Yale Law Journal

Volume 28
Issue 4 *Yale Law Journal*

Article 5

1919

RECENT CASE NOTES

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
RECENT CASE NOTES, 28 Yale L.J. (1919).
Available at: https://digitalcommons.law.yale.edu/ylj/vol28/iss4/5

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

RECENT CASE NOTES

ADMIRALTY—PROHIBITED ADVANCES TO SEAMEN UNDER SEAMAN'S ACT—INAPPLICABILITY OF PROHIBITION TO ADVANCES MADE IN FOREIGN PORTS.—The master of a British ship made advances on wages to certain foreign seamen in England, where such advances were lawful. The ship having come to an American port, the seamen demanded one-half the wages then earned, which the master paid, deducting, however, the advances made in England. The Seaman's Act (1915) 38 Stat. L. 1164, 1168, made advances "unlawful in any case" and provided that "such advance wages . . . . shall in no case . . . . absolve the vessel or master . . . . from the full payment of wages . . . . earned, and shall be no defense to a libel suit . . . . for the recovery of such wages." This section was to "apply as well to foreign vessels while in the waters of the United States, as to vessels of the United States." On a libel by the seamen for the payment of the amount deducted, it was *Held,* that the libel should be dismissed, since the Seaman's Act did not purport to make unlawful nor prevent the deduction from wages of advances made in foreign countries. *Sandberg et al. v. McDonald* (1918) 39 Sup. Ct. 84. McKenna, Holmes, Brandeis and Clarke, JJ., *dissenting.*

A similar conclusion was reached, with the same dissentients, in a similar case involving advances made to seamen on an American vessel in a foreign port where such advances were lawful. *Neilson v. Rhine Shipping Co.,* and *Hardy v. Shepard & Morse Lumber Co.* (1918) 39 Sup. Ct. 89.

The cases involved a question of statutory construction. The provision against advances had been held to forbid advances by masters of foreign vessels while in United States waters. *Patterson v. Bark Eudora* (1903) 190 U. S. 169, 23 Sup. Ct. 821. The majority in the principal cases conclude that it does not apply to advances made in foreign ports, whether to foreign vessels, as in the *Sandberg* case, or to American vessels, as in the *Neilson* case,—which sustains *The State of Maine* (1884, S. D. N. Y.) 22 Fed. 734. Thereby, they weaken greatly the protective value to seamen of these provisions of the "Seaman's Act," for advances made in a foreign port, the benefit of which go usually to "crimps" or shipping masters, *may* now be deducted from wages earned, and they *do* constitute a defense to a libel suit, notwithstanding the apparently express words to the contrary of section 10 (a): "The payment of such advances . . . . shall *in no case* . . . . absolve the vessel or master . . . . from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit . . . . for the recovery of such wages." The minority conclude that these provisions as to the remedy, being unqualified, import no limitation requiring the advances to have been made in the United States. The majority admit that Congress may attach such legal consequences as they deem proper to acts committed abroad and territorially lawful there. *The Kensington* (1902) 183 U. S. 263, 22 Sup. Ct. 102 (a foreign limitation of liability for negligence not recognized in the U. S.); *Kaufman v. Gerson* (C. A.) [1904] 1 K. B. 591 (duress abroad, while no defense to a contractual obligation where undertaken, considered a valid defense in England); Westlake, *Priv. Int. Law* (5th ed.) sec. 215. The minority find the statute to embody the public policy of the United States against advances to seamen. But the majority, denying relief to seamen on an American vessel who received advances in a foreign port, force the territorial doctrine to an extreme, and give, it is submitted, an unnecessarily narrow interpretation to the phrase "every seaman on a vessel of the United States," which is not qualified like that governing seamen on foreign vessels

"while in harbors of the United States" (sec. 4530 R. S.); and even as to the latter, the statute provides that "the courts of the United States shall be open . . . . for [the Act's] enforcement." American law may not punish as crimes acts lawfully done in a foreign jurisdiction. *United States v. Freeman* (1915) 239 U. S. 117, 120; 36 Sup. Ct. 32. But that seems no reason for not enforcing the statute civilly in accordance with its language. Whether advances made in an American port to seamen on a British ship would be treated in an English court as non-deductable is very doubtful. *In re Missouri Steamship Co.* (C. A., 1888) 42 Ch. Div. 321 (Limitation of liability, though void by American law, the *lex loci contractus,* enforced in England). The decision of the minority in the principal cases, it is submitted, seems better in accord with the policy and is fully sustainable under the express language of the Act.

