Notre Dame Law Review

Volume 15 | Issue 4 Article 5

5-1-1940

Recent Decisions

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reason the burden of proof in a will contest, brought after admission of the will to probate must be on the plaintiffs in such cases." [39]

From the brief discussion given above it can be easily seen that the courts are in conflict as to just who has the burden of proof of mental capacity to execute wills in actions to probate. As each line of decisions appears to have adequate reasons, there seems to be little hope for uniformity without the aid of statutes.

Fenton Mee.

RECENT DECISIONS

ELECTIONS—NOMINATING PETITIONS—NECESSITY THAT VOTERS SIGNING PETITION BE REGISTERED VOTERS.—The plaintiff and the defendant were nominated by their respective parties for the office of trustee of their township. The defendant was victorious in the election, and the plaintiff brings this action for a recount and to contest the election on the grounds that the petition presented by the defendant was not signed by the required number of registered voters. The statute required that such petition be signed by ten qualified voters. The petition had been signed by seven qualified and registered voters, and by three other voters who were not registered at the time they signed the petition. These three petitioners registered after the primary and voted in the general election. From a judgment for the defendant the plaintiff appeals. Held, the fact that the voters were not registered at the time they signed the petition accompanying the candidate's declaration of candidacy did not disqualify them from signing, nor void the petition. Judgment affirmed. *Case v. Conrad,* 24 N. E. 2d 1010 (Ind. 1940).

The statute of Indiana provides that in petitions for nominations, the petitioners are qualified to sign if they are "qualified voters, are adherents of the same political party as the candidate and that they desire and intend to vote for such candidate." BURN'S ANN. ST. SUPP. § 29—513.

The principal case is in accord with what appears to be the majority rule in the United States, although there is authority to the contrary. By weight of reason and sound judgment it appears that registration is unnecessary to qualify a person as a petitioner for the nomination of a candidate for public office. *Puiser v. Sioux City,* 220 Iowa 308, 262 N. W. 551 (1935). See 100 A. L. R. 1298, annotations on page 1308.

The cases on the effect of nonregistration as affecting one's qualification as a signer of a petition, are divided into two general classes: first the effect of nonregistration as affecting one's qualification as signer of a nominating petition; and secondly, the effect of such as a signer of a petition for a special election or submission of proposition.

Treating first of the effect of nonregistration on one's qualification as signer of a nominating petition, the case of *In Re Sullivan,* 307 Pa. 221, 160 A. 853 (1932), holds that registration is unnecessary to constitute a person a "qualified voter," notwithstanding it may be a prerequisite for voting. In *Benson v. Election Commission,* 62 Col. 206, 161 P. 295 (1916), the court held that in nomination by certificate of independent candidates for public office, the petition for nomina-

[39] *In re* Hayes' Estate, 55 Colo. 340, 135 P. 449, 452.

tion may be signed by any voter, adding his place of residence and making an oath that he is a voter and resident within the political division, and is not limited to only those who are registered. In *George v. Ballot Com'rs.*, 79 W. Va. 213, 90 S. E. 550 (1916), it was held that legal voters may, before they have been registered for the purposes of an election, make a nomination of a candidate for office, by certificate. Thus these cases establish that registration is not a prerequisite for becoming a signer of a nominating petition for public office.

The case of *People ex rel. Hotchkiss v. Smith*, 206 N. Y. 231, 99 N. E. 568 (1912), held that a statute, providing that the name of no person signing a nominating petition should be counted "unless such person shall on one of the days of registration in such year be registered as a qualified elector," was reasonable and constitutional. In interpreting this statute the court, in *People ex rel. Steinert v. Britt*, 146 App. Div. 683, 131 N. Y. S. 455 (1911), held that a person signing such a certificate should be counted if he registers in such year, either before or after signing the petition. This ruling was followed in the case of *In Re McGrath*, 189 App. Div. 140, 178 N. Y. S. 231 (1919). *Contra*: *In Re Horan*, 108 App. Div. 269, 95 N. Y. S. 607 (1905).

Treating now of the question of the effect of nonregistration on one's qualification as a signer of a petition for special election or submission of a proposition the leading case of *Wilson v. Bartlett*, 7 Idaho 271, 62 P. 416 (1900), gives a good statement of the law from that point of reason. Regarding a petition to remove a county seat, the court said: "We do not think that registration is a substantive qualification of an elector in this state, although said section of the Constitution declares that persons having certain qualifications, and, in addition to those, if they be registered, they are qualified electors. We do not think that registration is intended as one of the substantive qualifications of an elector. Registration was intended only as a regulation of the exercise of the right of suffrage and not as a qualification of such right. . . . Section 34 of the Election Laws of 1899 provides, among other things, that the registrar shall register only qualified electors. If registration is one of the qualifications of an elector, the registrar is prohibited from registering any person who has not theretofore been registered, and after a most careful examination of the several provisions of the constitution in which the terms 'elector' and 'qualified elector' are used, we conclude that said terms are used interchangeably and that an elector is a qualified elector." While this appears to be a good statement of the law, there was one dissenting judge who considered that an elector could not vote or sign a petition unless he was an elector who had registered.

The term "qualified electors," in a statute providing for a special election to be held only after a certain percentage of such electors sign a petition, has reference to those having the qualifications for voting, as to age and residence, without regard to whether or not their names appear on the registration records of the municipality, although a statute prohibits one from voting unless registered. *Puiser v. Sioux City*, 220 Iowa 308, 262 N. W. 551 (1935). The term "qualified electors, as shown by the poll list" in the statute requiring such to sign a petition for a special election, means those who have participated in the last election as shown by the official documents, as distinguished from the qualified electors who might have participated in said election, as shown by the permanent registration list. *Gilman v. Sioux City*, 215 Iowa 442, 245 N. W. 868 (1932).

On the question of whether or not a qualified elector must be a registered elector the court said, "a qualified elector is one within the meaning of this statute who meets the requirement of the Constitution of Michigan." *Rutledge v. Marquette County*, 160 Mich. 22, 124 N. W. 945 (1910).

In New York the question arose as to whether or not women, who had just been given the right to vote, and had not had an opportunity to register, were

qualified to sign a petition for nomination of a candidate. In that state the court held that the women signing the petition were qualified to vote, and so they were qualified to be registered; consequently registration does not qualify the voter, and the women were allowed to sign the petition even though they had not registered. *Curtin v. Denton,* 183 App. Div. 312, 170 N. Y. S. 58 (1918); *In Re Special Election,* 183 App. Div. 941, 170 N. Y. S. 61 (1918).

Where the statute provided that the petition be signed by "registered voters," and the registration law under which the voters had registered was invalid, the court held that the term "registered" should be struck out of the designation "registered voters," because of the inability of the voters to register, and the petition was good, even though the petitioners were not registered. *Wiley v. Reasoner,* 69 Ore. 103, 138 P. 250 (1914).

In *Roesch v. Henry,* 54 Ore. 230, 103 P. 439 (1906), the statute provided that "qualified electors" must sign the petition, the court held that the terms "legal voters" and "qualified electors" are not equivalent to registered voters. In *Ferguson v. Monroe County,* 71 Miss. 524, 14 So. 81 (1893), the court stated that registration does not give the right to vote. "It is that without which one cannot be a qualified elector, — an essential prerequisite, and yet not conferring the right."

The Illinois statute provides that only such legal voters as are registered shall have the right to vote, and the court held that a petition on a special question should be signed only by registered voters. *Mayes v. Wanek,* 241 Ill. 529, 89 N. E. 708 (1909).

Under the holding of the majority of the courts, it appears that where there is no express provision in the constitution or statute of the state that the signers of a petition for either nomination to public office, or special election or proposition, must be registered voters, the fact of such signers not being registered voters will not void the petition or disqualify them from signing. Where it is expressly stated that such signers must be registered voters, the letter of the statute must be followed. Consequently, the holding of the court, in the instant case, that non-registration of voters at the time they signed the petition for candidacy to public office did not disqualify them from signing or void the petition, is in accord with the weight of authority and better reason.

