

## RECENT CASES

ACCRETION—DREDGING.—GILLIHAN v. CIELOHA, 145 PAC. (ORE.) 1061.—*Held*, where a slough between two islands is practically filled by accretion caused by a dyke, and the alluvion is added to by waste from a dredger distributed by high waters, the land so formed will not be treated as the product of avulsion, and, in the absence of a claim by the general government, will be apportioned between the shore owners.

Accretion is the gradual deposition by natural causes of soil adding to that land already in the possession of the owner. 3 Washburn, *Real Property*, (6th Ed.) 70. The doctrine of accretion is based on the right of the shore owner not to be shut off from the water (*Steers v. City of Brooklyn*, 101 N. Y. 51), and in a reciprocal consideration for possible loss by erosion. 2 Blackstone's *Commentaries*, 262. It is immaterial whether the water be navigable or not. *Buse v. Russell*, 86 Mo. 209; *Lovington v. St. Clair County*, 64 Ill. 56. The fact that accretion is aided by artificial means does not necessarily destroy its character as such. 3 Farnham, *Waters and Water Rights*, 2486. But where the water front is fixed by statute and the addition of soil is caused by pre-emption, the doctrine does not apply. *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118. The process by which a large quantity of land is suddenly added to the shore by its severance bodily from its former location, as by the cutting of a new channel by a river, is avulsion. 1 Farnham, *Waters and Water Rights*, 320; *Nebraska v. Iowa*, 143 U. S. 359.

The principal case holds that shore owners are the owners of any artificial extension of their lands, as against everyone but the state. The decision is founded on the right of shore owners to have access to the water. Waste from a dredger is neither accretion nor the product of avulsion. The case would seem to mark an extension of the rules of original acquisition of land. If, however, the accretion had so far advanced before the dredging began that title to the new land had already vested in the owners the case would fall under the regular rules of accretion.

BANKRUPTCY—EXEMPTION—TIME OF FILING CLAIM OF HOMESTEAD.—BRANDT v. MAYHEW ET UX.,—IN RE MAYHEW, 218 FED. 422.—*Held*, that where the right of the bankrupt to file his schedules after adjudication had not been questioned, his claim of a homestead exemption in his schedules, as he was permitted by law to do, was in time. Ross, Circuit Judge, *dissenting*.

While the exemptions allowed a bankrupt are those provided for by the statutes of the state, the time and manner of claiming such exemptions, and of awarding them and setting them apart, are regulated by the Bankruptcy Act. *In re Burnham*, 202 Fed. 763; *In re Kane*, 127 Fed. 552. As the claim of a bankrupt to exemption is a personal right, it is waived unless asserted in due time. *In re Exum*, 209 Fed. 716; *In re Harrington*, 200 Fed. 1010; *In re Gerker*, 186 Fed. 693. Whether an

application for an exemption has been made in due time is for the determination of the referee subject to review by the court, if desired by the bankrupt or creditors. *In re Dobbs*, 175 Fed. 319. A claim for an allowance of an exemption in involuntary proceedings is in effective time if made by the bankrupt in his schedules. *In re Le Vay*, 125 Fed. 990. Generally where the claim is made in good faith and for the benefit of his family, a bankrupt is permitted to amend his schedules at any time before sale or distribution and after adjudication to assert an exemption omitted by mistake or to assert a further claim to exemptions allowed him by the state law. *Goodman v. Curtis*, 174 Fed. 644; *In re Maxson*, 170 Fed. 356; *In re Fisher*, 142 Fed. 205; *In re Moran*, 105 Fed. 901; Collier on Bankruptcy, 7 ed., 146. But, though the court as a rule exercises great liberality in permitting amendments, it does not favor the extension by amendment of exemptions where such extension will work solely for the benefit of a creditor. *In re Merry*, 201 Fed. 369; *Moran v. King*, 111 Fed. 730; *In re Moran, supra*. The provision of the Bankruptcy Act that the trustee shall be vested with the title of the bankrupt as of the date of adjudication, "except in so far as it is to property which is exempt," does not show an intent that the claim of exemption must have been made prior to adjudication; *In re Fisher, supra*; and the statement of the dissenting judge in the principal case that that date is the "dead line" cannot be said to accord with the authorities. Where the time for filing schedules is extended that extension operates to extend the time for claiming exemptions. Collier on Bankruptcy, 7 ed., 146.

