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CURRENT DECISIONS

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BANKRUPTCY—CONTRACTS—RESCISSION ON GROUNDS OF FRAUD AMOUNTING TO A PREFERENCE.—In December, 1919, one Ponzi began a systematic scheme of fraudulent borrowing on his personal notes, promising the lenders a return of 150% in forty-five days. He later publicly announced that he would return the principal in full in less than that time, if the lenders became dissatisfied. His scheme was to pay the first comers with the loans of later dupes. The defendants loaned him various sums which he deposited in the X bank of Boston between July 20 and 24, 1920. On July 19, Ponzi's deposits there aggregated $334,000. On July 24, his balance was $871,000. By July 28, all these deposits had been withdrawn but a large balance was still maintained by transferring all his deposits in other banks to the X bank. On August 2, the fraud was exposed and in the "run" on Ponzi's Boston office subsequent to the exposure, the defendants succeeded in procuring a return of their loans although they were not yet due. On August 10, Ponzi became a bankrupt. His trustee in bankruptcy sued in equity to collect these payments as voidable preferences under the Bankruptcy Act. The district court dismissed his bill and the dismissal was upheld by the circuit court of appeals. *Held,* that the decree be reversed. *Cunningham, Trustee, v. Brown* (Apr. 28, 1924) U. S. Sup. Ct., Oct. Term, 1923, No. 213.

The supreme court held that the repayment did not constitute a rescission by the defendants on grounds of fraud. And that if it did, such repayment created a preference, the original fund paid in by the defendants having been exhausted by subsequent payments by Ponzi to his creditors. Thus the relation of cestui and trustee could not exist between Ponzi and the defendants at the time of the repayment. For a criticism of the lower court here reversed, see COMMENTS (1923) 32 YALE LAW JOURNAL, 267.

BANKS AND BANKING—GENERAL DEPOSIT FOR SPECIFIC PURPOSE.—A depositor of the defendant bank gave his check in its favor for transmission to the plaintiff bank to the credit of a third person. The defendant wired the plaintiff to extend the credit and promised to remit by draft on a New York bank. The plaintiff paid the money before receiving the draft which the New York bank refused to honor due to the insolvency of the defendant. The plaintiff filed a claim as a preferred creditor. *Held,* that the plaintiff was a general creditor. *First National Bank of Shreveport v. State Bank of Portland* (1924, Or.) 222 Pac. 1079.

The instant case soundly recognizes that the actual transaction is an executory contract for the purchase of credit. *Noyes v. First Nat. Bank* (1917) 180 App. Div. 162, 167 N. Y. Supp. 288; *Schofield v. Cochran* (1904) 119 Ga. 901, 47 S. E. 208; see (1923) 32 YALE LAW JOURNAL, 410; COMMENTS (1924) 33 YALE LAW JOURNAL, 177. Many courts confuse this with a general deposit for a specific purpose and invoke a trust. *Morton v. Woolery* (1922, N. D.) 189 N. W. 232; *Titlow v. Sundquist* (1916, C. C. A. 9th) 234 Fed. 613; *State v. Grills* (1912) 35 R. I. 70, 85 Atl. 281.

EQUITY—LITERARY PROPERTY—INJUNCTION AGAINST PUBLICATION NOT GRANTED TO RECIPIENT OF LETTER.—The defendants had acquired possession of letters received by the plaintiffs and were publishing them. The plaintiffs sought to enjoin publication. *Held,* that the injunction be refused. *Knights of Ku Klux Klan v. International Magazine Co.* (1923, C. C. A. 2d) 294 Fed. 661.

The recipient owns only the physical substance of a letter, while property in the expressed thought remains in the author. *Baker v. Libbie* (1912) 210 Mass. 599, 97 N. E. 109; *Philip v. Pennell* [1907] 2 Ch. 577. A recipient has been allowed to enjoin publication without joining the author as co-plaintiff. *Granard v. Dunkin* (1809, Ir. Ch.) 1 Ball & B. 207. But since an injunction protects the expression of

the idea in which the recipient has no property interest, the instant case reaches the sounder result.