Lawrence J. Petroshius.

ESTOPPEL TO RELY ON LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION, HEREIN OF DILIGENCE OF INQUIRY.—Plaintiff sued to recover damages for injuries alleged to have been suffered as the result of a collision between her automobile and that driven by defendant, on December 8, 1933. At the time of the accident defendant gave his name as "Harold" Evers. Within the period allowed by the two-year Statute of Limitations, § 61 BALDWIN'S IND. STAT. 1934; BURNS IND. STAT. ANN. 1933, § 2-602, plaintiff filed a complaint against "Harold" Evers. After the expiration of two years from the date of the accident, during the conditional examination of defendant on the suit that had been filed, plaintiff discovered that the defendant's name was in fact "Howard" Evers and that she was suing the wrong man; whereupon she filed the complaint in the principal suit, February 16, 1936. Defendant interposed the defense that the suit was barred by the two-year Statute of Limitations referred to above. Plaintiff contended that defendant, by his misrepresentation and fraud in concealing his name, was estopped to assert the Statute of Limitations in defense to the action because of § 68 BALDWIN'S IND. STAT. 1934; BURNS IND. STAT. ANN. 1933, § 2-609 or the doctrine of equitable estoppel. The section referred to reads: "If any person liable to an action shall conceal the fact

from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." The court held that the concealment referred to relates to the cause of action and not to the identity of the party against whom the action may be brought. It was said that the facts in the case did not justify the application of the doctrine, for the fraud or misrepresentation must be of such a character as to prevent inquiry or to elude investigation or to mislead or hinder the party who has the cause of action from obtaining the necessary information by the use of ordinary diligence and the actions relied upon must be of an affirmative character and fraudulent. Under the doctrine of equitable estoppel, plaintiff was charged with whatever knowledge she could have acquired in the exercise of ordinary diligence. Judgment was given for defendant, affirming the decision below. *Landers v. Evers,* 24 N. E. 2d 796 (Ind., 1940).

It is settled doctrine in equitable actions in this country, that when a party, against whom a cause of action exists in favor of another, by fraud or concealment prevents such other from obtaining knowledge thereof, the Statute of Limitations will begin to run only from the time the cause of action is discovered. 37 C. J. 972. At equity this rule will even permit estoppel where the negligence of plaintiff would otherwise have precluded him from a valuable right. While at law there is contrariety of authority, the majority of jurisdictions favor the rule that prevails in equity and do not permit the defendant who has concealed his cause of action to avail himself of the protection of the Statute of Limitations. Some jurisdictions refuse, in the absence of statutory exception, to recognize the plaintiff's replication, that the defendant has fraudulently concealed the cause of action, as a good answer to the pleading of limitations as a bar to the action, *Murray v. Chicago Ry. Co.,* 92 F. 868, 35 C. C. A. 62 (1899); *Freeman v. Conover,* 95 N. J. L. 89, 112 A. 324 (1920); but as has been stated above the great weight of authority is in favor of the doctrine, (for collection of cases see 37 C. J. 973, n. 18).

The reason for the rule in equity and apparently recognized at law is that the Statute of Limitations cannot be used to protect the very fraud which it was designed to prevent. In *Bailey v. Glover,* 21 Wall. (U. S.) 342, 22 L. Ed. 636 (1911), the Supreme Court of the United States by Mr. Justice Miller said, "We are of the opinion that the weight of judicial authority, both in this country and in England is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the Statutes of Limitations. They were enacted to prevent frauds, to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such right never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in such a manner that it concealed itself until such a time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." In *Lightner Mining Co. v. Lane,* 161 Cal. 689, 120 P. 771, Ann. Cas. 1913 C. 1093 (1911), the leading cases in support of conflicting view on the question are cited and discussed.

Irrespective of the agreement of the authorities regarding the correctness of the doctrine, we find great disparities in the definitions of "concealment" and "fraud" in the application of the principle. There is of course no categorical formula by which we can determine the case necessary for an estoppel of this kind. Disparities are numerous. In *Gilbert v. Hayward,* 37 R. I. 303, 92 A. 625 (1914), it was held that fraudulent concealment of property was not a fraudulent concealment of a cause of action. Nor can there be a fraudulent concealment of a matter, of the existence of which defendant himself had no knowledge, as in *Brown v.*

Grimstead, 212 Mo. App. 533, 252 S. W. 973 (1923), wherein it was held that where defendant surgeon did not know that a gauze sponge was left in plaintiff's abdominal cavity after an operation, he could not conceal such fact. In *Colby v. Shute,* 219 Mass. 211, 106 N. E. 1006 (1914), in which an undivided interest in land was sought to be recovered, by assignee in bankruptcy after the statutory period had run, which interest had not been scheduled but the failure to do so was not fraudulent; it was held that an intentional fraud could not be presumed to justify a recovery on the theory that there was a fraudulent concealment of the right of action. However, in *McLearn v. Hill,* 276 Mass. 519, 177 N. E. 617 (1931), it was held that where defendant in an action for damages for the negligent operation of a motor vehicle induced plaintiff to discontinue the action and to sue in another court where like actions were pending, he was estopped to assert the Statute of Limitations in bar to the second action. The first action had been commenced within the period allowed by the Statute, but the second was filed after the period had expired. Here there was no evidence of deceit, bad faith or actual fraud, nor did defendant promise anything in return for the concession. The court refused to permit him to seek the protection of the Statute, saying, "The Statute of Limitations is for individuals and not to secure general objects of policy, hence, it can be waived by express contract or by necessary implication."

It is held generally that a mere mistake of law will afford no ground for relief, but where a person occupying a fiduciary relation fraudulently misrepresents to his *cestui que* trust the state of the law or the legal rights arising out of certain facts, whereby the *cestui que* trust is led to forbear bringing suit, the former cannot afterward plead the Statute of Limitations against him, where such action is brought by the *cestui que* trust within a reasonable time after discovering the right of action.

An interesting problem arises from the relation of attorney and client and the possibilties attendant thereto. When the attorney errs in advising his client, giving rise to a cause of action against himself in favor of the client, does he by not apprising the client of said cause of action, estop himself from pleading the Statute of Limitations in bar to the action when the action has been brought after the period permitted by the statute has expired? In *Fortune v. English,* 226 Ill. 262, 80 N. E. 781, 117 Am. St. Rep. 253, 126 L. R. A. (N. S.) 1005, 9 Ann. Cas. 77 (1907), it was held that an attorney who advised his client that the mortgage on property client was purchasing could not be executed, but in fact the client was made to pay thereon, was not guilty of fraudulently concealing the cause of action until the period permitted by the Statute of Limitations had expired, and such attorney could effectively plead the Statute in bar to the action It seems doubtful that an attorney would have to make such a complete disclosure of the law to the client as to include advice that the client has a cause of action against the attorney.

The maxim "Everyone is presumed to know the law" is applied with full vigor to cases involving a misrepresentation of law, and it is generally held that a misrepresentation as to the state of the law is not actionable fraud. This rule was the basis of the decision in *Robbins v. Law,* 48 Cal. App. 555, 192 P. 118 (1920), in which defendant told plaintiff, in an action for assault and rape, that she had no cause of action for his act was no offense and he had been so advised by his attorney. The court ruled that it was a misrepresentation of law and would not prevent defendant from pleading the Statute of Limitations in bar to the action.

The authorities are divided on the question of the misrepresentation by a third person as estopping the party favored by his action from pleading the Statute of Limitations. The situation arises when a third person misrepresents the contemplated course of the defendant and relying on this the plaintiff does not prosecute his suit until it is barred by the Statute. Is this such a fraud that

will give rise to the equitable estoppel to plead the Statute? In *Welu v. Dubuque,* 202 Ia. 201, 209 N. W. 439 (1926), defendant, a city solicitor for defendant city, told plaintiff in a suit for personal injuries caused by the city's alleged negligence, that the city would compromise the claim, and plaintiff relying on the advice did not sue until the period permitted by the statute had expired. It was held that the city was not estopped to set up the Statute of Limitations in bar to the action in the absence of a statute that conferred on the solicitor the authority to waive Limitations. In *Eckman v. Pluma County Bank,* 215 Cal. 671, 12 P. 2d 433 (1932), it was held that the grantee of the mortgagor of property for whose benefit mortgagee granted an extension on the mortgagor's signing a waiver of limitations was estopped to assert the limitations, though he did not sign a written waiver. It appeared that the grantee was the one who induced the extension, but here was no fraud involved in his request for the extension. The waiver was held good as between the parties to the mortgage but not to subsequent purchasers.

