

## RECENT CASES

BILLS AND NOTES—ACCOMMODATION MAKER—EXTENSION OF TIME OF PAYMENT—EFFECT.—*COWAN v. RAMSEY*, 140 PAC. (ARIZ.) 501.—*Held*, that where the payee of note who has knowledge that the defendant maker signed merely for the accommodation of the other party, and the payee enters into a binding agreement for an extension of time with the other party, the accommodation maker is not thereby discharged.

Before the passage of the Negotiable Instruments Law, one who made a promissory note for the accommodation of another was, as between the parties, a surety. The holder, who had knowledge of the true relation of the parties, was bound to act towards such accommodation maker as toward a surety in order to preserve his rights against him. Under such circumstances an extension of time to the person ultimately liable, without the consent of the surety, that is, the accommodation maker, released the latter. *Guild v. Butter*, 127 Mass. 386; *Barron v. Cady*, 40 Mich. 259; *Wright v. Bartlett*, 43 N. H. 548; *Bank v. Walter*, 104 Tenn. 11. There were, however, a few early cases which held, as a result of the influence of Lord Mansfield's decision in the case of *Fentum v. Pocock*, 5 Taunton 192, that the accommodation acceptor or maker is the party ultimately and primarily liable, regardless of any knowledge the payee or holder might have. *Wilson v. Isbell*, 45 Ala. 142; *Cronise v. Kellogg*, 20 Ill. 11; *Anderson v. Anderson*, 4 Dana (Ky.) 352. This was the minority view. The principal case rests on the ground that the Negotiable Instruments Law has changed the prevailing common law so as to make the accommodation maker or acceptor primarily and not secondarily liable. If this is true there is no escape from the conclusion of the court. The courts have almost unanimously taken this view in the few cases so far adjudicated. *Vanderford v. Farmers, etc., Nat. Bank*, 105 Md. 164, 66 Atl. 47; *Cellers v. Lyons*, 49 Oreg. 186, 89 Pac. 426; *Waestenholme v. Smith*, 34 Utah 300, 97 Pac. 329; *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170; *National Citizens Bank v. Topfritz*, 81 App. Div. 593, 71 N. E. 1; *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000; *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882; *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679; *Murphy v. Panter*, 125 Pac. (Oreg.) 292; *Lumberman's Nat. Bank v. Campbell*, 121 Pac. (Oreg.) 427. The Iowa Court is the only one which has taken a contrary view. *Fullerton Lumber Co. v. Snouffer*, 139 Iowa 176, 117 N. W. 50. In the case of *Collers v. Lyons, supra*, the court maintained this view notwithstanding the fact that the word "surety" was placed after the accommodation maker's signature. The decision in this case has been criticized because it did not consider a provision of the act that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Whatever views one may entertain about the correctness of the decision in the principal case on principle, it is certain that it is entirely in accord with the well considered cases.

COMMERCE—STATE REGULATION—CONGRESSIONAL INACTION—RATES FOR INTER-STATE FERRIAGE.—PORT RICHMOND AND BERGEN POINT FERRY CO.

V. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, 34 SUP. CT. R. 821.—The Ferry Co. was incorporated by act of the New York legislature to maintain a ferry across the Kill von Kull from Port Richmond, Staten Island, N. Y., to Bergen Point, Hudson Co., N. J. By an act passed in 1799 the New Jersey legislature had given the Board of Freeholders power to fix the rates of ferriage from Hudson County to New York. The plaintiff in error contends that this act was repugnant to the commerce clause of the Federal Constitution. *Held*, that a state may fix reasonable rates of ferriage from its shores to the shores of another state over a boundary stream until Congress undertakes to regulate such rates.

