RECENT CASES

BLASTING—INJURY—NEGLIGENCE—PATRICK ET UX. V. SMITH ET AL., 134 PAC., 1076, (WASH.)—*Held,* where defendants, while engaged in work on a right of way, exploded a charge of powder which loosened earth and by vibration alone destroyed plaintiff's well, located about 500 feet from the point of the explosion, plaintiff was entitled to recover without proof of negligence.

It is conceded to be the rule that when one in blasting on his premises casts earth or rock on the land of another he is liable for the invasion, although the work was done without negligence, *St. Peter v. Denison,* 58 N. Y., 416; *G. B. & L. R. R. Co. v. Eagles,* 9 Colo., 544; *McAndrews v. Collerd,* 42 N. J. L., 189; *Munro v. Dredging Co.,* 84 Cal., 515, proceeding on the theory that it is better that one should be deprived of the use of his land in a particular way than that another lose the use of his altogether, which is an unremote possibility. *Hay v. Cohoes Co.,* 2 N. Y., 159, a leading case; *Scott v. Bay,* 3 Md., 431. The basis of recovery is the maxim, *"sic utere tuo ut alienum non laedas." Tiffin v. McCormack,* 34 Ohio St., 638. When, however, there is no physical invasion of the premises in question and the damage is found to result only from the vibration of the air or earth, the weight of authority is contrary to the principal case, and holds that negligence must be shown or it is *damnun absque injuria, Booth v. Rome W. & T. R. R.,* 140 N. Y., 267; *Murphy v. City of Lowell,* 128 Mass., 396; *Benner v. Atlantic Dredging Co.,* 134 N. Y., 156, Vann, J., *dissenting,* unless possibly the blasting is *per se* a nuisance, *Simon v. Henry,* 65 N. J. L., 486, semble. These holdings are based on the idea that the maxim *"sic utere tuo,* etc." can only apply when a legal right has been invaded, *Newell v. Woolfolk,* 91 Hun. (N. Y.), 211, and especially is this doctrine advanced if the damage is inevitable. *French v. Vix et al.,* 143 N. Y., 90. So one blasting in a mine cannot be held liable for surface injuries, in the absence of negligence, if the land in its natural state be not disturbed. *Marvin v. Mining Co.,* 55 N. Y., 538. Other jurisdictions, nevertheless, make no distinction as regards proof of negligence, between physical invasion and vibration so be it that the damage occurs. *Colton v. Onderdonk,* 69 Cal., 155; *Farrandis v. R. R.,* 41 Wash., 486; *Gosset v. So. R. Co.,* 115 Tenn., 378. These courts refuse to regard damage from the jarring of earth as *damnum absque injuria, Smith v. St. Paul R. R.,* 41 Wash., 355, either on the basis that work is being done which is intrinsically dangerous and the natural consequences, whether resulting in physical invasion of another's premises or damage to them by vibration, are acts which are the subject of recovery, *Fitzimmons v. Braun,* 199 Ill., 397, or that the force used constitutes the injury, the invasion being immaterial. *Hickey v. McCable & Bihler,* 30 R. I., 346 (1910). Others reach the same conclusion by assuming that blasting, in cities at least, is a prima facie nuisance, relieving the plaintiff from proof of negligence, if damage result. *Glycerine Co. v. St. Mary's Co.,* 64 Ohio St., 560; *Tiffin v. McCormack, supra.* The rule of the case under discussion is in harmony with the

noted case of *Fletcher v. Rylands,* L. R. 3 H. L., 330, would seem to work substantial justice, and be the better on principle if not on authority. Each case would thus be considered on its own merits without the restraint of technical rules of trespass, which casts the burden on the plaintiff of proving negligence.

CARRIERS—ACTION BY STREET CAR PASSENGER—EVIDENCE ADMISSIBLE UNDER GENERAL ISSUE.—BINDER ET AL. V. GEORGIA RY & EL. CO., 79 S. E. 216 (GA.).—*Held,* that where a suit is brought against a street railway company to recover damages for the failure to perform its duty by protecting a passenger from the wrongful act of its motorman, the defendant, under the plea of the general issue, can introduce evidence showing that the act and conduct of its servant was fully warranted and justifiable.

