RECENT CASES

BANKS & BANKING—BILLS AND NOTES—FUNDS OF DEBTOR—FAILURE TO APPLY—DISCHARGE OF SURETY.—TATUM V. COMMERCIAL BANK AND TRUST CO., 69 S. (ALA.) 508.—*Held,* a bank holding notes indorsed to it by the payee who was the principal debtor, of which it had knowledge, and which failed to apply payee's deposit after maturity of notes to their payment, thereby discharges the accommodation maker.

It is universally held that a bank *may* apply the amount credited to a depositor to a debt to it by such depositor, 1 Morse on Banks & Banking § 324. Decisions are conflicting as to whether the bank is duty bound to do so for protection of indorser or surety. The prevailing rule seems to be that a bank is not under obligations to appropriate a balance due to the maker in payment of the liability of a surety. *National Mahaiwe Bank v. Peck,* 127 Mass. 298; *Citizen's Bank v. Booze,* 75 Mo. App. 188. Another view treats the deposit as being security for the note and so holds that bank's permitting depositor to withdraw this, effects a discharge of the surety. *Burgess v. Deposit Bank,* 30 Ky. Law Rep. 177; *Commercial National Bank v. Henninger,* 105 Pa. 496. But this usually applies only where the deposit is to the credit of the party primarily liable on the note. *First National Bank v. Peltz,* 176 Pa. 513. This doctrine is further restricted in some of these jurisdictions by holding that failure of bank to appropriate funds placed there *after* maturity does not discharge surety. *National Bank of Newburgh v. Smith,* 66 N. Y. 271. This restriction, however, is not logical. The lien theory adopted by the principal case cannot be sustained because there is no property in the hands of bank belonging to the debtor to which the surety on paying can be subrogated. It should be observed that the principal case extends the security doctrine to protect the surety even where the depositor is an accommodated *payee.*

M. H. L.

BILLS AND NOTES—BONA FIDE PURCHASER—KNOWLEDGE OF DIRECTOR.—HARDIN ET AL. V. DALE ET AL., 146 PAC. (OKL.) 717.—A corporation, the payee of a note, had been notified that the consideration for which it was given had failed. Thereafter, before maturity and for value, the corporation transferred the note to one of its directors who had no actual knowledge of the fact. *Held,* the director was chargeable with notice and was not a purchaser in good faith.

In general, a corporation has imputed knowledge of all matters brought to the notice of its directors and officials. *Mutual Investment Co. v. Wildman,* 182 Ill. App. 137; *Arthur v. Harrington,* 211 Fed. 215. The converse of this doctrine, as regards banks, is thus laid down: "Whatever knowledge a director has or ought to have officially, he has or will be conclusively presumed to have as a private individual." *Morse, Banks & Banking,* § 137. See also *State Bank of Indiana v. Mentzler,* 125 Iowa 101; *McKarty v. Kepreta,* 139 N. W. (N. D.) 992 (*Spalding, C. J., and Bruce, J., dissenting*). A person will be held to have notice as an indi-

vidual of what he does as agent of a corporation. *Lancaster v. Collins*, 7 Fed. 338; *Boit & McKenzie v. Whitehead*, 50 Ga. 76. In some jurisdictions an agent of an industrial corporation is chargeable with notice of equities against commercial paper, where the corporation as payee or indorsee had actual notice. *Mason v. Jones*, 7 D. C. 247; *Webb v. Moseley*, 70 S. W. (Tex.) 349. This coincides with the doctrine of the principal case, but in a few states such facts are merely evidence of bad faith to go to the jury. *Phillips v. Loyd*, 83 Ga. 536; *Martin v. Johnston*, 134 Neb. 797.

S. H. S.

CARRIERS—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DAMAGES—HUMILIATION.—FREEMAN V. CLARK, 177 S. W. (TEX.) 1188.—When plaintiff, contemplating attending a Confederate Reunion, was induced by the traffic agent of defendant railroad to travel over its lines, and to influence his friends to do so, by the promise to furnish through first-class chair-car transportation, *held*, in an action for breach of such contract, the plaintiff could not recover for any humiliation he sustained because the friends whom he had induced to go with him were compelled to ride in inferior cars.

