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Notes on Recent Cases

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NOTES ON RECENT CASES*

CRIMINAL LAW—The right of self-defense does not accrue to a person until he has availed himself of all proper means in his power to decline the combat. Commonweaith v. Trippi (Mass.) 167 N. E. 354.

An ingenous and novel defense was introduced in this Massachusetts homicide case The trial court had convicted Trippi of first degree murder for the killing of a prison guard who resisted Trippi's attempted escape from the Massachusetts State Prison. The defense attempted to show by defendant's testimony that at the time the shooting took place Trippi had abandoned his attempt to escape and shot the officer in self-defence. In his confession the defendant said that when the officers came up to get him they pulled out their guns, that he pulled out his gun and said, "All right fellows, put them up." Instead of putting up their hands the defendant stated that they fired at him and that he fired back, and that if the officers had put up their hands he would have just made them keep quiet until he got over the cupola. In his testimony he denied that he was still attempting to escape at the time.

At the trial the defense requested the following instructions, the refusal of which is the basis of this appeal. The instruction requested was: "If the jury find that the defendant Trippi at any time prior to the shooting of the deceased Pflager (the prison guard) had abandoned his attempt to escape and that after such abandonment he found himself threatened with great bodily harm or death he would be justified in using necessary force to defend himself to the extent of taking life.'"

The Supreme Court of course upheld the refusal of such an instruction, saying "The right of self-defense does not accrue to a person until he has availed himself of all proper means in his power to decline the combat."

L. A. O'Connor

*With this issue we are inaugurating a new policy in conducting this department of the LAWYER. The new plan has been adopted with the view of providing the students with a digest of current decisions of the various courts on questions of great moment. It is hoped that this added feature will prove of greater value to readers than the former plan of reporting isolated cases.

Editor

TELEPHONE RATES—Penalty for Past due Payment.

In the case of RE MIDDLE STATES UTILITIES COMPANY (Mo.) P. U. R. 1929B 554 there was a petition for a penalty of 10 percent on telphone bills if not paid by the date due in the current month. The Missouri Public Service Commission did not allow the claim, as it was of the opinion that such a penalty was unecessary in view of the fact that the Company is receiving payment for service during the month in which the service is rendered, and the Company is also armed with the right to discontinue its service if payment is not paid promptly for which it may charge a reconnecting fee. The Commission professed its willingness to grant all companies all protection necessary for the collection of bills, but to grant additional penalty to those already allowed would be unjust to the subscribers especially where they pay for the service in the current month.

Yet, in an earlier case decided by the same Commission it ordered the Company to establish rules for the securing of prompt payment for telephone service and said the Company should be required to collect outstanding accounts due, since the good paying subscribers were at the present time being penalized by the action of the Company in allowing the poor paying subscribers to be furnished service. IN RE WINFIELD TELEPHONE CO. CASE NO. 3700, 1923.

However, in the case of IN RE NORTHERN INDIAN TELEPHONE COMPANY (Ind.) P. U. R. 1929A, 74 the Indiana Public Service Commission allowed a collection sharge of 25 cents per month on all bills that are not paid on or before the 15th of the month in which the service is rendered. It is noted that in this jurisdiction the companies may also discontinue service but the span of the delinquent period is greater than that allowed in Missouri. It is probable on this ground that the Indiana Commission has allowed the aditional penalty to encourage prompt payment. This same Commission in the case of IN RE PEOPLES CO-OPERATIVE TELEPHONE COMPANY (Ind.) P. U. R. 1928 D, 528 allowed a request for a 25 percent per month penalty on all rural accounts where the bills were not paid on or before the 15th day of the middle month of each quarterly period. Here the discouragement for tardy

remittance amounted to as high as $1.50 on each bill, but the Commission seemed convinced that this was not unreasonable as the collection in rural districts was somewhat more tedious and the expense of collection greater than in cities.

