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Notes on Recent Cases

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NOTES ON RECENT CASES

ATTORNEY AND CLIENT—*Lowell v. Connolly, et al,* 223 N. W. 786 (Minn.) is an action to recover $250 for legal services claimed to have been rendered. The plaintiff here prepared a will for John E. Martin, a brother of Michael Martin, in which the latter was named as principal beneficiary. After the death of John E. Martin the plaintiff acted as attorney for Michael J. Martin in litigation growing out of the administration of the estate. In that litigation the widow clamed that she was entitled to all of the property except certain specific bequests. In the probate court the plaintiff's client was successful but an appeal was taken and while it was pending Michael Martin died testate. The defendants here are the ones interested in the appeal that was pending when Michael Martin died. They hired different attorneys to handle the case and these attorneys did all the work in the district court and also on appeal to the supreme court. The plaintiff here claims that he continued to act in the case and that he is entitled to compensation therefor. The defendants deny that they retained the plaintiff or that they are indebted to him in any sum. There was no evidence offered by the plaintiff of any specific agreement and no showing that the defendants availed themselves of the services of the plaintiff, if any were rendered. The plaintiff relies here for his rcovery upon a quantum meruit.

In the opinion written by Justice Hilton it was said that in the absence of an express agreement the law may imply a contract from the circumstances or the acts of the parties; and where there is nothing from which a contrary intention or understanding is to be inferred it is a just and reasonable presumption that he who has received the benefit of the services or property of another impliedly undertakes to make compensation therefor. *Deane v. Hodge,* 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321. This case does not come within that rule. There was no express contract nor can a contract be implied from the facts as the defendants did not accept or avail themselves of the services of the plaintiff.

Marc Wonderlin.

AUTOMOBILES—In the recent case of *Greeson v. Bailey,* 146 S. E. 49, handed down by the Supreme Court of Georgia, it was held that a master is not liable for an injury by his servant acting within the scope of his employment to a person permitted to ride with the servant in excess of authority.

The agent was employed by the defendant to drive the defendant's automobile from place to place. While so engaged, the servant voluntarily permitted the plaintiff to ride with him. He then willfully and wantonly injured the plaintiff. The plaintiff sought in this action to hold the defendant liable under the doctrine of "respondeat superior".

The court held that the driver of a motor-vehicle, in the absence of express or implied authority from the owner to permit third persons to ride therein, is ordinarily held to be acting outside the scope of his employment in permitting them to do so. And a principal is not liable for the acts of his servant done outside the scope of his employment, unless those acts are in the prosecution of the master's business. To give rides, the master not being in that business, is certainly not to prosecute the master's business.

Francis T. Ready.

AUTOMOBILES—Guest held negligent in connection with collision with cables stretched across road, where she was watching men at work and did not warn driver.

Action for damages was prosecuted by M. L. Boltinghouse, joined by her husband, J. F. Boltinghouse, against R. H. Thompson et al. The grounds of negligence were that defendants were engaged in moving, leveling and repairing a schoolhouse (without pay) near a third class public road and had stretched cables across the road in the furtherance of their work, and that they gave no warnings. Mrs. Boltinghouse, passing along the road with a lady friend who was driving the automobile, ran into the cables and was injured severely. *Boltinghouse v. Thompson,* 12 S. W. (2nd) 253 (Texas).

A preponderance of the evidence tended to show an utter lack of care and showed contributory negligence on the part of the two women. The cables were large and visible for a long distance, and if the car had been kept in the road, or had turned off on a shorter route, which was used by others traveling by, no ac-

cident would have happened. Mrs. Boltinghouse admitted that she did not look along the road but was looking at the men and the schoolhouse and did not see the cables that were clearly visible. She was riding in the car as the guest of her friend Mrs. Alexander.

It was the contention of the plaintiffs that a guest is not guilty as a matter of law when a driver of an automobile is negligent; but as Mrs. Boltinghouse knew that they were moving rapidly and that her companion was not keeping watch on the road, but was looking at the men at work on the schoolhouse, and as Mrs. Boltinghouse not only did not utter a word of warning to the driver but gave all her attention to the men at work also, while had she exercised the least care she could not have failed to see the cables, the court applied the rule that "while the negligence of the operator of an automobile is not chargeable to a passenger, still a passenger is bound to exercise such care for his own safety as the exigencies of the situation require. It is no less the duty of the passenger, where he has an opportunity to do so, than the driver, to learn of danger and to avoid it if practicable." Berry, Automobiles, sec. 571. The decision in favor of the defendants was affirmed.