The following is the generally accepted rule of damages for breach of contract: The damages recoverable for breach of contract are those which might reasonably have been contemplated by the parties. *Hadley v. Baxendale*, 9 Exch. 341. Mental suffering, resulting from breach of contract, has been held not to be a subject for compensation. *Russell v. Western Union T. Co.*, 3 Dakota 315; *Beaulien v. Great Northern Ry.*, 103 Minn. 47; Sedgwick on Damages, Vol. I, p. 65. If, however, mental anguish is such a necessary and natural result of the breach of contract as that the party breaking it can be held to have contemplated such mental suffering, a recovery may be allowed. *K. and T. Ry. Co. of Texas v. Ball*, 61 S. W. (Tex.) 327. Where a carrier compelled a white woman to ride in a negro coach, it violated its contract, and for such breach is liable for the mental pain and humiliation suffered as the direct result of the breach, though unaccompanied by physical injury. See also *Cole v. Gray*, 70 Kan. 705. These cases serve as precedents for the view of the principal case upon this point at page 1189. There has been much confusion as to the test to be adopted in determining whether to allow recovery for mental anguish, distress and humiliation. The true test seems to be: "Where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of damages flowing from the breach." *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695. This test is borne out by the case of *Lewis v. Holmes*, 109 La. 1030, where a breach of a contract to furnish a trousseau for a bride was held naturally to involve mental suffering. See also *Smith v. Leo*, 92 Hun (N. Y.) 242. If one of the contracting parties receive special notice of circumstances that make mental suffering a natural consequence of the breach, recovery may be had. Thus, "Undertakers, who contract with parents to keep safely the body of their deceased child until they should be ready to inter the same, are liable, on breach of such contract, in damages for mental anguish caused thereby." *Reinhan v.*

Wright, 125 Ind. 536. In the principal case, the carrier cannot be said to have had notice that mental suffering would follow a breach.

C. Y. B.

CHARITIES—CHARITABLE CORPORATION—VOLUNTEER FIRE DEPARTMENT.—NEPTUNE FIRE ENGINE & HOSE CO. V. BOARD OF EDUCATION.—178 S. W. (KY.) 1138.—*Held*, a volunteer fire department which received a remuneration from the city for its services, and which was incorporated under an act that did not definitely impose upon it the duty of going to all fires, is not a charitable corporation.

After the Statute of 43 Eliz. those purposes were considered charitable in England which "that statute enumerates, or which by analogies are deemed within its spirit and intendment." *Morrice v. Bishop of Durham*, 9 Ves. 399. A Ky. statute concerning charities, after an enumeration of purposes not including volunteer fire departments, concludes, "or all grants, conveyances, etc., for any other charitable or humane purpose shall be valid if it shall point out with reasonable certainty the purposes of the charity. . . ." *Ky. Statutes 1909. Chapter 17.* The character of an institution as a public charity is not effected by this fact alone, that a fee is accepted or required from those benefited. *Centennial & Memorial Association of Valley Forge*, 235 Pa. 206; *New Eng. Sanitarium v. Stoneham*, 205 Mass. 333; *Commonwealth v. Y. M. C. A.*, 116 Ky. 711 (Burnam, C. J., dissenting). Gifts for fire protection have been held to be for a charitable purpose. *Magil v. Brown*, 16 Fed. Cases 408; *Bethlehem Borough v. Perseverance Fire Co.*, 81 Pa. 445. But fire companies organized and supported by insurance companies have been held not to be charitable corporations. *Bates v. Worcester Protective Dept.*, 177 Mass. 130; *Louisville Ry. Co. v. Louisville Fire & Life Protective Assn.*, 151 Ky. 644. *Contra, Fire Insurance Patrol v. Boyd*, 120 Pa. 624. In the principal case, no positive duty is imposed upon the corporation to go to fires, and it does not appear that the remuneration was for upkeep alone, and not for profit. It was therefore rightly held not to be a public charity.

S. H. S.

CONSTITUTIONAL LAW—14TH AMENDMENT—POLICE POWERS—SEGREGATION ORDINANCES.—HOPKINS V. CITY OF RICHMOND, COLEMAN V. TOWN OF ASHLAND, 86 S. E. (VA.) 139.—*Held*, ordinances which provided for the segregation of races in the city of Richmond and the town of Ashland, and which contained clauses providing that nothing therein should affect the location of residences made previous to the approval of the ordinances, were valid. See XXV Yale Law Journal 81.

