RECENT CASES

BILLS AND NOTES—NOTICE OF EXECUTORY CONSIDERATION—CONDITIONS IN CONTEMPORANEOUS DOCUMENTS.—SUMTER CO. STATE BANK V. HAYS ET AL., 67 So. (FLA.) 109.—*Held,* that an indorsee of a negotiable note given for a stock subscription, who takes with knowledge of a contemporaneous document setting forth an executory consideration, with a provision for cancellation of the subscription on a specified contingency, is not a holder in due course.

By the general law of bilateral contracts an executory promise would generally be construed as conditional upon a substantial performance of the executory consideration up to date. *Kingston v. Preston,* 2 Doug. 689. This construction may of course be obviated by an unequivocal expression of intention to the contrary. By the great weight of authority a person affixing his signature to a negotiable instrument indicates *prima facie* his intention to make a promise unconditioned upon performance on the other side. *Arthur v. Hart,* 17 How. 6; *Davis v. McCready,* 17 N. Y. 230; *Chapman v. Eddy,* 13 Vt. 205. Especially, though not exclusively, is this true when performance of the reciprocal agreement is not to be complete until after maturity. *Morrison v. Hart,* 122 Ga. 660. *A fortiori,* when performance is entirely postponed to maturity. *Hudson v. Best,* 104 Ga. 131; *Nat. Bank v. Floss,* 38 Ore. 68. This has been carried so far as to exclude the defense of non-performance of executory consideration even between immediate parties. *Waterhouse v. Kendall,* 11 Cush. (Mass.) 128; *Chapman v. Eddy, supra.* But such a defense would in such case generally be admitted as a total or partial failure of consideration. *Kelly v. Webb,* 27 Tex. 368. In accordance with these views the mention of the executory consideration on the face of the instrument does not render the promise conditional, thereby destroying the negotiability of the paper. *Siegel v. Trust & Savings Bank,* 131 Ill. 569. *Contra, Howard v. Kimball,* 65 N. C. 178. However, a contemporaneous written agreement, either in terms or by identity of subject-matter referring to a note, and expressly imposing a condition thereto, is binding between the original parties. *Rogers v. Smith,* 47 N. Y. 324; *Machine Co. v. Wood,* 90 Me. 516; *Hunt v. Livemore,* 5 Pick. (Mass.) 395. By the better view a purchaser with knowledge of the terms of such agreement is also bound by the conditions. *Thomas v. Paige,* 3 McLean 167; *Sutton v. Beckwith,* 68 Mich. 303; *Hill v. Huntress,* 43 N. H. 480 (indorsed after maturity). *Contra, Jennings v. Todd,* 118 Mo. 296 (note to be void in a certain contingency); *Adams v. Smith,* 35 Me. 324 (payment conditional); *Black v. First Nat. Bank,* 96 Md. 399 (condition, with agreement not to negotiate). In so far as these conditions rendered further negotiation a breach of faith, the cases last cited cannot be the law under the Act, Secs. 52 and 55. However, courts tend strongly to construe conditions in stock subscriptions as subsequent and not precedent. *Swartout v. R. R. Co.,* 24 Mich. 389; *Chamberlain v. R. R. Co.,* 150 L. St. 225. And extreme reluctance is shown in allowing conditions to negotiable instruments, even when

express reference is made to them. *Atwood v. Lewis,* 6 Mo. 392. Much more, it should be expected, where, as in the principal case, no such reference is made. On the ground chosen, notice of executory consideration, the principal case is contrary to the overwhelming weight of authority.

BILLS AND NOTES—MAKERS WHO ARE LIABLE AS SUCH.—NEW ENGLAND ELECTRIC COMPANY V. SHOAK ET AL., 145 PAC. (COLO.) 1002.—*Held,* where a note for a corporate obligation, bearing the corporate seal, and reciting that, "I, we (and each of us) promise to pay," etc., was signed first by the corporation and then by the defendants, who appended to their names the titles, "President" and "Secretary," that defendants are not personally liable on the note.

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." The Negotiable Instruments Law, Sec. 20. This does not change the common-law rule. *Metcalfe v. Williams,* 104 U. S. 93; *Megowan v. Peterson,* 173 N. Y. 1. The question in each case is whether the words added are words of description or words of indication. *Brockway v. Allen,* 17 Wend. (N. Y.) 40; *Bank v. Ariss,* 123 Pac. (Wash.) 592. When the principal does not appear as a co-signer, the presumption is that the added words are *descriptio personae. Brockway v. Allen, supra; Schumacher v. Dolan,* 134 N. W. (Iowa) 624. But parol evidence is admissible to show that, as against the plaintiff, the words *indicated* a principal. *Decowski v. Grabarski,* 181 Ill. App. 279. The words do not constitute notice. *Bank v. Wallis,* 150 N. Y. 455. Therefore, as against a holder without actual knowledge of the agency the words are merely *descriptio personae,* and parol evidence of the agency is inadmissible. *Megowan v. Peterson, supra; Bank v. Love,* 13 App. Div. (N. Y.) 561. Where the name of the principal appears above that of the alleged agent, the instrument is *prima facie* that of the principal. *Aungst v. Creque,* 72 Oh. St. 551; *Thompson v. Hasselman,* 131 Ill. App. 257. Similarly, when the seal of the corporation appears on the instrument. *Reed v. Fleming,* 209 Ill. 390. In such case, even where the agent added no designating words to his name, parol evidence was admitted to free him from liability, against the payee, in *Dunbar Company v. Martin,* 103 N. Y. Supp. 91; against a holder in due course, in *Bank v. Mariner,* 129 Wis. 544. The use of the pronouns "I," "we," and "I or we," is immaterial in determining the liability of the agent. *Wilson v. Fite,* 46 S. W. (Tenn.) 1056; *Williams v. Harris,* 198 Ill. 501.