Walter E. Parent.

AUTOMOBILES—Motorist has duty as to pedestrian's safety, even though moving in obedience to traffic signal.

To a certain degree, the testimony in the case of *Margeson v. Town Taxi, Incorporated,* 165 N. E. 20, is conflicting. The plaintiff, Ella Margeson, before attempting to cross a street in Boston, stopped at the intersection to observe any possible approaching vehicle. Seeing a clear crossing, she proceeded to cross. Before reaching the other side, however, being but a few feet from the curb, she was struck by a cab belonging to the defendant company. The driver of the cab testified that he was moving with the traffic under the officer's direction. There were located at this intersection, traffic signals, which were declared to have been in favor of the defendant's procedure at the time of the accident. The cab driver was declared to have seen the pedestrian when about four or five feet in front of him, at the said time, the cab being in a stationary position.

The court stated that as "he (the cab driver) started from a

stationary position when the plaintiff was within his line of vision in front of the taxicab_____made it possible_____to say that he failed to exercise care of a reasonable, prudent and careful driver_____. He had a duty to perform for the safety of a pedestrian in the street, even if he was moving in obedience to a traffic signal." Citing *Donovan v. Mutrie,* (Mass.) 164 N. E. 377.

The vehicle driver of today appears to be unaware of anyone other than additional drivers, on the street. Little or no attention is given to the casual pedestrians, as though they had altogether disappeared from existence. The motorists anxiously wait for the "go" signal; when it flashes they are off, thinking little about who might be in their path. As S. Whipple said in his article "Destiny By Statute", 4 N. D. L. 359, "Rather than think correctly,—we manufacture excuses to think incorrectly." The drivers do not stop to think, nor concern themselves about the safety of others, their main thought being on a traffic signal. And in case he was moving in obedience to the signal, the driver is of the opinion that he was in the right. He is too willing to have others do his thinking for him, as Mr. Whipple explains in his article (supra). The driver must learn to think of and be concerned with the safety of the pedestrians no matter if he be moving in obedience or disobedience to traffic signals.

J. R. Harrington.

AUTOMOBILES—Instruction that failure to keep highway reasonably safe was negligence was held not erroneous as imposing absolute liability. *Fichtenberg et ux v. Lincoln County,* S. C. of Washington, 1929.

Action by Fichtenberg and wife against Lincoln County. From a judgment for plaintiffs, defendant appeals. Affirmed.

This action is to recover damages sustained upon the plaintiff's autombile going into an opening in a county road caused by the removal of the covering over a narrow stockway. The undisputed evidence is to the effect that plaintiffs were coming down the hill which, due to rain during the day, had frozen to some extent and was quite slippery. During the day the road foreman, with help, was engaged in removing the stockway and filling up the road to the proper level. As to how fast plaintiff was going when he approached the stockway and just how the road foreman attempted to warn him or whether he warned

plaintiff at all are facts that are in dispute.

The judge instructed the jury that the county is required to keep its highways in a reasonably safe condition for travel, and that failure to do so would constitute negligence, and failure to guard the road properly while under repair by the erection of fences or barriers so as to prevent possible injuries would make the county liable for the injuries.

Defendant excepted on the ground that the instruction was preposterous because "if the bridge was removed, as is frequently done, this part of the highway is unfit for travel and every one knows it is not". But the court overruled the objections, saying "it was still the duty of the county to see the *highway,* and not merely the bridge, was kept in condition and reasonably safe for travel."

James A. Allan.

CHARITIES—Bequest for scholarships for young men of poor parents, with provision for preference to descendants of testator's relatives, held valid charitable trust.

Testator devised his real property to certain trustees in trust to pay over the income therefrom to his mother and wife for life and upon their deaths the income to be applied and apportioned to educating young men in a certain Pennsylvania college. The young men were to be from poor parents who resided in certain named counties in West Virginia and Ohio and the will provided that preference in receiving such education be given to the sons of certain of testator's relatives. It was contended that the general trust for educating young men contained a private trust in favor of sons of relatives of testator and that the entire trust was unenforceable because of indefiniteness of purpose. A demurrer to the bill which sought to have the trust declared void was sustained. *Gallaher v. Gallaher et al,* 146 S. E. (W. Va.) 623.

