Notre Dame Law Review

Volume 5 | Issue 6 Article 7

3-1-1930

# Notes on Recent Cases

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DIVORCE — *Grounds — Cruelty — Necessity of Actual Physical Violence* — In a suit for divorce upon the ground of extreme cruelty complainant charged that the defendant "did upon several occasions threaten to leave your oratix and to go to another country," said threats causing her extreme suffering to the extent that her health was greatly impaired. *Held,* this allegation, if proven, could not justify the granting of a decree of divorce; that a divorce upon the ground of extreme cruelty will be denied in the absence of actual physical violence, unless the treatment complained of injures health or renders cohabitation unsafe and intolerable.—*Chisholm v. Chisholm* (Florida, 1930), 125 So. 694.

The court in the instant case followed the ruling in *Kellogg v. Kellogg,* 93 Fla. 261, 111 So. 637, in holding that extreme cruelty as a ground for divorce is "such conduct as endangers life or health, or causes reasonable apprehension of bodily hurt; mere inconvenience, unhappiness, or incompatibility of temperament or disposition, rendering marriage disagreeable or even burdensome, does not authorize a decree of divorce for extreme cruelty." This modern definition of cruelty seems to be substantially the same in the greater number of jurisdictions. *White v. White* (W. Va., 1929), 146 S. E. 720; *McCullough v. McCullough* (Texas, 1929), 20 S. W. (2d) 224; *Henricksen v. Henricksen* (Iowa, 1928), 216 N. W. 636; *Wermerling v. Wermerling,* 217 Ky. 126, 288 S. W. 1050; *Krouss v. Krouss,* 163 La. 218, 111 So. 683; *McCurdy v. McCurdy,* 123 Okla. 295, 253 Pac. 295. Danger of life, limb, or health are necessary to constitute "cruelty." *McKane v. McKane* (Maryland, 1927), 137 Atl. 288. But a divorce for legal cruelty in *Proudfoot v. Proudfoot,* 154 Md. 585, was not granted where the conduct of husband and wife was on parity and the wife's health was not endangered. Reaction of husband's treatment upon wife often furnishes great weight in a divorce suit on the ground of cruelty. A husband repeatedly choked his wife in the case of *Regan v. Regan* (N. J.

Ch., 1927), 135 Atl. 478, and it was held not extreme cruelty where the wife was not made afraid.

The ancient rule that actual bodily harm or apprehension of actual bodily harm is necessary to constitute cruelty as a ground for divorce has been repudiated almost universally. Today the rule has been extended in most jurisdictions to include even mental suffering. *Horkheimer v. Horkheimer* (W. Va., 1929), 146 S. E. 614 (2d case); *Feyerherm v. Feyerherm* (1928), 128 Okla. 147, 262 Pac. 199. In *Miller v. Miller* (1928),223 Ky. 537, 4 S. W. (2d) 363, it was held that insults and neglect of wife, producing and aggravating mental anguish and wounded feelings, are as cruel within the divorce statute as actual bruising of the person. However, this rule cannot be applied too broadly. In the divorce complaint in the case of *Heinemann v. Heinemann* (Oregon, 1926), 245 Pac. 1082, a charge of impotency was made, but the court held that this was not a ground for divorce, unless it was wanton and malicious and causing defendant such mental suffering as to be injurious to health.

Illinois seems to adhere, to a greater extent, to the ancient doctrine in regard to the necessity of actual physical violence or apprehension thereof in order to constitute legal cruelty. In *Trenchard v. Trenchard,* 245 Ill. 313, the wife filed a bill for divorce on the ground of cruelty alleging that her husband used physical violence (shaking her with excessive force on one occasion, and at another time pushing her violently against a door). The court found that the bill did not show facts that the acts were committed in anger, without justifiable provocation or that the wife was injured on either occasion, or that as a result the wife may have reasonably feared she would be in danger if she continued to live with him, and consequently the court held that the bill did not state a case of extreme and repeated cruelty within the statute authorizing a divorce on that ground.

Although it is true that the term "cruelty" as defined in *Kellogg v. Kellogg,* supra, seems to be in substance the general interpretation given to that term by most courts, yet it remains that in view of the incongruous decisions which

are repeatedly arrived at by the different states, the inability and impossibility of our courts to adopt a definite and universal interpretation of that term is most obvious. Our state statutes concerning divorce, and concerning the essential elements involved in that branch of the law, is the principal source from which the inconsistencies are developed. In many instances the inconsistency arises by reason of the vast diversity of opinion of our judges who are authorized to grant the divorce decree. As a matter of fact, the disparity of the laws among our states on this subject is so great that in the eyes of the laws of one state a man may be divorced, whereas the status of this same individual in another jurisdiction will assume an entirely different aspect. It is a common observation that the dissolution of the marriage status requires the consideration of very delicate principles. However liberal our courts are treating this problem, or however great is the lack of harmony among the states in establishing divorce laws, the very nature of the relationship with which we are dealing will necessarily govern the extension of the legal principles adopted.

