiken v. Wabash Ry.,* 80 Mo. App., 8; *Jacobs v. C. R. of N. J., supra.* Notice will not be presumed where the conditions intended to limit the carrier's liability are printed on the back of the ticket. *Hutchinson on Carriers,* §1299. Some courts however allow a limitation of liability for loss caused by negligence. *Rose v. N. P. Ry. supra; Westhall v. C. R. of N. J.,* 79 N. J. L., 87; *Tewes v. North German Lloyd Steamship Co.,* 186 N. Y., 151. In a few instances, as where a free pass is given, a carrier may wholly exempt itself from liability; *Holly v. Southern Ry.,* 119 Ga., 767; even for the felonious acts of its servants. *Marriott v. Yeoward Bros.,* 2 K. B. (Eng., 1909), 987; *contra, Hutto v. Southern Ry.,* 75 S. C., 295. In Iowa, Texas and Virginia, by statute, a carrier cannot limit its common-law liability. *Galveston, etc. Ry. v. Eales,* 33 Tex. Civ. App., 457; *C. & O. Ry. v. Beasley,* 104 Va., 788. Stipulations as to baggage are held not to apply to hand baggage. *Runyan v. C. R. of N. J.,* 61 N. J. L., 537; *Holmes v. Nor. Ger. L. S. S. Co.,* 184 N. Y., 280.

CHARITABLE SUBSCRIPTION — DONATION — ENFORCEMENT — CONSIDERATION.—YOUNG MEN'S CHRISTIAN ASS'N. V. ESTILL, 78 S. E. (GA.), 1075.—*Held,* that, as a general rule, a promise to donate money to a charitable purpose is gratuitous and unenforcible, unless some consideration therefor exists. But a consideration for a promise to donate money to a charitable corporation is supplied where the corporation, during the life of the promisor, and before a withdrawal of the promise, and in reliance on his promise, as well as that of others, expended money and incurred enforcible liabilities in furtherance of the enterprise the donors intended to

promote. The original gratuitous promise will thus be converted into a valid and enforcible contract.

A subscription is generally regarded as merely an offer to contribute toward the accomplishment of a proposed object ,and being no more than an offer, it does not give rise to a contractual obligation until supported by a consideration. *Albany Presb. Church v. Cooper,* 112 N. Y., 517. Nevertheless, the meritorious purposes which are usually the object of subscriptions have led the courts in most cases to hold that subscribers' promises are enforcible. Different reasons have ben given for holding the subscriber. If the work for which the promise was made has been done or liability incurred in regard to such work, on the faith of the subscription,, consideration is found in that fact. *First Church v. Donnell,* 110 Ia., 5; *Richelieu v. Inter. Mil. Encamp. Co.,* 140 Ill., 248; *Cottage St. Church v. Kendall* 120 Mass., 528; 1 *Page on Contr.,* par. 298. See also, *Lasar v. Johnson,* 125 Cal., 549. While the cases that allow recovery on the ground of expenditures made, or work done, in reliance on the subscription, usually state the reason in terms of consideration, it has been held that the right of recovery is on the ground of an estoppel invoked against the promisor. *Beatty v. West, College,* 177 Ill., 280, 292; *Simpson College v. Tuttle,* 71 Ia., 596; *Kansas City School Dist. v. Sheidly,* 138 Mo., 672. Being merely an offer, it may be revoked any time before acceptance. *Beach v. First Church,* 96 Ill., 177; *Helfensteins Estate,* 77 Pa., 328. So, too, it lapses by the death of the subscriber, if the death occurs before there is an acceptance, and before a consideration is furnished. *Twenty-Third Street Baptist Church v. Connell,* 117 N. Y., 601; *In re Helfenstein, supra.* Then again, it has been held that the promise of each subscriber is supported by the promises of the others. *Christian College v. Hendley,* 49 Cal., 347; *Higert v. Trustees,* 53 Ind., 326. *Contra. Cottage St. Church v. Kendall, supra; Albany Presb. Church v. Cooper, supra.* Consideration for the subscriber's promise has also ben found either in the express promise, or in what is regarded as the implied promise, of the promisee to carry out the purpose for which the subscription was made. *Barnett v. Franklin College,* 10 Ind. App., 103. This view has not met with judicial approval. *Johnson v. Otterbein University,* 41 Ohio St., 527, 531. The fact that others have been induced to subscribe has been held, in a few cases, to be a good consideration. *Hanson Trustees v. Stetson,* 5 Pick. (Mass.), 606. overruled in *Cottage St. Church v. Kendall, supra; Comstock v. Howd,* 15 Mich., 237; *Irwin v. Lombard Univ.,* 56 Ohio St., 9. Recovery is also allowed where the promisor expressly or impliedly requests that acts be done in furtherance of the purpose of the subscription, and they are performed pursuant to the request. *Union Semin. v. Brownell,* 34 N. Y., 379; *Keuka Coll. v. Ray,* 167 N. Y., 96; *Albany Presb. Church v. Cooper, supra.* A few cases hold that the object being meritorious and beneficial to the promisor, this benefit to him furnishes a good consideration for the promise. *Pitt. v. Gentle,* 49 Mo., 74, 77; *Comstock v. Howd, supra.* While in most cases there is a strong moral obligation to pay the promised subscription, there are but few cases where the subscription has been enforced explicitly on this