BILLS AND NOTES—LIABILITY OF AGENT—ADMISSIBILITY OF PAROL EVIDENCE.—MERCHANTS BANK OF MOUNT VERNON v. JONES, 173 S. W. (TEXAS) 606.—*Held*, where an agent signed his own name to a negotiable instrument without adding words to indicate his agency, he is personally liable in an action by the payee, even though he disclosed his agency at the time of the transaction. (Not decided under the N. I. L.)

By the common law rule, an agent, whose name appeared on a negotiable instrument which did not disclose his principal, was solely liable. *Sturdivant v. Hull*, 59 Me. 172. In such case, even though the agent added words to his signature, showing that he signed in a representative capacity, such words were deemed merely *descriptio personae*. *Schumacher v. Dolan*, 134 N. W. (Iowa) 624. This rule was established to aid and encourage the negotiation of commercial paper. *Bank v. Love*, 13 App. Div. (N. Y.) 561. In some jurisdictions, an exception to the rule arose on the principle, *cessante ratione cessat ipsa lex*; and where an instrument was taken from an agent with knowledge of the agency, the agent was relieved from liability. Huffcut on Agency, § 123, 189; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Burkhalter v. Perry & Brown*, 56 S. E. (Ga.) 631; 4 *Am. & Eng. Enc. Law*, 151; *Metcalf v. Williams*, 104 U. S. 93. A few jurisdictions, however, have held, in accord with the principal case, that evidence of the agency is inadmissible, as being in violation of the rule excluding parol evidence in variance of the terms of a written agreement. *Bryan v. Duff*, 12 Wash. 233. The Negotiable Instruments Law, it seems, especially in New York, has codified

the common law rule with the exception. *Megowan v. Peterson*, 173 N. Y. 1. It is doubtful, however, whether the decision in the principal case is not strictly in accord with the N. I. L., in that no words were added by the agent. Section 20. Courts have felt at liberty to admit evidence of the agency between the original parties, *Keidan v. Winegar*, 95 Mich. 430 (at common law); *Kerby v. Ruegames*, 107 App. Div. (N. Y.) 491 (under N. I. L.) But it seems there is no valid reason for excluding such evidence against third parties, when it is established that such parties had knowledge of the circumstances surrounding the execution of the instrument. *National Bank v. Clark*, 139 N. Y. 307, 311; *National Bank v. Wallis*, 150 N. Y. 455, 458; *Megowan v. Peterson*, *supra*, 6. It is well settled that collateral agreements between the parties which are a defense against the payee can be established to bar an action by a subsequent holder who took with knowledge of such agreements. 1 Daniel on Negotiable Instruments, (6th ed.) § 156; *Higgins v. Ridgway*, 153 N. Y. 130.

BROKERS—LIABILITY TO PRINCIPAL FOR UNAUTHORIZED INVESTMENTS BY AGENT.—*TITCOMB v. RICHTER*, 93 ATL. (CONN.) 526.—*Held*, brokers are liable to a client's principal if they allow the client to purchase and sell stocks on margin with the principal's money knowing that the money belongs to the principal and was intrusted to the client to invest so as to produce an income.