—J. P. GUADNOLA.

ACTION—Injury to person and damage to vehicle give rise to distinct causes of action, though resulting from a single tortious act.—*Clancey v. McBride* (Ill) 169 N. E. 729.

Automobiles of the plaintiff and defendant collided at an intersection, resulting in injuries to the plaintiff and damages to her automobile. The plaintiff sued and recovered damages for the injuries to her car, and then started an action for injuries to herself. The defendant interposed the former judgment as a bar to this action, contending that the injuries amounted to only one cause of action. The court reversed the decision of the appellate court in favor of the plaintiff, holding that "while causes of action for injuries to person and damage to his property as a result of the same negligent act may be joined in a single suit in a court of competent jurisdiction, recovery of judgment for damage to property is not a bar to a subsequent action to recover damages for injuries to the person."

This case seems to be in conflict with the great weight of authority on the question of whether or not an injury to person and personal property arising out of the same act amounts to one cause of action or several. In deciding as it did, the Illinois court followed the rule followed by the New York court and courts of England. The reasoning of the courts holding that there are two causes of action is that the period of limitations for the two causes are different, and that one right is assignable and survives death of either party while the other is not assignable and does not so survive. Cases holding that an injury to the person and damage to the property resulting from the same wrongful act gives rise to a distinct cause of action for each of the rights infringed are; *Brundsen v. Humphrey,* L. R. 14 Q. B. Div. 141; *Reilly v. Sicilian Asphalt Paving Co.,* 170 N. Y. 40; *Ochs v. Public Service Railway Co.,* (N. J.) 80 A. 495; *Watson v. Texas and Pacific Railway Co.,* (Texas) 27 S. W. 924. The case of *Reilly v. Sicilian Asphalt Paving Co.,* Supra, was criticised in *McInerney v. Main,* 81 N. Y. S. 539 (1920), and see also *Van Ommen v. Hageman,* (N. J.) 126 A. 468.

A single wrongful act, which causes injury or damage with respect to different rights, creates but one cause of action. *Birmingham Southern Railroad Co. v. Lintner,* (Ala.), 38 So. 363; *Jenkins v. Skelton,* (Ariz.) 192 P. 249; *Segar v. Town of Barkhamsted,* 22 Conn. 290; *Cassidy v. Berkovitz,* (Ky.) 185 S. W. 129; *Doran v. Cohen,* (Mass.) 17 N. E. 647; *King v. Chicago, Milwaukee & St. Paul Railway Co.,* (Minn.) 82 N. W. 1113; *Kimball v. Louisville & Nashville Railroad Co.,* (Miss.) 48 So. 230; *Fields v. Philadelphia Rapid Transit Co.,* (Pa.) 117 A. 59; *Smith v. C., N. O. & T. P. Railway Co.,* (Tenn.) 189 S. W. 367; *Sprague v. Adams,* (Wash.) 247 P. 960. The reasoning usually given for this rule is that since the acts involved and much the greater part of the testimony is identical, there is but a single cause. Moreover it is more convenient to settle a dispute of this kind in one rather than in several distinct suits.

In my opinion, the supreme court of Illinois was wrong when they reversed the decision of the Appellate court. The

very courts of New York and New Jersey have in their later decisions shown a tendency towards the more liberal rule; and it is on the decision of these courts that they based their decision. Then, too, a rule leading to two lawsuits where one will accomplish the same results is not to be favored. KENNETH J. KONOP.

AUTOMOBILES—In automobile collision case, evidence that the plaintiff's license was suspended after accident held properly excluded. *Peskin v. Buckley;* 168 N. E. 791 (Mass.)

This is an action of tort to recover damages for injuries to the person and property of the plaintiff, alleged to have been sustained by reason of the negligent and unskillful driving of an automobile by the defendant on a public highway in the city of Worcester. The case was tried to a jury and a verdict was returned for the plaintiff.

There was evidence that, while the plaintiff was operating his automobile with due care, the defendant drove his car "at an excessive rate of speed" upon and into the plaintiff's automobile, thereby causing the harm and damage complained of. There was also evidence that the plaintiff was not in the exercise of due care, and that the collision was attributable in part to the negligent driving of the plaintiff's car.