CONTRACTS—MUTUALITY—CONTRACT OF EMPLOYMENT.—GABRIEL V. OPOZNAUER, 153 N. Y. SUP. 990.—*Held*, a contract of hiring is not void for want of mutuality where plaintiff entered into performance of her duties and would have completed, but for defendants' breach, because it did not contain any words expressly requiring plaintiff to perform; it appear-

ing that the contract was one for services for a year and that defendants specified the grounds for discharge.

Contracts must be obligatory on both parties so that each may have an action upon it, in order to be binding. *McGowin Lumber Co. v. Camp Lumber Co.*, 68 So. (Ala.) 263. Defendant in the principal case claims that inasmuch as the contract contained only an engagement of the plaintiff by the defendant for a year and no reciprocal agreement by the plaintiff to work for that time, the contract was unilateral and could be accepted only by a year's work. This reasoning is analogous to that of the decision in *Hudson v. Browning*, 174 S. W. (Mo.) 393. It was there held that a contract to take 200,000 railroad ties was void where the seller was not bound to furnish that many. To meet this the court allows evidence outside the contract to be introduced to the effect that both parties considered the plaintiff bound to give her services for a year and that so believing she began work. In accord with the principal case is *Halpern v. Langrock Co.*, 153 N. Y. S. 985. The case of *Ayer Tie Co. v. O'Bannon & Co.*, 174 S. W. (Ky.) 783, goes further in finding mutuality. There the contract required the defendant to accept "such ties as the plaintiff could deliver" within a certain time and it was held there was no want of mutuality as plaintiff would be required to use reasonable diligence in procuring and delivering the ties.

S. B.

QUASI-CONTRACT—PAYMENT UNDER DURESS—FEAR OF INJURY TO BUSINESS.—BALDWIN V. VILLAGE OF CHASANING, 154 N. W. (MICH.) 84.—In order to prevent depreciation in the value of his property, plaintiff without protest paid a license fee under an invalid ordinance. *Held*, there was no duress, and the payment could not be recovered.

As a general proposition of law a tax paid voluntarily under an illegal assessment cannot be recovered, if there was no coercion, but merely ignorance of the law. *Holder v. Galena*, 19 Ill. App. 409; *Painter v. Polk*, 81 Ia. 242; *Garrison v. Tillinghast*, 18 Cal. 404. So too, when an excessive amount has been exacted. *Camden v. Green*, 54 N. J. L. 591; *Baker v. Bucklin*, 60 N. Y. S. 294. A payment, to be regarded as made under duress, thus making it involuntary, must be made to relieve the person or property from an actual and existing duress imposed by the party to whom the money is paid. *Vick v. Shinn*, 49 Ark. 70. The authorities, however, are divided as to whether or not the payment of an illegal license fee due to the exigencies of business is sufficient duress to warrant recovery. One line holds to the view that business necessity does not alter the voluntary character of the payment. *Custin v. Viroqua*, 67 Wis. 314; *Robinson v. City Council*, 2 Richardson Law (S. C.) 317. The other, considering that the parties are not in pari dilecto, allows recovery. *Baker v. Cincinnati*, 11 Ohio St. 534; *Swift v. U. S.*, 111 U. S. 29; *Catoir v. Matterson*, 38 Ohio St. 319. In view of the authorities, one is led to form the conclusion that payment under circumstances similar to those of the principal case may be recovered, and that therefore the principal case is out of harmony with the modern trend of decisions.

