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EDITORIAL

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LIABILITY OF CORPORATIONS ON PAPER ISSUED AND NEGOTIATED WITHOUT AUTHORITY BY THEIR EMPLOYEES.

It is generally held that where an officer of a corporation has a general power to make, accept or indorse negotiable paper for it, the corporation is bound by his exercise of that power, where the paper is in the hands of a holder who took *bona fide* and without knowledge of any wrongful exercise of the employee's power in the particular instance.[1] Nor is one deprived of the protection of a *bona fide* holder simply because he is negligent or has knowledge of circumstances which would arouse suspicion in the mind of a more prudent man, provided he acts in *good faith.*[2] It is said, however, that the above can have no application in a case where the paper, on its face, imports notice that the paper was issued for the employee's personal benefit, as where it is made payable to himself individually.[3]

[1] *Credit Co. v. Howe Machine Co.,* 54 Conn., 357; *Monument Nat. Bank v. Globe Works,* 101 Mass.. 57.

[2] *Goodman v. Harvey,* 4 Ad. & El. 870; *Goodman v. Simonds,* 20 How., 343.

[3] 4 *Thompson on Corporations,* Sec. 4724.

The Rhode Island Supreme Court in a recent case held that one who takes the check of a corporation in payment of the personal debt of its employee is bound to inquire and ascertain if it has been issued by the company with knowledge of the purpose to which it is to be applied; and, where he makes no such inquiry, and the employee was in fact not authorized to so issue the check, the corporation is not liable thereon.[4]

It will be seen that this rule makes the taker assume that the corporation issued the paper without knowledge of its purpose and that the man who proposes to deal with it has no right to do so; and this in the face of any extraneous facts of which the taker might have knowledge that would be reasonable ground for a contrary assumption. It is submitted that the law does not require an intending purchaser of negotiable paper to suspect fraud and institute inquiry where everything seems fair and honest.[5] The rule in the principal case amounts to saying that, under no circumstances may one receive the corporation's paper from its employee without making inquiry each time as to whether the corporation has authorized its issue, or knew of the purpose for which it was issued. No reliance could be placed on knowledge of former dealing, nor would one be allowed to assume from the nature of the employee's employment that he was not in a position to fraudulently sign or procure the corporation's name to be signed to the paper. Neither reason nor policy demands a rule so broad nor do the best considered authorities support it.

A great many decisions, which are cited as supporting the rule, do not do so, if the decisions are confined strictly to the facts adjudicated in the case before the court.

The court in the principal case cites no authority except a former Rhode Island case,[6] where the taker of a note was requested not to present it for payment until later and he knew at the time that the corporation had made an assignment for the benefit of creditors. It was upon this knowledge that the court deprived the taker of the protection of a *bona fide* holder.

In *Claflin v. The Farmer's Bank*,[7] decided in 1862, the holding for a year by the plaintiff of two checks payable to the corporation's president and certified "good" by him, was the main circum-

[4] *Sheer v. Hall & Lyon Co.*, 88 Atl., 801.
[5] *Seybel v. National Currency Bank*, 54 N. Y., 288.
[6] *Randall v. Rhode Island Lumber Co.*, 20 R. I., 625.
[7] 25 N. Y., 293.

stance which disentitled the plaintiff to the protection of a *bona fide* holder. Davies and Sutherland, JJ., dissented from the majority decision.

In *West v. The Shawnee Bank*,[8] the paper showed that the defendant's name had been used as an accommodation indorser, in which capacity, as a rule, banks have not power to indorse.

In *Chemical Bank v. Wagner*,[9] decided in 1892, the plaintiff had discounted six notes of $20,000 each, payable at four months to the order of the president. The court cites no authority for its decision in favor of the defendant.

In *Wilson v. Metropolitan R. R. Co.*,[10] Parker, C. J., stated the rule essentially as laid down in the principal case, but it was purely *obiter*. He allowed the plaintiff to recover there because, *if* he had made inquiry, he would have found an *apparent* authority, though not an authority *in fact*. This is a very important limitation on the rule laid down in the princpal case and shows the tendency to allow a purchaser to act on appearances. Yet the later New York cases n general follow the rule stated in that case by way of dictum and cite it as authority for it.