Without objection or exception, the supervising inspector of the state registry of motor vehicles in Worcester county testified that he partly investigated an automobile accident in which the plaintiff was involved in November, 1926; that the plaintiff told him at the office of the registry "he was crossing Washington Square at an estimated speed of seventeen miles an hour, and that he was in collision with this car which he hadn't seen up to the time of contact." The defendant then asked the witness. "What official action was taken in regard to Peskin's license?" Subject to the exception of the defendant the judge excluded the answer to the question and the defendant made an offer of proff in substance "that the license of the plaintiff was suspended." In support of the relevancy of the proffered evidence the defendant relies on G. L. c. 90 22, which reads; "The registrar may suspend or revoke any certificate of registration

or any license issued under this chapter, after due hearing, for any cause which he may deem sufficient."

It is plain the mere suspension of the plaintiff's license could have no relevancy, no rational tendency to prove want of due care by the plaintiff, and it is obvious that the fact of the suspension. If admitted in evidence, would be prejudicial to the plaintiff. *Beauregard v. Benjamin F. Smith Co.,* 213 Mass. 259, 100 N. E. 627, 45 L. R. A. (N. S.) 200 Ann. Cas. 1914A, 473. The evidence was rejected rightly. WILLIAM JUDGE.

CHATTEL MORTGAGES. — Mortgagee suing sheriff in trover for selling automobile seized under execution on judgment against mortgagor held entitled to possession without making demand. *Burton v. Jennings,* (Md.) 148 A. 424.

Appellee sued the appellant who had formerly been sheriff at Baltimore county in an action of trover for selling a Ford Sedan of one Clarkin on which appellee (Jennings) had a chattel mortgage, under a writ of fieri facias issued out of one of the Law Courts of Baltimore city directing appellant (Burton) as sheriff of Baltimore county to levy on the property of Clarkin, after the recording of appellee's mortgage. The mortgage was recorded in Howard county where the mortgagor resided and in Baltimore city where he was engaged in business. The Ford sedan was now claimed to be the property of appellee by virtue of a duly recorded mortgage in default of payment. The levy was made and the automobile was seized in Baltimore county as Clarkin was passing through. Burton had actual notice of such mortgage arising from the recording thereof and refused to give up the said automobile at the request of Jennings and sold the same to one Linzey who took possession thereof and transferred it to others who are now claiming the said automobile.

It is true, the sheriff had actual notice of the mortgage and that it was properly recorded where the law required it to be recorded and he was warned not to make the sale.

The plaintiff was entitled to possession. By the terms of the mortgage the mortgagor agreed to surrender pos-

session to the mortgagee on default. The mortgage was in default.

The plaintiff could have filed a claimant's petition under Code. Art. 9 *47. But he was not bound to do so. *Richardson v. Hall* (21 Md. 399), *Corner v. Mackintosh* (48 Md. 374), *Kilpatrick v. O'connell* (62 Md. 403), *Keen v. Doerner* (62 Md. 475).

A demand by the mortgagee was not necessary under the circumstances of this case, as a preliminary to the right of possession by the mortgagee, as on the seizure of the automobile by the sheriff it was no longer possible for the mortgagor to comply with such a demand and it would therefore have been ineffectual.

There appeared to be no evidence of any express demand on the sheriff for delivery of the automobile. However, there is evidence of a notice of the mortgage and of the places of record, and that he would be held responsible for appellee's "equity in the car." That was in fact, a warning that appellee was demanding all his rights, and put the sheriff on inquiry as to what those rights were. On examination of the records to which he was referred would have disclosed that the mortgage was overdue and that the mortgagor was in default, and that he had agreed to surrender the automobile to the appellee; that the very attempt to sell the car by the sheriff would entitle the appellee to immediate possession. J. H. TUBERTY.

COMMONWEALTH v. CANTER.—Libel and Slander—Words "Fuller—Murderer of Sacco and Vanzetti" carried on placard held libelous per se. *Commonwealth v. Canter;* 168 NE 790, (Mass.)

The defendant was indicted for criminal libel on Dec. 10, 1928; he pleaded "not guilty"; he was tried by a jury; and on May 27, 1929, was found "guilty."