The general rule is that a carrier of passengers it not an insurer of their safety. *Gardner v. N. J. Tract. Co.,* 58 N. J. L., 176; *McPadden v. N. Y. C. R. Co.,* 44 N. Y., 478. But such a carrier is bound to use the highest degree of care, skill, and diligence, that is possible under the circumstances, to protect its passengers from injury. *Louisville R. R. Co. v. Wellington,* 137 Ky., 719; *Penn. R. R. Co. v. Ray,* 102 U. S., 451. Courts taking this view impose on the carrier an absolute liability for the torts of its servants. *McMahon v. Chicago City R. Co.,* 239 Ill., 334; *Horgan v. Boston El. R. Co.,* 208 Mass., 287. Hence, it has been held that abusive or insulting language on the part of the passenger will not justify an assault by the carrier's employee, so as to relieve the carrier from liability for damages resulting from the assault. *B'ham R. Light. & Power Co. v. Mullen,* 138 Ala., 614; *Hanson v. Urbana & C. El. Co.,* 75 Ill. App., 474; *Neuer v. Metr. Str. R. Co.,* 143 Mo., 402. But other cases hold that abusive language by a passenger toward the carrier's employee may relieve the carrier from liability for an assault on the passenger. *Wise v. R. R. Co.,* 17 Ky. L. Rep., 1359; *Peavy v. R. R. Co.,* 81 Ga., 485. But the courts taking this view put their decisions on the ground that the passenger is guilty of contributory negilgence in unfitting the employee, by such insults, from properly observing his duty, rather than that the insulting language justifies the assault. *Rohrback v. Pull. Pal. Car Co.,* 166 Fed., 797; *R. R. Co. v. Shropshire,* 101 Ga., 33. Courts which do not recognize abusive language as a complete defence for an assault by the carrier's employee, nevertheless allow such conduct as an element in mitigation of damages. *B. & O. R. Co. v. Barger,* 80 Md., 23; *Freedman v. Metr. Str. R. Co.,* 89 App. Div. (N. Y.), 486. But if there had been time for cool reflection after the insults, or if the insulting words were themselves provoked by similar words of the employee the principle of mitigation is held not to apply. *R. R. Co. v. Batchler,* 37 Tex. Civ. App., 116. And, where the conduct of the passenger is not allowed to mitigate the damages, it is allowed to be shown as a defence to the recovery of exemplary damages. *R. R. Co. v. Myzell,* 87 Ark., 123; *Mitchell v. R. R. Co.,* 125 Mo. App., 1. But the fact that a man is a servant of a carrier does not deprive him of the right of self-defence, and so it is generally held that damages in respect of an assault committed by the carrier's servant for the purpose

of defending himself against the violence of a passenger, cannot be recovered in an action against the carrier. *R. R. Co. v. Sampley,* 169 Ala., 372; *O'Brien v. R. R. Co.,* 185 Mo., 263; *R. R. Co. v. Jopes,* 142 U. S., 18. As a carrier is bound to use the highest degree of practicable care to protect its passengers from assaults or insults at the hands of fellow-passengers, it would seem, *a fortiori,* that it would owe the same degree of care to protect from its own servants. See *Goddard v. R. R. C.,* 57 Me., 202, 213.

FOOD—DECEPTIVE NAME—SALE—REGULATIONS.—ST. LOUIS INDEPENDENT PACKING CO. V. HOUSTON, SEC. OF AGRICULTURE ET AL., 204 FED., 120.—Act of Congress, June 30, 1906, c. 3913, 34 Stat., 674, declares that no meat or meat product shall be sold or offered for sale by any person in interstate or foreign commerce under a false or deceptive name, and that the Secretary of Agriculture from time to time shall make such rules and regulations as are necessary for the efficient execution of the act. *Held,* that the term "sausage" being defined by lexicographers as an article of food composed of meat, salt, and spices, the Secretary of Agriculture had authority to prescribe that meat products sold under the name of "sausage" should not contain cereal in excess of 2 per cent, nor water or ice in excess of 3 per cent, and if water and cereal were in excess of such percentages; the substance should be labeled "sausage, water, and cereal."