moral obligation consideration. *Caul v. Gibson,* 3 Pa. St., 416; *Hart's Estate,* 13 Phila. (Pa.), 226. In England a charitable subscription is not held to be binding. *In re Hudson,* 54 L. J. Ch., 811. The doctrine of the principal case illustrates the tendency of the courts to discover a technical consideration for the promise of the subscriber, and is in accord with the weight of authority.

CONTRACTS—DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.—GREIL BROS. CO. V. MABSON, 60 So. REP. (ALA.), 876.—*Dictum,* where performance of a contract becomes impossible subsequent to its making, the promisor is not thereby discharged, unless the impossibility of performance is caused by a change in the law, or by some action or authority of the government, in which case he is discharged.

While impossibility of performance was originally regarded as in no case an excuse for the non-performance of a contract, three well recognized exceptions to this general rule have arisen. A defense is admitted where, without fault of either party, performance has been prevented by the destruction of the subject matter of the contract, by a new law forbidding the act promised, or by sickness or death of the parties to a contract for personal services. 10 *Columbia Law Review,* 83; but see *Vogt v. Hecker,* 118 Wis., 306. Intervention of a foreign law is considered as impossibility of fact and no defense for non-performance of a contract. *Tweedle Trading Co. v. McDonald,* 114 Fed. Rep., 985. In Louisiana, by statute, interference by a fortuitous event excuses. *Romero v. Newman,* 50 La. Ann., 80; see also *Johnson v. Lyon,* 75 Mich., 477. In New York, impossibility is also an excuse when caused by the non-continuance of conditions essential to performance. *Buffalo & C. Land Co. v. Bellevue Land & C. Co.,* 165 N. Y., 247. Where the impossibility is caused by fault of the promisor he is not excused; *Frothingham v. Seymour,* 121 Mass., 409; and so a legislative enactment made at his instance is of no benefit to him; *Re Companies' Acts,* 117 L. T. R. 60 (Eng., Ch. D.); although voluntary dissolution of a partnership promisor has been held a valid excuse. *Bovine v. Dent,* 21 T. L. R., 82 (Eng., K. B. D.) Fault of the promisee makes impossibility resulting therefrom a discharge of the promisor from his obligation. *Vandegrift v. Cowles Eng. Co.,* 161 N. Y., 435. In addition to being opposed to the great weight of authority, the Alabama court's statement of law seems altogether too stringent. For further discussion of this topic see *Wald's Pollock on Contracts,* Williston's 3rd Ed, p. 518 *et seq;* and see article on "Discharge of Contracts" by Arthur L. Corbin in 22 *Yale Law Journal,* 531.

CONSTITUTIONAL LAW—POWER OF JUDICIARY—REVIEW OF ACTION OF GOVERNOR.—GERMAINE V. FERRIS, GOVERNOR, 124 N. W., 738.—*Held,* that the official action of a governor in removing, pursuant to authority conferred by law, the mayor of a city cannot be reviewed by *certiorari,* nor can mandamus issue, without an invasion by the judiciary of the execu-

tive function of government, as conferred by that article of the Constitution dividing the powers into legislative, executive and judicial departments, and declaring that no person in one department shall exercise the powers belonging to another.