On the other hand, there are respectable authorities which have held the other way, making *actual bona fides* the test of the character of the holder.

The Supreme of Massachusetts, in 1906, had a case precisely in point before it.[11] There the defendant held some sixty personal promisory notes of the corporation's treasurer falling due one each month, which he regularly paid with checks signed by himself as treasurer, payable to his own order or to the order of the payee of his notes. It was held that the money paid on such notes could not be recovered because the defendant took them *bona fide*. It was said that the defendant had a right to believe from her knowledge of the treasurer's uprightness, as evidenced by former relations with him, that the money was being withdrawn lawfully or was so appropriated in payment of his own salary. The Court said that "even if there might have been some circumstances which would have raised doubts in the mind of a more prudent person, the defendant's right to retain the proceeds of the checks cannot be divested without proof that she knew, or

[8] 95 U. S., 557.
[9] 93 Ky., 525.
[10] 120 N. Y., 145.
[11] *Fillebrown v. Haward*, 190 Mass., 472.

in the face of facts sufficient to put her on inquiry, purposely refrained from knowing of the fraud of Cable."

In New Jersey, a bank president, Damon, without authority issued a note to himself for $10,000, which was discounted by another bank, a statement being presented at the time from one Hebbard, which showed the bank to be indebted to Damon in a larger amount than the amount of the note. The court held that the discounting bank was justified under the circumstances in relying on the statements of Damon and had a valid charge against the bank, though as a matter of fact he was unauthorized to make the note and the bank owed him only $55.[12]

Another New Jersey case held that where bonds were issued and properly signed by the mayor and left in his custody, but without authority to negotiate, one who took *bona fide* from him got a good title. There a recovery was allowed because the holder was a holder in due course as defined in the Negotiable Instruments Law—having no notice at the time it was negotiated to him on any infirmity in the instrument or defect in the title of the person negotiating it.[13]

These three decisions are under the Negotiable Instruments Law and show authority for making the holder's actual *bona fides* the test of his rights. Even in the cases which hold the other way, the courts seize upon any extraneous knowledge the taker may have had to deprive him of the character of a *bona fide* holder and there seems to be no good reason why the same character of knowledge should not be allowed to corroborate that *bona fide* character which law presumes every holder to have. Because the rule laid down in the principal case would disallow such, it is submitted that it is too broad.

IN EXECUTORY CONTRACTS FOR THE SALE OF LAND, WHAT IS THE GROUND ON WHICH THE VENDOR, WHO HAS PAID THE TAXES, CAN RECOVER THEM FROM THE VENDEE IN POSSESSION?

In the case of *Miliville Aerie No.* 1836, *Fraternal Order of Eagles, v. Weatherby et al.*, recently decided by the New Jersey Court of Chancery, the Vice-Chancellor relied chiefly upon authority, and his reasoning was not clearly set forth.[1] That he had in

[12] *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq., 18.
[13] *Borough of Montvale v. People's Bank*, 74 N. J. L., 464.
[1] 88 Atl. Rep., 847.

mind, however, that class of quasi contracts which the law implies against one man in favor of another who, under compulsion, has discharged some obligation of the former and thereby enriched him, is clearly indicated by these words: "Such payments cannot be regarded as in any sense voluntary." Since the vendor held the legal title, in other words, he was responsible to the state for the taxes.[2] But how was the vendee rendered liable to the vendor? Eliminating contract and tort, neither of which appeared in the case, we have left only some obligation implied by law, as suggested above. Two elements of such obligation are clearly present—compulsion exerted upon the vendor, and his resulting payment. But where is the obligation of the vendee, which was discharged by such payment? Clearly he was not bound at law to pay the taxes to the state. An examination of the cases cited later in support of his liability, will show that such liability is confined to his relations with the vendor. As shown above, the state will look to the holder of the legal title.