The Federal Constitution provides that "The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Art. I, Sec. 8*. Ferries over waters separating the states cannot be deemed beyond the control of Congress under this power. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. But the states are not expressly excluded from exercising control over such commerce and if they are excluded it must be because of the nature of the power requires that the authority should not reside in the states. *Crandall v. Nevada*, 6 Wall. 35; *Sturgis v. Crowninshield*, 4 Wheat. 122. In considering the nature of the power the thing to look at is the subject of the power, as no rule can be laid down for the power as a whole. *Cooley v. Board of Wardens of Philadelphia et al.*, 12 How. 299. Where the subjects are so national in their nature as to admit of only one uniform system of regulation the power over them is exclusive in Congress. *Transportation Co. v. Parkersburg*, 107 U. S. 691. But where the subject of the commerce power is local and limited in its nature and sphere of operation the states may prescribe regulations until Congress interferes and assumes control. *Gloucester Ferry Co. v. Pennsylvania*, *supra*. As where Congress hasn't regulated wharfage charges the states may do so. *Transportation Co. v. Parkersburg*, *supra*. Congressional inaction on such subjects of a local nature is to be deemed a declaration that for the time being and until Congress acts the states may regulate. *City of Mobile v. Kimball*, 102 U. S. 691. From the earliest times the states have regulated ferries and they can more advantageously do so, as they are of a purely local nature. *Gloucester Ferry Co. v. Pennsylvania*, *supra*. But the states must not place any burdens upon inter-state commerce. *Transportation Co. v. Parkersburg*, *supra*. A reasonable charge however is in no sense a burden on such commerce. *City of Mobile v. Kimball*, *supra*; *Gloucester Ferry Co. v. Pennsylvania*, *supra*. In the principal case the charges were found to be reasonable and the cases seem all agreed that this is the only limitation on state authority in the absence of Congressional action.

EQUITY—SUIT TO REMOVE CLOUD ON TITLE.—LOUISVILLE & NASHVILLE R. R. v. WESTERN UNION TEL. CO., 34 SUPREME COURT REPORTER, 810.—*Held*, that a bill in equity will lie to remove a cloud on title, where both parties are non-resident, and where, under local law as construed by the state courts, the rightful owner of real property within the state may maintain a suit to dispel a cloud cast upon his title, even though

the instrument is void on its face. (Though this case is decided in the Federal Court, it is decided in accordance with the state law of Mississippi, and it is the point of state law which is here under consideration.)

The general rule of equity is that a court of equity will not entertain a suit to remove a cloud on title, cast by an instrument void on its face. *Washburn v. Burnham*, 63 N. Y. 132; *Patterson v. Simpson*, 145 Ala. 685. But there are some courts which hold contra to this, even though the deed is void on its face. See *Bishop v. Moorman*, 98 Ind. 1; 3 *Pomeroy's Equity*, sec. 1399; *Day Co. v. State*, 68 Tex. 527; *Mount v. McAulay*, 83 Pa. 529. Many courts hold, under statutes, that a bill will lie to remove a cloud on title, even though the instrument or deed be void on its face. *Kittle v. Bellegarde*, 86 Cal. 556; *Simmons v. Carlton*, 44 Fla. 719. So, too, if the deed is made a *prima facie* case for defendant, by an Act, though the deed is void on its face. *Scott v. Onderdonk*, 14 N. Y. 9.

EVIDENCE—PAROL—WRITTEN CONTRACT.—RUTHERFORD V. HOLBERT. 142 PAC. (OKLA.) 1099. When a written contract of sale has an express condition precedent, *held*, other conditions precedent may be shown by parol evidence.

The earliest case we have establishing that the terms of a written contract may not be varied by parol evidence is that of a sealed instrument. *Bresslau*, 546: "There is therefore no counterproof allowable against the statements of fact in a sealed document." This doctrine soon spread, until in 41 Edw. III, as Justice Holmes (Common Law, p. 262) says, "If a man said he was bound, he *was* bound." (Of course evidence of fraud was admissible; in 1371 (Y. B. 44 Ass. 30) a man escaped liability on a sealed instrument by showing that it had been incorrectly read to him.) This is the law to-day, of contracts in general. *Tripp v. Smith*, 168 N. Y. 655; *Merrigan v. Hall*, 175 Mass. 508; *Tuttle v. Burgett*, 53 Ohio St. 498; *Booth v. Hoskins*, 75 Cal. 271; as well as of contracts of sale; *New Idea Pattern Co. v. Whelan*, 75 Conn. 455; *Tichenor v. Newman*, 186 Ill. 264; *Fry v. National Glass Co.*, 207 Pa. St. 505. However, the distinction between integral parts of a contract and conditions precedent to the existence of a contract should be noted carefully. This was recognized as early as 1292. *Anon.* Yr. Bk. 20 Edw. I. 258 (Horwood's Ed.), in which evidence was admitted as showing that a claimant to land under a written contract had not satisfied an oral condition precedent made at the time of writing. Some jurisdictions have not appreciated the importance of the distinction. *Findley v. Means*, 71 Ark. 289; *Chattanooga, Rome and Columbus R. R. Co. v. Warthen*, 98 Ga. 599; *Beard v. Boylan*, 59 Conn. 181. But we find that the principal case is in accord with the majority of holdings on this point. *Pym v. Campbell*, 6 E. & B. 370; *Wilson v. Powers*, 131 Mass. 539; *Musser v. Musser*, 92 Neb. 387; *Alexander v. Richter*, 240 Pa. 22.