It is interesting to note that the Illinois Commerce Commission ordered the Illinois Telephone Company to refund to its subscriber a reconnection charge of $3.50, as that Company had no authority from the Commission to make such charges, and when the Company did apply for such permission it was limited to a charge of $1.00 for reconnection after discontinuence of service for slow payment. HOWARD v. ILLINOIS TELEPHONE COMPANY (Ill.) P. U. R. 1924E, 386. The Illinois Commision reflects very conservative ideas in regard to penalties in a decision some nine years ealier when it said, "The proposed penalty ($0.25 against all subscribers who fail to pay within thirty days from the date the bills are due) appears to be an unreasonable regulation. The Commission recognizes that a telephone Company has the right to establish rules and regulations governing the conduct and operations of its business when such rules and regulations are reasonable in their requirements, and a rule which provides for the payment of rentals within a prescribed period is a regulation of the permitted character; and so is a further regulation that unless payment is made the service shall be discontinued. This should afford ample means for protecting the utility against patrons who are careless in making payments, or who deliberately refuse to make payment within the prescribed period. The Commission does not approve of penalty in the form of an additional charge against subscribers who fail to pay promptly." IN RE ST. PETER TELEPHONE CO. (ILL.) P. U. R. 1915B, 350.

When the Home Telephone and Telegraph Company found its accounts receivable swelling to unbecoming proportions it appealed to the Oregon Public Service Commission for some counteracting pursuasion in the way of a 10 per cent penance for nonpayment of all toll bills and a 50 cents reconnection charge when service is discontinued for nonpayment of bills. But the Commission felt that a telephone company is peculiarly advantageously situated to control collection of its accounts by means

of denial or temporary disconnection of service to delinquent subscribers. The Commission then decided that until the Company could show that it had exhausted all the remedies that it now possessed it would not sanction the imposition of a cash penalty for failure to make prompt payment of bills. The fact that the penalty if allowed would be imposed on charges billed in advance and not yet due and owing exerted considerable influence in their decision. IN RE HOME TELEPHONE AND TELEGRAPH COMPANY (Ore.) P. U. R. 19164, 579.

The Alabama Public Service Commission authorized an increase in telephone rates amounting to 25 percent per telephone per month with a provision permitting a discount or reduction of the same amount to all patrons paying their bills for the preceeding month by the 10th of the following month. The Commission said, "It is not only right, but the duty of a utility of this character to conduct its business as economically as possible, consistant with its obligation to render adequate service At the same time an obligation rests on the public that uses the service of the utility to pay the lawfully established charges therefor promptly." IN RE DEMOPOLIS TELEPHONE COMPANY (Ala.) Docket No. 4282, 1923. In accord with this is the decision of the Kansas Public Utilities Commission that found it absolutely necessary for a telephone utility to establish and put into force a rule providing a penalty for failure to pay promptly. IN RE NORTON COUNTY TELEPHONE COMPANY Docket No. 5327, 1923.

Norman J. Hartzer

COMMON CARRIERS—Elevators—Operators as Carriers —Degree of care toward Passenger—Plaintiff, a traveling salesman, was a paying guest of the hotel owned and operated by the defendant. In going to his room, plaintiff approached the hotel elevator by way of a dark hall, found the cage door open at the elevator, stepped in, and fell to the bottom of the shaft, a distance of about twelve feet, the cage at the time having been left by someone at the second floor. Plaintiff, sustaining a broken leg and being otherwise severely and permanently injured, brought an action for damages. Held, the owner and operator of an elevator is not a common carrier of passengers, but the degree of

care required of an innkeeper toward his guest, with reference to his passenger elevator, is similar to that of a common carrier toward its passengers. **Mc Dowell v. Rockey** (Ohio, 1929) 167 N. E. 589.

Although this case involves a question upon which the authorities are not in agreement, the Ohio court adopted the doctrine which is followed in most jurisdictions—a doctrine which is well established upon the more reasonable theory of the law. (**Hutchinson Carriers** (3d ed) §100.) A vast number of jurisdictions hold that the proprietor is in the position or sustains the liability of a common carrier or has a liability which is analogous to that of a common carrier. **Sweeden v. Atkinson** 93 Ark. 397, 125 S. W. 439, 27 L. R. A. (N. S.) 124; **Goodsell v. Taylor** 41 Minn. 207, 4 L. R. A. 673; **Southern Build. & Loan Assoc. v. Lawson** 97 Tenn. 367, 56 A. S. R. 804; **Quimby v. Bee Bldg. Co.**, 87 Neb. 193, 127 N. W. 118; **Wilmarth v. Pacific Mut. Life Ins. Co.** 168 Cal. 536, 143 Pac. 780. The relation of carrier and passenger did not exist in **Johnson v. Lincoln Hotel Co.** (1920) 189 Iowa 291, 177 N. W. 550. And in the more recent case of **Southern Ry. Co. v. Taylor** (App. D. C., 1926) 16 F(2D) 517, it was held that an elevator operator is not a "common carrier", but is required to exercise the same high degree of care as common carriers for the safey of passengers. It has been held also that the United States was not a common carrier in the operation of an elevator in a government building devoted to government purposes. **Bigby v. U. S.** (U. S.) 103 Fed. 597, 599.