Therefore his obligation, if any existed, was equitable. But the only equitable obligation which could possibly have rested upon him was to repay to the vendor the taxes assessed upon and paid by the latter. Strictly speaking, therefore, the only obligation in the case was the one which the law implied, as far as the vendee was concerned. This eliminates from our consideration a large class of quasi contracts, except for a few cases usually included under the head which we are discussing in the collection of cases on the subject.[3] These are, in general, cases where the plaintiff under compulsion, at least, of moral duty, or sometimes facing the alternative of loss to himself, has incurred expense in the preservation of defendant's property. Such a case was *Great Northern Railway Co. v. Swaffield,* where the plaintiff, a carrier, was compelled by the fault of the consignee and owner, here defendant, to incur liability for the keep of a horse, in preference to risking an action by turning it loose.[4] Plaintiff had judgment. In the Vermont case of *Beckwith v. Frisbie,* the carrier of oats had to incur storage charges during transit to prevent a loss, and collected the amount of these charges from the consignee on delivery.[5] The consignee then tried to reimburse himself by this

[2] 37 Cyc., 788, tit. Taxation.

[3] Scott, *Cases on Quasi Contracts;* Keener, *Cases on Quasi Contracts.*

[4] L. Rep., 9, Exc. 132.

[5] 32 Vt., 559.

action, and failed. In both these cases, it will be noted that property of the defendant was preserved, and he was thereby enriched, while in neither case did the payment redound to the advantage of the plaintiff. Therefore, while these decisions seem as nearly parallel to the principal case as any in the field of quasi contract, this important distinction is to be observed—that in the principal case, and in the similar decisions, to be cited later, on which it was based, the property which was protected was at least as much that of the vendor, who claimed reimbursement, as of the vendee, and the former had a valuable interest—that of security—to be preserved. Hence we cannot say, in any usual sense of the term, that the vendee has been enriched through the vendor's payment. It seems necessary to look to some matter collateral to the main transaction to discover a justification for the imposition of this liability.

What reason is there, why in natural justice as between these two parties, the burden should be borne by the vendee? Is the court blindly following the analogy of the risk of loss? Clearly not, for out of the twelve states[6] which make liability for taxes expressly dependent on possession, two, Pennslvania and Missouri,[7] expressly hold that possession has nothing to do with the risk of loss; while three, New Jersey, Georgia, and Wisconsin,[8] go part way toward this conclusion, either by adopting without express qualification the rule laid down by Lord Eldon in *Paine v. Meller,*[9] that the risk is on the vendee from the time of the bargain, or by inclining, as Georgia and Wisconsin do, toward the minority view that risk is on the vendor until the date for conveyance has arrived. Also, not one of these states holds expressly that possession is a condition precedent to the incidence of the risk of loss upon the vendee. It is obvious, therefore, that the burden of taxes is not the inevitable concomitant of the risk of loss.

We are driven to the conclusion that the burden of taxes is made to accompany possession, because he who receives the

[6] New Jersey, Pennsylvania, Iowa, Arkansas, eGorgia, Michigan, Missouri, Ohio, Utah, Vermont, West Virginia, and Wisconsin.

[7] *Robb v. Mann,* 11 Pa., 300; *Manning v. North British Insurance Co.,* 123 Mo. App., 456.

[8] *Marion v. Wolcott,* 68 N. J. Eq., 20; *Phinizy v. Guernsey,* 111 Ga., 346; *Wetzler v. Duffy,* 78 Wis., 170.

[9] 6 Ves., 349.