In the absence of fraud or a fiduciary relation it is held that mere silence does not constitute fraudulent concealment of a cause of action, *McNaughton v. Rockford State Bank,* 261 Mich. 265, 246 N. W. 84 (1933); *Armstrong v. Union Electric Light Co.,* 60 S. W. 2d 1013 (Mo., 1933); nor can a cause of action be concealed from one having personal knowledge of facts creating it, *Kenyon v. United Electric Co.,* 51 R. I. 90, 151 A. 5 (1930). In *Charles Weitz's Sons v. United States Fidelity & Guaranty Co.,* 206 Ia. 1075, 219 N. W. 411 (1928), it was held that where plaintiff agreed to await the determination of another case before settling defendant's claim, defendant was estopped to contend that the claim was barred by the Statute of Limitations. These cases did not require that plaintiff prove that the inducement was fraudulent but only that the plaintiff relied thereon.

However, some courts have been more stringent in permitting the exception and have required some positive fraudulent act designed to conceal the cause of action before the exception would be held to remove the bar of the Statute of Limitations. In *Skrodzki v. Sherman State Bank,* 348 Ill. 403, 181 N. E. 375 (1932), the court stated that fraudulent concealment to toll the statute must consist of affirmative acts or representations designed to prevent discovery of the cause of action, and fraudulent misrepresentations as to facts founding the basis of the cause of action was held not to constitute fraudulent concealment, in the absence of acts or representations tending to conceal the cause of action. In *Connolly v. Bartlett,* 286 Mass. 311, 190 N. E. 799 (1934), it was held that the fraud concealing the cause of action must be actually accomplished by positive acts done with intention to deceive plaintiff. In *Murray v. Allen,* 103 Vt. 373, 154 A. 678 (1931), it was stated that concealment which prevents the running of the Statute of Limitations must be with design to prevent discovery of facts, giving rise to the action. So we see the strict and liberal applications of a recognized doctrine.

Although some jurisdictions hold that the doctrine is applicable only in contract actions, *Holman v. Omaha & Council Bluffs Ry. & Bridge Co.,* 117 Ia. 268, 90 N. W. 833 (1902); *Renachowsky v. Water Commissioners of Detroit,* 122 Mich. 613, 81 N. W. 581 (1900); *Louisville & Nashville Ry. Co. v. Carter,* 226 Ky. 561, 10 S. W. 2d 1064 (1937); and *Armstrong v. Levan,* 109 Pa. 177, 1 A. 204 (1885); are the leading cases holding that the doctrine is applicable to tort actions and will prevent a defendant guilty of concealing the cause of action from asserting the Statute of Limitations in bar to the action. (See collection of cases in 77 L. R. A. 1044.)

It is generally held that where an agent fraudulently conceals a cause of action against his principal without the knowledge of connivance of the principal, the Statute of Limitations will be given its full effect. *Sedalia School District v.*

DeWeese, 100 F. 705 (1900). There is authority to the contrary however. *Day v. Dages,* 17 Ind. App. 228, 46 N. E. 589 (1897). But where the principal instigates the concealment, the exception operates and the Statute does not protect the principal until the discovery of the cause of action. *Manufacturer's National Bank v. Perry,* 144 Mass. 313, 11 N. E. 81 (1887).

Although this doctrine may seem to be very far-reaching in its scope, it is in fact limited greatly by the equitable doctrine that charges plaintiff with whatever knowledge it could have acquired in the exercise of ordinary diligence. In *Williams v. Pittsburgh Terminal Canal Corporation,* 62 F. 2d 924 (1933), it was held that limitations do not begin running where facts are deliberately concealed, until plaintiff has or by reasonable diligence should have, knowledge of facts constituting the cause of action. *Conklin v. Towne,* 204 Ia. 916, 216 N. W. 264 (1927). The extent to which some courts have gone in demanding great vigilance on the part of plaintiff is illustrated by *McNaughton v. Rockford State Bank, supra,* which stated that in an action against a bank for conversion, defendant's alleged promise to notify plaintiff of any excess after the sale of collateral, did not excuse plaintiff's failure to make inquiry. The court held that the delay in instituting suit was caused by plaintiff's own negligence. In *Chalker v. Fidelity & Deposit Co. of Md.,* 286 Mich. 333, 256 N. W. 343 (1934), the court held that where plaintiff had sufficient notice of fraud to put him upon inquiry, he cannot remain inactive and rely on concealment of the cause of action or fraud to stay the running of the Statute, but must make such effort to ascertain facts as he could and should make in exercise of reasonable care and diligence. The Missouri Supreme Court in *Obermeyer v. Kurshner,* 225 Mo. App. 734, 38 S. W. 2d 510 (1931), ruled that in an action for conversion of a dividend check on stock in defendant's name but belonging to plaintiff, brought after the period allowed by the Statute of Limitations had expired, was barred where defendant did nothing to prevent discovery of the alleged fraud.

From the foregoing it appears that the decision in the principal case is sound and in accord with the great weight of authority. To constitute fraudulent concealment of the cause of action to toll the Statute of Limitations, the defendant must be proved to have committed positive, fraudulent acts. designed to delay the suit and it must be made to appear further that the plaintiff in the exercise of reasonable care and diligence could not have discovered the action. The doctrine is sound and is judicially essential to permit the proper operation of the Statute of Limitations.

Edward V. Minczeski.

FIXTURES—WHEN LESSEE'S BUILDING CONSIDERED REALTY.—In an action by a lessor to enjoin the lessee's removal of a building which had been constructed upon the leased premises by the lessee, it appeared that the premises had been occupied by the lessee under a lease which provided, among other things, that the lessee was to have the privilege of erecting a building upon the leased premises. It further appeared that after the expiration of the lease the defendant lessee continued to occupy the premises on a month-to-month basis until the lessor gave her notice to move. A decree for the plaintiff in the trial court was affirmed on appeal on the grounds that the evidence as to the permanent character of the building, and the fact that its removal would practically cause its demolition all supported plaintiff's contention that the parties intended that the building should remain as a permanent fixture upon the premises. *Martin v. Pilaczynski,* 25 N. E. 2d 362 (Ohio, 1940).

The basic case dealing with the subject points out that the intention of the party making the annexation is to govern. However, it goes on to say that the intention is to be inferred from the nature of the article or structure affixed, the relation and situation of the party making the annexation, the structure and mode of annexation as well as the purpose or use for which the annexation has been made. *Teaff v. Hewitt,* 1 Ohio State 511 (1853).

This case has been followed by the great majority of American courts and undoubtedly expresses the prevailing American rule on the subject. *Frost v. Schinkel,* 121 Neb. 784, 238 N. W. 659 (1931); *First State Bank v. Crab Orchard Banking Co.,* 255 Ky. 800, 75 S. W. 2d 517 (1934); *Colton v. Michigan Lafayette Bldg. Co.,* 267 Mich. 122, 255 N. W. 433 (1934); *McDonald v. McDonald,* 117 N. J. Eq. 181, 175 Atl. 87 (1934); *Knight v. Potter,* 32 Pac. 2d 1014 (Ore., 1934).

There is authority for the view that an annexation of a chattel in a manner that would cause great damage to realty on an attempted removal affords a strong ground for presuming that the chattel was intended to be annexed in perpetuity to the land. *Wake v. Hall,* L. R. 8 App. 195.