BROKERS—COMPENSATION—ACTING FOR BOTH PARTIES.—SCARBOROUGH & DARNELL V. STAGNER, 171 S. W. (TEX.) 1049.—*Held,* a broker may recover a commission from his principal, a vendor, although he has employed

another to act for him in executing the principal's business, and that other has, without the knowledge of the vendor, also represented the purchaser in the transaction.

If an agent of a vendor is, unknown to that vendor, also agent for the purchaser, he may not collect a commission from the vendor. *Moore v. Kelley,* 162 S. W. (Tex.) 1034; *Walker v. Osgood,* 98 Mass. 348. In fact, it has been held that under these circumstances he can collect from neither. *Bell v. McConnell,* 37 Oh. St. 396; *Rice v. Wood,* 113 Mass. 133. Even though the party sought to be charged knew of the double agency, provided the other principal did not. *Chapman v. Currie,* 51 Mo. App. 40; *Neal v. Adkins,* 145 S. W. (Tex.) 264. *Contra, Jauman v. McCusick,* 166 Cal. 517. The fact that the sale was advantageous to the principal is immaterial. *Cannell v. Smith,* 142 Pa. St. 25. But he may act for both parties when they have so consented. *Jarvis v. Schaefer,* 105 N. Y. 289; *Barry v. Schmidt,* 57 Wis. 172. Also when he acts merely as middleman to bring the parties together, although neither of them knew of his agency for the other. *Ranney v. Donovan,* 78 Mich. 318; *Rupp v. Sampson,* 16 Gray (Mass.) 398. The reason advanced for the general doctrine that one agent may not act for two parties whose interests conflict is that the temptations to defraud are so great that it is contrary to public policy to allow it; the law will presume fraud. As to the principal case, if there is anything in the maxim that the acts of an agent are the acts of his principal (Story on Agency, ninth ed., 2), it seems clear that the broker, plaintiff, who has employed one who is also acting for the other side, has himself acted for both sides, and is therefore entitled to no commission, and the defendant should be allowed to take advantage of this in a suit for a commission.

CHATTEL MORTGAGES—INVALIDITY AS TO CREDITORS—POSSESSION BY MORTGAGOR.—BAILLARGEON V. DUMONLIN, 151 N. Y. SUPP. 112.—*Held,* that a chattel mortgage on a stock of merchandise remaining in the possession of the mortgagor, who continues in business, disposing of the stock and replacing stock and carrying on trade with knowledge of the mortgagee, is fraudulent as against creditors.

A mortgage void as to creditors and purchasers may be good as between the parties. *Bagley v. Harmon,* 91 Mo. App. 22. At common law, the delivery or change of possession, either actual or constructive, was essential to the validity of a chattel mortgage as against third persons. *Goodnow v. Dunn,* 21 Me. 86; *Russell v. Fillmore,* 15 Vt. 130. Practically all the states now permit the recording of chattel mortgages and in general consider it as the equivalent of change of possession of the property. *Berson v. Nunan,* 63 Cal. 550; *Holman v. Doran,* 56 Ind. 358. Although the mortgage is duly recorded, in a few jurisdictions a legal presumption of fraud arises from the continued possession of the property by the mortgagor. *Smith v. Acker,* 23 Wend. 653; *Severance v. Leavitt,* 16 Nebr. 439. With regard to the doctrine of the principal case, the states are about equally divided and those contra hold that the power given to a mortgagor in a mortgage of

a stock of goods to sell the goods in the regular course of trade, does not of itself avoid the mortgage. *Louden v. Vinton,* 108 Mich. 313; *Fletcher v. Powers,* 131 Mass. 333. Those cases in harmony with the principal case make a mortgage void as to creditors when the mortgagor remains in possession disposing of the mortgaged goods in the usual course of business without accounting in any manner to the mortgagee. *Gee v. Van Natta Lynds Drug Co.,* 105 Mo. App. 27; *Gillespie v. McClaskie,* 160 Ala. 289. And in the latter cases the recording of the mortgage cannot make it valid, for the recording of a mortgage is merely constructive notice of its terms and when the mortgage includes the right of disposition for the use and benefit of the mortgagor, it is deemed fraudulent in law. *Zartman v. First National Bank,* 189 N. Y. 267. But where a power of sale contained in a mortgage covers only a part of the property subject thereto, it is generally held that though mortgage is void in part, it is valid as to the property not included in the power of sale. *Cook v. Halsell,* 65 Tex. 1. It should be noted that the holding of the principal case does not apply when mortgage stipulates that the mortgagor is required to account to the mortgagee for the proceeds of the sale which proceeds are to be applied in payment of the debt. *Skilton v. Codington,* 185 N. Y. 80; *Dunham v. Stevens,* 160 Mo. 95; *Stevens v. Curran,* 28 Mont. 366.