rents and profits ought, in natural justice, to bear it. But we must be careful to distinguish the case of a tenant from that of one who is the actual and ultimate recipient of the rents and profits. In the principal case, attention is called to the New Jersey statute which provides that, although the taxes may be levied against the tenant, he has recourse over against the landlord, because the latter is of course the real recipient of the rents and profits.[10] The same rule will be found in Cyc.[11] Under what circumstances, then, does the vendee under an executory contract correspond to a tenant, and when does he enjoy these benefits exclusively? First, a mere contract for the sale of land, conveyance at a future date, does not, in the absence of some express stipulation, give the vendee the right to possession.[12] (These citations have been confined within the twelve states mentioned above.[6] Four of them hold as above stated, and in the other eight no decision in point can be found.) When, therefore, we find the vendee in possession, his presence can be explained only on the basis of special contract, the consideration for which is the payment of rent, or some concession as to the terms of sale, or on the simple basis of the vendor's generosity. If the first supposition is true, how does his position differ from that of the tenant? He has paid for the use of the premises, just as the tenant has, and if the mere fact that he is to obtain title in the future ought to render him liable for taxes, why not impose the same burden on a vendee not in possession? A case exactly illustrating this point was that of *Clinton v. Shugart,* decided in Iowa.[13] Here the vendee under an executory contract was in possession as a tenant under lease, the date for conveyance being set at the end of the term, and the vendor was held liable for the taxes.

Where the vendee's possession is a pure gratuity, however, and he receives the rents and profits without paying a consideration, there is some basis in natural justice for making him pay the tax. It is submitted, however, that for a court to imply an obligation against one man in favor of another, simply because the latter has on a previous occasion given the former a present, is quite unique in the field of quasi contract.

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[10] P. L., 1903, p. 424, s. 46.

[11] 24 Cyc., 1074, and cases cited.

[12] *Druse v. Wheeler,* 22 Mich., 439; *Doe v. Roe,* 39 Ga., 91; *Du Bois v. Baum,* 46 Pa., 537; *Prendergast v. Burlington R. R. Co.,* 53 Iowa, 326.

[13] 126 Iowa, 179.

STERILIZATION OF CRIMINALS.

In the recent case of *Smith v. Board of Examiners of the Feeble Minded,* 88 Atl., 963 (N. J.), there was drawn in question the constitutionality of a statute which authorized a board of examiners to inquire into the condition of the feeble minded, epileptic, certain criminal and other defective inmates confined in the several reformatories, charitable and penal institutions of the counties and state, and that, upon deciding unanimously, in conjunction with the chief physician of the institution, that procreation by such inmates was inadvisable, and no improvement being probable so that procreation might afterwards become advisable, it should be lawful for the said board to authorize such operation for the prevention of procreation as it considered effective, and thereupon for a surgeon, under the direction of the chief physician of such institution, to perform such operation.

The court, while stating that it recognized the underlying question of whether the state is justified in the theoretical betterment of society by the sterilization of its undesirable members, did not decide that matter, but held that the statute was unconstitutional, in that, first having created two classes of persons, *i. e.,* those within and without the said institutions, it then applied the remedy to the class to which it had the least and not the sole application, and the class so affected bore no reasonable relation to the object of the regulation, and that thus it denied to the individuals of the class the equal protection of the laws. This caused a violation of the Fourteenth Amendment.

This decision appears to be correct. By the police power of the states persons and property are subjected to all kinds of restraints and burdens, within constitutional limitations, in order to secure the general comfort, health and prosperity of the state as a whole.[1]

Again, the public policy of a state is determined by itself and is subject to no control from without unless it contravenes the Federal Constitution or some treaty or statute conformable thereto,[2] and the general rule is that the Fourteenth Amendment does

[1] Redfield, C. J., in *Thorpe v. Burlington & Rutland R. R. Co.,* 27 Vt., 140. See *Barbier v. Connolly,* 113 U. S., 27; *Turberville v. Stampe,* 1 Ld. Raym., 764; *Pixley v. Clark,* 35 N. Y., 520.

[2] *Hartford Fire Ins. Co. v. Chicago M. & St. P. R. R. Co.,* 175 U. S., 91.

not withhold from the states the power of classification if the statute in question deals with all of a certain class alike[3] and the classification is reasonable.

Yet the classification must not be arbitrary,[4] and must always rest upon some difference which bears a reasonable relation to the act in respect to which the classification is proposed.[5] So when the question of the power of a state to classify for the purpose of taxation was presented to the Supreme Court, Mr. Justice Bradley said: "All such regulations, and those of like character, as long as they proceed within reasonable limits, are within the discretion of the legislature; but clear and hostile discrimination against particular persons and classes, *especially such as are of an unusual character,* unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."[6]

The case under discussion falls directly within the latter part of this statement. Here the legislature has provided a remedy for those individuals of a class who happen to be under its care, and who, indeed, have no opportunity for reproduction, and excepted the larger portion of the class who are at liberty, and free to people the world with progeny. A more unreasonable classification could scarcely be imagined.