It appears from the record, and is not disputed by the defendant, that about two o'clock on the afternoon of Nov. 3, 1928, the defendant marched at the head of twenty-five persons in single line in front of the State House on the State House side of Beacon street, Boston, Mass., for seven or eight minutes; that he carried a placard bearing

the words, "Fuller--Murderer of Sacco and Vanzetti"; that there were people on the same side of the street watching the procession and about fifty or seventy-five people across the street on the side of the Common. Aside from sauntering and loitering there was no breach of the peace and no disorder. At the trial the defendant admitted that the placard carried by him referred to Alvan T. Fuller, then Governor of the Commonwealth of Massachusetts, and that "Sacco" and "Vanzetti" mentioned on the placard were Nicola Sacco and Bartolomeo Vanzetti who had been executed for the crime of murder in the Commonwealth. The defendant, while under arrest at the station house, in reply to the question of what the idea was of parading up and down before the State House carrying the sign, said; "Because these men Sacco and Vanzetti had been executed illegally and we think Governor Fuller is the man who is to blame for the carrying out of the execution." The words, "Fuller--Murderer of Sacco and Vanzetti," taken in their usual, natural and popular sense and without forced construction, import a charge of the most heinous crime known to the law—wilful murder—and are libelous per se. Giving to the words their primary meaning the publication of them was well calculated to injure the reputation of Governor Fuller, to degrade him in society, to lower him in the confidence of the community, and to bring him into public hatred and contempt. The defendant, not denying the publication by him of the words displayed on the placard or the falsity of them in so far as they import wilful murder, offered to prove that the police officers and everybody else present on the occasion of his arrest would testify that they understood the words used are used not in the sense that Governor Fuller had been guilty of murder as set forth in the indictment, but that he was morally responsible for the deaths of Sacco and Vanzetti, and contended that the question whether such was the fact was purely a question of fact for the jury. Based upon the presumed common knowledge that Sacco and Vanzetti were executed by the Commonwealth of Massachusetts more than a year prior to the parade of the defendant and others with the placard, the defendant contends that nobody could take the words published to mean

as stated in the indictment that Governor Fuller had been guilty of murder with malice aforethought.

Disregarding as surplusage the inuendo of the indictment wherein the word "Murderer" as printed on the placard is defined as "meaning one who slays or kills with deliberately premeditated malice aforethought, and meaning that the said Alvan T. Fuller is guilty of the crime of murder." *Commonwealth v. Snelling,* 15 Pick, 321, 335; *Commonwealth v. Szliakys,* 254 Mass, 424, 150 N. E. 190, it is plain the words of the placard when published were not susceptible of meaning to the world that Governor Fuller was not guilty of murder as a crime but was morally responsible for the deaths of Sacco and Vanzetti, *Thomas v. Blasdale,* 147 Mass., 438, 18 N. E. 214. It is not sufficient for a defendant to show by arguments that words in form libelous were not intended to be such in fact, where the words published are not ambiguous and have a meaning that is perfectly clear and well understood by everybody. There was no error, in the refusal to direct a verdict for the defendant, in the refusal to receive the testimony offered to prove that the words were used to mean only that Governor Fuller was morally responsible for the deaths of Sacco and Vanzetti, in the refusal to receive the testimony offered to prove the truth of the publication assumed to have the mean ing ascribed to the words by the defendant, in the denial of the requests for rulings to which exception was taken, in the exception taken to the charge, or in any of the exceptions which have been argued. WILLIAM JUDGE.

*Chicago Title & Trust Co. vs. De Lasaux et al* Supreme Court of Illinois, December 25, 1929.

Bill of interpleader by Chicago Title and Trust Co. against De Lasaux and others to determine the ownership of $1,000 held by it. Decree granting $150 to the Chicago Title and Trust Company and $850 to F. W. Harsh, one of the claimants of the $1,000 held by the Trust Company. Affirmed by the Illinois Appellate Court. De Lasaux brings certiorari. Affirmed by Supreme Court of Illinois.

It appears that De Lasaux contracted with Harsh, a broker, to pay the latter three per cent commission if he sold a particular lot located in Chicago. Harsh entered into

a contract to sell the real estate to one Windham for $36,000. By the terms of this agreement the vendee was to pay $1,000, which incidentally is the money in question, to the Chicago Title & Trust Co. and the balance was to be paid to De Lasaux, vendor, when transfer was made. The deal was closed, and the purchase price paid to vendor, except the money held by trust company, and on account of which this bill of interpleader is filed.

Plaintiff in error, De Lasaux, insists that under the pleadings and evidence the Chicago Title and Trust Co. incurred an independent liability towards plat in error; that the trust company had no lawful right to bring her into a court of equity to litigate the claim of Harsh, broker, against her; and that none of the essential elements necessary to grant relief prayed appear either in the bill or in the evidence.