EVIDENCE—HEARSAY—SPONTANEOUS DECLARATIONS.—In an action for the death of a pedestrian struck by a truck, the plaintiff offered in evidence the statement made by the driver immediately after stopping the truck over 100 feet from the point of collision, "Arrest me officer, it is my fault." The defendant objected to the evidence as hearsay. The lower court sustained the objection. *Held,* that the judgment be affirmed. *Perry v. Harritos* (1924, Conn.) 124 Atl. 45.

The court overruled *Morse v. Consolidated Ry. Co.* (1908) 81 Conn. 395, 71 Atl. 553, which held that an utterance caused by a startling event is admissible only if made contemporaneous with the event. The instant case adopts the better view that the test is whether the utterance was spontaneous and unreflective. Lapse of time between event and utterance is only evidence of lack of spontaneity. The spontaneity of the utterance is a sufficient guarantee of trustworthiness. *Roach v. Gt. Northern Ry. Co.* (1916) 133 Minn. 257, 158 N. W. 232; *Eby v. Travelers Ins. Co.* (1917) 258 Pa. 525, 102 Atl. 209; *Starcher v. South Pennsylvania Coal Co.* (1918) 81 W. Va. 587, 95 S. E. 28; *Washington Ry. Co. v. Deahl* (1919) 126 Va. 141, 100 S. E. 840; 3 Wigmore, *Evidence* (2d ed. 1923) sec. 1747; Morgan, *Utterances Admissible as Res Gestae* (1922) 31 YALE LAW JOURNAL, 238.

INSURANCE—EXECUTION OF INSURED FOR MURDER A DEFENSE.—An insured murdered the beneficiary and was executed for the crime. The policy did not expressly exempt the company from liability for death by legal execution. The insured's executrix sued under a provision "that, if the beneficiary should predecease the insured, the interest in the policy would vest in the insured." *Held,* that she could not recover. *Smith v. Metropolitan Ins. Co.* (1923, Mun. Ct.) 122 Misc. 136, 203 N. Y. Supp. 173.

The court, with a vague reference to public policy, accepts the view that death by legal execution is impliedly excepted from the risks assumed. *Collins v. Metropolitan Ins. Co.* (1907) 27 Pa. Super. Ct. 353; *Northwestern Ins. Co. v. McCue* (1912) 223 U. S. 234, 32 Sup. Ct. 220. However, an incontestable clause has been held to invalidate this defense. *Weil v. Travelers' Ins. Co.* (1918) 201 Ala. 409, 78 So. 528; *contra: Scarborough v. American National Ins. Co.* (1916) 171 N. C. 353, 88 S. E. 482. And, in some states, it is said to add forfeiture of property to punishment for crime, which is inconsistent with constitutional or statutory provisions abolishing such forfeitures. *Collins v. Metropolitan Ins. Co.* (1907) 232 Ill. 37, 83 N. E. 542; *Fields v. Metropolitan Ins. Co.* (1923, Tenn.) 249 S. W. 798; *Am. Nat. Ins. Co. v. Coates* (1923) 112 Tex. 267, 246 S. W. 356. The latter aspect was apparently ignored by the court. See N. Y. Cons. Laws, 1909, ch. 88, sec. 512. The tendency is to deny an implied exemption from liability in the analogous cases of suicide. See COMMENTS (1921) 30 YALE LAW JOURNAL, 401.

JUDGMENTS—RES ADJUDICATA—CONCLUSIVENESS OF FINDING OF FACT IN PRIOR BANKRUPTCY PROCEEDING.—In an action for deceit the plaintiff alleged that the defendants had obtained credit from him by a false statement as to their financial condition. In a prior bankruptcy proceeding against the defendants, the plaintiff had opposed the confirmation of an offer of composition on the same ground, but the court found that the statement was true when made, and the composition was confirmed. The lower court excluded this evidence and the defendant appealed. *Held,* that the determination of this fact in the bankruptcy proceeding was conclusive in the instant case. *Myers v. International Trust Co.* (1923) 263 U. S. 64, 44 Sup. Ct. 86.