APPEALS—MOTION TO DISMISS—EFFECT OF CHANGE OF CIRCUMSTANCES MAKING EQUITABLE RELIEF ASKED IMPOSSIBLE.—In a suit by taxpayers to restrain a county and its officers from proceeding under a contract with a bridge company for the construction of a bridge and from making payments thereunder, on the ground that the contract had not been entered into in accordance with the statutory requirements, a temporary restraining order was denied. The bridge company was made a party to the suit. After a trial on the merits judgment was entered for the defendants. After an appeal had been taken the defendants moved to dismiss the appeal, offering affidavits which showed that, pending the proceedings in the lower court and on appeal, the bridge company had fully carried out its agreement and had received payment from the county in full. *Held,* that the appeal would not be dismissed. McCoy, J., *dissenting. Clarke v. Beadle Co.* (1918, S. D.) 169 N. W. 23.

The decision seems both sensible and legally sound. If the judgment should be reversed and the agreement held illegal, the taxpayers might perhaps, under the liberal procedure of South Dakota, be permitted under the general prayer for relief to obtain alternative relief by way of damages, or, if not, could bring a separate action for the same. *McMillan v. Barber Asphalt Paving Co.* (1912) 151 Wis. 48, 138 N. W. 94. Moreover, the decision of the lower court, since judgment was rendered after a trial on the merits, would, if unreversed, preclude any suit "at law" by the taxpayers for damages. *Young v. Farwell* (1901) 165 N. Y. 341, 59 N. E. 143. The result would be that the appellate court would never pass upon the question of the legality of the contract. In spite of all this other jurisdictions have on similar facts dismissed the appeal. *Barber Paving Co. v. Hamilton* (1914) 80 Wash. 51, 141 Pac. 199. In the principal case the dissenting judge argued that since the taxpayers could, after the denial of the restraining order, have prevented the bridge company from proceeding with the work by filing a *supersedeas* appeal bond, they ought not now to be able to recover damages from a contractor who had "in good faith" gone on and completed the contract and received payment therefor. This seems to overlook that when the statutory requirements have not been complied with the contractor, although he completes the work, is not entitled to payment, either under the contract or in quasi-contract for the reasonable value of the work and materials. *McDonald v. The Mayor, etc. of New York* (1876) 68 N. Y. 23. Note that the contractor in the principal case knew that the legality of the contract was questioned. Sound policy would seem to dictate that he be held to have acted at his peril if it turns out that the taxpayers' contentions are correct. Nor ought the fact that in the instant case the contractor had been paid to affect the result, for it is generally held that the rule that money

paid under mistake of law cannot be recovered does not preclude the recovery by public corporations of money illegally paid out by their disbursing officers. *County of Wagner v. Reynolds* (1901) 126 Mich. 231, 85 N. W. 574; Woodward, *Quasi-Contracts*, sec. 40; Ann. Cas. 1915 B, 811. Such an action may be brought by a taxpayer. *Kerr v. Regester* (1908) 42 Ind. App. 375, 85 N. E. 790. The desirability of a provision in our procedural law for declaratory judgments is emphasized by the principal case. Indeed, the opinion in the principal case follows in its general line of reasoning the principles underlying such judgments. For arguments in their favor see Professor Borchard's articles in (1918) 28 YALE LAW JOURNAL, 1, 105.

ASSIGNMENTS—PARTIAL ASSIGNMENT—CONVERSION BY ASSIGNOR WHO COLLECTS DEBT.—A written partial assignment of a money claim against a city was made by a corporation, acting through its president. The parties orally agreed, however, that the assignee was not to notify the debtor of the assignment, that the assignor should collect the whole, and that "as soon as the corporation received" the amount of the debt from the debtor "the amount so assigned would be paid" to the plaintiff. The president of the corporation collected the whole sum, receiving a warrant therefor payable to the order of the corporation. This warrant he deposited in the corporation's bank account, and then used the funds for corporation expenses. The corporation became bankrupt and the partial assignee then brought the present action for conversion against the president of the corporation. *Held,* that the plaintiff could not recover. Smith, J., *dissenting*. *Hinkle Iron Co. v. Kohn* (1918, N. Y. App. Div.) 171 N. Y. Supp. 537.

See COMMENTS, p. 395.