The Federal courts have taken the view that in the absence of an agreement prior to the annexation of chattels to real estate by the party who is making the annexation, that the property is to remain his personal chattels, the evidence favors an implication that the legal intention was that the property is to be regarded as a fixture. *Murray v. Bender,* 125 F. 705, 63 L. R. A. 783 (Mont., 1903).

The Georgia courts give more weight to the nature of the article affixed than they do to the spoken word as the controlling factor in determining the status of the affixed chattel. *Western and A. R. Co. v. State,* 14 L. R. A. 438 (GA. SPEC. JUD. COMM., 1891).

Some courts hold that the mode of annexation may be such as alone to show the intention of the parties. *McKiernan v. Hesse,* 51 Cal. 594; *Baker v. Davis,* 19 N. H. 325 (1849); *Guthrie v. Jones,* 108 Mass. 191 (1870).

There is ample authority for the more liberal view that in the absence of a provision authorizing a lessee to remove any building that he erects during his tenancy, any structures that are annexed to the realty become a part of the realty. THOMPSON ON REAL PROPERTY (1924), §§ 149, 172, 179; *Schneider v. Bulger,* 194 S. W. 737 (Mo., 1917); *McAllister v. Reel,* 59 Mo. App. 70 (1894); *Buhlinger v. United Firemen's Insurance Co.,* 16 S. W. 2d 699 (Mo., 1929); *Crawford Lumber Co. v. Mann,* 203 Ia. 748, 211 N. W. 225 (1926); *Pole-Carew v. Western Counties Manure Co.,* 2 Ch. 97 (1920).

The majority of the courts strongly support the view that if a tenant attaches his fixture so that it can be removed only by doing substantial damage and injury to the freehold or by causing a shocking and profitless loss of value to the thing itself, he thereby has lost his ownership to the fixture because of accession to the freehold. *Friedlander v. Rider,* 30 Neb. 783, 47 N. W. 83 (1890) — where a frame wing was built on a leased house; *Alder v. Mayfield,* 163 Cal. 793, 127 Pac. 44 (1912) —where the front of a building was replaced by a glass and marble front; *Squire v. Portland,* 106 Me. 234, 76 Atl. 679 (1909) — where a three story cold storage plant was built into a warehouse building; *Wright v. Du Bignon,* 114 Ga. 765, 49 S. E. 747 (1902) — where metal gutters were placed on a roof and pipes were placed underground; *Buhlinger v. United Firemen's Insurance Co., supra,*— where a modern building was constructed on the premises.

Illinois and New York courts uphold the less prevalent view that a tenant has the right to remove annexed chattels at the expiration of his lease even if the structures annexed must be taken down piece by piece and may be of no practical value to the lessee after being removed. *Baker v. McClurg,* 198 Ill. 28, 64 N. E. 701 (1902); *Re Improvement of Water Front,* 192 N. Y. 295, 84 N. E. 1105 (1908).

Missouri and New Jersey courts are authority for the view that where the landowner consents to the placing of a building on his land by a tenant without an express agreement as to whether it shall become a part of the realty or remain personalty, an agreement will be implied that it is to continue personal property with a right of removal in the tenant. *Merchants National Bank v. Stanton,* 55 Minn. 211, 56 N. W. 821 (1893); *King v. Morris,* 68 Atl. 162, 74 N. J. L. 810 (1907).

Massachusetts courts give great weight to the factor of irreparable damage. They hold that an injunction will not lie to restrain the owner of property situated on another's land from removing it where it does not appear that the landowner will be unable to collect his damages, or that by removing it himself he can prevent the trouble of damages or that the harm is more than a purely technical trespass. *Gates v. Johnston Lumber Co.,* 172 Mass. 495, 52 N. E. 736 (Mass. 1899).

There is authority to support the contention that where the annexation is such that the article annexed cannot be removed without injury to the building this fact does not conclusively show an intent that it shall be a part of the realty. *Allen v. Mooney,* 130 Mass. 155 (1881); *Voorhees v. McGinnis,* 48 N. Y. 278. *Contra: Markle v. Houck,* 19 U. C. Q. B. 164; *Haggert v. Brampton,* 28 Can. Sup. Ct. Rep. 174; *Crane v. Grigham,* 11 N. J. Eq. 29 (1855); *Horne v. Smith,* 105 N. C. 322; *Hill v. Wentworth,* 28 Vt. 428 (1856); *State National Bank v. Smith,* 15 Wash. 160; *Graves v. Pierce,* 53 Mo. 423 (1873); *Bartlett v. Haviland,* 92 Mich. 552, 53 N. W. 1008.

The older cases seem to support the view that a tenant can remove anything which does not cause a lasting injury to the strength or appearance of the property and which would leave the property fit for occupation by another tenant for a similar purpose. They can see nothing wrong in digging up the earth or breaking up concrete or plaster. *Beigh v. Herring Safe Co.,* 136 F. 368 (C. C. A. 2d, 1905) — removing heavy machinery, boilers, shafting, etc., used in the manufacture of safes; *Brown v. Reno Electric Co.,* 55 F. 229 (C. C. Nev., 1893) — removing buildings and machinery; *Hunt v. Potter,* 47 Mich. 197, 10 N. W. 198 (1881) — no action for damage done in removing machinery when removed with due care and caution; *Ray v. Young,* 160 Ia. 613, 142 N. W. 393 (1913) — building for garage and shop removable; *General Petroleum Corp. of California v. Schefter,* 141 Ore. 349, 16 Pac. 2d 645 (1932) — filling station removable.

The more recent decision, with the exception of *General Petroleum Corp. of California v. Schefter, supra,* are of a contrary opinion. *Maronall Co. v. Bernard,* 263 N. Y. S. 485 (1933) — where a greasing pit could not be removed by the tenant; *Sultz v. Seiler Motor Car Co.,* 243 Ky. 459, 48 S. W. 2d 1068 (1932) — where a used car lot fence, electric signs and a temporary building were not allowed to be removed.

The present case of *Martin v. Pilaczynski* seems to be in accord with the majority holding in this country. Although there is authority to the contrary, the prevailing and better view seems to be that where a tenant erects a building on leased property with the consent of the landlord and there is no agreement that it is to remain personalty, its affixation, the purpose or use for which the annexation was made and the relationship of the parties are to supply very strong evidence as to the intention of the parties, thus supporting and further establishing the principles laid down in *Teaff v. Hewitt, supra,* the basic case on this subject.

Ronald Rejent.

LIABILITY OF BASEBALL PARK OWNERS TO SPECTATORS INJURED BY BATTED BALLS. —The Plaintiff, a spectator at a professional baseball game was seated in the pavilion, a section not protected by screening. It was "Ladies' Day," a day on which a lady, by paying a ten-cent fee to cover taxes, could obtain admission to the pavilion, or, if she desired, she could pay an additional twenty-five cents and receive a screened seat. The Plaintiff did not choose to sit in the screened section. She admitted that she was a regular baseball "fan" and that she had witnessed more than a dozen games in each of the previous twelve years. During the course of the game the Plaintiff was struck by a foul ball. She testified that she never thought of the danger incident to sitting in the pavilion and that there was no warning given her of any danger. From a judgment for the Plaintiff, the Defendant appealed. On appeal the judgment was reversed. The court held that the duty of a baseball park owner to a patron, as invitee, is to exercise only ordinary care to guard the patron against danger, and that he is not the insurer of the safety of the patron and neither is the patron protected against all hazards, nor relieved of all duty to himself for his own safety. Moreover, the court went on to say that where the patron in the pavilion at a ball game has full and complete actual knowledge of danger of being struck by a foul ball, knowledge being imputed from being a regular spectator at baseball games, that knowledge dispenses with the necessity for warning. *Ivory v. Cincinnati Baseball Club Co.*, 24 N. E. 2d 839 (Ohio, 1940).

It seems from the decision that the Plaintiff, even though an invitee, with a higher degree of care owed to her by the Defendant, than if she was a mere licensee, was not allowed to recover. The court thus showed the scope of the Defendant's protection against liability to its patrons.