CONTRACTS—CONSIDERATION—LEGAL DUTY TO THIRD PERSON.—POETKER v. LOWRY, 144 PAC. (CAL.) 981.—*Held,* that a promise to perform a preëxisting duty to a third person is no consideration for a second promise.

It is agreed that the performance of, or the promise to perform, an existing legal duty to the promisor is no consideration to support a promise. *Lingenfelder v. Brewing Co.,* 103 Mo. 578. The minority of cases which seem to override this rule, do so upon the theory of an abrogation in some manner of the previous contract. *Munroe v. Perkins,* 9 Pick. (Mass.) 298. Or upon the erroneous theory of a surrender by the promisee of the alleged alternative privilege of incurring damages rather than performing in specie. *Lattimore v. Harsen,* 14 Johns. (N. Y.) 330. The rule is generally stated as applying also to legal duties to persons other than the promisor. *Kenigsberger v. Wingate,* 31 Tex. 42; *Sherwin v. Brigham,* 39 Oh. St. 137; *Johnson v. Seller,* 33 Ala. 265. In the case of non-contractual duties, it has not been necessary so to decide, as the illegal character of the consideration would be an all-sufficient ground. Accordingly, in such cases, courts often proceed upon the illegality, rather than upon the absence, of consideration. *Voorhees v. Reed,* 17 Ill. App. 21; *Warner v. Grace,* 14 Minn. 487. And many of the decisions in apparent accord with the principal case might well have gone upon the ground of a preëxisting legal obligation to the promisor himself. *Arend v. Smith,* 151 N. Y. 502; *Drill Co. v. Ashhurst,* 148 Ill. 115. The majority doctrine has, of course, no application in the case of an absolute undertaking to perform what one was only conditionally obligated to a third person to do. *Green v. Kelly,* 64 Vt. 309. Several deviations from the prevalent

doctrine are to be noted. First, a promise to perform a preëxisting contractual obligation to a third person, as distinguished from performance itself, has been admitted as sufficient consideration. *Merrick v. Giddings,* 1 Mack. (D. C.) 394. Second, where the second promisor has a direct interest in the performance of the original undertaking, such performance or promise to perform is sufficient consideration. *Donnelly v. Newbold,* 94 Md. 220; *Hirsch v. Carpet Co.,* 82 Ill. App. 234; *Hamer v. Decatur Co.,* 98 Ala. 461. Third, in a few jurisdictions the doctrine of the principal case has been repudiated altogether. *Abbott v. Doane,* 163 Mass. 433; *Scotson v. Pegg,* 6 H. & N. 295; *Champlain Co. v. O'Brien,* 117 Fed. 271; *Wilhelm v. Foss,* 118 Mich. 106 (point not discussed). See *Day v. Gardner,* 42 N. J. Eq. 199. On principle there seems no reason why either a performance, or a promise to perform, should not be a sufficient, if legal, consideration, if it be something which the second promisor wished to procure in return for his promise, and to which he had previously no legal right, whatever may have been the previous rights of third parties thereto.

CONVERSION—CUTTING TIMBER—MEASURE OF DAMAGES.—SIBELLE V. EASTHAM, 67 So. (LA.) 364.—*Held,* that one who cuts timber on the land of another in good faith, believing it to be his own land, is liable for the value of the timber before the cutting, and not as manufactured into lumber.

When property is severed from the freehold and converted by the defendant, the prevailing view is that if the defendant acted in good faith, the measure of damages is the value of the property as it was just before the wrongful act of the defendant. *Forsyth v. Wells,* 41 Pa. 291; *Bond v. Griffen,* 74 Miss. 599; *U. S. v. McKee,* 128 Fed. 1002; *Wood v. Morewood,* 3 Q. B. 440. Certain American courts, however, have allowed recovery of the whole value of the property, after its severance. In the case of *Brown v. Sax,* 7 Cow. (N. Y.) 95, Sutherland J., *dissenting,* the facts were the same as in the principal case, and the plaintiff recovered the value of the boards manufactured from the lumber. In the following cases the measure of damages was held to be the value of the logs just after they were felled. *White v. Yawkey,* 108 Ala. 270; *Moody v. Whitney,* 38 Me. 174; *U. S. v. St. Anthony R. Co.,* 192 U. S. 524. Where the defendant knowingly converted property severed from the plaintiff's land, the measure of damages is everywhere held to be the value of the property at the time of the conversion, that is, after the severance. *Meloon v. Read,* 73 N. H. 153; *Foster v. Weaver,* 118 Pa. 42; *Wooden Ware Co. v. U. S.,* 106 U. S. 432. The rule of the principal case seems the just view, since it restricts the plaintiff to compensation for his actual loss, where the defendant has acted in good faith.

CRIMINAL LAW—ASSAULT AND BATTERY—EXCESSIVE SPEED OF AUTOMOBILE—STATE V. SCHUTTE, 93 ATL. (N. J.) 112.—*Held,* that a conviction for assault and battery was sustained by proof that the defendant ran

his automobile at a rate of speed which exceeded that allowed by law, which endangered the public safety, and which actually resulted in the injury of a pedestrian.