Where an agent disposes of his principal's property in excess of his authority the principal may recover his property from anyone. *Bertholf v. Quinlan Bros.*, 68 Ill. 297; *Kingman v. Pierce*, 17 Mass. 247; *Thatcher v. Kaucher*, 2 Colo. 698. The principal is not limited to his action against the agent. *Peters v. Ballister*, 3 Pick. 495. But the principal must be able to trace the property or its avails. *Roca v. Byrne*, 145 N. Y. 182. Evidence of substantial identity may be attached to the thing itself or be extraneous; but in either event it is admissible. *Farmers' Bank v. King*, 57 Pa. St. 202. One who actively assists in an agent's breach of trust with full knowledge of the agent's duty, and obtains the principal's money, incurs the same liability to the principal as does the agent. *Guernsey v. Davis*, 67 Kans. 378; *Perry v. Oerman*, 63 W. Va. 566. That the third party knew when he received the principal's property that the agent was appropriating it stamps the transaction with fraud. *Livermore v. Johnson*, 27 Miss. 284. The principal may, if in equity and good conscience entitled to the money, recover it in an action for money had and received. *Lehigh v. American Brake-Beam Co.*, 205 Ill. 147. The third party under the circumstances stated above is guilty of a conversion. *Gilmore v. Newton*, 9 Allen 171; *McCombie v. Davies*, 6 East 540. Hence the principal may maintain trover. *Worthington v. Vette*, 77 Mo. App. 445. Money sent by a principal to his agent in the course of business between them is often treated by the courts as a trust fund. *Roca v. Byrne*, *supra*. The trust ends when the fund is devoted to the purpose intended; but if the money is converted, the trust follows it into the hands of the party receiving it. *Central Stock Exchange v. Bendinger*, 109 Fed. 926. But to charge a third person as a party to the misappropriation of a trust fund

he must knowingly participate in the breach. *Perry v. Oerman, supra*. If such person receives the money in good faith, for value and without notice of the trust so as to acquire an equity superior to that of the true owners, he is not liable. *Central Stock Exchange v. Bendinger, supra*. Treating the property as a trust fund, an action in equity lies. *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411. Whether the action be in quasi-contract, in trover or in equity, the authorities show that the rule in the principal case is correct.

DEDICATION—ESTOPPEL TO ACCEPT.—MAYOR OF BALTIMORE v. CANTON Co., 93 ATL. (IND.) 144.—Where there has been a dedication of land for a street, no user by the public or attempted control by the city, but a long continued user by the dedicating party who has for years paid taxes assessed by the city on the land, *held*, that under these facts and circumstances the city is estopped from asserting any right in the property and from accepting the dedication.

Dedication is a question of intention, and no particular form is required to make it valid. A valid dedication may be by a written instrument, by declaration or by acts. *Godfrey v. City of Alton*, 12 Ill. 29; *Smith v. Town of Flora*, 64 Ill. 93. An acceptance is always necessary (*Riley v. Hammel*, 38 Conn. 574), and must be made within a reasonable time. *Niles v. Los Angeles*, 125 Cal. 572. An acceptance may be by user by the public. *Hast v. Railroad Co.*, 52 W. Va. 396. An acceptance by a municipality is binding upon the dedicator. *City of Eureka v. Armstrong*, 83 Cal. 623. There seems to be little conflict on the proposition that a city may be estopped from asserting a right in the property dedicated. *Rhodes v. Town of Brightwood*, 145 Ind. 21, holds that, a dedication being to the public, a city, as the trustee of the rights of the public, cannot be estopped by its acts from maintaining the rights of the public. In that case, however, the grant became irrevocable, lots having been sold with reference to the parts dedicated. *Gillean v. City of Frost*, 25 Tex. Civ. App. 371, follows the case last cited, but may be explained also by the fact that an acceptance is shown by user by the public. Many cases hold that a re-occupation by the grantor for a long time will estop a city from accepting the dedication. *Town of Cambridge v. Cook*, 97 Iowa 602; *Village of Grandville v. Jenison*, 84 Mich. 54; *Village of Vermont v. Miller*, 161 Ill. 210. But here the element of acceptance within a reasonable time is evidently lacking and estoppel is not necessary. *Simplot v. City of Dubuque*, 49 Iowa 630, and *Smith v. City of Osage*, 80 Iowa 84, hold that where the right of use of the locus has been abandoned and taxes have been assessed and collected on the land in question the city is estopped from setting up any claim to the land. In the first of these two cases an abandonment and reverter to the grantor is shown. In the second case there was no acceptance within a reasonable time. *Hanger v. City of Des Moines*, 109 Iowa 480, holds that dedicated land in the actual possession of the public on which taxes have been collected for several years may be claimed by the city and the doctrine of estoppel does not apply. It is obvious that estoppel does not apply where there is an acceptance and a continued user.

In all the cases above cited and in the principal case the doctrine of estoppel is invoked when not necessary to the decision. The use of estoppel in these cases savors of a "legal short-cut."