CONFLICT OF LAWS—EFFECT OF FOREIGN INJUNCTION ON PENDING SUIT.—In a *mandamus* proceeding in Minnesota it appeared that the relator was administratrix of a person killed in Nebraska under circumstances making the defendant railway company liable under the wrongful death statute of that state; that the administratrix began an action in Minnesota against the defendant to recover damages for the wrongful death, the defendant being subject to jurisdiction there; that after issue had been joined in the Minnesota action, but before trial, the defendant railway company obtained in Nebraska a temporary injunction restraining the administratrix from proceeding with the Minnesota suit; that the Minnesota court entered an order staying proceedings until final hearing on the Nebraska injunction. The administratrix now asked the Supreme Court of Minnesota for a peremptory writ of *mandamus* to compel the Minnesota court to proceed with the action. *Held,* that the relator was entitled to the writ of *mandamus,* although it did not appear that the Nebraska injunction had been dissolved. *State ex rel. Bossung v. District Court* (1918, Minn.) 168 N. W. 589.

In the absence of the injunction the right of the administratrix to enforce her claim in the Minnesota courts was clearly established by the decisions in that jurisdiction. *Herrick v. Minneapolis, etc. Co.* (1883) 31 Minn. 11, 16 N. W. 413. On the other hand, the power of the Nebraska court to issue the injunction could not be denied, as apparently the administratrix was not only personally served in Nebraska but was in addition a citizen of that state. It is elementary also, that the Nebraska injunction could not bind the Minnesota court. It might, however, furnish a reason why on grounds of policy or "courtesy" the

Minnesota court would refrain from proceeding until the Nebraska suit had been finally settled. Only one other decision squarely in point has been found and that reaches directly the opposite result. *Fisher v. Pacific etc., Ins. Co.* (1916) 112 Miss. 30, 72 So. 846. The argument of the Minnesota court may be summarized in two propositions: (1) if the plaintiff was a citizen of Minnesota she would be entitled to proceed in spite of the Nebraska injunction; (2) if so, a Nebraska citizen must be equally entitled to proceed, otherwise the court would violate Art. 4, Sec. 2 of the federal Constitution,—"the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." As to the second point: where no question of injunction is involved, it has been held that citizens of other states are entitled, under the constitutional provision in question, to sue in state courts on so-called "transitory" causes of action arising elsewhere, if citizens of the state are so entitled. *Eingartner v. Illinois Steel Co.* (1896) 94 Wis. 70, 68 N. W. 664; *State ex rel. Prall v. District Court* (1914) 126 Minn. 501, 148 N. W. 463. *Contra: Robinson v. Oceanic Steam Nav. Co.* (1889) 112 N. Y. 315, 19 N. E. 625. We may doubt the applicability of this to the case in hand, where a Nebraska citizen is seeking to escape from the courts of her own state. If we accept it as applicable, we are brought to the other point, viz., whether a citizen of Minnesota under circumstances otherwise similar would have been entitled to have the court below proceed with the action. In answering this in the affirmative the court cited no authorities precisely in point. It appeared to them that to allow a Nebraska injunction to have the effect of depriving a Minnesota citizen of his right to go on with a suit in his own state would be to give the courts of another state undue control over Minnesota litigation. All that can be said is that a question of policy of this kind is one upon which views may differ, as is shown by the fact that the Mississippi court in the case cited reached the contrary result.

Constitutional Law—Due Process of Law—Revocation of License without a Hearing.—The statutes of North Dakota authorized the Dairy Commissioner to issue licenses to creameries and cream stations and to revoke licenses "on evidence" that the licensee had violated or had been "convicted" of violating the dairy laws. They also made it unlawful to misread a certain Babcock test for determining the quality of milk. A dairy inspector reported to the Commissioner that the petitioner had misread the test, whereupon, without notice or a hearing, the Commissioner revoked the petitioner's license. The petitioner requested and obtained a hearing from the State Commissioner of Agriculture who, although without statutory authority to grant or hold a hearing, sustained the Dairy Commissioner's order revoking the license. On a petition for a writ of *certiorari* to review the action of the Dairy Commissioner, *held,* that the writ must be denied. *Cofman v. Osterhous* (1918, N. Dak.) 168 N. W. 826.

See Comments, p. 391.

Contracts—Consideration—Performance of Existing Duty to Defendant.—The plaintiff was employed by the defendant by a written contract for one year from a certain date at $90 per week. Three months later a second written contract was made for one year from the same date for the same services at $100 per week. In an action for breach of the second contract the jury was instructed that the contract was valid in case the parties had rescinded the prior contract before executing the second. *Held,* that this was correct and that there

was evidence of a rescission sufficient to justify a verdict for the plaintiff. *Schwartzreich v. Bauman-Basch Inc.* (1918, Sup. Ct. App. T.) 172 N. Y. Supp. 683.