With the wisdom or policy of such legislation the courts have no concern. Those are matters of which the legislature is the sole judge.[7] Nevertheless it may not be improper to consider for a moment the practical workings of these laws. The legislatures of seven states have passed statutes similar in many respects to that of New Jersey.[8] What will be the effect? As tending to the betterment of the race, this action of the states would seem much too hasty. It is not even admitted by any means universally that the children of criminals, etc., are necessarily of an inferior type. There is still a grave dispute among medical authorities as to

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[3] *Hayes v. Missouri,* 120 U. S., 68; *St. Louis & San Francisco Ry. v. Mathews,* 165 U. S., 1; *Giozza v. Tiernan,* 148 U. S., 657.

[4] *Vanzant v. Waddel,* 2 Yerg., 200; *Debrell v. Morris's Heirs,* 15 S. W., 87; *State v. Loomis,* 115 Mo., 307; *Yick Wo v. Hopkins,* 118 U. S., 356.

[5] *Gulf, Colo. & Santa Fe Ry. v. Ellis,* 165 U. S., 150.

[6] *Bell Gap R. R. Co. v. Pa.,* 134 U. S., 237.

[7] *Spier v. Baker,* 120 Cal., 370; *Baxter v. Tripp,* 12 R. I., 310; *People v. Gillson,* 109 N. Y., 389; *Townsend v. State,* 147 Ind., 624.

[8] Laws, N. Y., ch. 445, 1911; Laws, Wash., 1909, ch. 249, s. 35; Ind., ch. 215, 1907; Conn. Laws, 1909, ch. 209; Iowa, 1911, ch. 129; Cal., 1909, ch. 720.

whether the development of certain traits in an individual is to be attributed to inherited tendencies or merely to the law of atavism.[9] Therefore, until this question is settled beyond reasonable doubt the zeal of these legislatures considerably outruns their discretion.

As to the prevention of rape, the remedy is singularly ineffective. To quote a work of recognized authority, "it removes about the only existing deterrent, namely the dangers attending the gratification of such immoral desires".[10] The subject is as capable of performing the acts which constitute the crime of rape as before.

"What is the essence of the crime of rape? Dishonor by violence, not by impregnation. Is a woman dishonored by a forcible entry of her person? This has never been doubted in any country in Europe.[11]" Yet the statutes do nothing in providing such a remedy to protect women from this crime.

The real point of interest, from a legal standpoint in statutes of this kind is whether such operations as are thus permitted to be performed on criminals are to be regarded as a "cruel and unusual punishment" within the meaning of the prohibition in the Federal and State Constitutions. The clause in the Constitution of the United States embodying such prohibition has been held to be no restraint on the states,[12] but the Constitutions of most of the states include the same provision.[13]

It has been said that whether a given punishment is cruel and unusual or not depends in each case upon the act to be punished and the particular punishment.[14] It may be safely asserted that physical torture or such acts as would shock the feelings of ordinary persons would never be permitted as a punishment, no matter how horrid the crime.[15] The constitutional prohibition, moreover, seems, according to the general opinion, to refer solely to

[9] See *Journal of Criminal Law and Criminology,* Vol. 4, No. 3, pp. 321 and 326.

[10] 41 L. R. A., 419, note.

[11] *Robertson's Case,* 1 Swint., 93.

[12] *Pervear v. Conn.,* 5 Wall., 475; *O'Neill v. Vermont,* 144 U. S., 323.

[13] N. J. Const., Art. I, sec. 15; Ind. Const., Art. I, par. 61; N. H. Const., Part I, Art. 33; Tex. Const., Art. I., sec. 13.

[14] *Blydenberg v. Miles,* 39 Conn., 484; *State v. Stubblefield,* 157 Mo., 360.