The most difficult question the courts have had to consider under the Pure Food Law is when is an article of food misbranded or sold under a deceptive name. Courts have resorted to numerous devices to determine the question. In the principal case the court appears to have taken judicial notice of what had become the generally recognized understanding by the public of what the term "sausage" meant, and of what the public generally expected and believed it was composed. In deciding whether a certain food product sold as whiskey should be branded as "Whiskey" or "Imitation Whiskey", in addition to the chemical analysis, the court took into consideration the method of manufacturing each, the product from which each was made, and the time required for "ripening" each. *Woolner & Co. et al. v. Remmich et al.,* 170 Fed., 662; *U. S. v.* 68 *Cases of Syrup,* 172 Fed., 781. Whether two food products composed of sugar house molasses, corn syrup, and sulphur dioxide and labeled "Sugar Glen Molasses" and "Buno Molasses" respectively and each label stating of what the molasses was composed, the court based its decision on the chemical analysis of pure molasses and the article in question, and held that there was no misbranding. *U. S. v.* 779 *Cases of Molasses,* 174 Fed., 325; *U. S. v. Morgan,* 181 Fed., 587. Where an article was put on the market as "Hudson's Extract of Vanilla", not having a well known trade meaning or any other indication of what the article was composed, it was held a clear case of misbranding. *Hudson Mfg. Co. v. U. S.,* 192 Fed., 920. Where an article was sold as "London Dry Gin", and it referred to a well known kind of gin and was not intended to represent that it was a foreign product, it was held that there was no misbranding. *U. S. v.* 36 *Bottles of London Dry Gin,* 205 Fed., 111. In a very recent case the court went farther than heretofore in endeavoring to enforce the act. Green in New

York ordered of H. H. Shufeltd & Co. in Illinois five cases of champagne. The company shipped a drink composed of a low grade white wine charged with gas, and put in bottles of the same shape, size, and kind of seal and shipped them in the regular champagne cases, but nowhere on either bottles or case did the word "Champagne" appear. It was held that although the word "Champagne" did not appear, the imitation being so near like the regular champagne that a person would be readily deceived, there was a misbranding and the goods were subject to confiscation. *U. S. v.* 5 *Cases of Champagne,* 205 Fed., 817. From the foregoing decisions, the holding of the principal case is sound. Where an article of food or a food product has, by long continued use, custom, trade, become generally recognized and accepted as a standard for quality and purity, and any other article of food or food product, purporting to be the same but differing materially in quality and purity from the accepted standard, is a misbranding.

HIGHWAYS—LIABILITY FOR INJURIES—NEGLIGENCE.—NICHOLSON v. TOWN OF STILLWATER, 101 N. E. (N. Y.), 858.—In an action for damages for the death of plaintiff's intestate resulting from the capsizal of the automobile which he was driving within the defendant town, the capsizal being due to driving so near an unguarded embankment to pass a team that the automobile went over the embankment, *held,* the town was not liable unless its commissioners would have been liable for negligence because of not foreseeing the danger of such an accident as happened and guarding against it by a barrier or other appropriate means.

At common law towns were not liable for injuries caused by defective highways but have been made so by statute. *Beardsley v. City of Hartford,* 50 Conn., 529. Lack of an effective barrier where there is a dangerous embankment is a defect in the highway. *Roth v. Highways Commission,* 115 Md., 469; *Hudson v. Inhabitants of Marlborough,* 154 Mass., 218. Towns are liable for injuries caused by such defect. *Drew v. Town of Sutton,* 55 Vt., 586; *Hayden v. Attleborough,* 7 Gray (Mass.), 338. It is the duty of township supervisors to maintain a guard-rail against gulleys and declivities when they become dangerous on account of their proximity to the highway. *Cobb v. Bradford Tp.,* 81 At. (Penn.), 199. Failure to erect such a barrier is negligence, for the results of which the town is liable, *Wood v. Town of Gilboa,* 76 Hun., 175., though the commissioners may not be liable for negligence. *Glazier v. Town of Hebron,* 62 Hun., 137. The town is liable though the commissioners are not the agents of the town. *Hardy v. Keane,* 52 N. H., 370. In New York the liability of the town depends upon the negligence of the highway commissioners. *Maxim v. Town of Champion,* 4 N. Y. S., 515; *Wallace v. Town of New Albion,* 105 N. Y. S., 524. The sounder view is not in accord with the New York doctrine nor with the strict statutory liability prevalent in New England. On principle, the sounder view is, where a given *duty* is a corporate one and is absolute and not discretionary, and is one owing to the plaintiff, the corporation is liable for damages resulting to individuals by its neglect to perform its duty. Dillon, Municipal Corporations, vol. 4, sec. 1665.