This appears to be an ordinary case where an increase of salary is agreed upon before the end of the contract period. It is highly improbable that at any instant prior to execution of the second contract the defendant could have dismissed the plaintiff without having to pay damages or that the plaintiff was at liberty to refuse to work. The only change in the legal relations of the parties was that the defendant's duty to pay $90 per week was replaced by a duty to pay $100 per week. The court's willingness to permit the jury to indulge in the fiction of a total rescission shows that the plaintiff's counsel conceded too much when he conceded that "a promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration." Such has, indeed, been stated to be the rule in *Vanderbilt v. Schreyer* (1883) 91 N. Y. 392 and other New York cases; but if the plaintiff had not himself threatened a breach of contract, a strong argument in his favor could be founded upon *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807. See Corbin, *Does a Pre-existing Duty Defeat Consideration?* (1918) 27 YALE LAW JOURNAL, 362. It is believed that the existing commercial and social *mores* do not justify the defendant in refusing to pay the new salary; and if so, it is certain that the courts will bring the law of consideration into harmony with the *mores*, as the court did in the principal case, by the use of fiction if necessary. The making of the new agreement can always be held to be evidence from which a rescission of the prior contract can be "implied"; the jury will do the rest.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—PRECEDENCE OF WAR ORDERS BY GOVERNMENT.—A buyer claimed damages for non-delivery of goods as per contract. The seller replied that it was prevented from delivering by reason of orders for goods given by the United States government for war purposes, these orders having precedence by Act of Congress. The contract contained an express provision as to strikes, accidents, and reasons beyond the seller's control. The government agents expressly demanded precedence for their orders, although this was done in an informal manner. *Held,* that the government order was not voluntarily sought by the seller and that the buyer was not entitled to damages for non-delivery. *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278.

In a later case on similar facts it was found as a fact that the seller voluntarily sought the government contract and that the government agents had not demanded precedence in accordance with the Act of Congress until after the defendant had had ample time to perform its previous contract. *Held,* that the defendant had no excuse for non-performance. *Mawhinney v. Millbrook Woolen Mills* (1918, N. Y. Sup. Ct.) 172 N. Y. Supp. 461.

See COMMENTS, p. 399.

CONTRACTS—INCREASED EXPENSE DUE TO WAR—STRIKE, ACCIDENT, AND WAR CLAUSE.—In a contract for the manufacture and sale of "chamber acid" generally made from pyrites, it was provided that "war . . . or other uncontrollable causes rendering the sellers unable to deliver shall make this contract inoperative during the continuance of the difficulties." The war broke out later in Europe, and in 1917 the activity of the German submarines made it impossible to obtain a sufficient supply of pyrites. A better acid could be made from brimstone, which was obtainable, but the expense would have been

twice as great. The defendant began making acid from brimstone, and prorated its product among those customers who would pay an increased price. The plaintiff brought a bill for specific performance to compel delivery to him of acid made from brimstone, at the old contract price. *Held,* that the duty of the defendant was only to deliver acid made from pyrites and that there was no further duty in case pyrites could not be obtained by the exercise of reasonable diligence. *Davison Chemical Co. v. Baugh Chemical Co.* (1918, Md. App.) 104 Atl. 404.

See COMMENTS, p. 399.

CRIMINAL PROCEDURE—CONSTITUTIONAL LAW—VALIDITY OF STATUTE AUTHORIZING STATE TO APPEAL.—A state statute authorized an appeal by the state in criminal cases. A jury having acquitted the respondent of a charge of murder, the state appealed, alleging error in rulings on evidence. The respondent contended that the statute was unconstitutional. *Held,* that the statute was constitutional and, the exceptions being well taken, the state was entitled to a retrial. *State v. Felch* (1918, Vt.) 105 Atl. 23.