The court briefly set out the elements upon which the equitable remedy of interpleader depends: First, the same thing, debt, or duty must be claimed by both or all of the parties against whom the relief is demanded. (In the instant case the same thing—$1,000—was claimed by the vendor and the broker). Second, all the adverse titles or claims must be dependent on or derived from a common source (here the common claim is derived from the sale of the real estate). Third, the person asking the relief must not have or claim any interest in the subject matter, (here the trust company does not claim any interest or part of the $1,000; it merely wants the true owner to have the money). The fourth, and last requisite, is that the party having the bill must have incurred no independent liability to either claimant, that is, he must stand perfectly indifferent between them, in the position merely as stakeholder. (in the present case the trust company held just that position; it was under contractual obligation to neither vendor nor broker).

Equity courts in America uniformly require the four elements referred to in the preceding paragraph to be the grounds of relief . . . 126 Ill. App. 493; 181 Ala. 338; 121 Mo. App. 442, 97 S. W. 200; 94 N. E. (Mass.) 271; 161 Mich. 521; 91 Conn. 444; 256 Pa. 363; 71 N. Y. S. 481; 65 N. Y. App. Div. 214.

A bill of "interpleader" should not be confused with a bill "in the nature of interpleader." A bill of "interpleader is distinguished from a bill "in the nature of interpleader" in that in the latter there are grounds of equitable jurisdiction other than the mere right to compel defendants to interplead, and complainant may seek some affirmative equitable relief. 6 Ala. 362; 92 Ark. 446, 123 S. W. 233; 115 Ga. 97, 41 S. E. 272; 178 Ill. A. 551; 263 Ill. 453, 105 N. E. 319; 52 Ind. 218.

"While the assertion of perfect disinterestedness is an essential ingredient of a bill of interpleader, no principle of equity jurisprudence is violated by permitting a party in interest to file a bill of that nature to ascertain and establish his own rights, where there are conflicting rights between third persons," *Royal Trust Co. v. Gardiner,* 44 App. (D. C.) 570. For example, a bill in the nature of interpleader is a proper remedy where plaintiff is a mortgagor seeking to redeem, and there are conflicting claims to mortgage money. 16 R. I. 417.

A line of demarcation should also be drawn between the two bills already considered and a "bill of peace." Equity in its descretion in order to prevent a multiplicity of suits will adjust conflicting equities of many parties in one suit. As in the case of a bill of interpleader there must be a single issue before the courts will allow a bill of peace. But in a bill of peace the complainant has an interest in the outcome, whereas in a bill of interpleader the complainant can have no interest in the subject matter. A bill in the nature of interpleader and a bill of peace more closely resemble each other but they are dissimilar in as much as in the former complainant seeks to enforce an equitable right, whereas in the latter complainant's right is legal but in being dealt with in equity for convenience—avoiding a multiplicity of suits. WM. LEE O'MALLEY.

REMOVAL OF CAUSES:—Key No. 43.—Diversity of citizenship to justify removal to Federal Court must exist at the beginning of the suit and at time petition for removal was filed, and subsequent change of domicile does not furnish justification for removal. (28 Usca Sect. 71,

P. 183). *Southern Ry. Co. et al. v. Bailey,* reported in 125 So. 403, (1929).

On the second trial of this case, in the Circuit Court, a second petition for removal to the Federal Court was presented. A denial of relief on that petition is here assigned as error. The latter petition for removal discloses that at the time the action was commenced Plaintiff was a citizen and resident of Alabama, but that she has removed her residence, and changed her citizenship, and is now a citizen of Mississippi, and, on account of the diversity of citizenship resulting from such change Defendant Railway Co. has the right to remove this cause, and prays for an order to that effect.

The court stated that it was well settled many years ago by the Supreme Court of the United States that, to justify the removal of a cause from a state to federal court on account of diversity of citizenship, such diversity must exist at the beginning of the suit and also when the petition for removal was filed, and that the subsequent change of domicile by Plaintiff from the state, did not furnish justification for a removal of the cause on the petition of the Defendant. 108 U. S. 561, (Ohio), 2 S. Ct. 873, 27 L. Ed. 825; 117 U. S. 197, (Tenn.), 6 S. Ct. 669, 29 L. Ed. 888; 111 U. S. 358, (Texas), 28 L. Ed. 455; 130 U. S. 230, (Mo.), 32 L. Ed. 914; 18 F. 657 (Wis.); 19 F. 881 (Cal.); 116 F. 471 (Wash.).

A case cannot be removed on the ground of diversity of citizenship at the time of filing the petition for removal unless such diversity existed also at the commencement of the suit. 111 U. S. 358; 117 U. S. 197.