An assault and battery may be committed by wilfully hitting another with an automobile. *Schneider v. State,* 104 N. E. (Ind.) 69. Gross negligence or the wilful, wanton or reckless disregard of the safety of others is a basis for imputing to the negligent person the criminal intent which is the essential ingredient of crime. *Thomas v. The People,* 2 Colo. App. 513. So, persons who recklessly and negligently, or wantonly and wilfully, drive a horse and team upon the highway at a dangerous rate of speed are criminally liable for the results thereof. *Belk et al. v. The People,* 125 Ill. 584; *Rex v. Walker,* 1 C. P. 320; *Rex v. Timmins,* 7 C. & P. 499. A verdict of guilty in an action for assault and battery will be sustained where there is evidence of reckless speed and reckless running of an automobile. *Commonwealth v. Bergdoll,* 55 Pa. Sup. Ct. 186. If the injury occasioned by the collision results in death, the culpable party may be justly convicted of manslaughter, if the collision was caused directly by such gross carelessness as to indicate an indifference to consequences, or by the commission of an unlawful act. *State v. Goetz,* 83 Conn. 437; *Luther v. State,* 98 N. E. (Ind.) 640; *State v. Watson,* 216 Mo. 420; *People v. Danagh,* 141 N. Y. App. 408. Would the mere violation of a statute regulating speed—the commission of an unlawful act—of itself supply the criminal intent necessary? In *Commonwealth v. Adams,* 114 Mass. 313, it was held that one driving a horse at an unlawful rate was not guilty of criminal assault and battery, as the act was merely *malum prohibitum* and not *malum in se.* This same distinction in not implying criminal intent from an act merely *malum prohibitum* is recognized in 1 East. P. C. 260; 1 Bishop's Criminal Law 204. In *Commonwealth v. Hawkins,* 157 Mass. 551, it was held that the fact that the defendant discharged a revolver in violation of a city ordinance was proper evidence for the consideration of the jury on the question of negligence, inasmuch as recklessness or gross carelessness lay at the foundation of the action, but would not of itself be sufficient to impute a criminal intent to the defendant. Likewise in *People v. Scanlon,* 132 N. Y. App. Div. 528, the court says, "The authorities hold that driving at a rate prohibited by law is evidence of negligence." In such cases as those above the defendant was violating some statute to be sure, but quite apart from the statute his manner was criminally negligent. As is pointed out in *Schultz v. State,* 130 N. W. (Neb.) 972, none of the cases are based solely on the violation of the statute but on the negligent, reckless, careless, and dangerous driving of the machine. It seems that criminal intent will not be imputed from the violation of a speed ordinance *ipso facto,* but that such violation would be strong evidence of a wilful recklessness amounting to criminal negligence.

ELECTRICITY—ACTION FOR INJURY—RES IPSA LOQUITUR.—CAIN V. SOUTHERN MASSACHUSETTS TELEPHONE CO., 107 N. E. (MASS.) 380.—*Held,* In an action for injury by electric shock while the plaintiff was using a telephone, the doctrine of *res ipsa loquitur* applies.

The doctrine of *res ipsa loquitur* is applied where an accident occurs which is of such a nature that the natural and reasonable inference is that it would not have happened in the ordinary course but for the negligence of the defendant, or when it appears that the facts are so far within the defendant's exclusive knowledge that it is reasonable to call upon him for an explanation of the accident. *Keasbey on Electric Wires,* Sec. 271; *Chaperon v. Portland Electric Co.,* 41 Ore. 39; *St. Louis v. Bay State Street Railway Co.,* 216 Mass. 255. Where a person is lawfully using a public highway in the usual way, and is injured by an electric shock, these facts establish a *prima facie* case in his favor against the company furnishing the electricity. *Snyder v. Wheeling Electrical Co.,* 43 W. Va. 661; *Boyd v. Portland Electric Co.,* 40 Ore. 126; *Clarke v. Railroad Co.,* 41 N. Y. Supp. 78. The doctrine of *res ipsa loquitur* applies, as in the principal case, where the plaintiff is injured while using an electrical device on his own premises, where the wires and appliances are under the control and management of the defendant. *Reynolds v. Narragansett Electric Lighting Co.,* 26 R. I. 457; *Alexander v. Nanticoke Light Co.,* 209 Pa. 571; *Union Light, Heat & Power Co. v. Lakeman,* 156 Ky. 33. But the doctrine does not apply where the wires and appliances are under the control of the plaintiff or some one other than the defendant. *Peters v. Lynchburg Light and Traction Co.,* 108 Va. 333; *Hill v. Pacific Gas & Electric Co.,* 136 Pac. (Cal.) 492; *Harter v. Colfax Light & Power Co.,* 124 Iowa 500. (*Contra, Augusta Railway & Electric Co. v. Beagles,* 12 Ga. App. 849.) Courts have refused to apply the doctrine of *res ipsa loquitur* where the evidence of the plaintiff shows that the shock received from the electrical appliance was probably caused by an act of God. *Rocap v. Bell Telephone Co.,* 230 Pa. 597; *Aument v. Pennsylvania Telephone Co.,* 28 Pa. Super. Ct. 610.

EVIDENCE—TRAILING BY DOGS.—FITE V. STATE, 84 S. E. (GA.) 485.—*Held,* when it is established that one or more of the dogs were of the stock noted for acuteness of sense and power of discrimination, and had been trained in the exercise of these qualities and were in charge of one accustomed to use them; and that they were laid on a trail, which circumstances indicate to have been made by the accused, then the tracking by the bloodhound may be permitted to go to the jury.