The constitution of Vermont does not contain the provision, so common in state constitutions, prohibiting "double jeopardy." It is of course well settled that the similar prohibition in the Fifth Amendment to the federal constitution is a limitation solely upon the powers of the United States government. *Ex parte Spies* (1887) 123 U. S. 131, 8 Sup. Ct. 21. The only federal constitutional provision which might be deemed applicable is the "due process" clause of the Fourteenth Amendment. The court in the principal case very properly held that the statute in question satisfied the tests of federal due process, inasmuch as it merely required the accused to submit to a new trial but not to a second punishment for the same offense. Apparently the federal Supreme Court has never passed upon the question directly. Where the Criminal Code of the District of Columbia gave the prosecution a "right of appeal" but added the proviso that "if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside" (Code D. C. sec. 935), the United States Supreme Court refused to pass upon errors committed where a verdict of acquittal had been rendered, on the ground that any determination made would not affect any case pending before the court and so would not be an exercise of judicial power. *United States v. Evans* (1909) 213 U. S. 297, 29 Sup. Ct. 507. Connecticut long ago by statute gave the state a right of appeal and it was upheld by the State Supreme Court, chiefly, however, on the ground that there is no "double jeopardy" involved in giving the state a right to a new trial even after a verdict of acquittal. *State v. Lee* (1894) 65 Conn. 265, 30 Atl. 1110. That was the view of Mr. Justice Holmes in his dissenting opinion in a case involving an interpretation of the prohibition against "double jeopardy" in a federal statute governing criminal procedure in the Philippines. *Kepner v. United States* (1903) 195 U. S. 100, 24 Sup. Ct. 797. That view is not, however, the prevailing one, as the opinion of the majority in the *Kepner* case shows. In the Connecticut case above cited, however, the question of federal due process was also raised, and passed upon adversely to the contention of the accused. The Vermont Bill of Rights provides: "Nor can any person be justly deprived of his liberty, except by the laws of the land." As a prohibition on legislative action this clause is at most equivalent to the "due process" clauses of other state constitutions. It therefore protects only the same "fundamental rights" that "due process" does. The right to be free from the vexation of a second trial where the first was erroneously conducted is certainly not one of these.

QUASI-CONTRACTS—WAIVER OF TORT—ASSUMPSIT AGAINST ONE JOINT TORT FEASOR AS BAR TO TORT ACTION AGAINST OTHERS.—The defendants, officers of a corporation, acting for the corporation, converted the plaintiff's wheat to the use of the corporation. The corporation became bankrupt and the plaintiff proved his claim for the value of the wheat in the bankruptcy court. By this means he received payment in part. In the present action he claimed to recover from the officers for conversion of the wheat. *Held,* that by claiming in the bankruptcy proceeding the plaintiff had elected to "waive the tort" and could not thereafter recover in tort from any of the tort-feasors. *Shonkweiler v. Harrington* (1918, Neb.) 169 N. W. 258.

The decision is put by the court on the ground that having "collected from the corporation upon the implied contract to pay for the goods, he cannot afterwards allege against anybody that he did not sell the goods to the corporation." It is submitted that such a result is based upon a misunderstanding of our law relating to so-called "waiver of tort." The "implied contract" referred to was, under the common law system of pleading, merely a pleader's fiction, used for the purpose of giving a remedy in "assumpsit." Corbin, *Waiver of Tort and Suit in Assumpsit* (1910) 19 YALE LAW JOURNAL, 221. At the trial a tortious appropriation of the plaintiff's goods and a resulting enrichment of the defendant were the operative facts to be proved. Under modern code procedure these facts may, if the pleader desires, be stated without resorting to the fiction, although the old form may in many jurisdictions still be used. *Farron v. Sherwood* (1858) 17 N. Y. 227. Pomeroy, *Code Remedies* (4th ed.) sec. 431. Consequently, even if, as the court correctly maintains, proving the claim in bankruptcy was equivalent to obtaining judgment against the corporation in an action of "assumpsit" upon a "contract implied in law," this proves merely that the plaintiff elected to sue the principal wrongdoer in that "form of action." No authority need be cited for the proposition that joint tort-feasors in this country are liable severally as well as jointly. This being so, an election to sue one in one "form of action" can, as a matter of common sense, have no effect upon the right to sue another in some other "form of action." It is only by following a confused notion that the "implied contract" is something more substantial than a fictitious allegation of a pleader, an invention to give a plaintiff a remedy in "assumpsit," that some courts have been led astray. A question may perhaps be raised as to whether the liability in "assumpsit," as distinguished from that in "trover," is joint or joint and several. No authorities directly in point have been found. However, the cases uniformly hold that if some of the joint tort-feasors receive no benefit, they are not liable in assumpsit jointly with the others. *Minor v. Baldridge* (1898) 123 Cal. 187, 55 Pac. 783. On the other hand there are cases holding that the injured person may have a joint judgment when each of the wrongdoers receives a portion of the benefit. *Gilmore v. Wilbur* (1831, Mass.) 12 Pick. 120. These cases do not, however, determine that the liability is not also several, to the extent to which each tort-feasor is severally benefited. There seems no good reason why it should not be, once we recognize that the "implied contract" is a pleader's fiction. *Cf.* Woodward, *Quasi-Contracts,* sec. 289. Moreover, even if it were admitted that the "assumpsit" liability is joint solely, it would seem to follow, not that the tort actions were extinguished, but merely that no further assumpsit actions could be brought. Fortunately, the weight of authority on the precise point at issue seems to be against the conclusion reached in the principal case. Woodward, *Quasi-Contracts,* sec. 299. The case of *Huffman v. Hughlett* (1883, Tenn.) 11 Lea, 549, contains an exceedingly clear opinion in favor of the majority rule. The leading case supporting the view taken in the principal case is *Terry v. Munger* (1890) 121 N. Y. 161, 24 N. E. 272. For a searching criticism of that case, see Keener, *Quasi-Contracts,* 210.