The holding of the court in the principal case is in accord with the majority rule throughout the country.

Washington and Oregon courts have uniformly adhered to the view that where a patron of a baseball park had a choice between screened and unscreened seats and chose an unscreened seat, and was injured by a batted ball, he could not recover for injuries because he was negligent and assumed the risk incident to his choice. *Curtis v. Portland Baseball Club*, 130 Ore. 93, 279 Pac. 277 (Ore., 1929); *Kavafian v. Seattle Baseball Club Ass'n.*, 105 Wash. 215, 181 Pac. 679 (Wash., 1919).

The Supreme Court of California did not regard the choice of seats as an essential factor in the determination of liability because it took the position that a spectator at a baseball park who chose an unscreened seat or took one because a screened seat was not available assumed the risk of being struck by thrown or batted balls. *Quinn v. Recreation Park Ass'n.*, 3 Cal. 2d 725, 46 Pac. 2d 144 (Cal., 1935).

A New York court extended the time, during which the defendant was free from liability, to batting practice before the game, stating that there was no marked distinction, in regard to defendant's liability, between the time of the actual game and the period of practice preceding the game. *Blackhall v. Capital District Baseball Ass'n.*, 278 N. Y. Supp. 649 (1935).

Even in a night baseball game, where the spectator's chances of being struck by batted balls are greater, a recent decision could see no reason for increasing the park owner's liability to an injured spectator. *Paxton v. Buffalo International Baseball Club*, 9 N. Y. Supp. 2d 42 (1939).

The interesting point concerning the status of a person moving in the direction of his seat was discussed in a New York case. The court there held that one attempting to procure a seat in the unscreened portion of a baseball park bleacher during batting practice assumed the incidental risk of being struck by foul balls

while moving in the aisle toward a seat there and therefore could not recover damages from the park owner for resulting injuries. *Blackhall v. Albany Baseball & Amusement Co.*, 285 N. Y. Supp. 695 (1936).

Minnesota and Missouri courts have uniformly held that the proprietor of a baseball park is not an insurer of the safety of his patrons. This is a view also looked upon with favor in the principal case. *Edling v. Kansas City Baseball and Exhibition Co.*, 181 Mo. App. 32, 168 S. W. 908 (1914); *Wells v. Minneapolis Baseball and Athletic Ass'n.*, 122 Minn. 327, 142 N. W. 706 (1913); *Crane v. Kansas City Baseball and Exhibition Co.*, 168 Mo. App. 301, 153 S. W. 1076 (1913).

The authorities are well settled on the point that the proprietor of a baseball park is required to use only ordinary or reasonable care in putting and keeping the premises in a reasonably safe condition for persons attending baseball games. The fact that a portion of the seats are unscreened is held not to be an unreasonable or unsafe condition. *Hart v. Washington Park Club*, 54 Ill. App. 480, 41 N. E. 620 (1895); *Wells v. Minneapolis Baseball and Athletic Ass'n., supra; Edling v. Kansas City Baseball and Exhibition Co., supra; Cincinnati Baseball Co. v. Eno*, 112 Ohio St. 175, 147 N. E. 86 (1925); *Curtis v. Portland Baseball Club, supra; Cates v. Cincinnati Exhibition Co.*, 1 S. E. 2d 131 (Ohio, 1939).

Evidence showing that a ball park owner had placed signs in conspicuous places in the ball park stating that the management would not be responsible for injuries from batted balls was admitted to show a precaution taken by the management to warn the spectator. *Wells v. Minneapolis Baseball and Athletic Ass'n., supra.*

A recent Missouri case expresses the broad view that a baseball club is liable to persons only for injuries occasioned by the unsafe condition of premises arising from negligence and known to the club alone. *Lappin v. St. Louis National League Baseball Club*, 33 S. W. 2d 1025 (1931).

Although the vast majority of cases do not allow recovery for injuries suffered by spectators who are struck by batted balls, there are a few cases where the injured party was allowed compensation for his injuries. A Missouri court in the past year held that a person who paid for a screened seat but was struck in the face by a baseball as she was leaving the ball game was allowed to recover on the theory that the proprietor was negligent in its duty to exercise ordinary care for the safety of a patron in failing to extend the screen protection to cover the exit which was necessarily used by her in leaving the game. *Olds v. St. Louis National League Baseball Club*, 119 S. W. 2d 1000, (Mo., 1939).

Recovery was allowed a spectator under slightly different circumstances. Another Missouri court held that a person who paid the admission price for a seat in the grandstand of a baseball park was not guilty of contributory negligence, as a matter of law, in seating himself where a batted ball might pass through a defective spot in the screen and might hit him, when he had not observed or been warned that the screen was defective. *Edling v. Kansas City Baseball and Exhibition Co., supra.*

In cases which involved injuries suffered by spectators witnessing hockey games the decisions of the courts are in conflict, the courts being undecided whether the baseball injury decisions should govern or not. In the only four cases on record a Rhode Island court and a Massachusetts court are of the opinion that the games of hockey and baseball are fundamentally different and that baseball injury cases are not authority in hockey injury cases. On the other hand two New York court decisions are of the view that there is no marked distinction between hockey injury cases and baseball injury cases, the baseball decisions, in their opinion, being applicable to the cases arising from hockey injuries. The question is a new one and at the present time it would be a purely speculative opinion

as to which view courts in the future will take in regard to this matter. *James v. Rhode Island Auditorium,* 199 Atl. 293 (1938); *Shanney v. Boston Madison Square Garden Corp.,* 5 N. E. 2d 1 (1936); *Hammel v. Madison Square Garden Corp.,* 279 N. Y. Supp. 815 (1935); *Ingersoll v. Onondaga Hockey Club,* 281 N. Y. S. 505 (1935).

As was so deftly stated in *Shanney v. Boston Madison Square Garden Corp., supra,* the common sense as well as the logical view to be taken in all spectator injury cases in regard to baseball as well as other sports seems to be that "cases of liability for injuries to spectators at games must be decided by the application of general principles to the particular facts shown and not by an arbitrary classification according to the names of the various games."

Ronald Rejent.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTS IN STREETS.—Plaintiff's car while proceeding down a street, that was in the process of repair, ran into a ditch, thereby causing the injuries for which suit was brought. It appeared from the evidence that the street was insufficiently lighted and no warning was posted concerning the condition. Plaintiff based her action on the negligence of the city in failing to properly guard or to give warning of the defect. A defense motion for a directed verdict, on the ground that the plaintiff failed to allege the existence of a nuisance, was overruled and judgment given for plaintiff in the lower court. An appeal from the adverse ruling was granted and the judgment below was reversed on rehearing. *Gerend v. City of Akron,* 25 N. E. 2d 363 (Ohio, 1940).

The court stated that the facts alleged were not such that the existence of a nuisance could be inferred therefrom, although enough had been stated to constitute a cause of action for common-law negligence. It was conceded that negligence may be an element of nuisance, but it was further stated that there were equally important factors to be considered, such as locality, surroundings, methods and degree of danger. The action was held not to fall within that section of the OHIO GEN. CODE, § 3714, which provides for the duty of the municipality with regard to the maintenance of streets and alleys, to-wit: "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair and free from nuisance."

In the instant case Judge Washburn, summarized: "Where negligence is involved, the existence of a nuisance does not rest upon the degree of care used, but rather upon the degree of danger existing if due care is used." The court relied upon the opinion in the case of *Village of Cordington v. Administrator of Fredericks,* 46 Ohio St. 442, 21 N. E. 766 (1899), in which it was stated that the above section of the Code does not impose a duty, the violation of which gives rise to a cause of action under the principles of common law negligence, but that the action is one for a nuisance.