Upon the subject whether the trailing by a bloodhound should be allowed to go in evidence, there is a square conflict of authorities. But the majority of courts, in which the cases have come up, have allowed such "testimony" to go in. *State v. Dickerson,* 77 Oh. St. 34; *Gallant v. State,* 167 Ala. 60; *Davis v. State,* 46 Fla. 137; *Dunham v. Commonwealth,* 119 Ky. 508; *State v. Adams,* 116 Pac. (Kans.) 608; *Spears v. State,* 92 Mich. 613; *Parker v. State,* 46 Tex. Crim. Rep. 461; *State v. Freeman,* 146 N. C. 615. In the following cases, the evidence was held inadmissible because there was not a sufficient foundation laid, though the rule is recognized. *State v. Norman,* 153 N. C. 591; *Stout v. State,* 92 N. E. (Ind.) 161; *Sprouse v. Commonwealth,* 132 Ky. 269; *Allen v. State,* 62 So. (Ala.) 971. The following cases held such evi-

dence not admissible under any circumstances. *Brott v. State,* 70 Neb. 395; *People v. Pfanschmidt,* 262 Ill. 411.

The courts which allow it, allow it only when the conditions as set out in the headnote are fulfilled. Such evidence is to be strictly scrutinized. The Nebraska court said: "The blood hound is frequently right in his conclusions, but that he is frequently wrong is a fact well attested by experience. It is unsafe evidence, and both reason and instinct condemn it." It seems that the minority courts are right. Human life is too sacred to be staked on the scent of a dog.

FRAUD—SALE OF LAND—MISREPRESENTATION OF MEASUREMENTS—O'NEILL V. CONWAY, 88 Conn. 651.—*Held,* that a vendor who makes representations as to the measurements of a plot of land, having no actual knowledge thereof nor any reasonable ground for believing them, and intending the vendee to rely thereon, is guilty of a fraud, and it does not matter that the actual boundaries are pointed out to the vendee and that he has an opportunity to make the measurements himself, if he does not do so and actually relies upon the statements of his vendor.

It is generally laid down that a statement made by a vendor with intent to influence the vendee, of which the vendor is consciously ignorant, or recklessly indifferent as to whether it is true or false, and upon which the vendee relies is a fraud. *Furnace Co. v. Foundry Co.,* 145 Fed. 596; *Snively v. Meixsell,* 97 Ill. App. 365; *Miller v. John,* 70 N. E. (Ill.) 27; *Converse v. Blumrich,* 14 Mich. 109; *Riggs v. Thorpe,* 67 Minn. 217; *Robertson v. Fry,* 144 Pac. (Ore.) 128; *Hanson v. Tompkins,* 2 Wash. 508. Representations of a vendor as to the quantity of land in a tract which he offers for sale are not mere matters of opinion, but are material, and the vendee may rely upon them, unless by the exercise of ordinary prudence he may readily ascertain their falsity. *Stearns v. Kennedy,* 103 N. W. (Minn.) 212; *McGhee v. Bell,* 120 Mo. 121; *Conn v. Atwell,* 46 N. H. 510. The vendor, if the representations be false, cannot avoid their consequences merely because the vendee might have ascertained their falsity by a survey of the land or by reference to official plats and records. *Porter v. Fletcher,* 25 Minn. 493; *Miller v. Wissert,* 134 Pac. (Okla.) 62. Nor can he avoid the consequences even if the true boundaries are pointed out to the vendee. *Stearns v. Kennedy, supra; Shell v. Roseman,* 71 S. E. (N. C.) 86; *Cawston v. Sturgis,* 29 Ore. 331. It is a matter of common knowledge that a man cannot view a tract of land and arrive at anything like an accurate estimate of its contents. *Boddy v. Conover,* 126 Iowa 31; *Disney v. Lang,* 90 Kans. 309; *Pringle v. Samuel,* 11 Ky. 43; *Starkweather v. Benjamin,* 32 Mich. 305; *Judd v. Walker,* 114 Mo. App. 128. Ordinary prudence does not require a survey and measurement thereof but the vendee may rely upon the positive statements of his vendor. *Ledbetter v. Davis,* 22 N. E. (Ind.) 744; *Judd v. Walker, supra.* The Massachusetts rule is contra. "If the representations relate to the number of acres within boundaries which are pointed out, they are not actionable, for they are to be regarded as the usual and ordinary means adopted by sellers

to obtain a high price." *Mooney v. Miller,* 102 Mass. 217; *Credle v. Swindell,* 63 N. C. 305. The Massachusetts rule is criticized in *Shuttlefield v. Neil,* 145 N. W. (Iowa) 1, and is followed in but a very few jurisdictions.

INDICTMENT AND INFORMATION—VARIANCE—NAME OF PERSON INJURED.—PEOPLE V. ANDERSON, 107 N. W. (ILL.) 840.—*Held,* that proof of an assault upon "Olson," the husband of the person filing the information, will not support a conviction where the information names "Jonas Olson" as the person assaulted.