However, some courts have carried this doctrine to the extent of not only taking the proprietor or employer out of the classification of "common carriers", but have lessened the degree of care and liability to the use of only "ordinary care and prudence" commensurate with the danger to be reasonably apprehended. **Putnam v. Pacific Monthly Co.** 68 Ore. 36, 130 Pac. 986, 136 Pac. 835, 45 L. R. A. (N. S.) 338, Ann. Cas. 1915 C 256. The reasoning is based upon the ground that the employer is only bound to exercise ordinary care to provide a reasonably safe place and reasonably safe appliances for the convenience of the employees in connection with their work. Similarly it was held in the case of landlord and tenant in **Edwards v. Manufacturers'**

Bldg. Co. 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 8 Ann. cas. 974.

Jurisdictions which sustain the rule that the person maintaining an elevator is a common carrier of passengers seem to disregard, in application to the term "common carrier", the manner of carrying passengers, that is, whether it be horizontal or vertical. This was emphasized in the case of Springer v. Ford 189 Ill. 43 where an elevator was maintained by the owner of an office building, and it was held that the rental paid by tenants includes the compensation for the carrying of the persons transacting business with the tenants. Maintainer of elevator held to be common carrier in Goldsmith v. Holland Bldg. Co. 182 Mo. 597, 81 S. W. 1112, 1114; Ohio Valley Trust Co. v. Wernke 42 Ind. App. 326, 84 N. E. 999, 1002; Smith v. Odd Fellows Bldg. Assn. (1922) 46 Nev. 48, 205 Pac. 796, 23 A. L. R. 38; Engstrand v. Hartnett (1919) 106 Wash. 404, 180 Pac. 132. Escalator as well as elevator is deemed a "common carrier" in Petrie v. Kaufmann & Baer Co. 291 Pa. 211, 139 Atl. 878.

Strictly speaking an operator or proprietor of an elevator is not a common carrier in the legal sense ascribed to the term. (Seaver v. Bradley 179 Mass. 329). But in view of the decisions reached in an overwhelming majority of the cases cited above, it may be reasonably concluded as a general legal principle that he owes the same degree of care as a common carrier to his passengers.

Joseph P. Guadnola

WILLS—A will providing for the disposition of testator's property, if either of his children should die childless, became operative on the child's death, whether before or after the death of the testator.

One Miller by his will provided for the disposition of his property "both real and personal should either of his children die childless." This provision was held to refer to their death without children regardless of whether death should occur before or after testator's death, under a Kentucky Statute, Paragraph 2344, prescribing that contingent words should be construed as a limitation to take effect when the person to whom

they are applied shall die, unless a different purpose be plainly expressed in the instrument. Lightfoot v. Beard, 20 S. W. (2nd) 90, (Ky).

The phrase dying "without issue" or "Childless" or the like, standing alone in a will is ordinarily construed at common law as meaning an indefinite failure of issue. 61 A. 641 (Pa); 166 U. S. 83. An indefinite failure of issue has been defined as an extinction of issue at any period where the limitation over is to take effect wherever the issue becomes extinct. 40 N. J. Law 337.

This has been the interpretation unless varied by statute, 39 A. 421 (Md); 246 S. W. 172 (Mo); 112 Pa. 913 (Pa); 133 S. E. 407 (N. C.), or by the intention of the testator as expressed in the will, 36 S. E. 404 (Ga) 87 N. E. 1005 (N.Y.); 75 A. 1025 (Pa); 283 S. W. 103 (Ky).