J. McD.

CONVEYANCE—HUSBAND AND WIFE—ESTATE BY ENTIRETY.—IN RE KLATZL, N. Y. LAW JOURNAL, OCT. 20, 1915 (COURT OF APPEALS).—*Held,* land conveyed by a husband to himself and wife, although it is specified that they are to be tenants by entirety, is held by them as tenants in common. Collin, Hiscock, and Cardozo, JJ., *dissenting.*

The majority holds that the husband and wife here held as tenants in common, because it is demonstrable that they are not joint tenants or tenants by entirety, and hold undivided shares. (See Washburn on Real Property, § 876.) The entire court agrees that they are not joint tenants, for even if the conveyance is regarded as made to two persons, by statute they do not hold as joint tenants, unless expressly so provided in the deed. The majority holds that they are not tenants by entirety, for the basis of that estate is the common law unity of husband and wife, and since statutes have so far destroyed that unity as to enable a husband to convey to his wife, it does not exist in this respect, that it may be the recipient of an estate from one of its parts. The minority insists that mere implication will not uphold a destruction of the common law rule, and hence the statute which authorizes a conveyance from husband to wife does not sunder the unity; so, there being a valid conveyance to the unity, an estate by entirety is created. That the conveyance was valid to create some estate in husband and wife, the court takes for granted. (But see, to the effect that an attempted conveyance from A to A and B vests the entire estate in B, *Cameron v. Steves,* 9 New Brunswick 141; Shep. Touchstone 82.) The point involved in this case appears to be novel.

C. Y. B.

CORPORATIONS—LIABILITY OF DIRECTORS—MISCONDUCT TOWARDS CORPORATION.—GENERAL RUBBER CO. V. BENEDICT, 109 N. E. (N. Y.) 96.—The defendant, director of plaintiff corporation, failed to notify the plaintiff that funds of another corporation, in which it held most of the stock, were being misappropriated. *Held,* defendant was liable for breach of duty as a director.

It is well recognized that the directors of a corporation are its agents. *Cumberland Coal & Iron Co. v. Sherman et al.,* 30 Barb. 553. Ordinarily an agent is bound to inform his principal of matters material to his agency arising within the scope of his duties. *Clark & Co. v. Bank of Wheeling,* 17 Pa. St. 322. And he is liable for failure to do so. *Brown v. Arrot,* 6 W. & S. (Pa.) 402; *Rogers v. Bradford,* 1 Pin. (Wis.) 418. A director is bound to exercise as much care, as a director, as men ordinarily exercise in their own affairs. *Hun v. Cary,* 82 N. Y. 65. In some states he is held to be in a position with reference to corporate property analogous to that of a trustee. *Ryan v. Leavenworth,* 21 Kan. 365. The principal case certainly goes as far as *Hun v. Cary, supra,* in holding a director to strict accountability. The decision seems to extend the general rule, which holds the agent only as to matters arising within the scope of his agency.

L. S.

FIRE INSURANCE—BREACH OF CONDITION—FORFEITURE—STATUTORY REGULATION—RETROACTIVE POWER.—LAGDEN v. CONCORDIA MUT. FIRE INS. CO. OF BAY, SAGINAW AND ARENAC COUNTIES, 154 N. W. (MICH.) 87. In case of a breach of condition in a policy requiring notice on taking out other insurance, *held*, that under Pub. Acts, 1911, No. 128, providing that no policy of fire insurance shall be void for breach of condition, if the insurer has not been injured by such breach, and where loss has not occurred by reason thereof, the insured is not precluded from recovering despite the terms of the contract making the policy void for such breach. Ostrander, J. dissents from the reasoning of the majority, and from the conclusion on the added ground that the statute cannot be retroactive.

At common law, a breach of condition of an insurance policy resulted in a forfeiture irrespective of its materiality. *Bank of Ballston Spa v. Ins. Co.*, 50 N. Y. 45; *Norwaysz v. Ins. Co.*, 204 Ill. 334. Sometimes, however, forfeiture has been held to result only from a permanent breach. *Adair v. Ins. Co.*, 107 Ga. 297. A temporary breach by securing double insurance did not cause forfeiture. *Obenmeyer v. Ins. Co.*, 43 Mo. 573. The breach, it has been held, must be one of the operative factors at the time of the loss if it is to be effective. 65 Ohio St. 119. Statutory regulation of insurance contracts has been upheld. *McGannon v. Ins. Co.*, 127 Mich. 639. When provisions clash, those of the policy yield to those of the statute. *Ritchey v. Home Ins. Co.*, 104 Mo. App. 146; *Christian v. Ins. Co.*, 143 Mo. 460. (Statutes similar to that of the principal case are in force in Maine, Missouri, New Hampshire, North Carolina, Ohio, and So. Dakota. Richards on Ins., 157.) Accordingly, in the regulation of insurance contracts, the statute prevails and the general principle of law as laid down in the principal case is sound. However, in its application to the facts of the principal case, the query of Ostrander, J. (dissenting) with regard to the retroactive effect of the statute of 1911 on this contract made in 1908 brings out clearly that the majority made an error. A statute may limit the right of a corporation to contract, *Ins. Co. v. Craven*, 178 U. S. 389; but it cannot impair the obligations of contracts already made. *Const. of U. S. Art. I, Sec. 10.* This applies to insurance contracts. *Brit. Amer. Ass. Co. v. Ry.*, 52 Colo. 589; and to conditions in contracts in general. *Murray v. Charlestown*, 96 U. S. 432.