The right of removal depends upon the case disclosed by the record when the petition for removal is filed. 230 F. 711 (D. C. Or. 1916); 163 Ark. 255, 259 S. W. 730; 210 N. Y. S. 243, 214 App. Div. 58.

Where a consolidation of a foreign with a domestic railroad has not taken place till after suit is brought against the foreign corporation by a domestic corporation, and the filing of a petition for removal, the consolidation does not alter the Defendant's right to a removal of the cause. See: 29 F. 337, (C. C. Iowa, 1886).

In the present case, since it affirmatively appears on the face of the petition, that when suit was brought, Plaintiff was a citizen of Alabama, we therefore conclude that the Southern Ry. Co.'s petition of removal was properly denied. FRANCIS G. FEDDER.

MUNICIPALITIES:—City in maintaining a bathing beach in a city park was discharging a governmental function, hence it was not liable to users thereof; charge of a small fee for use of bathing suit and other conveniences did not make the city liable to one injured while using municipal bathing beach.

The city of St. Paul maintained a public park in which there was situated a lake. A part of the lake and beach was set apart for bathing and provided with diving scaffolds and boards. Anyone was permitted to make use of these facilities free of charge. There was a bathhouse situated on a portion of the beach where bathing suits, towels and lockers could be rented and soap purchased from the city. The plaintiff went to the beach; rented a bathing suit, towel and locker, and bought a piece of soap. He then went on the diving board and dove into the water, but as he struck the water, his head came into contact with some sharp substance which cut a gash in his head. He seeks to recover damages from the city for the injury sustained. *Held:* The city in the maintenance of bathing facilities in a public park was discharging a governmental function and hence not responsible for negligence to those making use of the same. The court also held that the fact that the city provided for a price the things needed by those making use of the public bathing beach did not render the city liable. *St. John v. City of St. Paul,* 228 N. W. 170 (Minn.)

Generally in reference to liability for torts, it is held that a municipal corporation has a dual character, the one public and the other private, or what is a more correct classification, the one governmental and the other proprietary. By practically unanimous authority it is held that a city is not liable for injuries resulting while the municipality is acting in a governmental capacity. 256 U. S. 650; 31 Ala. 469; 94 Ark. 80; 178 Pac. 50 (Cal.); 132 A. 467 (Conn.);

111 N. E. 573 (Ill.); 112 N. E. 994 (Ind.); 209 N. W. 454 (Ia.); 270 S. W. 837 (Ky.); 149 N. E. 204 (Mass.); 198 N. W. 214 (Mich.); 191 N. W. 167 (Minn.); 225 S. W. 934 (Mo.); 137 N. E. 24 (N. Y.); 140 N. E. 324 (Ohio); 124 A. 273 (Pa.)

It is just as universally held that when a municipality is acting in a private or proprietary capacity, the city stands on the same footing as a private corporation, and like such private corporation is liable for injuries resulting from its negligence while acting within the scope of the municipal power. 256 U. S. 650; 124 S. W. 14 (Ark.); 81 A. 958 (Conn.); 111 N. E. 573 (Ill.); 114 N. E. 636 (Ind.) 207 N. W. 134 (Ia.); 67 N. E. 244 (Mass.); 121 N. W. 274 (Mich.); 211 S. W. 59 (Mo.); 99 N. E. 540 (N. Y.); 41 Ohio St. 149; 124 A. 273 (Pa.); 155 N. W. 127 (Wis.)

These general propositions are not controverted, but the difficulty lies in determining whether the municipality is acting in a governmental or in a proprietary capacity under a certain state of facts. These functions have been fairly well classified in most instances. However, the facts as stated in the principal case have led to a contrariety of decisions, in determining whether the municipality is carrying out governmental or proprietary functions.

In the case of *Augustine v. Town of Brant,* 163 N. E. 732 (N. Y.), the court, while admitting that there was a conflict of authority on the question, held that a municipality in maintaining a bathing beach was acting in a proprietary and not in a governmental capacity, and so the municipality was liable for injuries arising therefrom. Judge Pound in rendering the decision stated that "The establishment of town parks, playgrounds and other similar places is not a public duty imposed on the town, and the town does not act as an agent of the state when it avails itself of the privilege of maintaining them."

In *Bolster v. City of Lawrence,* 114 N. E. 722 (Mass.) on an identical statement of facts, the Massachusetts court holds squarely opposite to the preceding decision by the New York court. In this case as in the principal case the municipality charged a fee for the use of the beach, but the court maintained that this fact did not prevent the city from

acting in a governmental capacity. The court based its decision on the ground that the maintenance of free public baths was in its essence a public benefit, and was for the general good of all the public. T. J. O'NEIL.