INTOXICATING LIQUORS—LICENSE—ELECTION—"MAJORITY OF VOTES CAST."—MCLAUGHLIN V. VILLAGE OF RUSH CITY, 142 N. W. (MINN.), 713. —*Held,* that in determining under section 1533, Rev. Laws 1905, whether a majority of the votes cast at an election are in favor of or against license, all the ballots cast, including those which are blank, as well as those so indefinitely marked that the intention of the voter cannot be determined, must be included in the total vote.

This decision concerns ballots legally cast but improperly marked and not ballots illegally cast but properly marked. The doctrine of this case has been followed in South Dakota, Ohio, and Minnesota. *State ex rel. Clark, Atty. Gen. v. Stakke et al.,* 22 S. D., 228; *Treat v. Morris,* 25 S. D., 15; *Engart v. Trustees of Hanover Township,* 25 Ohio St., 618; *Lodoen v. City of Warren,* 118 Minn., 371. In *Engart v. Trustees of Hanover Township,* a vote at a regular election was taken on the question of levying a special tax authorized by statute. The number of ballots cast on the tax question was less than the number cast for town officers. The court held that a majority of the total number of ballots cast and not a majority of the number of ballots cast on the particular question was necessary for decision. Michigan appears to have adopted a different rule. At a special election on the question of license, seventy-one of the ballots were rejected because they were either blank or defective in marking. *Held,* that blank or rejected ballots must be deducted from the total vote, and that a majority of those remaining was sufficient to decide. *Battle Creek Brewing Co. v. Board of Sup'rs of Calhoun Co.,* 166 Mich., 52, two judges *dissenting; Atty. Gen. v. Board of Sup'rs of Genesee Co.,* 166 Mich., 61; *Wightman v. Village of Tecumsch,* 157 Mich., 326. These cases may be differentiated from the South Dakota and Minnesota cases on the ground that it was a special election in the former and a regular election in the latter. This does not appear to be a sound reason for distinction. On principle the decision of the principal case is sound. There seems to be no ground for holding a ballot imperfectly marked or not marked at all when cast by a legally authorized voter at any election, regular or special, and it should not be included in the total vote cast unless the statute expressly provides the contrary. *Marion County v. Robert Winkley,* 29 Kan., 36.

LANDLORD AND TENANT—INJURIES FROM DEFECTS TO GUESTS OF LESSEE —NOTICE OF DEFECT.—GLYNN ET AL. V. LYCEUM THEATRE CO., 87 ATL. (CONN.), 796.—*Held,* that in an action against the lessor of a theatre for injury to a patron resulting from a defective seat, where there was no evidence of knowledge of the defect on the part of the lessor, and there was likewise no evidence of notice, or facts from which notice would be implied, on the part of the lessee, the lessor could not be held liable by virtue of his covenant to keep the premises in repair.

A landlord is never bound to keep the leased premises in repair, in the absence of a covenant to do so, since in contemplation of law the tenant is considered as purchaser of the premises from the landlord for the