The adjudication of an operative fact essential to the determination of a case in a prior proceeding, is conclusive if the same fact is again at issue between the

parties. *Union Central Life Ins. Co. v. Drake* (1914, C. C. A. 8th) 214 Fed. 536; *Sutton v. Wentworth* (1917, C. C. A. 1st) 247 Fed. 493; (1915) 14 MICH. L. REV. 241. It is not necessary that the adjudication be made in the prosecution of the same claim or demand. *Hickman v. Town of Fletcher* (1912, C. C. A. 8th) 195 Fed. 907.

MARRIAGE AND DIVORCE—RECRIMINATION—ADULTERY OF PETITIONER NO BAR.—In an action for divorce, the evidence showed that both the petitioner and her husband had been guilty of adultery, the petitioner with one C; that C was willing to marry her, and that she had left her husband's home because of his cruelty. Under the Matrimonial Cause Act (1857) 20 & 21 Vict. c. 85, sec. 31, the court has discretionary power to grant a divorce where both parties are guilty of misconduct. *Held,* that the divorce be granted. *Tickner v. Tickner* (1924, P.) 40 T. L. R. 367.

It is generally held in this country that if the petitioner's misconduct is itself sufficient ground for divorce, a decree will not be granted. *Day v. Day* (1905) 71 Kan. 385, 80 Pac. 974; Keezer, *Marriage and Divorce* (2d ed. 1923) sec. 427. A decree, however, may be granted where both parties are not equally at fault. *Johnsen v. Johnsen* (1914) 78 Wash. 423, 139 Pac. 189. Or where the misconduct of one is provoked by the other. *Garrett v. Garrett* (1911) 252 Ill. 318, 96 N. E. 882. A discretionary power in the court, as in the instant case, seems the best solution of a difficult problem. A relaxation of the general rule under extraordinary circumstances is beneficial. See *Weiss v. Weiss* (1913) 174 Mich. 431, 140 N. W. 587; (1924) 2 AMERICAN MERCURY, 39.

REPLEVIN—STATUTORY FORTHCOMING BOND—ACCIDENTAL DESTRUCTION OF PROPERTY.—A sheriff, acting under N. C. Cons. Sts. sec. 3403, seized an automobile used in violation of the prohibition law, and when directed in replevin to deliver it to the plaintiff, who claimed it as a mortgagee, gave a forthcoming bond retaining possession of the property. Thereafter the property was destroyed without the defendant's fault. From a judgment for the plaintiff the defendant appealed. *Held,* (two judges *dissenting*) that the judgment be affirmed. *T. & H. Motor Co. v. Sands* (1923) 186 N. C. 732, 120 S. E. 459.

At common law, one who obtains possession of goods by a writ of replevin is, in case of subsequent accidental destruction, responsible for their value on his forthcoming bond, if his claim to the goods proves unfounded. *Lillie v. McMillan* (1879) 52 Iowa, 463, 3 N. W. 601; *Suppiger v. Gruaz* (1891) 137 Ill. 216, 27 N. E. 22. Similarly, by express provision of statutes permitting the defendant to retain the chattel on giving bond. *Bradley v. Campbell* (1908) 132 Mo. App. 78, 111 S. W. 514; *Randolph v. McGowans* (1917) 174 N. C. 203, 93 S. E. 730; *contra: Jennings v. Sparkman* (1892) 48 Mo. App. 246. The confiscation statute in the instant case has been held not to prejudice the rights of innocent third parties. *Skinner v. Thomas* (1916) 171 N. C. 98, 87 S. E. 976. It seems that the sheriff would then be justified in permitting one claiming to be such a party to take possession under a writ of replevin, as the forthcoming bond would give the state full protection.

SALES—OPEN BILL OF LADING—LIABILITY OF A CARRIER FOR REDELIVERY TO THE SHIPPER NOT NAMED AS CONSIGNOR.—A, having contracted to sell a carload of lumber to the plaintiff, but not having the lumber on hand, contracted to purchase the lumber from B to be sent to the plaintiff. B delivered the lumber to the defendant carrier on an open bill of lading, naming A as consignor and the plaintiff as consignee, and attached a draft to the bill of lading and sent them to A. On A's refusal to pay the draft, B demanded and received a redelivery of the lumber from the defendant. The plaintiff had paid a draft attached to a bill of lading which was sent to him by A. There was evidence that by prior dealings

between B and A, B reserved title. *Held,* that the plaintiff cannot recover. *Collins v. Seaboard Air Line Ry. Co.* (1924, N. C.) 120 S. E. 824.