There is no opposition in the decisions to the proposition that mandamus will not issue to compel governors to exercise political or discretionary functions, nor may the courts review their acts under such circumstances. *Miles v. Bradford,* 22 Md., 170; *Tenn. & Coosa R. R. v. Moore,* 36 Ala., 371. The weight of American authority is also against the issue of mandamus to governors in the performance of mere ministerial acts. *State v. Warmoth,* 22 La. Ann., 1; *Hawkins v. the Governor,* 1 Ark., 571; *State v. the Governor,* 39 Mo., 388; *People v. the Governor,* 29 Mich., 320; *Chamberlain v. Libley,* 4 Minn., 309; *State v. Drew,* 17 Fla., 67; *People v. Bissell,* 19 Ill., 229. Nor will the fact that the duty might have been entrusted to another than the governor alter the matter. *In re Dennett,* 32 Me., 508. This rule has been extended to protect the governor as an *ex officio* member of a public board. *People v. Morton,* 156 N. Y., 136. Nor will mandamus issue against a governor in his military capacity rather than his civil, though the duty be purely ministerial. *Mauran v. Smith,* 8 R. I., 192. In some jurisdictions, however, if the governor answer the writ without objecting to the validity of the action, and aver his willingness to perform, mandamus will issue, 6 Lea., 12 (Tenn.), though this is denied in one state at least. *State v. Stone,* 120 Mo., 428. It also results from the sovereignty of each state that mandamus will not issue from the Federal courts to the governor of a state, whether the duty be ministerial or not. *Commonwealth v. Dennison,* 24 How., 66. There is, nevertheless, a strong current of authority that the governor may be required to perform duties merely ministerial. *Groome v. Gwinn,* 43 Ind., 572; *Middleton v. Low,* 30 Cal., 596; *Gray v. State,* 72 Ind., 567. So where a banking company had complied with the requirements of a statute of incorporation, the governor was compelled to issue a proclamation declaring it *in esse, State v. Chase,* 5 Ohio St., 528; and a governor has been required to draw a warrant upon the treasurer for salary due a state officer, *Magruder v. Swann,* 25 Md., 173; and on the principle that mandamus will issue when such an official refuses to act at all, mandamus will lie to determine whether there is a vacancy. *Attorney General v. Taggart,* 66 N. H., 362. In these states, it is noteworthy, that refusal or neglect of the duty must clearly appear. *In re Cunningham,* 14 Kan., 416. The right must be clear and the duty imperative, *State v. Humphrey,* 47 Kan., 561; and the mandamus will never issue if the act would be useless or nugatory. *People v. State Canal Board,* 13 Barb., 432. The basis for these decisions rests, apparently, in the last analysis, upon *obiter dicta* by Chief Justice Marshall, in *Marbury v. Madison,* 1 Cranch, 49, for there all the court decided was that it could not take jurisdiction under a statute which was held unconstitutional. In England, Lord Mansfield is authority for the statement that "whenever there is a right to execute an office and a person is kept out of possession, and has no other remedy, this court ought to assist by mandamus," *King v. Baker et al,* 3 Burrows, 1266,

and mandamus was held to lie against the Lords of the Treasury to compel them to pay money granted by Parliament to a private person. *Rex v. Lords Commissioners,* 4 A. & E., 286. The American conflict of authorities is irreconcilable..

HOMICIDE—SELF-DEFENSE—RIGHT TO INVOKE.—UNDERWOOD V. STATE, 60 So. REP. (ALA.), 842.—*Held,* that to invoke the right of self-defense, one must have been free from all fault on provoking the difficulty with deceased.

There are several well established exceptions to the general rule laid down by the court. One who provokes a difficulty may defend himself against violence on the part of the one provoked if it is disproportionate to the seriousness of the provocation or greater than the law recognizes as justifiable under the circumstances. *Sams v. State,* 124 Ga., 25; *Bennyfield v. Commonwealth,* 13 Ky. L. R., 446. If the aggressor abandons the conflict, and is subsequently murderously assaulted, and kills in self-defense, he is not estopped to plead self-defense; but the withdrawal must be in such manner as to manifest clearly to his adversary his intention in good faith to desist. *Jackson v. State,* 2 Ala. App., 55; *Ferguson v. State,* 95 Ark., 428; *Padgett v. State,* 40 Fla., 451. *State v. Kellogg,* 104 La., 580. In a few states, the aggressor is not deprived of his right to take the life of another in self-defense unless his acts of provocation were committed with malicious intention. *Foutch v. State,* 95 Tenn., 711; *Thornton v. State,* 65 S. W., 1105 (Tex. Cr. App., 1901); *Hash v. Commonwealth,* 88 Va., 172; *State v. Taylor,* 57 W. Va., 228; see also *State v. Kretschmar,* 232 Mo., 29.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATION.—FLANAGAN V. MCLANE, 87 ATL. (CONN.), 727; 88 ATL., 96.—*Held,* that where a woman suspected a workman of having stolen money and had written her suspicious to a constable asking him to investigate, a second letter written by her stating that she had found the money "in a place where we would never have put it", and that she would do no more about the matter, but that she still believed the workman to have stolen it, was a privileged communication if made honestly and in good faith. Roraback and Wheeler, JJ., *dissenting.*