The general rule is that the name of the person injured must be proved as laid, and variance between the allegation and proof in this particular is fatal. *Milontree v. State,* 30 Tex. App. 151. The Christian name of the person injured must be proved as charged, and variance between allegation and proof thereof is fatal. *Meyer v. State,* 50 Ind. 18; *Hughes v. State,* 41 Cal. 234; *Lewis v. State,* 90 Ga. 95. In Colorado it has even been held that there is a fatal variance between the allegation of ownership in Michael Johnson and proof of ownership in Mike Johnson. *Sullivan v. People,* 6 Colo. App. 458. Some courts, however, have made exception to the general rule. Where a name is spelled in two ways in an indictment and proved one way, there is no variance. *Davenport v. State,* 38 Ga. 184. If the variance is so slight that the person would have been readily known by the name used such variance is immaterial. *Aaron v. State,* 37 Ala. 106. In some cases, in event of a slight variance, the question of identity has been held to be one for the jury. *McLain v. State,* 71 Ga. 279. In *Bennett v. United States,* 194 Fed. 630 (affirmed 227 U. S. 333), it was held that where the record clearly indicates the identity there is no variance though the Christian name alleged is not that proved. In *Joyce v. State,* 2 Swan (Tenn.) 667, it was held that the objection of lack of proof of the Christian name of the deceased was too technical and insufficient to disturb the verdict, no question as to the name of the deceased having been raised at the trial. This case cannot be said to be contra to the principal case since it does not clearly appear in the report of the latter just when the question of identity was first raised. The holding of the principal case seems overtechnical. It would seem preferable to leave the question of identity to the jury.

MANDAMUS—LIABILITY OF GOVERNOR—MINISTERIAL DUTIES.—GANTENBEIN V. WEST, 144 PAC. (ORE.) 1171.—*Held,* that the governor of a state is subject to a writ of mandamus to compel the performance of ministerial duties.

It was early decided that the head of an executive department was amenable to judicial control in the performance of ministerial functions. *Kendall v. U. S.,* 12 Pet. (U. S.) 524; see *Marbury v. Madison,* 1 Cranch (U. S.) 137. *Contra, State v. Dike,* 20 Minn. 363; *R. R. Co. v. Randolph,* 24 Tex. 317. Many courts have proceeded on the assumption that the governor of a state fell within the same principle. *Magruder v.*

Swann, 25 Md. 173; *State v. Nash*, 66 Oh. St. 612; *State v. Savage*, 64 Neb. 684; and cases cited in *People v. Morton*, 156 N. Y. 136. Some of these assume, though none have been called upon to decide, that the writ could be enforced against the governor, if necessary. *Martin v. Ingham*, 38 Kans. 641; *Magruder v. Swann, supra.* Such authority as has been found is adverse to such a contention. *Thompson v. R. R. Co.*, 22 N. J. Eq. 111 (subpoena); *Hartranft's Appeal*, 85 Pa. 433 (subpoena). See *Burr's Trial*, 182 (subpoena). More often it is assumed that the enforcement of the decree is merely a question of physical, and not legal, inability, and as such an irrelevant consideration in a judicial proceeding. *Cotton v. Ellis*, 52 N. C. 545. By the weight of authority, mandamus will not lie against the chief executive officer. *People v. Governor*, 29 Mich. 320; *State v. Stone*, 120 Mo. 428; *Rice v. Governor*, 207 Mass. 577; *People v. Morton*, 156 N. Y. 136, and cases there cited. This immunity cannot be waived by appearance. *Rice v. Austin*, 19 Minn. 103; *State v. Governor*, 25 N. J. L. 331. *Contra*, see *State v. Board of Inspectors*, 6 Lea (Tenn.) 12; *People V. Bissell*, 19 Ill. 229. Where, however, the question of the jurisdiction of the court is not raised, the court proceeds as if it had authority. *Governor v. Nelson*, 6 Ind. 496. An exception is sometimes made in the case of a function to be performed by the governor as an *ex officio* member of a statutory board. *Gray v. State*, 72 Ind. 567. Cf. *Davis v. Gray*, 16 Wall. (U. S.) 203. By the better view, however, the immunity extends to all duties imposed upon the governor *ex nomine*. *People v. Morton, supra; State v. Frazier*, 114 Tenn. 516. There seems no reason why the process should not issue against the other members of the board, wherever their action, apart from that of the governor, would control. See *People v. Morton*, supra; *State v. Huston*, 27 Okla. 606. But it has been held that process must issue against all the members or none. *McFall v. Board*, 101 Tex. 572. Under our coördinate system of governmental departments, it seems clear that mandamus proceedings against that officer from whose support the court derives all its power to issue compulsory process, are an anomaly, the objection to which has been concisely stated: "Such a judgment would be mere advice, and courts do not advise." *R. R. Co. v. Lowry*, 61 Miss. 102.

MONOPOLY—CONSPIRACY OF MEMBERS OF TRADE UNIONS—CIRCULATION OF UNFAIR LISTS.—LAWLOR V. LOEWE, 59 U. S. (L. Ed.) 170.—*Held*, the circulation of a list of "unfair dealers," manifestly intended to put a ban upon those whose names appear therein among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibition of the Sherman Anti-Trust Act of July 2, 1890 (26 *Stat. at L.* 209, *chap.* 647), if it is intended to restrain and does restrain commerce among the states.