period covered by the lease. *Galvin v. Beals,* 187 Mass., 250; *Akerly v. White,* 58 Hun. (N. Y.), 362; *Viterbo v. Friedlander,* 120 U. S., 707. There is a distinction drawn between covenants to keep the premises in repair, and those in which the lessor agrees to keep them in a safe condition. See *Miles v. Janvrin,* 196 Mass., 431, 438. In covenants of the latter sort, no notice to the lessor is necessary. In the former, notice is necessary before the lessor is in default. *Rumberg v. Cutler,* 86 Conn., 8, 10; *Miles v. Janvrin, supra.* After notice, the lessor's liability rests on his negligent failure to perform his contractual duty, or the performing of it in a negligent manner. *Dustin v. Curtiss,* 74 N. H., 266, 269. And breach of duty by the lessor cannot be predicated on the mere failure to perform. *Marley v. Wheelright,* 172 Mass., 532, 533; *Towne v. Thompson,* 68 N. H., 317. In cases like the present there is no such bailment of the person into the hands of the lesse, which will make him liable as a common carrier. *Williams v. Park Ass'n,* 128 Iowa, 32, 38; *Hart v. Wash. Park,* 157 Ill., 9. Hence the lessee was not an insurer of the safety of the theatre seats, but only assumed the duty of exercising reasonable care to have the seats in a reasonable safe condition for its guests. *Turgeon v. Conn. Co.,* 84 Conn., 538; *Scofield v. Wood,* 170 Mass., 415; *Nephler v. Woodward,* 200 Mo., 179. In some jurisdictions it is held that the covenant of the landlord does not inure to the benefit of a stranger to the contract, and that no action will lie in tort for a breach of it. *Frank v. Mandel,* 76 N. Y. App. Div., 413; *Davis v. Smith,* 26 R. I., 129. But if the third party is in the premises at the invitation of the lessor, he can take advantage of such a contract to repair by the lessor. *Clyne v. Helmer,* 61 N. J. L., 358, 368. But other courts hold the lessor on his covenant, if he negligently makes or fails to make repairs, to avoid circuity of action. *Boyce v. Tallerman,* 183 Ill., 115; *City of Lowell v. Spaulding,* 4 Cush. (Mass.), 277; *Cheetham v. Hampson,* 4 Durn. & East., 318. The principal case, holding that the lessor is not liable on his covenant unless he has knowledge of the necessity of repairs, or has received notice from the tenant, is clearly in harmony with the weight of authority.

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.—MITTLESTEADT V. JOHNSON, 135 PAC., 214.—*Held,* the presumption is that an absolute deed, with or without a contemporaneous agreement for a resale, there being nothing on the face of the papers to show a contrary intent, is what it appears to be, and he who asserts that it should be given a contrary construction must show by clear and convincing evidence that a mortgage and not a sale with a right to repurchase was intended.

The weight of authority is in accord with the case under discussion and holds that he who seeks to prove a deed absolute on its face to be a mortgage must prove the same by clear and convincing evidence. *Cadman v. Peter,* 118 U. S., 73; *Coyle v. Davis,* 116 U. S., 73; *Horbach v. Hill,* 112 U. S., 144; *Reeves v. Abercrombie,* 108 Ala., 535; *Williams v. Williams* 180 Ill., 361; *Bowery Savings Bank v. Belt,* 60 Hun. (N. Y.), 57; *Snavely v. Pickle,* 29 Gratt. (Va.), 27. The rule in England is the same. *Townshend v. Stangroom,* 6 Ves. Jr., 328. When evidence is introduced it is

a matter for the jury to determine the intent of the parties, *Bogk v. Gessert,* 149 U. S., 17; *Clup v. Wooten,* 29 Miss., 503; *Morris v. Budlong,* 78 N. Y., 543, but in the absence of evidence it is a question of law for the court to determine from the writing alone, *Kieth v. Catchings,* 64 Ga., 773; *Munro v. Watson,* 6 Grant Ch. U. C., 60; *Beale v. Ryan,* 40 Tex., 399, and if nothing so tending appears on the face it will not be construed a mortgage, *Reynolds v. Reynolds,* 42 Wash., 107; *Runyon's Adm'r v. Pogue,* 19 Ky. Law, 940. Some cases even hold that conclusive evidence is necessary to establish a mortgage, *Lincoln v. Wright,* 5 Tenn., 1142; *Woods v. Jensen,* 130 Cal., 205; *Kibby v. Harsh,* 61 Iowa, 196, others incline to the view that a mere preponderance of evidence is enough, *Wallace v. Berry,* 83 Tex., 328; *Miller v. Yturria,* 69 Tex., 549; *Kellogg v. Northrup,* 115 Mich., 327, but some jurisdictions do not accept this rule if there is a substantial conflict in the testimony, *Perot v. Cooper,* 17 Colo., 80; *Howe v. Fisher,* 2 Barb. Ch., 559. There are also states which hold, contrary to the principal case, that when a deed absolute on its face is shown to be either a sale with a right to redeem or a mortgage, a less degree of proof is required for the latter than the former. *Cosby v. Buchanan,* 81 Ala., 574; *Michell v. Wellman,* 80 Ala., 16; *Howland v. Blake,* 97 U. S., 624. In Georgia it was held that on a bill in equity seeking to foreclose on a deed absolute on its face as a mortgage, that an instruction that it must be shown by clear and convincing to be a mortgage is erroneous, *DeLaigle v. Denham,* 65 Ga., 482, and in West Virginia that where the parol evidence leaves it in doubt as to whether the paper is a mortgage or an absolute deed, the court will incline to construe it a mortgage. *Gilchrist v. Beswick,* 33 W. Va., 168.