However, courts look with much disfavor on a provision providing for a limitation over on an indefinite failure of issue, and so if the court can seize on an expression which denotes a definite failure of issue, the court will not hesitate to do so. 117 A. 340 (Pa.); 81 S. W. 1162 (Mo); 125 N. W. 986 (Wis); 26 N. E. 1112 (Mass); 33 N. E. 482 (N. Y.); 12 Ohio St 320; 26 S. E. 716 (S. C.); 140 A. 708 (N. H.).

In the following cases words of suvivorship in wills are construed as referring to the death of the testator wherever the words of the instrument do not clearly refer to a subsequent date. 97 So. 104 (Ala); 113 Ga. 526 (Ga); 115 N. E. 789 (Ind.); 165 N. W. 587 (Ia); 101 A. 19 (Conn); 129 N. E. 543 (Ill.; 122 A. 886 (N. J.); 211 N. Y. 772; 189 Pac. 222 (Ore).

T. J. O'Neil

FIXTURES—Refrigerator installed in a hotel sold under a conditional sales contract held a fixture and did not constitute part of the freehold.

The Brookville Hotel Company entered into an executory contract of sale with the Refrigeration Sale Company under wich the latter agreed to sell to the hotel a refrigerator to be used by the purchaser until paid for. The contract provided that the re-

frigerator was to be delivered by the seller to a common carrier, the title to remain in the seller until the purchase indebtedness was fully paid in cash. On certain contingencies or on the failure to pay any of the installments due under the contract, the seller was to have the option of retaking the property and retaining as rent, depreciation, and damages the payments theretofore made. The contract was assigned to the Commercial Finance Company to whom the Hotel ompany paid the installments. A balance of $163 being due and unpaid the Finance Company sued out a writ of repleving to obtain possession of the refrigerator. The Hotel Company then brought this action for an injunction to restrain them on the ground that the installation of the refrigerator with the necessary pipe and other fittings caused the refrigerator to become fixed to the realty and to lose its quality of personal property.

The court held that the refrigerator did not constitute part of the freehold. Its character as personal property was not lost by the installation in the building. The title was in the Finance Company and on the failure to pay the installments due that Company had a right to take the property by replevin. The refrigerator was personal property when the contract was made, it was referred to in the contract as a chattel, and in the transaction between the parties it was so regarded. The bill does not allege that the parties intended by the installation to make it a part of the freehold, nor that the seller waived his right to repossess it in the event of the failure of the purchaser to pay for it. Commercial Finance Company v. Brooksville Hotel Company, 123 So. 814 (Fla.).

The majority of the states have held in accord with the principal case. 211 Fed. 244; So. 89 (Ala); 179 Pac. 154 (Colo); 93 A. 376 (Del) 151 N. E. 361 (Ind); 158 Pac. 63 (Kan); 160 N. E. 330 (Mass); 7 So. 499 (Miss) 167 N. W. 869 (Mich); 160 S. W. 902 (Mo); 43 A. 418 (N. J.); 112 N. E. 447 (N. Y.) 90 So. 564 (N. C.); 13 N. E. 493 (Ohio); 78 A. 934 (Pa); 113 S. E. 327 (S. C.) 16 S. W. 979 (Tex); 18 A. 93 (Vt); 191 Pac. 948 (Wash); 132 N. W. 981 (Wis); 201 N. W. 845 (N. D.).

Occasionally it has been held that the conditional vendor has

the right of removal because the purchaser of the chattel, not being the owner thereof, has no right to annex it. 193 Pac. 909 (Ore); 142 S. E. 551 (Ga).

Anglo-American Mill Co. v. Community Mill Co., 41 Idaho, 561, 240 Pac. 446, holds that the parties to a condiitonal sale contract may agree that the chattel, though sold for the purpose of being annexed to the realty, will retain the character of personal property after annexation and title remain in the vendor until the purchase price is paid, provided that by annexation the chattel does not lose its distinctive identity or become an essential part of the structure into which it is incorporated.

California holds that though personalty may be converted into realty by annexation, yet where the question of title arises only between the seller who retains the title and the buyer who affixes the property to the land, the property as between the two will under the California Code be treated as personalty. Oakland Bank of Savings v. California Pressed Brick Co., 191 Pac. 524.