LANDLORD AND TENANT.—If building is defective when lease is executed, covenant requiring tenant to repair will not relieve landlord from liability for injuries caused by defect. *Updegraff v. City of Ottumwa.* (Iowa) 226 N. W. 928.

The defendant was the owner of a building which he had leased to the Kresge Company. Evidence shows that a down spout which had been constructed on the side of the building and adjacent to the side walk had been defective for months prior to the lease. This defect caused water to run over the sidewalk which collected and froze. After the Kresge Company had taken possession of the building under the lease, plaintiff slipped and fell on ice which had formed on the sidewalk, thereby sustaining injuries for which she now seeks to recover. Court held that the plaintiff could recover from the owner of the building in spite of an agreement in the lease requiring the lessee to "make any and all repairs which may be necessary to said premises or any part thereof."

The general rule that "the landlord who has parted with full possession and control of his premises by lease to a tenant is not liable for injuries to third persons caused by the negligence of the tenant," is universally adopted by all the states. But this immunity from liability does not extend to cases where the injuries to third persons results from defects in the premises which existed at the time of the execution of the lease. 64 Pac. 564 (Cal.); 27 Conn. 632; 89 S. E. 1099 (Ga.); 53 S. W. 452 (Ind.); 61 Pac. 689 (Kan.); 45 So. 258 (La.); 139 N. E. 379 (Mass.); 172 N. W. 491 (Minn.); 85 S. W. 915 (Mo.); 174 N. Y. S. 625; 67 N. E. 286 (Ohio); 123 A. 491 (Pa.); 96 S. E. 202 (Va.); 149 N. W. 489 (Wis.); 193 Pac. 61 (Cal.) In the last case the court said that the nuisance must be one which in its very essence and nature is a nuisance before the landlord can be held liable. If it is something which

is capable of being thereafter rendered a nuisance by the tenant, the landlord cannot be held liable.

Whether or not the landlord's liability, under the second rule, is relieved by the tenant's agreement in the lease to make all necessary repairs is generally answered in the negative. 91 N. E. 911 (Mass.); 225 Ill. App. 50; 137 N. E. 663 (Mass.); 59 N. Y. 28; 13 N. W. 499 (Mich.); 95 N. W. 224 (Minn.); 118 A. 99 (N. H.)

JOSEPH YOCH.

MUNICIPAL CORPORATIONS. — Municipal council cannot delegate to a municipal officer the power to decide upon legislative matters properly resting within its judgment and discretion. *State ex rel Srigley v. Woodworth, Safety Director.* (Ohio) 169 N. E. 713.

The relatrix in mandamus proceedings seeks to compel the defendant, a city officer, to issue to her a permit authorizing her to build a gasoline filling station on her lot in the city of Athens. The defendant justified his action on the grounds that sections 13 and 14 of the city ordinance number 512, provided that no filling stations should be erected in a residential district of the city. In this case the safety director, acting as building inspector, determined for himself that the street upon which the relatrix's property was located was a residential district. It is this power of the defendants, which permits him to say what part of the city is residential and what part is not that the relatrix objects to and claims the ordinance is void because of. The court of appeals awarded the writ of mandamus and ordered the defendant to issue the permit on the grounds that a provision in an ordinance authorizing an inspector of buildings to determine what part of the city belongs in various districts held void as an unlawful delegation of legislative power.

A municipal council cannot delegate to another municipal officer the power to decide upon legislative matters properly resting in the judgment and discretion of the council. The members of a council are chosen by the people to legislate, and the public is entitled to the judgment and discretion of those elected for that purpose, and not to the judg-

ment and discretion of some other to whom the council may confide it. 19 Ruling Case Law 896. In *Jewell Belting Co. v. Village of Bertha* (Minn.) 97 N. W. 424, the court said, "Ministerial duties such as are absolute, fixed, and certain, involving no element of judgment or discretion, may be delegated by the governing body of a municipality; but discretionary powers must be exercised by the body itself."

The generally accepted rule is to the effect that a statute or ordinance which vests arbitrary discretion with respect to an ordinary lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform—is unconstitutional and void. 12 A. L. R. 1436.