GAMBLING SLOT MACHINES—SUMMARY SEIZURE AS A MEASURE OF PREVENTATIVE JUSTICE.—SOPER ET AL. V. MICHAL, 91 ATL. (MD.) 684. In an action of replevin to recover from the police commissioners of Baltimore

ninety-eight "slot machines" and other apparatus, all of them devices adapted to gambling purposes and some "at the time of seizure . . . susceptible of no other use," held, that a police officer cannot as a measure of preventative justice, seize summarily articles adapted to an illegal use, unless the owner be under criminal prosecution or accusation in connection therewith.

Summary seizure of goods adapted to an illegal use has been unhesitatingly sustained for use as evidence in a criminal prosecution. *Kneeland v. Connally*, 70 Ga. 424; *People v. Hess*, 85 Mich. 128. It has also been upheld under statutory authorization as an incident to criminal proceedings for the suppression of certain crimes. *Woods v. Cottrell*, 55 W. Va. 476; *Early v. People*, 117 Ill. App. 608. It is sometimes sustained purely as a measure of preventative justice. *State v. O'Neill*, 58 Vt. 163 (intoxicating liquors); *Police Commissioners v. Wagner*, 93 Md. 190 (slot machines); *Lawton v. Steele*, 152 U. S. 133 (fishing nets unlawfully employed); *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655 (fishing net). Some courts have proceeded upon the theory of goods *mala in se*, from which the law withholds all protection. *Spalding v. Preston*, 21 Vt. 9 (counterfeit money); *Robertson v. Porter*, 1 Ga. App. 223 (gambling apparatus which could not conceivably be used for any lawful purpose). Goods of doubtful criminality may never be seized summarily upon the two grounds last mentioned. *Wagner v. Upshur*, 95 Md. 519. Evidence which uncontradicted would amount to proof must be forthcoming prior to the seizure. *Mason v. Lothrop*, 7 Gray (Mass.) 354. A statutory requirement of less than this would be an unconstitutional deprivation of property without due process of law. *Darst v. People*, 51 Ill. 286. If goods are summarily seized in doubtful cases, it is no defense to show the actual guilt of the plaintiff in replevin. *Wagner v. Upshur*, *supra*; *Averill v. Chadwick*, 153 Mass. 171. The principal case is within the severe language of *Spalding v. Preston* and *Robertson v. Porter*, *supra*. It is distinguished, however, by one important fact, the absence of any evidence of the owner's actual or intended breach of any law. The cases cited establish the necessity that the goods seized be obviously and intrinsically adapted to an unlawful purpose. The principal case adds, consistently and properly, with a view to the protection of an innocent proprietor, that this is not enough, without evidence that the person upon whom the loss is to fall is privy to the illegal practice.

INSURANCE—ACCIDENT—DEATH INDUCED BY MENTAL SHOCK.—INTERNATIONAL TRAVELERS' ASS'N. v. BRANUM, 169 S. W. (TEX.) 389.—*Held*, that death from apoplexy caused from the shock and excitement of seeing a helpless man accidentally burned to death is a death caused by accidental means within the terms of an accident certificate, and not from disease.

An accident has been defined as an event taking place without expectation or foresight. *Schmid v. Indiana Travelers' Acc. Ass'n.*, 42 Ind. App. 483; *U. S. Mut. Acc. Ass'n. v. Barry*, 131 U. S. 100; *Ludwig v. Preferred Acc. Ins. Co. of N. Y.*, 113 Minn. 510. It must be without the aid and design of the person. *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; *N. W. Com. Travelers Ass'n. v. London Guarantee & Acc. Co.*, 10 Mani-

toba L. Rep. 537. Although one is so afflicted with disease that he will die from it shortly yet if by accidental means he dies sooner of the disease it is a death by accident. *Hooper v. Standard Life and Acc. Ins. Co.*, 148 S. W. (Mo.) 116. Death from apoplexy caused by physical shock such as a fall is within an accident policy. *Hall v. Am. Masonic Acc. Ass'n.* 86 Wis. 518; *Nat. Benevolent Ass'n. v. Grauman*, 107 Ind. 288. One English decision has held that inability to work caused by mental shock from an impending train accident came within a clause in an insurance policy, "in case of his being incapacitated from employment by reason of accident." *Pugh v. The London Brighton & South Coast Ry. Co.*, L. R. 2, Q. B. D. 248. Tort actions for damages for injuries caused by mental suffering are distinguished. *Pugh v. Ry. Co.* (supra), citing *Victorian Rys. Commissioners v. Coultas*, 13 App. Cas. 222.