T. J. O'Neil

AUTOMOBILES—Contributory negligence of a motorist colliding with parked truck without lights at night held for the jury.

In this case the plaintiff alleged that the defendant parked his large truck on a public street without lights at about eight-thirty at night; with the rear end of the truck angling out into the street. It was raining and the plaintiff had dimmed his lights, in passing a car coming from the other direction, about fifty feet from the truck. He collided with the truck, not having seen it in time and demolished his car, which, was thrown eighty feet from the truck by the force of the collision. The defendant pleaded that the plaintiff was traveling at an excesive rate of speed, to have had his own car thrown so far and was therefore guilty of contributory negligence. The jury found that the contributory negligence of the plaintiff was sufficient to bar him from recovery. On appeal, the appellate court held that "contributory negligence of a motorist colliding with a parked truck without lights at night is a question of fact for the jury" and they affirmed

the lower courts decision. McKee v. Suesz (Ind.) 167 N. E. 720. In the case of Koplovitz v. Johnson (Ind.) 151 N. E. 390 the same point came up as was decided in this case and the Supreme Court of Indiana decided that the jury that tried the case was right in weighing the evidence as to the plaintiff's contributory negligence. Here, however it was held that the facts did not show that the plaintiff was guilty of contributory negligence. In Holt v. State of Indiana, 199 Ind. 134, the court held that the statute requiring lights on automobiles was applicable to parked cars as well as to automobiles being driven.

Other jurisdictions that follow the ruling in this case are Arkansas, Deleware, Iowa, Kentucky, Massachusetts, New Jersey, Ohio and Washington. But in Michigan and Minnesota the question of contributory negligence of a motorist colliding with a truck without lights seems to be a question of law for the court. In Spencer v. Taylor (Mich.) 188 N. W. 461 it was held "The plaintiff whose automobile collided at night with an unlighted truck, was held guilty of contributory negligence as a matter of law." Also, in Jacobs v. Belland (Minn.) 214 N. W. 55 the court said, "finding of negligence in parking truck on highway without lights sustained; evidence held not to require finding as matter of law that driver of automobile colliding with truck parked without light was negligent."

Kenneth Konop

BLOOM-ROSENBLUM-KLINE CO. V. UNION INDEMNITY CO.—June 12, 1929, (Ohio) 167 Northwestern 884.

The Plaintiffs in this action had a contract of insurance with the present defendants, whereby the latter were to defend all suits instituted against the Plaintiff, because of liability imposed by law upon the Plaintiffs for injury accidentally suffered or alleged to have been accidentally suffered, by any persons or person caused by the automobile vehicles described or referred to in the policy, and agreed, if such suit be brought to enforce such claim for damages, to defend such suit whether groundless or not.

The question in this case is whether the present defendants, under the above statement of the policy, should defend a suit, in

which the present plaintiff's plea is that none of its vehicles were in the accident, and in no way caused the injury complained of. The defendant claims that it had the plaintiff's vehicles insured, and since the plea of the plaintiff, in the action brought against it, was that none of its vehicles caused the injury, then the present defendant should not be forced to defend the action, because none of the vehicles it had insured were implicated in the suit. However, this court held that since the defendant had agreed to defend all claims whether groundless or not, it should have defended this action, because if the plaintiff had lost the former suit, it would have been necessarily proved that it was one of its vehicles which caused the injury, and thus it would clearly be the duty of the present defendant to have defended such an action.

The material facts of the circumstances which gave rise to this cause of action may be briefly set forth as follows:

The plaintiff in this case has a large number of automobiles which it owns and others which it hires, and uses all of the said vehicles for delivery purposes. The defendant is engaged in selling what is known as casualty insurance. The plaintiff wished to have its delivery cars insured, and entered into an agreement with the defendant, in the form of an insurance contract, whereby the defendant was to insure the plaintiff against loss because of injuries accidentally suffered, by any person or persons, or the death of such persons, resulting at the time therefrom, and caused by any of the plaintiff's vehicles mentioned in the policy. Said policy, as executed and delivered, contained a provision as follows:— "In consideration of the premium determined as hereinafter provided for, it is hereby understood by and between the named insured and the company that this policy shall cover the operation of all automobiles and trailors of the type stated in the policy hired by the assured, during the term thereof and used for the purpose stated in the declarations, without a specific description of, and specific premium charge for, each automobile to be covered as required by this policy.