SURETYSHIP—ALTERATION OF INSTRUMENTS—BLANKS FILLED BY PRINCIPAL DEBTOR BEFORE DELIVERY TO CREDITOR.—The defendants became sureties on a contract, guaranteeing among other things the payment of an existing indebtedness, the amount being in blank when they signed. When the instrument was offered in court the blank had been filled, but without the knowledge of the defendants. *Held,* that the filling of the blank was an unauthorized alteration which discharged the sureties. *J. R. Watkins Medical Co. v. Miller et al.* (1918, S. D.) 168 N. W. 373.

Where a surety signs an incomplete document and hands it to the principal, authorizing him to fill blanks in some specified manner and to deliver the completed document to the creditor, he should always be bound by the instrument as finally delivered, when it is in the hands of an innocent holder for value. This should be so even in the case of a sealed instrument, for it does not become the surety's deed until delivery by the principal debtor to the obligee or his representative. Nor is the principal such a representative. Such is the rule in the case of negotiable instruments. N. I. L. sec. 14; *Ward v. Hackett* (1883) 30 Minn. 150; see also (1918) 27 YALE LAW JOURNAL, 951, (1917) *ibid.* 242, and CURRENT DECISIONS, *infra.* There is a strong conflict in the case of sealed instruments, but the better rule is that the surety is bound by estoppel. *Butler v. United States* (1874, U. S.) 21 Wall. 272. Authority to deliver a sealed instrument may be by parol, and the instrument *as delivered* is the signer's deed. *White v. Duggan* (1885) 140 Mass. 18 ("A specialty deriving its validity from an estoppel *in pais* is perhaps somewhat like Nebuchadnezzar's image with a head of gold supported by feet of clay." Holmes, J.). Some states, however, hold that the instrument is not the deed of the surety even when the blanks were filled out exactly as he directed. *State v. Boring* (1846) 15 Ohio, 507. Such a doctrine is a worship of a misconception of mere ancient form, when in fact the form was other than the one that is being worshipped. At the very most, these cases do not support the principal case, where the contract does not appear to have been a specialty. In cases like this the surety has ready means of protecting himself by refusing to sign until after blanks are all filled. The obligee has no such means of detecting unauthorized filling of blanks left by the surety. The court was quite correct in holding that the filling of the blank was a material alteration. If such an alteration had been made by the obligee or his agent, it would discharge the surety. Occasionally the principal debtor may properly be held, in this regard, the agent of the obligee, rather than of the surety. *Koch Medical Tea Co. v. Poitras* (1916, N. D.) 161 N. W. 727. But there seems to be little ground for assuming such a state of facts in the present case; and the surety has been held bound even where the principal was said to be the agent of both parties. *Palacios v. Brasher* (1893) 18 Colo. 593, 34 Pac. 251.

SURETYSHIP—NONDISCLOSURE BY CREDITOR OF EXISTING DEFAULT BY PRINCIPAL.—The defendant signed the bond of a paving contractor in ignorance of the fact that the latter was already in default on the contract the performance of which was being guaranteed by the defendant. Such breach of contract was well known to the creditor, the obligee in the surety bond. By the terms of the bond the defendant bound himself to answer only for future defaults. *Held,* that the surety bond was not operative to bind the surety. *Park Paving Co. v. Kraft* (1918, Pa.) 105 Atl. 39.