By the unusual term "open bill of lading" seems to be meant a straight bill. *Saunder Bros. v. Payne* (1923, Ga.) 116 S. E. 349. Delivery to a carrier of goods on such a bill *prima facie* passes title to the consignee who alone can sue the carrier, and whose instructions in respect to the goods the carrier may follow. *Ellington v. Norfolk & So. Ry.* (1915) 170 N. C. 36, 86 S. E. 693; *Georgia Marble Works v. Minor* (1917) 128 Ark. 124, 193 S. W. 498. But where the carrier's default resulted in non-acceptance, the consignor was allowed to sue the carrier. *Savannah, F. & W. Ry. v. Commercial Guano Co.* (1898) 103 Ga. 590, 30 S. E. 555; *Anderson v. American Ry. Express Co.* (1924, N. C.) 121 S. E. 354. But the general rule is that shipment by a seller to his buyer's sub-vendee bars stoppage in transit. *Memphis R. R. v. Freed* (1882) 38 Ark. 614; Williston, *Sales* (1909) sec. 525. And regardless of the prior dealings between A and B in the instant case, it seems that in the absence of notice, payment by the plaintiff, on the faith of accurate evidence of shipment direct to him, should have settled his right to the goods.

TORTS—FALSE IMPRISONMENT—COMMITTING SANE PERSON TO INSANE HOSPITAL.—The plaintiff was released from an insane hospital on probation for a period of 30 days. During such period, without honest belief in his insanity, the defendant, Commissioner of Lunacy, detained him and notified the manager of the hospital. The latter in good faith recommitted the plaintiff without examination. After being confined for nine years, he sued for false imprisonment. From a verdict for £25,000 for the whole period of detention, to be apportioned at the rate of seven-tenths against the commissioner and three-tenths against the manager of the hospital, the defendants appealed. *Held,* that the plaintiff should recover £5,000 for the original detention by the Commissioner and the remaining £20,000 should be awarded according to the jury's apportionment. *Harnett v. Bond* (1924, K. B.) 40 T. L. R. 414.

A physician who in good faith, but without reasonable care, causes a sane person to be confined in an insane hospital, is liable for false imprisonment. *Ayers v. Russell* (1888, N. Y.) 50 Hun. 282, 3 N. Y. Supp. 338; *Hall v. Semple* (1862, Q. B.) 3 Fost. & F. 337. As in the instant case the damages will be enhanced upon proof of an improper motive. *Bacon v. Bacon* (1898) 76 Miss. 458, 24 So. 968. If the mistake is due to a mere error in judgment there is no liability. *Williams v. LeBar* (1891) 141 Pa. 149, 21 Atl. 525; *Everett v. Griffiths* (1920, C. A.) 3 K. B. 163.

WILLS—INTERPRETATION—RIGHT OF LIFE TENANT TO SHARE IN A LIMITATION OVER TO TESTATOR'S "HEIRS AT LAW."—A trust was created by will for life, and thereafter contingently to the testator's "heirs at law." At the testator's death, the life tenant was his sole heir at law. *Held,* that upon the happening of the contingency the remainder passed to the testator's heirs at law excluding the life tenant. *Gross v. Hartford-Connecticut Trust Co.* (1924, Conn.) 123 Atl. 907.

An heir is not precluded from taking a limitation over merely because he takes as life tenant. *Redmond v. Gummere* (1922, N. J.) 119 Atl. 631; (1923) 33 YALE LAW JOURNAL, 217; see (1919) 29 *ibid.* 575; see (1923) 21 MICH. L. REV. 612. This fact may, however, be considered in determining whether the testator intended to exclude the life tenant from participating in the gift over. *Wadsworth v. Murray* (1900) 161 N. Y. 274, 55 N. E. 910; see 13 A. L. R. 615, note. The Connecticut courts seem to have gone further and presume an intent to exclude unless a contrary intent is manifest from the language of the will. *Close v. Benham* (1921) 97 Conn. 102, 115 Atl. 626; see (1921) 35 HARV. L. REV. 890.