On November 30, 1926, one Stephen Terimay entered suit against the plaintiff, wherein he claimed that the plaintiff in this action was liable to him in a large sum for personal injuries, his

cause of action based on a claim that on November 18, 1926, he (Terihay) was a passenger or guest in an automobile hired by the plaintiff and used for the purpose stated in the declarations of the policy of insurance, to wit, "commercial delivery", which automobile was being then and there operated by this plaintiff, through certain of its employees, in the usual course of its business, and that said automobile was caused to come into violent collision with another automobile as a result of the negligence of this plaintiff and its employes. Said Terihay had due service upon the present plaintiff, the plaintiff sent the service to the present defendant as the policy called for, and the present defendant after starting to defend refused to continue; and as a result the present plaintiff, in order to protect his interests was forced to defend the suit himself, which he did. It was shown Terihay had no action but he incurred $28.30 court costs and $772 attorney fees, to enforce the payment of which by the defendant this suit is brought.

The court held since the policy provided that the operation of all automobiles and trailors hired by the plaintiff should be covered, and since the plaintiff proceeded according to the terms of the policy and placed the matter in the hands of the defendent for defense, and the latter refused to perform even though it had promised to defend such suits whether groundless or not, the the plaintiff was entitled to the expense incurred in defending the suit itself.

The defendant claimed that it was necessary to allege that the damages were sustained while riding in an automobile in fact covered by the policy, or that an automobile in fact covered by the policy was involved in the accident.

Judge Jones in his dissenting opinion held that by holding the defendant liable for the costs incurred by the plaintiff in defending the former suit the court was making the defendant liable for a car not covered by the policy.

However, the majority of the court were of the opinion that that was begging the question, since it turned out that the automobile in which Terihay was riding was neither owned nor hired by the plaintiff, and that the assured has no liability whatsoever.

Hence it is obvious that the plaintiff cannot meet the defendant's demands and set forth that it was one of its automobiles which caused or was in the accident, since its defence was that it had nothing to do with the automobile which caused the accident.

In meeting Judge Jone's dissenting opinion the court pointed out that if the facts set up in Terihay's petition had been established at the trial of that case, and a judgment rendered thereon, the insurance company would have been required under the liability clause of the policy to satisfy that judgment to the extent of the amount specified in the policy. The lability of the plaintiff would have been determined at the end of the trial. There could be no argument if he had been found liable; the defendant would have to defend or pay the costs of defending plus the damages. Hence it is no defense that the plaintiff was found not liable.

This agreement to make the defense on behalf of the assured whenever a suit is brought against it is a valuable provision of the policy, but it would be of little value, and would be rendered almost meaningless if the duty of the company with respect to the enforcing of claims for damages did not arise when the action was brought against the assured based upon a claim of injury by an automobile covered by such policy. The position of the assured in this case evidently was that no automobile hired by it was involved in such transaction, and for that reason Terihay's suit was groundless; but before the assured could be relieved of this potential liability it was essential that it defend itself against the action instituted by Terihay. The insurance company by the express provisions of its policy had agreed to conduct that defense and pay the expense thereof.

While it does not appear that the precise question here presented has been previously considered in any reported case, the view herein expressed and conclusion rached upon the admitted facts are supported by the courts which have thus far had similar provisions before them for consideration, and no decisions are to the contrary. 2 Berry on Automobiles #2091, and the following cases, which are in point: Greer-Robbins Co. v. Pacific Surity Co., 37 Cal. App. 540; South Knoxville Brick Co. v. Empire State Surity Co., 126 Tenn. 402, 150 S. W. 92.; Mayor Lane &

Co. v.Commercial Casualty Ins. Co., 155 N. Y. S. 75; Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (N. S.) 609; Western Indemnity Co. v. Walker-Smith Co. (Tex) 203 S. W. 93; Coast Lumber Co. v. Ætna Life Ins. Co., 22 Idaho, 264, 125 P. 185.

James E. Keating