J. McD.

INSURANCE—ACCIDENT INSURANCE—"ACCIDENT."—NEWSOME V. TRAVELERS INS. CO., 85 S. E. (GEO.) 1035.—An accident insurance policy contained a provision which excepted from operation of the policy injuries "intentionally inflicted on insured by any other person." *Held*, such exception does not relieve insurer from liability for an injury inflicted on insured by a third person, who mistook the insured for the person intended to be injured.

Where the issue is whether injury to the insured in an accident policy was intentionally inflicted by a third party, the intention of the third party is alone controlling. *Travelers Protective Ass'n. v. Fawcett*, 104 N. E. (Ind.) 991. This intention (i. e., of the third party) may be resolved into the following elements: (1) Intent to commit the par-

ticular injury. (2) Direction of the intent against some particular person. Where it can be shown that both of these elements are lacking, the insurance company will be unquestionably liable as for an accident. E. g., where the injury is by an insane person incapable of rational intent. *Corley v. Travelers Protective Ass'n.* 105 Fed. 854, 46 C. C. A. 278; *Berger v. Pac. Mut. Ins. Co.,* 88 Fed. 24. A person may become equally incapable by intoxication. *Northwestern Benevolent Soc. v. Dudley,* 61 N. E. 207, 27 Ind. App. 327. Conversely, if both of these elements of intent are present, the insurance company will not be held liable. *Butero v. Travelers Accid. Ins. Co.,* 71 N. W. 811, 96 Wis. 536. A difficulty arises when the court tries to make one element sufficient without the other. Under a policy providing for non-liability when death is caused by an intentional injury by the insured or others, recovery cannot be had when the insured was murdered. *Travelers Prot. Ass'n. of America v. Langholz,* 86 Fed. 60, 29 C. C. A. 628; *Johnson v. Travelers Ins. Co.,* 39 S. W. 972, 15 Tex. Civ. App. 314. The general intent to commit murder is here held sufficient, although intent against the particular person may or may not have been present. Again, the case of *Continental Casualty Co. v. Cunningham,* 66 So. (Ala.) 41, in holding that physical injury by a third party, who understood the nature and consequences of his act, was an intentional act within the policy, seems to imply, as in the murder case, that general intent to injure is alone sufficient to preclude recovery.

If so, the authority of *Johnson v. Co., supra,* is opposed to that of the principal case, which holds that although the first element was present, in the absence of the second element—namely, the intent against the particular person (i. e., the insured)—the act is still to be regarded as accidental and the company is liable.

C. B.

PRINCIPAL AND AGENT—AGENT'S LIABILITY TO THIRD PARTIES—IMPLIED WARRANTY OF AUTHORITY—MEASURE OF DAMAGES.—GRISWOLD V. HAAS, 177 S. W. (Mo.) 728.—Where defendant bid in some bonds at a commissioner's sale as agent, but was in fact without authority, in an action of assumpsit for breach of his implied warranty of authority, *held,* the measure of damages was the amount of the bid.

In some states the measure of damages in a similar action is the difference between the contract price and the market price. *LeRoy v. Jacobovsky,* 136 N. C. 443; *Roberts v. Tuttle,* 105 Pac. (Wash.) 516. In others, damages recoverable are all those directly caused by the want of authority. *Simmons v. Moore,* 100 N. Y. 140; *Hyman v. Caspary,* 117 N. Y. Supp. 966. And this is held to include the costs of an unsuccessful action against the supposed principal. *White v. Madison,* 26 N. Y. 117; *Groeltz v. Armstrong,* 125 Iowa 39; *see Taylor v. Nostrand,* 134 N. Y. 108. But the plaintiff cannot recover what he would have made had the principal performed. *Wallace v. Bentley,* 77 Cal. 19; *Teddler v. Riggin,* 61 So. (Fla.) 244.