[15] *Wilkerson v. Utah,* 99 U. S., 130; *Hobbs v. State,* 133 Ind., 404.

such punishments as disgraced the civilization of former ages[16] as, for instance, boiling in oil, quartering, hanging in chains, burning at the stake, breaking on the wheel, and other barbarous inflictions.[17]

Judge Cooley defines the clause as including "what public sentiment has condemned as cruel or such punishments as those which, if ever employed at all, have become unusual."[18] It must also, of necessity, include any new forms of punishment which would be repugnant to our sense of justice now, as well as the old atrocities, sanctioned under the common law.

We may accept the rule, in effect, that the punishment should be proportioned to the offense.[19] Let us consider the crime for which this operation is usually prescribed as a penalty and the exact nature of the operation itself, together with its results. So far the crime thus punished has been that of rape. No one will deny its heinous nature. The operation is known as "vasectomy". It is considered in the medical profession an "office operation", painlessly performed in a few moments. The patient suffers no inconvenience and is not impaired for the pursuits of life except that he is effectually sterilized.[20]

The only adjudicated case on this subject is that of *State v. Feiler,* decided in Washington during 1912.[21] There the statute provided that "whenever any person shall be adjudged guilty of a carnal abuse of a female under ten years, or of rape, or shall be adjudged to be an habitual criminal, this operation (vasectomy) may be directed to be performed."[22]

A unanimous court held this not to be a cruel and unusual punishment, saying that it did not appear that any marked degree of physical pain was suffered; that, since death might have been made a punishment for the offense, any lesser degree of punishment, unaccompanied by physical torture, was permissible, and that they would not disturb the discretion of the legislature except in extreme cases.

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[16] *Whitten v. Georgia,* 57 Ga., 297.

[17] *State v. Woodward,* 68 W. Va., 66; *In re Kemmler,* 136 U. S., 436; *Wilkerson v. Utah, supra.*

[18] Cooley, *Const. Lim.,* 7th ed., 473.

[19] *Weems v. United States,* 217 U. S., 349; Blacks., Vol. 4, 92, 327, 377.

[20] *Medico-Legal Journal,* Vol. 27, p. 34.

[21] 70 Wash., 65.

[22] Rem. and Bal. Code, Wash., par. 2287.

From this conclusion we respectfully dissent. It may be all very well, whether or not it be conceded that sterilization is necessary to prevent the propagation of inferior children, to take such measures towards habitual criminals, though it might be suggested that it is rather difficult to determine who is an habitual criminal.

Nevertheless, to take from one who has committed the crime of rape but once, all hope of future progeny, when he may go forth from confinement at some future time a reformed man, seems as cruel and unusual a punishment as can well be conceived of. It is a punishment which lasts beyond his term of imprisonment, even to the grave.[23]

LIMITATION OF ACTION AGAINST SURETY ON OFFICIAL BOND.

In the case of *The City of Butte v. Goodwin et al.*,[1] which was an action commenced in May, 1911, against a former city treasurer, who held office from May, 1905, to May, 1907, and the sureties on his official bond, to recover money earned as interest by the city funds during his term of office and retained by him, three statutes of limitation were involved; and it was held that the cause of action was not one arising out of contract in the strict sense of the word, nor one based upon a liability created by statute, but one "upon an obligation or liability, not founded upon an instrument in writing, other than contract," and was barred because it was not commenced within three years, as provided by statute. The period of the statute applicable to actions on bonds was eight years.

In arriving at this conclusion the court decided that the city treasurer, who was not an insurer of the public funds, was a trustee, in point of law, of the funds for the use of the city and accountable for and under an obligation to pay over any profits derived from the use of the trust funds, on a quasi-contractual basis; and that a breach of such obligation constituted a breach of his official bond. But the court further said that there was a breach of the obligation of the bond only because the treasurer "was guilty of a breach of his implied promise to pay over" the

[23] But see an article by Governor Simeon E. Baldwin in 8 *Yale Law Journal*, 371.