MORTGAGES—ANTECEDENT DEBT—BONA FIDE PURCHASER FOR VALUE.—HUNT V. HUNT, 134 PAC. (ORE.), 1180.—*Held,* that an employer who accepted a mortgage from an employee for the amount embezzled by the latter and extended the time of payment of such amount six years, was a *bona fide* purchaser for value as against the employee's wife who was induced to join in the mortgage by her husband's false representations, since extending the time for the payment of an antecedent debt is sufficient to constitute a mortgagee a purchaser for a valuable consideration.

The general rule is that an antecedent debt is good consideration to sustain a mortgage given therefor as security, *Usina v. Usina,* 58 Ga., 178; *Hewitt v. Powers,* 84 Ind., 295; *Laylin v. Knox,* 41 Mich., 40; *Rea v. Wilson,* 112 Iowa, 517, and the weight of authority accords with the principal case in that one who joins a new consideration to the old debt is regarded as a *bona fide* purchaser for value, *Whitfield v. Riddle,* 78 Ala., 99; *Cook v. Parham,* 63 Ala., 456; *Douglas v. Miller,* 102 N. Y. App. Div., 94; *Branch v. Griffin,* 99 N. C., 173, but the mortgagee must be divested of some right or surrender some security to free himself from equities. *Salisbury Savings Society v. Cutting,* 50 Conn., 113; *Wells v. Morrow,* 38 Ala., 125; *Smith v. Moore,* 112 Iowa, 60; *Breed v. Auburn National Bank,* 171 N. Y., 648; *Small v. Small,* 34 N. C., 16; *People's Savings Bank v. Bates,* 120 U. S., 556. As in the case under discussion, the extension of time is, in