Words which charge the plaintiff with the commission of a crime involving moral turpitude or subjecting the offender to infamous punishment are slanderous *per se. Hassett v. Carroll,* 85 Conn., 23; *Dennehy v. O'Connell,* 66 Conn., 175. But an occasion of privilege exists if the admitted circumstances under which an alleged libel is published are such that the law recognizes a duty on the part of the defendant to make the communication. *Atwater v. Morning News Co.,* 67 Conn., 504. Upon grounds of public policy communications which would otherwise be libelous are protected if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose

of bringing to punishment the criminal. *Chapman v. Battle,* 124 Ga., 574; *Eames v. Whittaker,* 123 Mass., 342; *Cristman v. Cristman,* 36 Ill. App., 567. The majority of the court on the principal case held that the letter was still within the privilege of the defendant, in that the re-affirmation of her belief in the plaintiff's guilt was "for the guidance of the officer in case it was or might become his duty to pursue the investigation with a view to criminal proceedings." The dissenting opinion held that the letter, since it was written to stop any action by the officer in her behalf, did not come within the class of privileged communications.

PARENT AND CHILD—LIABILITY OF STEPFATHER—SUPPORT OF CHILD.—WHITE V. MCDOWELL, 132 PAC. REP. (WASH.), 734.—*Held,* that there is a duty upon a stepfather to support minor children of his wife by a former husband, which duty is something more than mere charity, and where the stepfather willingly fulfills that duty, recovery cannot be had by the wife against her divorced former husband for support of a child who was awarded to her custody.

A husband was not by the common law obliged to support the children of his wife by a former marriage. *Worcester v. Marchant,* 31 Mass., 510. And generally he is not required to support them unless he has voluntarily assumed the parental relation to them under circumstances that raise a presumption that he has undertaken to support them gratuitously. *Kempson v. Goss,* 69 Ark, 451. Nor is he required to support them where neither wife nor child resides with him. *Freeman v. Freeman,* 11 Ky. L. R., 822. The doctrine of the principal case is correct, however, to the extent that if a stepfather voluntarily assumes the care and support of a stepchild he stands *in loco parentis,* and under those circumstances the ordinary rules governing the parental relation will be held to apply. *Burba v. Richardson,* 14 Ky. L. R., 233; *Kirchgassner v. Rodick,* 170 Mass., 543; *In re Besondy,* 32 Minn., 387; *Sharp v. Cropsey,* 11 Barb. (N. Y.), 224; *Grossman v. Lauber,* 29 Ind., 618. The stepfather cannot then ask compensation for maintenance of his stepchildren; *Swetman v. Swetman,* 8 Ky. L. R., 266; and the stepchildren cannot ask compensation for services rendered in the absence of contract. *Kirchgassner v. Rodick, supra; Dixon v. Hosick,* 101 Ky., 231; the stepfather has a right to the services of the stepchildren and is liable to them for their support. *Mulhern v. Macdavitt,* 82 Mass., 405; *Livingston v. Hammond,* 162 Mass., 375; *Gillett v. Camp,* 27 Mo., 541; and in case of injury to the children, a right of action to recover for loss of services is given him to the exclusion of the mother. *Eickhoff v. Sedalia, etc., Ry.,* 106 Mo. App., 541. A distinction arises, however, where the stepfather is also guardian of his stepchildren and has funds of the latter under his control. He may then be allowed to apply a part of such funds to the support of his wards. *Latham v. Myers,* 57 Ia., 519; *In re Ward's Estate,* 73 Mich., 220; *Mull vs. Walker,* 100 N. C., 46; even though the stepchildren be members of his own family. *Pratt v. Baker,* 56 Vt., 70; *contra, In matter of Dissenger,* 39 N. J. Eq., 227. It has been held, too, that the marriage of a woman,

who has been appointed and qualified as guardian of her infant children by her former husband, has the effect of joining her husband with her in the guardianship and that he then has the undeniable right to charge his wards a reasonable sum for their board. *Martin v. Foster's Executor,* 38 Ala., 688. The relation of parent and child may be severed, however, and a charge made for support furnished thereafter. A severance is effected by the death of the mother or by the stepfather's withdrawal from the home of the stepchildren, where he has been living with them. *Kempson v. Goss,* 69 Ark., 451; *Meyer v. Temme,* 72 Ill., 574; *Rawson v. Corbett,* 43 Ill. App., 127. Charge for support may also be made where there has been an express contract to that effect. *In re Ackerman,* 116 N. Y., 654; *Brown's Appeal,* 112 Pa. St., 18; *McCormick Minors' Estate,* 1 Pa. Co. Ct., 517. But a stepfather cannot maintain, under ordinary circumstances, a claim against the children of his wife for improvements made during their minority upon their lands, of which he was in possession under no right except his wife's unassigned right of dower and his relation of stepfather. *Guckian v. Riley,* 135 Mass., 71; *Haggerty v. McCanna,* 25 N. J. Eq., 48; *Springfield v. Bethel,* 90 Ky., 593.