The weight of authority seems to be contrary to the principal case, in which, though suit is brought for breach of an implied warranty of authority, the agent is really forced to perform a contract of purchase.

L. S.

RAILROADS—KILLING DOG AT CROSSING—QUESTION OF NEGLIGENCE.—TAYLOR v. ST. LOUIS R. R., 171 S. W. (ARK.) 1182.—*Held*, proof that plaintiff's dog was killed by defendant's train at a crossing establishes a *prima facie* case of negligence on part of the railroad company.

In some states a duty is placed upon railroad companies to fence in their rights of way, but even in states where this is not required the mere killing of an animal on the railroad track is by a large number of decisions held to establish a *prima facie* case of negligence against the railroad. *Ritter v. R. R.*, 83 S. C. 21, 65 S. E. 175; *Kansas City, So. R. R. v. Cash*, 80 Ark. 284, 96 S. W. 1062; *Cincinnati, N. O. & T. P. R. R. v. Burgess*, 27 Ky. Law Rep. 252. In support of the theory that owners of animals, where the railroad is not required to fence out, must assume the major portion of the risk, many cases hold that there is no presumption that there was negligence from the mere fact of the killing. *St. Louis & S. W. R. R. v. Conley*, 142 S. W. (Tex.) 36; *Cox v. Chicago N. W. R. R.*, 126 N. W. (Neb.) 999; *Stark v. C. B. & Q. R. R.*, 118 N. W. (Neb.) 1066. If any distinction is to be made between different kinds of animals, it would seem proper in the case of dogs or similar animals that the rule should be construed more liberally in favor of the railroad, because they are not to be fenced in or out and act more on their own initiative than in the case of cattle. In line with this reasoning a recent holding on this specific point is to the effect that there is no presumption of negligence on the part of the railroad from the mere fact of the killing of the dog upon its tracks. *Fowles v. S. A. L. R. R.*, 73 S. C. 306, 53 S. E. 534. This is directly opposed to the principal case.

C. B.

SHERIFFS AND CONSTABLES—LIABILITY ON OFFICIAL BOND—HOMICIDE.—ROBERTSON v. SMITH, 85 S. E. (GA.) 988.—*Held*, a homicide committed by a deputy sheriff while investigating a crime, but not in the performance of any official duty, or upon one having any connection with the crime, is not such official misconduct as will subject the sheriff and his sureties to a suit upon his bond. Russell, J., *dissenting*.

In general, only those acts of a sheriff under color of office which are an abuse of authority and not a usurpation of authority never granted to him, render his sureties liable on his bond. *State ex rel. Brennan v. Dierker*, 101 Mo. 636. E. g., as to abuse of authority: The wrongful shooting of a misdemeanant for whom the constable has a warrant of arrest. *Black v. Moore*, 80 S. W. (Tex.) 867; *State v. Cunningham*, 65 So. (Miss.) 115; *Johnson v. Williams Adm'r.*, 23 Ky. Law Rep. 658 (wrongful arrest). As to usurpation of auth.: Assault on one not a party to the writ of fi. fa. which constable is engaged in serving. *State v. Dayton*, 61 Atl. (Md.) 624. The dividing line between abuse of authority and individual tort for which not even color of office may be inferred, is indistinctly drawn. Inasmuch as no act save that specifically contemplated in his writ of authority—e. g., arresting B instead of A—can be said to be an act for which he was empowered, the attempt to separate these two classes must necessarily be arbitrary and not natural. This

arbitrary attempt is based on the theory of *colore officii* the presence or absence of which is the test of the sureties' liability.

Dissenting Judge Russell holds that since Norton in the principal case was on a journey of official business, and was clothed with the powers of a deputy sheriff, in which capacity he committed the homicide, however unjustifiably, he acted under color of office.

The essential criterion discernible in this and other decisions seems to be whether the intent of the party was to do the act as an official or as a private citizen.

S. B.