The inference must be that the duty of the municipality regarding the repair of streets is governmental in character and that any statute imposing liability upon the municipality with regard to a duty that generally falls within the non-liability rule of a municipal corporation will be strictly construed. *City of Mingo Junction v. Sheline, Administratrix,* 130 Ohio St. 34, 196 N. E. 897 (1935). In that case it was held that in so exercising its governmental functions in the use and control of its

streets the city is not liable in tort therefor unless such exercise results in the creation or maintenance of a nuisance, within the purview of § 3714, OHIO GEN. CODE. What is necessary to constitute such a nuisance within the purview of this section of the Code has not been clearly stated by the Ohio courts. In *Craig v. City of Toledo*, 60 Ohio App. 474, 21 N. E. 2d 1003 (1938), plaintiff recovered judgment for damages suffered when the car in which she was riding collided with a concrete abutment of an uncompleted bridge. It appeared in the evidence that the area was poorly lighted, that no effective warning of the condition was given — one reflector so placed having been bent and turned aside, and that the abutment could not be seen except within a few feet thereof. Plaintiff brought the action charging the city with negligence in maintaining the condition. The court in affirming the decision of the lower court, stated, "We are clearly of opinion that the condition there existing at the time referred to, constituted a nuisance and a menace. . . ."

It is held generally in Ohio that the city is not liable when the injured party was guilty of contributory negligence in going upon slippery or defective sidewalks where the dangerous condition is apparent. *Conneaut v. Neal*, 54 Ohio St. 549, 44 N. E. 236 (1896); *Keister v. Akron*, 74 Ohio St. 596, 80 N. E. 1128 (1906); *Toledo v. LeBlond*, 75 Ohio St. 577, 80 N. E. 1124 (1906); *Cincinnati v. Buerger*, 80 Ohio St. 742, 89 N. E. 1117 (1909); *Norwalk v. Tuttle*, 73 Ohio St. 242, 76 N. E. 617 (1906). It would seem that by discussing the question of contributory negligence the court negatives the stated construction that predicates liability only on the nuisance theory—the existence of a nuisance *per se* that cannot be established by proof of negligence but must be alleged as such and proved by the condition and existent danger as held in the principal case. An implication that the city itself would be liable for its negligence were not the plaintiff negligent, seems to arise from these decisions. The narrow restriction of the liability of the municipality for failure to keep its streets in repair is doubtless due to the view that this duty of the municipality is governmental. The courts of Ohio are not in accord, however, in the interpretation of the section of the Code in question.

In *Robinson v. Greenville*, 42 Ohio St. 625 (1896), the court held that when a municipality is performing the duty of repairing streets, alleys, highways, bridges and public ways it is acting in its proprietary capacity, and its liability is largely if not entirely measured by the liability of an individual for similar acts. The court in *Kreiger v. Doylestown*, 25 Ohio App. 286, 158 N. E. 197 (1927), held that § 3714, *supra*, imposed liability on a municipality for an unsafe condition of its streets, but that the city was not liable for an unsafe use of the streets. The conclusion must be that the courts of Ohio are not agreed as to whether the municipality in such a situation is acting in a governmental or merely a proprietary capacity. One view regards the duty as governmental and construes the statute strictly — so strictly that it gives rise to a negative inference that a nuisance *per se* must be proved before the municipality will be held to have violated the statute. The other view regards the duty as ministerial or proprietary. This confusion is not limited to Ohio, however, but pervades all American jurisdictions.

Two distinct theories of liability are applied, in the absence of charter provisions expressly making the municipality liable for failure to properly maintain its streets: First; that the city exercises merely ministerial functions when it is carrying out its vested, exclusive authority over streets within the corporation, and that from the nature of the power arises an implied duty to keep the streets in a reasonably safe condition for ordinary use, and a corresponding liability exists on the part of the municipality to respond in damages for any failure of such duty. The second view is that while the duty of the city to maintain its streets and highways is a governmental duty, and the discharge of that duty is a governmental function, the nature of the authority is peculiar, and the municipality should be held liable for any failure of such duty, notwithstanding the rule that protects

municipalities from liability in the exercise of their governmental functions. The opposing rule appears in the principal case which regards the exercise of the municipal right and privilege over streets as a strictly governmental function, and thus the city is protected against liability to individuals, in the absence of statutory exception. The former doctrine is not regarded as an overthrow of the rule of non-liability of a municipality for acts done in the exercise of its governmental functions, but rather as an exception to it. The court in *Howard v. New Orleans,* 159 La. 443, 105 So. 443 (1925), stated that while the duty of a municipality to keep its streets in safe condition may be said to be governmental, yet the rule that makes it liable for negligence in failing to exercise the governmental function of keeping them in repair is an exception to the rule stated, to the effect that a municipality is not liable in damages for failure to exercise a governmental function intrusted to it, or for the negligence of its agents in exercising it. *Cornelison v. Atlanta,* 149 Ga. 416, 91 S. E. 415 (1917); *Hillstrom v. St. Paul,* 134 Minn. 451, 159 N. W. 1076, 25 L. R. A. (N. S.) 88 (1909).

The reasons assigned for the distinction are as various as they are numerous. In *Snider v. City of St. Paul,* 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151 (1892), Judge Mitchell stated: "The liability of cities for negligence in not keeping streets in repair would seem to be an exception to the general rule, which we think the courts would do better to rest either upon certain special considerations of public policy or upon the doctrine of *stare decisis* than to attempt to find some strictly legal principle to justify the distinction." In the same case the doctrine was strictly limited to streets, alleys, highways, bridges and public ways, and it was held that the city was not liable for the negligence of its servants in the discharge of the duty of providing and maintaining a city hall, in that it was a public and governmental duty and the city could not be held to respond in damages in a private action. Later, Chief Justice Start of the Minnesota Supreme Court remarked, that the liability of cities and other municipal corporations created by special charters for failure to maintain their avenues of travel, was an illogical exception to the general rule of immunity of such corporations, but the rule itself was too well settled by the almost unanimous agreement of all the authorities to be now questioned. In that case a governmental association was held not liable for injuries received by an individual riding a horse for the corporation in a race conducted by the latter, when the corporation knowingly permitted the injured party to ride a dangerous horse.

The reason most widely assigned for the exception is that such municipalties having been given exclusive control over their streets with ample power to provide funds to care for and maintain them, are chargeable with the duty to keep them safe for travel, and that it follows therefrom that they are liable for a failure to perform such duty. *Noonan v. Stillwater,* 33 Minn. 198, 22 N. W. 444, 53 Am. St. Rep. 23 (1885). A review of the cases has failed to disclose any satisfactory explanation or reason for making the distinction, except, that the city is the only one in a position to make such repairs, and has the power to provide funds therefor; that it is practical and designed to protect the welfare of the citizens, and accordingly, practical considerations will overweigh those strictly legal.

Another group of cases, regards the duty of the municipality to repair and maintain streets as purely ministerial and therefore the non-liability rule of municipal corporations does not apply. The liability for injuries resulting from defects in the streets or other public ways is implied from the provisions of the statutes which impose the duty upon such municipalities to keep the streets and other public ways in repair, giving them ample power to provide funds necessary to make such repairs. The cases hold that where a municipality is by its charter charged with the duty of keeping its streets in repair it is liable for any breach of said duty. *Cleveland v. King,* 132 U. S. 295, 10 Sup. Ct. 90 (1889); *Chicago v. Keefe,* 114 Ill. 222, 2 N. E. 267 (1885); *Holmquist v. Gray Construction Co.,*

169 Ia. 502, 151 N. W. 828 (1915). In the absence of charter provisions the exception above mentioned is recognized in Indiana. *Board v. Allman,* 142 Ind. 473, 42 N. E. 206 (1895); *City of Connorsville v. Snider,* 31 Ind. App. 64, 67 N. E. 555 (1903). It would seem that the principal case should fall within this great class but that it does not is clear from the opinion, *supra.*