INSURANCE—ACTIONS ON POLICY—WAIVER.—CRANSTON V. WEST COAST LIFE INSURANCE CO., 142 PAC. (OR.) 762. *Held*, where a policy contains a condition that it shall not go into effect until the policy is delivered and the first premium is paid and that no agent has power to modify this provision, the insurer waives the condition of the policy, where the agent, without express authority, delivers the policy and accepts as payment the note of the insured.

Where the agent is intrusted with a policy for the purpose of delivery, and does deliver it, though in violation of a provision of the policy as to payment, it has been held that the assured has a right to assume that prepayment has been waived. *Young v. Hartford Fire Ins. Co.*, 45 Iowa 377; *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Contra, Russell v. Prudential Ins. Co.*, 176 N. Y. 178. Haight, J., *dissenting*. The theory seems to be that by giving the policy to an agent for delivery and the delivery by the agent, without payment of the first premium by the insured, the insurer has conferred authority on the agent to waive that provision of the policy. The case accords with the weight of authority.

NEGLIGENCE—INJURY—PROXIMATE CAUSE.—NIRDLINGER V. AM. DISTRICT TELEGRAPH CO., 91 ATL. (PA.) 883.—*Held*, where the injury follows directly from the negligence, and might or ought to have been foreseen by the defendant as likely to result from his act, there the negligence is the proximate cause of the injury.

The court here uses the test of foresight to determine the proximate cause. In general, a wrong-doer is responsible for the natural and proximate consequences of his misconduct. *Ehrgott v. Mayor etc. of the City of New York*, 96 N. Y. 264. On the question of negligence, it is material to consider what a prudent man might reasonably have anticipated; but when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability. *Isham v. Dow's Estate*, 70 Vt. 588. When negligence is established, change in condition may carry the result of the negligence further than it would otherwise have gone, and yet liability attach for the conse-

quent injuries although entirely unforeseen. *Ide v. Boston & Maine Ry.*, 83 Vt. 66. The person guilty of the negligent act will not be excused for the reason that the particular consequences were unusual and could not ordinarily be foreseen. *Graney et ux. v. St. L., I. M., & S. Ry. Co.*, 140 Mo. 89; *Ala. G. S. Ry. Co. v. Chapman*, 80 Ala. 615; *Schumaker v. St. P. & D. Ry. Co.*, 46 Minn. 39; *Hubbard v. Bartholomew*, 144 N. W. 13; *Heiting v. C., R. I., & P. Co.*, 229 Ill. 390. The injurious, proximate, and natural consequences of an act of negligence are always deemed to be foreseen. *El Paso S. W. Ry. Co. v. Barrett*, 101 S. W. 1025. This mode of stating the law (as supra) is misleading, if not positively inaccurate. It confounds and mixes the definition of negligence with that of proximate cause. What a man may reasonably anticipate is important, and may be decisive in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. *Hudson v. Ry.*, 142 N. C. 198; *Smith v. London & S. W. Ry. Co.*, L. R., 6 C. P. 14. The negligence is the proximate cause if, after the injury is complete, the injury appears to have been a natural and probable consequence of it. *Fishburn v. Ry. Co.*, 127 Iowa 492; *Marsh v. Paper Co.*, 101 Me. 89; *Hill v. Winsor*, 118 Mass. 251. In a word, the proper test of negligence is foresight, but of proximate cause is hindsight.

REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EQUITABLE RELIEF.—*PARCHEN v. CHESSMAN*, 142 PAC. (MONT.) 631.—*Held*, Reformation will be granted, where, through the mistake of a scrivener, terms are inserted in a negotiable note not in accord with the actual agreement and the fact that the plaintiff may have been negligent in signing it without reading it is not in itself sufficient ground for denial of relief.