It has been held that a combination to obtain a monopoly in the manufacture of a necessary is not illegal under the Sherman Anti-Trust Act though it tends indirectly to restrain interstate trade. *U. S. v. E. C. Knight & Co.*, 156 U. S. 1. Harlan, J., *dissenting*. Where the effect of the monopoly is to directly restrain interstate commerce, it

does come within the Sherman Act. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; *Swift & Co. v. U. S.*, 196 U. S. 375. Later cases held that every combination in restraint of interstate trade comes within the Anti-Trust Act of July 2, 1890. *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290; *Northern Securities Co. v. U. S.*, 193 U. S. 197. But this doctrine has been modified by the "rule of reason." *Standard Oil Co. of N. J. v. U. S.*, 221 U. S. 1. Harlan, J., *dissenting; U. S. v. American Tobacco Co.*, 221 U. S. 106. Harlan, J., *dissenting; U. S. v. International Harvester Co.*, 214 Fed. 987. Sanborn, J., *dissenting*. In the Standard Oil case the court said that the legislature "not specifying but indubitably contemplating and requiring a standard, it follows that the standard of reason . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." The statute covers combinations of labor as well as combinations of capital. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418; *Montague v. Lowry*, 193 U. S. 38; *Irving v. Neal*, 209 Fed. 471. The circulation by a combination of such information among possible customers which had and was intended to have the natural effect of causing such customers to withhold patronage from the concerns listed, was held to come within the Sherman law. *Eastern States Lumber Co. v. U. S.*, 234 U. S. 600. The opinion has been advanced that the Clayton Bill passed by the 63d Congress, Oct. 15, 1914, has taken labor organizations out of the operation of the Sherman act, but a careful review of the report of the committee shows that that bill merely meant to prevent the construction that associations for increasing wages and bettering terms of employment, where that employment is in interstate commerce, be considered *per se* illegal restraints of trade. The language of the act is that nothing in the anti-trust laws shall be construed to forbid the members of labor organizations from "lawfully carrying out the legitimate objects thereof." This clearly still leaves to the courts the application of a standard, and does not effect the decision of the principal case where the methods were not lawful, and the object was not legitimate.

NEGLIGENCE—CONTRIBUTORY—BURDEN OF PROOF—CARNEY V. BOSTON ELEVATED RY., 107 N. E. (MASS.) 411.—*Held,* the burden is upon the plaintiff, who is engaged in a dangerous occupation, to prove the absence of contributory negligence, in an action against his employer for injuries sustained in the course of that employment.

The doctrine of this case is followed in eleven of the states, while twenty-three states and the Supreme Court of the United States hold the contrary view; namely, that contributory negligence is a matter of defense to be set up and proved by the defendant. See Shearman & Redfield on Negligence (4th Ed.), p. 180. The elements of the plaintiff's position in the principal case seem to be closely analogous to those of the defendants' in cases where the doctrine of *res ipsa loquitur* is applied; where the thing is shown to be under the control of the defendant (plaintiff in this case) or his servants, and the accident is such as in the ordinary course of things does not happen if proper care be

used, it affords reasonable evidence, in the absence of explanation by the defendant (plaintiff here) that the accident arose from lack of proper care. *Muskogee Electric Traction Co. v. McIntire,* 37 Okla. 684; *McNulty v. Ludwig & Co.,* 153 App. Div. 206; *The Joseph B. Thomas,* 81 Fed. 578. The application of the doctrine of *res ipsa loquitur* does not shift the burden of proof. In fact, it does not even raise a presumption—that is, evidence sufficient to invoke this principle *may* not be sufficient to justify a directed verdict, in absence of rebuttal by defendant, but it must be presented to the jury and is sufficient to support an inference by the jury that the defendant was negligent. 24 Yale Law Journal 255 (Jan. 1915 and cases cited. A minority of jurisdictions (illustrated by the principal case), as shown above, go further as to contributory negligence and say that not only is a presumption raised but the burden of proof is shifted. The majority holding is contra.

PRINCIPAL AND AGENT—SALE OF PRINCIPAL'S PROPERTY BY AGENT TO HIMSELF.—HUTTON ET AL. V. SHERRARD ET AL., 150 N. W. (MICH.) 135.—*Held,* where agents have authority to sell land for a principal retaining for their compensation that part of the purchase price received over and above a minimum price specified, such agents may make a valid sale to themselves without previous consent or ratification by the principal.

It is a general rule of equity of universal application that parties in a position of trust with respect to a thing are not allowed to purchase that thing for themselves. *Grubbs v. McGlawn,* 39 Ga. 676; *Lamar's Ex'rs. v. Hale,* 79 Va. 158. This rule applies to agents whose relation to their principals precludes them from obtaining any advantage over their principals in any transaction had by virtue of the agency. *Calmon v. Saraille,* 142 Cal. 638; *Fairman v. Bavin,* 29 Ill. 75. An agent is bound to exercise his agency in the mode in which he knew his principal intended it to be carried out. *Hofflin v. Moss,* 67 Fed. 440. The reason for the general rule, as applied to agency, is the protection of the principal's interest from possible subordination to the interest of the agent. *Porter v. Woodruff,* 36 N. J. Eq. 174; *Rochford Watch Co. v. Manifold,* 36 Nebr. 801. Many cases cite the rule without exceptions, but a majority of jurisdictions hold that a purchase by the agent is binding if made with the previous consent or subsequent ratification of the principal, the principal having full knowledge of all the facts at the agent's command. *Burke v. Bours,* 98 Cal. 171; *Rochester v. Levering,* 104 Ind. 562. If such sale is made without the previous consent of the principal it is voidable at the option of the principal even in the absence of fraud. *Rockford Watch Co. v. Manifold,* supra; *Bain v. Brown,* 56 N. Y. 285. Although the agent has a power of attorney to convey, a conveyance to himself would not give him title as against the principal. *Cleveland Ins. Co. v. Reed,* 1 Biss. 180. There seems to be only three adjudicated cases precisely on all fours with the principal case. *Synnott v. Shaughnessy,* 2 Idaho 122, cited by the court, is in accord, the majority opinion holding that the contract of agency, which is like that in the principal case, is a verbal option.