most jurisdictions, held a good new consideration, *Randolph v. Webb,* 116 Ala., 135; *Gilchrist v. Cough,* 63 Ind., 576; *Cary v. White,* 7 Lans. N. Y., 1; *Missouri Broom Mfg. Co. v. Guyon,* 115 Fed., 112, but the fact, merely, that the taking of the mortgage may extend the time, is not sufficient, *Ingenhuetti v. Hunt,* 15 Tex. Civ. App., 248, nor is the fact that a note payable one day after date was given for an ascertained balance cotemperaneously with a mortgage, *Sweeney v. Bixler,* 69 Ala., 539, and it has been held that if the debt was evidenced by several notes the taking of a new note for the aggregate amount is not a parting with security. *Bisembarke v. Ramsey,* 53 Ind., 499. In *Lonsdale v. Brown,* 4 Wash. C. C., 148, it was said by Mr. Justice Washington that if the forbearance is for a short time it will not be a good consideration but otherwise if it is for a reasonable or indefinite time, referring to Cro. Eliz., 19. In New York extending time of payment is valuable consideration but mere taking of collateral security on time is not. *Cary v. White,* 52 N. Y., 138; *Youngs v. Lee,* 12 N. Y., 551; *Padgett v. Lawrence,* 10 Paige, 170. In other states the indorsee of a bill of exchange, taken as collateral security for an antecedent debt is *prima facie* a holder for value and entitled to recover as against an accommodation acceptor, *Atkinson v. Brooks,* 26 Vt., 569; *Swift v. Tyson,* 16 Pet., 1; *Holmes v. Smith,* 16 Me., 177, but in this connection Pomeroy remarks that, though it has been settled by the law merchant that the transferee of negotiable paper taken for an antecedent debt, may be *bona fide* holder for value, this can have no application to the matter of valuable consideration in the equitable doctrine of *bona fide* purchase. Pom. Eq. Jur. 2, par. 748. There is, indeed, some conflict in the authorities as to whether there must be a surrendering or cancelling of some written paper or security constituting an absolute extinguishment to make the obligee a holder for value, *Soule v. Shotwell,* 52 Miss., 236; *King v. Ford,* 9 Kan., 17; *Love v. Taylor,* 26 Miss., 567, or whether a mere forbearance is enough, *Bank v. Godfrey,* 23 Ill., 579; *Donaldson v. Bank of Cape Fear,* 1 Dev. N. C., 606. Some states go even further than the general rule in asserting that the mere taking of a mortgage for an antecedent debt without a new consideration will make the mortgagee a *bona fide* purchaser for value, *Babcock v. Jordan,* 24 Ind., 14; *Frey v. Clifford,* 44 Cal., 335, contrary to the doctrine that something of value must be parted with, *Mingus v. Condit,* 23 N. J. Eq., 313; *Clark v. Flint,* 22 Pick., 231; *R. R. Co. v. Barker,* 5 Casey (Pa.), 160. On principle, the cases holding this latter view would seem to enunciate the better rule. It is impossible to see why an agreement to forbear from suit should constitute one a purchaser for a valuable consideration, if forbearance itself, in taking the mortgage as security and refraining from the institution of proceedings to enforce the debt does not. The mortgagee after such action should stand in no worse position as to his rights against those in privity with the mortgagor than if he had made an agreement not to sue. It is also illogical to hold that the shortness of time of forbearance can have any relation to the question of value, for the consideration, though the forbearance be for ever so short a time, is still present.

PLEADING—ANSWER—INCONSISTENT PLEAS.—KERR GLASS MFG. CO. v. AMERICUS GROCERY CO., 79 S. E. (GA.), 381.—*Held,* that a defendant may

in different paragraphs of his answer file contradictory or inconsistent pleas.

At common law a defendant could not file two pleas to the same court. 1 *Chitty on Pleading* (16th Am. ed.), 586. This condition continued until the statute 4 & 5 *Anne*, c. 16, pars. 4-5, which allowed a party to plead as many defences as he had to the same count by leave of the court. In the United States the general rule is that a defendant may plead as many defences as he has although they may appear to be inconsistent and contradictory. *Parks v. McClellan*, 44 N. J. L., 552. In some code states it is provided by statute that inconsistent pleas may be pleaded. *Rudd v. Dewey*, 121 Iowa, 454. And some cases hold it as a matter of general law. *Societa, etc. v. Sulzer*, 138 N. Y., 468; *Wall v. Mines*, 130 Cal., 27. Other codes expressly forbid it. *Rooney v. Tierney*, 82 Ky., 253. While other courts forbid it in the absence of codal authority. *Rees v. Storms*, 101 Minn., 381. The rule is one on which there is a great deal of conflict. It seems that sound reason forbids the filing of two pleas together, the proving of one of which necessarily disproves the other. (See *Seattle Nat'l Bank v. Carter*, 13 Wash., 281.) But the general rule is that a plea in denial and a plea in confession and avoidance may be filed together. *Fudge v. Marquell*, 164 Ind., 447. Some courts have gone to extremes to justify such pleas. In the case of *Rudd v. Dewey, supra*, the court attempts to justify three defences made to an action for having negligently broken a borrowed kettle. The defences were, first, that the defendant had never borrowed the kettle; second, that the kettle was broken when he borrowed it; and third, that he had returned it in sound condition. The court justified its attitude by saying that the borrowing might have been done by a servant of the defendant who had left his employ, in which case it might reasonably be said that the defendant could not find out which defence would avail him, so he is allowed to file all pleas that could possibly cover the action of the servant. Whether it be logical or not, the great weight of authority accords with the principal case in holding that contradictory or inconsistent pleas may be filed to the same count if each plea is put in a separate paragraph.