There is no fiduciary relation between a creditor and one who is asked to be a surety. There is no *duty* to disclose all material facts that may affect the surety's willingness to sign. Nor—outside of marine insurance—is a dis-

closure of all material facts a condition precedent to the existence of a duty in the surety to pay as he has agreed. *North British Ins. Co. v. Lloyd* (1854) 10 Exch. 523; *Atlas Bank v. Brownell* (1869) 9 R. I. 168 (creditor did not disclose that the principal had been gambling); *Magee v. Manhattan Co.* (1875) 92 U. S. 93 (insolvency of principal); *Farmers' Bank v. Braden* (1891) 145 Pa. 473 (insolvency of principal); *Hamilton v. Watson* (1845, H. of L.) 12 Cl. & F. 109 (principal already largely indebted to the creditor); *Bostwick v. VanVoorhis* (1883) 91 N. Y. 353 (principal had been irregular in some way not affecting his moral character or honesty). On the other hand, the surety is not bound in case the creditor fails to disclose the fact that the principal was an embezzler or had been otherwise dishonest in his relations with the creditor. *Sooy ads. State of New Jersey* (1877, Sup. Ct.) 39 N. J. L. 135; *Railton v. Mathews* (1844, H. of L.) 10 Cl. & F. 934. Had the bond in the present case been so worded as to bind the surety to answer for past defaults as well as future ones, the disclosure of the existence of the past default would be a condition precedent. *Pidcock v. Bishop* (1825) 3 L. J. K. B. 109, 3 B. & C. 605. At least, such non-disclosure would be evidence of fraud. *Lee v. Jones* (1864) 17 C. B. N. S. 482. In view of the authorities the present decision seems to be too favorable to the surety.

TRUSTS—RESULTING TRUSTS—DEVISE ON TRUST NOT PROPERLY DECLARED.—A testator bequeathed all his personal property to his executor "in trust for the purposes of paying out and disposing of the same as I have advised and directed him to do." Prior to the execution of the will the legatee promised the testator to carry out the directions, which were communicated to him at that time. *Held,* that beneficiaries orally named by the testator to the legatee were not entitled to have the directions carried out, but that there was a resulting trust for the next of kin. *Reynolds v. Reynolds* (1918, N. Y.) 121 N. E. 61.

It has long been held in New York, in accordance with the great weight of authority in other jurisdictions, that if a gift in a will is in form absolute but in fact upon an oral "secret" trust communicated to the devisee or legatee, who has agreed to carry it out, there is a so-called "constructive trust" for the intended beneficiaries. *Matter of O'Hara* (1884) 95 N. Y. 403. This is also the English law. *Boyes v. Carritt* (1884) 26 Ch. D. 531. A recent Washington case is *contra. Brown v. Kausche* (1917, Wash.) 167 Pac. 1075, commented upon in (1918) 27 YALE LAW JOURNAL, 389. Where, as in the principal case, the will indicates that the property is to be held in trust, but fails to reveal the terms of the same, there is greater conflict of authority. The English authorities do not distinguish such a case from that in which the gift on the face of the will is absolute: *In re Fleetwood* (1880) 15 Ch. D. 594. Some American cases take the same view. *Curdy v. Berton* (1889) 79 Cal. 420, 21 Pac. 858; *Cagney v. O'Brien* (1876) 83 Ill. 72. There are, however, authorities to the contrary. *Olliffe v. Wells* (1881) 130 Mass. 90; *Sims v. Sims* (1897) 94 Va. 580, 27 S. E. 436. In the principal case the court attempts to distinguish the absolute devise from that before the court on the ground that in the former there is nothing in the will to show that the devisee or legatee is not to have the property, whereas in the latter the words "in trust" reveal a contrary intention. On the basis of this difference it is argued that in the latter case, the words of the will reveal a resulting trust for the next of kin; that it would therefore be a "fraud" upon them to allow the beneficiaries named in the oral communications to take, and would result in a clear violation of the statute of wills. With the latter contention we may agree; but for the reasons given in the comment in (1918) 27 YALE LAW JOURNAL, 389, it is believed that the same

is true in the case of gifts which on the face of the will are absolute. To permit the intended beneficiaries to take in either case seems to open the door to all the evils which the statutes requiring testamentary dispositions to be in a certain form are intended to prevent. For an argument to the contrary, see the discussion by Professor Costigan (1915) 28 HARV. L. REV. 266.