The extent to which some courts have gone in holding the municipality liable for failure to keep its streets in a safe condition, even in the absence of charter provisions is illustrated by *Fleming v. City of Memphis,* 126 Tenn. 331, 148 S. W. 1057, 42 L. R. A. (N. S.) 493 (1917), in which the Tennessee Supreme Court declared unconstitutional, a statute exempting the City of Memphis from any liability for a failure to properly maintain its streets. The statute was declared unconstitutional on two grounds; first it was an improper discrimination in favor of the municipal corporation, and secondly, that it was an attempt to restrict the rights of one class of individuals by preventing the assertion thereof, when they have been transgressed upon by another class, that by law is entitled to no special protection in the matters expressly stipulated in the statute. *Kennedy v. McGovern,* 246 Ill. 497, 92 N. E. 942 (1910). The matters stipulated refer to the maintenance of streets, alleys and other public ways, and the favored class is the municipality. The court stated: ". . . a municipal corporation for the government of a town or city is the proprietor of the streets, which it holds as easements, in trust for the benefit of the corporation and which it has the power to grade, pave and otherwise improve . . . it is well settled at this day, both in England and America, that such a corporation is liable to be sued in actions of tort in like manner as a natural person." A worthy review of the authorities supporting such liability is contained in *City of Denver v. Dunsmore,* 7 Colo. 328, 3 P. 705 (1884), in which plaintiff recovered damages for injuries suffered by reason of a defect in a bridge. The court stated that the maintenance and repair of streets was a corporate as distinguished from a governmental function, and that from the authority exercised over streets and bridges arose an implied liability for damages for injuries suffered from defects therein. *Norman v. Chariton,* 210 Ia. 279, 207 N. W. 134 (1926); *Hillman v. Anniston,* 214 Ala. 522, 108 So. 539 (1926); *Savannah v. Jones,* 149 Ga. 139, 99 S. E. 294 (1919). The construction seems to be that where charters give authority to a municipality over its streets and public ways, the exercise of such authority is ministerial and not govermental, and this view has been stated even in the absence of charter provisions. There is no clear cut distinction between the cases placing their decisions on duties imposed on the municipalities by their charters, and those based solely on the view that the authority so exercised is merely ministerial.

The last group of cases is composed of those which refuse to recognize any distinction between the maintenance and repair of streets and public ways and other ordinary functions of municipal corporations. In the absence of statutory provision to the contrary, they give full effect to the governmental character of the corporation and do not declare the corporation liable in a private action to respond in damages for injuries suffered from the negligence of its servants in the maintenance of avenues of travel. It is elementary law that cities and towns are not liable in damages to persons for injuries received from unsafe conditions, while traveling on a highway unless there is a statute imposing liability for such condition. *In Re Opinion of Justices to Senate,* 208 Mass. 625, 95 N. E. 930 (1911). Even where a statute has been enacted imposing such liability on municipalities no rights will arise by implication and the statute will be strictly construed since it is in derogation of the common-law which gives no rights to individuals to sue a municipal corporation for failure to perform its stipulated duties. *Miller v. Detroit,* 156 Mich. 630, 121 N. W. 490 (1909). The Michigan court considered the rights and duties with regard to streets and public avenues of travel as a governmental function and regarded the classification of powers, into those governmental in nature and those corporate in character as illogical. In *McCarthy*

v. Town of Leeds, 116 Me. 275, 101 A. 448 (1917), it was held that plaintiff could not recover damages under a statute which imposed liability on cities and towns for injuries to travelers, suffered from defects in streets, bridges and public ways when plaintiff was injured by reason of such defect. Plaintiff was riding in an unregistered car and it was held that he was then not a traveler within the purview of the statute. Thus in some jurisdictions, statutes, imposing liability on municipal corporations for failure to properly maintain avenues of public travel, have been rendered inoperative by constructions, that restrict their operation in a manner not contemplated by the Legislature that saw fit to enact the particular statute. Public policy has been crystallized by a few courts that are reluctant to keep pace with modern scientific progress. *Collins v. Fort Smith,* 73 Ark. 447, 84 S. W. 480 (1904); *Ansbro v. Wallace,* 100 N. J. L. 391, 126 A. 426 (1924); *Irvine v. Greenwood,* 89 So. Car. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363 (1911).

However, as stated above, the majority of jurisdictions recognize an exception to the general rule of non-liability of municipal corporations when such corporation has been guilty of negligence in failing to keep its streets, highways, alleys, bridges, sidewalks and other public ways, open for safe use by the public. Authority can be found for any one of a great number of reasons for the rule. The most prevalent are two; one that regards such duties as ministerial and proprietary, and thus not protected by the non-liability rule of municipal corporations; and the other regards such duties as governmental but holds that by the grant of the power or exercise of the function, an implied obligation arises to keep such ways open and safe for travel, and for any failure to fulfill such obligation the corporation will be liable to respond in damages for injuries suffered therefrom. Such liability is held to arise from the peculiar nature of the right and is classified as an exception to the general rule.

The minority group as exemplified by the principal case regards such duties as governmental and is reluctant to hold the municipality liable. Even in the instances where a statute imposing such liability has been enacted, the courts presume that the municipality is not liable, and by strict construction nullify the effect of the statutes. The court in this case failed to analyze the requirement of the statute, and for a failure in the allegation to use the words of the statute, *verbatim,* the plaintiff was denied recovery. This latter construction does not seem consistent with good conscience in view of the fact that the municipality is thus given the power to collect money for the repair of its streets, but at the same time is not answerable for a failure to properly use such monies for the protection and convenience of the public.

Edward V. Minczeski.

RAILROADS — TRESPASSERS — NOTICE PLACING DUTY UPON RAILROADS TO INVESTIGATE PRESENCE OF TRESPASSER.—A passenger alighted from a subway train and walked along the regular station platform toward the exit. His path was about two feet from the edge of the platform; the train started and as it approached his position he fell, for some unknown reason, immediately in front of the train. The train came to an almost immediate stop automatically by reason of the contact of a tripper device, located near the tracks and under the train, with some object, presumably the unfortunate passenger. When the train stopped the conductor was informed of the plaintiff's presence under the train whereupon the conductor went immediately to the motorman and they searched under the train for not more than four minutes and failing to find the body climbed into the train and continued the trip without consulting the witness, who had been a passenger on the train with the plaintiff. When the train started for the second

time the passenger was horribly injured about the legs. He sued for damages by reason of the negligent injury and recovered, but the trial court after the verdict by the jury granted defendant's motion for judgment *non obstante veredicto.* On the plaintiff's appeal to the Supreme Court, the judgment was reversed and the case remanded. *Frederick v. Philadelphia Rapid Transit Company,* 10 Atl. 2d 576 (Pa., 1940).

The problems presented concern the notice required to create the duty of an operator of an instrumentality to exercise reasonable care toward a known trespasser in acting and the extent of the duty after such notice.

In some jurisdictions the operator of an instrumentality owes no duty to a trespasser except to refrain from wilfully, wantonly and intentionally injuring him after discovery of his presence. *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Means,* 59 Ind. App. 383, 104 N. E. 785 (1914); *Fitzpatrick v. Penfield,* 267 Pa. 564, 109 Atl. 653 (1920). But, in the present case a most interesting point was brought out by the decision of the court whereby it was stated that when the operator of an instrumentality becomes "apprised" of the presence of a trespasser, the latter immediately acquires the right to proper protection under the circumstances. Thus, there is apparently a conflict of opinion on this point. In *Walsh v. Pittsburgh Rys. Co.,* 221 Pa. St. 463, 70 Atl. 826 (1908), it is definitely stated that after the trespasser's presence has become known to the operator of an instrumentality, a duty arises to act with reasonable care toward the trespasser. The plaintiff in the case,— a girl eight years old — the trespasser, was seen standing close to a cable by the employee of the defendant who operated a motor which moved the cable cars. This employee passed so close by the plaintiff that he nearly brushed her clothes, and entered the motor house. Within a few seconds after he entered the house the machinery was set in motion. The cable when in motion was raised a foot or two from the ground and it caught the plaintiff's dress drawing her into the cable drum and causing her injury. There is no doubt of the liability of the defendant who fails to act with reasonable care when he has actually seen a trespasser on his property and in a perilous position.

But our problem is to ascertain the liability of the operator of an instrumentality toward a trespasser when such persons have not actual knowledge of a trespasser's presence, but have been notified or warned by someone or some object or event that a trespasser is present and in a perilous position.