Cheezum v. Kreighbaum, 4 Wash. 680, holds that such a contract cannot be construed as an option; that it is only a power to sell, and that the agent is allowed to get no benefit from such a contract save his commission. *Meek v. Hurst,* 223 Mo. 688, is also contra to the principal case, holding that the agent should not be allowed to purchase on grounds of public policy, which requires the agent's eye to be kept clear to the principal's welfare. The reasoning in the last case is not convincing and the other two were decided by divided courts. The doctrine of the principal case seems sound.

PROCESS—SERVICE BY TELEPHONE.—LOWMAN & Co. v. BALLARD, 84 S. E. (N. C.) 21.—*Held,* under a statute which required that a summons be read to the party or parties defendant, the reading of a summons over the telephone where the sheriff recognized the voice of the defendant was not a valid service. Clark, C. J., and Allen, J., *dissenting.*

On the point which arose in the principal case there is a dearth of authority. Only one case involving service of process has been found though it is possible to draw analogies from somewhat similar cases along other lines. It has been held that the service of a subpoena by telephone was not a legal service. *Ex Parte Terrell,* 95 S. W. (Tex.) 536. Where demand on a promissory note was made over telephone it was held that the demand was invalid. *Gilpin v. Savage,* 201 N. Y. 167. On the other hand, it was remarked in *Thompson Co. v. Appleby,* 5 Kans. App. 680, that such demand can properly be made over a telephone if the holder of the note is sure that he is talking to the right party. In that case he was not. The cases which hold such demand invalid are at any rate put upon a ground which does not apply to the recent cases, namely, that the note must be shown to the maker. It has been held that an oath or acknowledgment cannot be taken over the telephone. *Sullivan v. First National Bank,* 37 Tex. Civ. App. 238. These meagre authorities would seem to cast great doubt upon the validity of such a service by telephone. The words of the statute would permit a service by telephone if taken literally, but, as the court points out, the statute is older than the use of the telephone—at least its general use. The fact that the legislature never intended such a service, the uncertainties and abuses which are likely to attend it, coupled with the fact that it is really an uncalled for innovation, would seem to justify the holding of the principal case.

QUASI-CONTRACTS—PLAINTIFF IN WILFUL DEFAULT—BUILDING CONTRACTS.—MALLORY ET AL. V. CITY OF OLYMPIA, 145 PAC. (WASH.) 627.—*Held,* where the plaintiff wilfully and inexcusably abandoned his building contract with the defendant, and the defendant has, pursuant to an express provision of the contract, taken over and completed the work, the plaintiff can recover the reasonable value of his labor and materials.

Where the plaintiff has wilfully and inexcusably refused to perform the conditions of an express contract, the general rule is that he can not recover for the benefit conferred upon the defendant. *Keener on Quasi-*

Contracts, p. 215; *Johnson v. Fehsefeldt,* 106 Minn. 202. But if the contract was for the sale of goods, he can recover the value of the goods delivered, on the theory that there has been a severance of the entire contract. *Bowker v. Hoyt,* 18 Pick. (Mass.) 555. *Contra, Catlin v. Tobias,* 26 N. Y. 217. In contract for services, a few jurisdictions allow recovery *quantum meruit* less the damage, if any, caused by the plaintiff's breach. *Britton v. Turner,* 6 N. H. 481; *Porter v. Whitlock,* 142 Iowa 66. Also in building contracts, a recovery *quantum meruit* is sometimes allowed a plaintiff who has wilfully abandoned his contract, following the rule in *Britton v. Turner, supra. Linnenkohl v. Winkelmeyer,* 54 Mo. App. 570. But there must have been a real benefit to the owner. *Globe Company v. Doud,* 47 Mo. App. 439. *Contra, Hollis v. Chapman,* 36 Tex. 1. The weight of authority, however, is clearly that a plaintiff in wilfull default on a building contract can have no recovery. Woodward, The Law of Quasi-Contracts, p. 271; *Malbon v. Birney,* 11 Wis. 107; *Mortimer v. Dirks,* 57 Wash. 402. But in the presence of such provision as in the principal case, there can always be a recovery. *Bader v. City of New York,* 101 N. Y. Supp. 351. The recovery is not quasi-contractual, as the principal case holds, but is on the express contract, and equals the contract price less the cost of completion. *Construction Company v. Jeunesse,* 140 Ky. 833; *McKee v. Rapp,* 35 N. Y. Supp. 175; *O'Brien v. Garibaldi,* 115 Pac. (Cal.) 249. The provision is held to give the owner the option of declaring the contract null or of continuing it with his own performance. *Ogden v. Alexander,* 140 N. Y. 356. It follows, therefore, that the right of the contractor accrues only on completion of the building by the owner. *Denison v. Burrell,* 119 Cal. 180.