Many of the books declare that no relief can be had under such circumstances. 2 *Herman on Estoppel and Res Judicata*, sec. 1004; 1 *Daniel on Negotiable Instruments*, sec. 849; 1 *Page on Contracts*, sec. 76. So in this same jurisdiction it was held freedom from negligence is a condition precedent to relief. *American Min. Co. v. Bos. Min. Co.*, Mont. 476. And the same view was taken in *Hennessey v. Holmes et al.*, 46 Mont. 89, *Brantly, J.*, the author of this opinion, concurring. So in *Grieve v. Grieve*, 15 Wyo. 358; *Met. Loan Ass. v. Esche*, 75 Cal. 513; *Snelgrove v. Earl*, 17 Utah 321; *Reed v. Coughran*, 21 S. D. 257. In *Ackerman v. Begrish*, 50 Atl. 673, no reformation was allowed, though in that case the party seeking reformation was trying to enforce a "hard bargain." Negligence will not deprive a party of his remedy if there be fraud. *Ward v. Spelts & Klosterman*, 39 Nebr. 809; *Hitchins v. Pettingill*, 58 N. H. 3, Contra; *Moorman v. Collier*, 32 Iowa 138. But where the party has been slow to ask for reformation he can have no remedy. *Van Houten v. Van Houten*, 68 N. J. Eq. 358; *Mills v. Lockwood*, 42 Ill. 111, Contra. In *Cole & Hart v. Williams*, 12 Nebr. 440, it was held fraudulent to attempt to enforce a writing executed by mutual mistake. In any cases of reformation the evidence must clearly show what the intended agreement was. *Strong v. Gammell*, 68 Nebr. 709. If this does appear there is authority that reformation may be had. *Werner v. Rawson*, 89 Ga. 619; *Smith v. Wakeman*, 114 Mich. 611; *Newland v. First*

*Baptist Church of Bellevue*, 137 Mich. 335. The principal case is in harmony with this modern tendency to grant relief when refusal would be harsh and inequitable and when the intent of the parties can be clearly shown.

SALES—BREACH OF WARRANTY—PRESUMPTION.—*FINK V. MARR*, 142 PAC. (WASH.) 482. Failure of the buyer to complain of the quality of the goods when their inferiority was discovered or within a reasonable time thereafter raises a presumption of FACT that the complaint of defective quality is unfounded.

Where the vendee retains possession of the goods and fails to give notice of defects or to return them, the presumption of LAW is that he has waived his objections and has no cause of action. *Wells v. Sherwood*, 61 Barb. (N. Y.) 238; *Tilley et al. v. The Enterprise Stone Co.*, 127 Ill. 457. There is a tendency by some of the courts to sustain the holding of the principal case. See *Ash v. Beck*, 68 S. W. (Texas) 53, also *Babcock v. Trice*, 18 Ill. 420. The weight of authority at present is adverse to the holding of the principal case.

WILLS—CONTEST—BURDEN OF PROOF.—*HERRING ET AL. V. WATSON*, 105 N. E., 900 (IND.)—*Held*, that where probate of a will is resisted on the grounds that the maker was of unsound mind and that the will was not duly executed, the burden of proving due execution and testamentary capacity is on the proponents of the will. Cox, C. J., and Erwin, J., *dissenting*.

The principal case follows the rule laid down in several previous decisions in this jurisdiction. *Steinkuehler v. Wempner*, 169 Ind. 154; *McReynolds v. Smith*, 172 Ind. 336. But the law in Indiana was formerly different, then placing the burden of proof on the contestants alleging absence of due execution or want of testamentary capacity. *Blough v. Parry*, 144 Ind. 463; *Teegarden v. Lewis*, 145 Ind. 98. Many other states have the doctrine set forth in the principal case. *Barber's Appeal from Probate*, 63 Conn. 393; *In re Hoyles' Estate*, 162 Mich. 275; *Fulton v. Umbehend*, 182 Mass. 487. There is, however, an entire divergence of opinion on the point, and about an equal number of jurisdictions place the burden of proof on the contestants. *Goldthorpe v. Goldthorpe*, 115 Ia. 430; *Matter of Preston*, 113 N. Y. App. 732; *McNitt's Estate*, 229 Pa. 71. In practically all jurisdictions there is a presumption in favor of the validity of the will, which enables the proponent to make out a *prima facie* case by proving the due execution of the will. Likewise, then, all these courts place upon the contestant the burden of going forward with evidence to overcome the presumption of validity which the law makes. By the former Indiana rule the proponent by establishing his *prima facie* case also throws the burden of proof upon the contestant, where it remains throughout the trial. Under the doctrine of the principal case the burden of proof is always on the proponent but the presumption of validity which the law makes weighs in his favor throughout.