Before going on, there is a question to be answered. Was the plaintiff in this case a trespasser? Under the present circumstances it is immaterial whether the plaintiff be considered a passenger or a trespasser for in either case his presence on the tracks was unexpectable and the duty imposed upon the operator of the instrumentality toward him is the same. It is stated in DOBIE ON BAILMENTS & CARRIERS that "all persons who ride in the vehicles of the carrier, with the latter's consent, either express or implied, are passengers, except those who are in the carrier's employment." The relation of carrier and passenger continues until the traveler has had a reasonable time to leave the carrier's premises after reaching his destination. Such is held in *Powell v. Philadelphia & Reading Railway Company,* 220 Pa. St. 638, 70 Atl. 268, 20 L. R. A. (N. S.) 1019 (1908). Therefore, the plaintiff here enjoys the status of a passenger as he was injured while properly leaving the premises within a reasonable time after alighting from the subway train. Although his presence upon the tracks was unexpected, he was not a trespasser as he did not go there voluntarily, but arrived there as the result of a fall. *Smith v. Stone,* (1647) Style 65, an early English case, supports the latter statement for there it was held that a man carried upon the land by other persons was not guilty of trespass *quare clausum fregit.* With regard to the duty of a carrier to a passenger, the case of *Pennsylvania Railroad Company v. Aspell,* 23 Pa. St. 147, 62 Am. Dec. 323 (1854), states that carriers "are bound to exercise the strictest

vigilance. They must carry the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it." However, since the presence of a passenger was not expected on the tracks as the carrier had provided a safe means of egress from the station, the operator was under no duty to keep a lookout for him. Thus, as it is a general rule of law that an operator of an instrumentality is ordinarily not bound to anticipate the presence of a trespasser, *Dobrowolski v. Pennsylvania Railroad Company,* 319 Pa. 235, 178 Atl. 488 (1935), the duty toward the plaintiff was the same whether he was a passenger or a trespasser. Since the duties of the carrier were not increased by the plaintiff's status under the circumstances, it is best that he be designated as an involuntary trespasser or as a mere trespasser.

To continue, the RESTATEMENT OF TORTS, Section 334, states: "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." That a possessor of land who knows of a trespasser's presence has a duty to act with reasonable care toward that person has been shown to be an accepted principle of law. Now, the RESTATEMENT OF TORTS evidently extends the principle to include those trespassers of whose presence the owner or occupier of land has no actual knowledge, but is in possession of facts by which he should know of such presence.

And, in a case involving a similar question to the case being discussed a person crossing the tracks at a crossing was warned by the brakeman of the defendant railroad company to leave the tracks, yet the plaintiff's testator remained thereon and was struck by the backing train. He was not injured but he fell beneath the cars and was killed by the fire-box of the engine which was pushing from the opposite end, one hundred and eighty feet away. The brakeman signalled the engineer who because of failure to keep a lookout missed the signal. *Teakle v. San Pedro, Los Angeles & Salt Lake Railroad Company,* 32 Utah 276, 90 Pac. 402 (1907). Here the court ruled that before a person inflicting an injury can be charged with an omission of duty in failing to discover a perilous situation of another there must be a duty owing from him to the deceased person which had it been performed with reasonable care, would have disclosed to him the exposed situation of the person receiving the injury. Had it happened that the deceased was a trespasser and had been struck by the train without the knowledge of the operators yet a bystander had warned them of the deceased person's presence under the cars and they had not acted on that warning, it would be reasonable to hold that they were guilty of negligence toward the victim. As it actually happened, the brakeman attempted to warn the operators, but because of their own negligent conduct they failed to see the warning and as a result the railroad company was held liable for such conduct.

In *Kennedy v. Southern Pennsylvania Traction Company,* 333 Pa. 406, 3 Atl. 2d 395 (1939), a case in point, the plaintiff's truck overturned and landed on the defendant traction company's private right of way by reason of the plaintiff's attempt to escape a collision on the parallel and adjacent highway. The plaintiff was unharmed, but was unable to extricate himself from the cab of the truck. An approaching trolley struck the truck because of the negligence of the operator of that instrumentality who abandoned his post even though he saw the truck on the tracks when there was more than sufficient time to halt the trolley. It is submitted that no one could find the operator free of negligence, if he had been warned by a passenger of the circumstances although he, himself, had not actually seen the truck on the tracks. Logically, under the circumstances of the present case, the defendant would be liable although he had not actually seen the plaintiff

because after the passenger's warning of another's presence, there was sufficient time for the operators to prevent injury as it did not result until the train started for the second time.

In the case of *Radley v. London & N. W. R. Company,* House of Lords, 1876, L. R. 1875-6, 1 App. Cas. 754, well-known authority for the unconscious last clear chance doctrine, the plaintiffs negligently permitted a freight car supporting a disabled freight car to remain on its siding. The combined height of the two cars was such that it was impossible for them to pass under a bridge straddling the siding. The defendant railroad delivered after dark, as was the practice, a train of empty cars to the same siding and pushed the loaded car along until it reached the bridge where the train was halted. The operators of the defendant's train without ascertaining the cause of the stoppage, gave momentum to the engine to such an extent that the bridge was overturned. The similarity between the present case and this landmark case is obvious: an instrumentality of the defendant is involved; there was notice of an existing danger in each case, the operators were warned by the unanticipated halting of the train; in neither were the operators actually conscious of the danger, but in both they had knowledge of facts which should have caused such consciousness; there is also present the neglect of a duty to properly determine the cause of the warning; and, finally the injury and damage. However, in the English case, contributory negligence is a factor, while in the recent case there is no evidence of contributory negligence. The theory of the defendant's liability in the "bridge" case was based upon the last clear chance doctrine a primary requisite of which is contributory negligence. This is so, since the doctrine really means that if one person's negligent acts have placed him in a perilous situation, and if another with knowledge of such peril fails to act with reasonable care and an injury results, the injured person is entitled to recover. *Chunn v. City & Suburban Railway of Washington,* 207 U. S. 302, 28 Sup. Ct. 63 (1907). Since the cases are obviously parallel in many instances, it would be proper to investigate the doctrine of last clear chance and decide upon its applicability. Although in a material issue, that of contributory negligence the cases lack similarity, yet in the case under consideration that absence should create a predominance of weight in favor of the injured person. The absence of contributory negligence eliminates a potent defense. The doctrine of last clear chance consists in two theories. The conscious last clear chance theory permits the plaintiff to recover only where the defendant was actually conscious of the plaintiff's peril in time to have avoided the injury by the exercise of reasonable care. *Anderson v. Minneapolis St. P. & S. S. M. Ry. Co.,* 103 Minn. 224, 114 N. W. 1123, 14 L. R. A. (N. S.) 886 (1908); *Petrowski v. Philadelphia & Reading Railway Company,* 263 Pa. 531, 107 Atl. 381.

The unconscious last clear chance theory renders defendant liable when he was unconscious of the peril but could by the exercise of ordinary care have discovered the danger in time to have avoided the injury — where the plaintiff is helpless to avoid the peril on his own part, conscious of its presence or not. *Mapes v. Union Railroad Company of New York City,* 56 App. Div. 508, 67 N. Y. Supp. 358 (1900). Although the theories of conscious and unconscious notice are so very well presented in the last clear chance doctrine and do assist in illuminating the presence of a duty on the part of the operators of the subway train to make a reasonable search under the circumstances, we must decide that the doctrine is inapplicable for there is no occasion to invoke such doctrine in the absence of negligence on the part of the plaintiff. *Gibbard v. Cursan,* 225 Mich. 311, 196 N. W. 398 (1923). In addition, the doctrine of unconscious last clear chance has not been found acceptable in Pennsylvania for actual sight was held to be necessary to impose liability on the defendant for injury to children playing on tracks. *Peden v. Baltimore & Ohio Railway Company,* 324 Pa. 444, 188 Atl. 586 (1936). Therefore, the last clear chance doctrine of liability would not be applicable under the circum-