RAILROADS—MORTGAGES—ROLLING STOCK.—BOOTH ET AL. V. CENTRAL SAVINGS BANK, 146 PAC. (COLO.) 240.—Plaintiff was mortgagee for the bondholders of a railroad. The mortgage specifically named the rolling stock of the road. It was not recorded according to the law governing chattel mortgages but was recorded in accordance with the real estate mortgage law. *Held*, that the mortgage is binding on the rolling stock as against the lien of judgment creditors because the rolling stock is a fixture, a permanent accession, and therefore realty.

The federal courts and a few of the states are in harmony with the principal case. They go on the theory that without the cars the road would be useless, inoperative and valueless and so they become fixtures when they are incorporated as a part of the railroad system. *Milwaukee & M. R. Co. v. Milwaukee etc., R. Co.*, 2 Wall. 609; *Farmer's Loan & Trust Co. v. Saint Joseph etc., R. Co.*, 3 Dill. 412; *Morrill v. Noyes*, 56 Me. 458. But rolling stock does not become a fixture so as to subordinate the vendor's lien to a mortgage covering after-acquired property because it is capable of separable ownership, not being actually attached to the land like the rails. *U. S. v. New Orleans, etc., R. Co.*, 12 Wall. 362. In most of the state courts, on the other hand, it has been held that a mortgage of the real estate of a railroad company does not include the cars. *Randall v. Elwell*, 52 N. Y. 521; *Boston etc., R. Co. v. Gilmore*, 37 N. H. 410; *Williamson v. N. J. So. R. Co.*, 29 N. J. Eq. 311; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619. A levy on the cars of a railroad company was held good in *Midland R. Co. v. Stevenson*, 130 Ind. 97. The principal case is in accord with the holdings in the federal courts but is contrary to the rule adopted in a majority of the states.

STATUTE OF FRAUDS—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR—CONTRACT TO REAR AND MAINTAIN A CHILD.—MYERS V. SALTRY, 173 S. W. (KY.) 1138.—*Held*, an oral contract binding one to rear and maintain another's child until the child's maturity is not within the statute of frauds requiring contracts to be in writing which are not to be performed in a year from the making thereof, for the child may die within the year and thereby terminate the contract.

It is well settled that an agreement is not within the statute merely because performance may extend over more than a year. *Warner v. Texas & Pacific R. R.*, 164 U. S. 418; *Clark v. Pendleton*, 20 Conn. 495; *Carrig v. Carr*, 167 Mass. 544. Promises which by their terms extend during the life of the promisor or promisee are not within the statute. *Boggs v. Laundry Co.*, 86 Mo. App. 616; *McCabe v. Green*, 45 N. J. L. 723. Likewise, contracts which are to be performed at the death of a person are not within the statute. *Kent v. Kent*, 62 N. Y. 560; *Hayes v. Jackson*, 154 Mass. 451. Where only one of the parties

is to perform his part within one year some cases hold that the contract is not within the statute. *Fernald v. Gilman*, 123 Fed. 797; *Bliss v. Jenkins*, 129 Mo. 647; *Bennett v. Mahler*, 90 App. Div. (N. Y.) 22. Contra, *Kelley v. Thompson*, 175 Mass. 427; *Deetrich v. Hoefelmeir*, 128 Mich. 145; *Parks v. Francis*, 50 Vt. 626. An agreement to support a minor until he arrives at maturity has been held not to be within the statute. *Wooldridge v. Stern*, 42 Fed. 311; *White v. Murland*, 71 Ill. 259; *McKinney v. McClosky*, 76 N. Y. 594; *Taylor v. Deseve*, 81 Tex. 264. If such a contract is not within the statute, it seems that no personal contract ought to be. Contra, *Goodrich v. Johnson*, 66 Ind. 258. But still the courts agree that a contract of personal services for a definite period for more than one year is within the statute, though it is submitted that the same reasoning applies here that does in the previous group of cases. *Hill v. Hooper*, 1 Gray 131; *Squire v. Whipple*, 1 Vt. 69; *Wahl v. Barnum*, 116 N. Y. 87. But see contra, *Shropshire v. Adams*, 40 Tex. Cir. App. 339; *Wynn v. Folowell*, 98 Mo. App. 463. It would seem that on principle the decision in the principal case is questionable but the weight of authority seems to support it.