Recent decisions holding that legislative functions cannot be delegated are, *Varela v Bell,* 10 Fed. (2d.) 989; *Moch Co. v. Renselaer Water Co.,* 217 N. Y. S. 426, holding that governmental functions of a city cannot be delegated to a private corporation to make it immune from liability; *Poggel v. Louisville Ry. Co.* (Ky.) 10 S. W. (2d) 305; *Moore v. Logan,* (Texas) 10 S. W. (2d) 428, deals with delegation of powers where the municipal corporation is under the commission form of government, and the same rule applies.

Decisions holding that ministerial functions can be delegated are, *Walker v. Towle,* (Ind.) 59 N. E. 20; *May v. Chicago,* (Ill.) 140 N. E. 845; *Milwaukee v. Rissling,* (Wis.) 199 N. W. 61; *Burge v. Rockwell City,* (Iowa) 94 N. W. 1103; and *Mayfield v. Phipps,* (Ky.) 263 S. W. 37.

Ohio decisions holding with the main case that when a delegation of authority is purely legislative, the power cannot be delegated by the municipal council or governing body are: *Elyria Gas Co. v. Elyria,* (Ohio) 49 N. E. 335; *State v. Bell,* 340 Oh. St. 194; *Lillard v. Ampt,* 7 Oh. S. and CP. 167.

There is no conflict among the states as to the rules laid down in this case. Where the conflict does arise, however, is when courts are attempting to determine whether or not a delegation of authority, was a delegation of a legislative function or a judicial function.

KENNETH KONOP.

SCHOOLS AND SCHOOL DISTRICTS.—"Injunction against transferring colored pupil from school for white children to color school on the sole ground that the distance was unreasonable, was held properly refused." *Wright v. Board of Education of Topeka,* 284 P. 363.

This was an action to enjoin the board of education from interfering with the attendance of W. Wright, a colored pupil at a school maintained for white children. P lives within a few blocks of the Randolph school. The Buchanan school is some twenty blocks from the P's residence. The sole contention is that the D's order that P attend the Buchanan school is unreasonable, because of the distance. It is found that the D furnishes transportation by automobile bus for the P to and from the Buchanan school without expense to her. The trial court properly held that the order of the board of education was not so unreasonable that it should be enjoined. Cases in agreement have been found in Arkansas, *Stephens v. Humphreys,* 224 S.W. 442, 145 Ark. 172; Illinois, *People v. Wabash Ry. Co.,* 121 N. E. 736, 286 Ill. 399; Nebraska, *State v. Stoddard,* 189 N. W. 299, 108 Neb. 712; Okl. *Lincoln County v. Matthews,* 230 P. 739, 104 Okl. 185. In Wisconsin it was held that "An act of a school board transferring a child with a defective voice from one school to another would not be interfered with by the courts." *State v. Board of Education of Antigo.* 172 N. W. 153, 169 Wis. 231.

Mississippi upheld the right of a school board to appoint the school which a child must attend when they found that, "Persons of mixed blood having any appreciable amount of negro blood are colored within the meaning of the Constitution, as to separate schools." *Moreau v. Gandich,* 75 So. 434, 144 Miss. 560.

In cases, however, where the board abuses its discretion, such abuse would make its order invalid. And a school that is an unreasonable distance and the child's safety would be jeopardized, would be such an abuse unless free transportation would be provided, thus eliminating the danger. *Williams v. Board of Education,* 79 Kan. 202, 99 P. 216, 22 L. R. A. (N. S.) 584.

Before such a prayer could be denied to the P, it must have been lawful for the school board to discriminate between white and colored children and dictate to them, where they should attend school. This power has been given the board by statute which "authorized boards of education in cities of the first class to organize and maintain separate schools for the education of white and colored children." (R. S. 72-1724).

This statute has been held valid in case of *Board of Education v. Welch,* 51 Kan. 692, 33 P. 654. It was also decided in *Reynolds v. Board of Education,* 66 Kan. 672, 72 P. 274: "Such act does not violate the fourteenth amendment to the constitution of the U. S. prohibiting any state from denying to any persons within its jurisdiction the equal protection of the laws."

The object of the fourteenth amendment being to enforce the equality of the races before the law, but was not intended to enforce social, as distinguished from political equality.

It was accordingly found constitutional in a U. S. case of *Betronneau v. Board of Education* in 3 Woods 177 when they found that, "Law providing separate public schools for white and colored children is constitutional.

*U. S. v. Buntin,* 10 Fed. 730; *Ward v. Flood,* 48 Cal. 36, 17 Am. Rep. 408; *Corby v. Carter,* 48 Ind. 327, 17 Am. Rep. 738; *Dallas v. Fosdick,* 40 How Prac. 249 (N Y.); *State v. Cincinnati,* 19 Ohio 178.

AUSTIN J. BARLOW.