[1] 134 Pacific Reporter (Mont.), 670.

interest; "it is this breach of his obligation or legal duty which gives rise to a cause of action. * * * The duty was imposed by law and was not affected in the least by the giving of the bond. * * * If the city has a cause of action against Goodwin, it arises from his wrongful act in retaining money which belonged to the city * * * and not upon the violation of any express contract."

Although the language of the court is ambiguous, it was probably intended to adopt the holding of the California court in the case of *Sonoma County v. Hall*,[2] which is cited. There, an action on an official bond of a county recorder was held to be barred by the statute of limitations which barred a quasi-contractual action against the recorder for breach of his official duty on the ground that when the primary obligation of the officer is barred or in any legal way extinguished, the sureties are relieved in like manner as a guarantor upon a written guaranty to answer for the debt of another would be relieved, when the primary obligation of the principal debtor is barred or extinguished, notwithstanding the written contract. That case is not only opposed to the weight of authority,[3] but the analogy attempted in it stands upon the false premise that the quasi-contractual obligation of the recorder was his primary obligation under the bond.

It is admitted that when the city treasurer failed to turn over to his successor in office the entire amount of the funds of the city entrusted to him, together with the earnings of such funds in the way of interest, he was guilty of a breach of the obligation of his official bond.[4] Immediately, principal and sureties became liable upon that bond and that liability continued until barred by the statute of limitations applicable to the case or until otherwise legally extinguished.

Undoubtedly the treasurer would have been liable on the basis of quasi-contract had there been no bond and would have been liable, on that basis, if the amount of his defalcation had exceeded the amount of the bond, to the extent of such excess; however, the fact that there was a bond, made it no longer necessary to resort to a fiction of law to secure the city in its right to its funds within the amount of the bond. Quoting from the dissenting opinion: "That instrument contains the express stipulation on the part of Goodwin and his sureties that he shall pay

[2] 132 Cal., 589.

[3] See Ames *Cases on Suretyship*, 131 *et seq.*; *Childs on Suretyship*, 239.

[4] See *Brandt on Suretyship and Guaranty*, 2d ed., 534.

over and faithfully account for all moneys coming into his hands belonging to the city. If he has not done this, I cannot understand how it can be that this express stipulation has not been violated, or why that violation is not the basis of his and their liability. * * * Implication may be necessary to the conclusion that the interest belonged to the city; but that the promise of Goodwin to pay over and faithfully account for the city's money is a pure fiction of law, I cannot believe. * * * The concept of duty is undoubtedly back of Goodwin's liability, as it may fairly be said to be 'the root' of all liability whatsoever. Breach of duty in some form is a necessary ingredient of every case; but that does not alter the fact that, when the duty is formally expressed by written instrument, causes of action may be and often are founded, within the meaning of the statute of limitations, upon the instrument, even though no legal necessity existed for the execution of it."

The contract of a surety is undoubtedly a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act, and there can be no liability of the surety without an original liability of the principal;[5] but because that is so it does not follow that the obligation of the principal as a party to the bond is collateral in the sense that it is made to depend upon what would have been his liability in the absence of the written instrument. Suppose the case of a wife living apart from her husband through the fault of the latter, who nevertheless contracts in writing with a merchant to pay the market value of such necessaries as the latter may furnish her; in the event of failure on the part of the husband to live up to his contract, would not the statue of limitations applicable to actions on contract apply, and not that applicable to quasi-contractual actions, although the husband was under a quasi-contractual duty to pay for necessaries furnished his wife?[6] "If Goodwin was required to and did execute the bond, this action * * * is not barred as to him. If his liability endures, that of the sureties endures also." The bond was given for the purpose of making the city more secure, and possibly even to secure the benefit of the longer period of limitation; and the giving of the bond was a condition precedent to the treasurer's entrance upon the duties of his office.

[5] *Eising v. Andrews,* 66 Conn., 58.

[6] *Hunt v. Hayes,* 64 Vt., 89.

To separate the liability of the treasurer as principal under the bond from his quasi-contractual liability and hold that the latter should alone be considered, whereas the obvious intention was that it should be superseded by the former, is to defeat the very purpose of the bond. The holding of the Montana court was clearly erroneous.