UNFAIR COMPETITION — PIRATING NEWS MATTER — THE ASSOCIATED PRESS CASE.—The defendant, a corporation engaged in selling news to papers not members of The Associated Press, had from its organization obtained and furnished to its subscribers items of news from early editions of papers published by members of The Associated Press and from bulletins posted by them. Sometimes these news items were verified, at other times not; sometimes they were re-written and again they were not. The Associated Press asked for an injunction to restrain this method of "pirating" its news "until its commercial value as news to the complainant and all its members had passed away." *Held,* that the complainant was entitled to an injunction. *The International News Service v. The Associated Press* (1918) 39 Sup. Ct. 68.

See COMMENTS, p. 387.

WORKMEN'S COMPENSATION—EVIDENCE—AWARD BASED UPON HEARSAY.—In a proceeding before the State Industrial Commission under the Workmen's Compensation Law an award was based solely upon hearsay evidence—statements of the deceased workman to his wife and others. These statements conflicted with other hearsay statements of the workman made to other persons. There was evidence that the deceased had been in two automobile accidents after the date of the alleged injury and before the physical injury which caused death was observed by his physician. There was also the direct testimony of other employees tending to controvert the deceased's statements upon which the award was based. *Held,* that the award was erroneous, as it was based solely upon "uncorroborated hearsay evidence." Chase, Cuddeback and Hogan, JJ., *dissenting. Belcher v. Carthage Machine Co.* (1918, N. Y.) 120 N. E. 735.

The New York Workmen's Compensation Law provides that the Industrial Commission "shall not be bound by common law or statutory rules of evidence . . . but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." N. Y. Laws, 1914, ch. 41, sec. 68. In spite of this the New York Court of Appeals held in an earlier case that although hearsay evidence might be made the basis of an award it was not sufficient when in conflict with the direct testimony of eye-witnesses. Seabury and Pound, JJ., *dissenting. Carroll v. Knickerbocker Ice Co.* (1916) 218 N. Y. 435, 113 N. E. 507. In the principal case, which probably on its facts did not require the court to go farther than it already had in limiting the powers of the Industrial Commission, the majority placed their decision squarely on the proposition that the Commission may not base an award solely upon "hearsay evidence, uncorroborated by facts, circumstances or other evidence." Of the three dissenting justices it is worthy of note that Cuddeback, J., wrote the prevailing opinion in the earlier case. It is submitted that both cases show an unfortunate tendency upon the part of the court to introduce, to some extent at least, into hearings before the Industrial Commission common law rules of evidence—a thing the statute expressly says shall not be done. Cases in another jurisdiction with a similar statutory provision exhibit the same tendency. *Englebetson v. Industrial Accident Commission* (1915) 170 Cal. 793, 151 Pac. 421; *Employers' Assurance Corporation v. Industrial Accident Commission* (1915) 170 Cal. 800, 151 Pac.

423. The California statute at that time provided that the Commission should not be "bound by the technical rules of evidence." The court regarded the rule against hearsay as not a "technical rule of evidence" within the statutory meaning. Since these cases were decided the California law has been revised so that it reads in substance like the New York law but contains the additional provision that "no award . . . shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence." Cal. St. 1917, p. 831. *Cf. Western Indemnity Co. v. Industrial Accident Commission* (1917) 174 Cal. 315, 163 Pac. 60. The hearsay rule may be well enough where we are seeking to keep a common law jury from being led astray, but it has no place when the trier of fact is a body consisting of persons who, in theory at least, are trained to weigh evidence. Note that the choice is not between the testimony of those who have seen or heard and thus have personal knowledge and those who have not; but merely between statements made out of court by those having personal knowledge and similar statements made in court. Note also that in both New York cases the person making the statements was no longer available at the time of the hearing before the Commission. Probably in both cases the court was led to make the decision it did because it felt that the Commission had made erroneous findings of fact. In view of the provisions of Section 20 of the New York statute, which makes the decision of the Commission final upon all questions of fact, it is difficult to see upon what basis the court can reverse these findings of the Commission, as clearly there was, under the express terms of the act, competent evidence having probative value upon which the Commission's finding could be based. It is to be hoped that courts in other jurisdictions where similar statutes exist will not follow the rule laid down in the principal case. If the distinction between "hearsay" and "direct" evidence is to be introduced into hearings before these industrial tribunals, it will be necessary to add the long list of exceptions to the hearsay rule, and the proceedings will take on the technical character of common law trials—the very result the framers of the statute intended to avoid.