Under the Code, chapter 57, "benevolent" gifts are made valid. Commenting on the meaning of "benevolent" it was said in *Hays v. Harris,* 73 W. Va. 17: "While the word 'benevolent' does not include all those indefinite trusts recognized in ch. 4, 43 Eliz. as charities, still it is more comprehensive and wider in its scope of meaning than the word charitable, and may include what are not recognized as charities in the old English law. *Chamberlain v. Stearns,* 111 Mass. 267. It includes all gifts prompted by

good will or kind feeling toward the recipient, whether an object of charity or not, and it has no legal meaning separate from its usual meaning. *Norris v. Thomson's Ex'rs,* 19 N. J. Eq. 307."

The gift being for the definite purpose of educating young men in a specifically named college, and the classes from which they are to be selected being also clearly designated, it is no objection to the validity of the trust that the individuals entitled to share in its benefits are not definitely identified. "One of the essential elements of a charitable or benevolent trust is that it be certain in its object and as to the class of persons, but indefinite as to the individuals to be benefitted." *Mercantile Banking & Trust Co. v. Showacre,* 102 W. Va. 260, 48 A. L. R. 1138.

The preference in favor of the sons and descendants of certain relatives of the testator does not invalidate the trust. The founder of such a trust as this is not precluded from directing that preference shall be given to his kin or to any other class of persons that he favors. A direction requiring such a preference is assumed to be a lawful exercise of his rights and powers. *Dexter et al, Trustees v. President and Fellows of Harvard College,* 176 Mass. 192.

D. M. Donahue.

CHARITIES—Action against hospital association for negligence not maintainable where evidence disclosed charitable trust and judgment would deplete trust fund.

Action was brought by Velpeau Brown against the St. Luke's Hospital Association for damages alleged to have been sustained through negligence of the defendant in failing to use reasonable care in the use of a vapor lamp for inhalation purposes, resulting in a portion of the contents thereof being projected upon plaintiff's arm, and there taking fire and burning her arm and breast. The defendant denied negligence, and further denied liability on the ground that it was a charitable institution. *Brown v. St. Luke's Hospital Association,* 274 Pac. (Colo.) 740.

In support of its contention that it had been from its inception a charitable institution, defendant introduced the articles of incorporation of itself and its predecessor, in which appeared its corporate functions, powers and objects. From these, and from the testimony of its superintendent, it was apparent that the hospital came into being as, and continued to remain, a charitable

institution, and that all property held or acquired by it was impressed with a trust for the charitable uses and purposes mentioned in its charter; that all the business of defendant was conducted on the hospital premises; and that the money derived from the paying patients was insufficient to enable it to operate without donations or income form endowments. As a result, therefore, any judgment rendered against the defendant and satisfaction thereof would result in the depletion of its funds held in trust for charitable purposes; it was contended by defendant that this could not be done. The Court upheld this contention, basing its opinion on the case of *St. Mary's Academy v. Solomon*, 77 Colo. 463, 238 Pac. 22, 42 A. L. R. 964. In that case it was held that: "A charitable trust fund may not be depleted by the tort of the trustee, but it does not logically follow that no judgment can be rendered against him. He may be liable and yet the trust fund not. . . . . The judgment against these corporations is valid, but no property which they hold in charitable trust can be taken in execution upon it, and while they hold no property but in such trust, this judgment cannot be collected of them." Since, therefore, in this case a judgment against the hospital, which was shown to be a charitable institution, would, if satisfied, have depleted the trust fund, it was held that the plaintiff could not maintain the action.

J. J. Canty.

CONSTITUTIONAL LAW—Statute fixing gasoline prices held unconstitutional.

Public Acts of Tennessee 1927. c. 22, regulated the fixing of prices at which gasoline could be sold within the state, provided for the issuance of a permit to sell, and prohibited rebates, price concessions and price discriminations between persons or localities.

The Standard Oil Co. of Louisiana and the Texas Company, being threatened with prosecution for violation of the above mentioned act, brought separate suits in the District Court of the U. S. for the Middle District of Tennessee to enjoin the state officers from carrying out their intention to enforce the act and institute criminal proceedings, and to have the act declared unconstitutional and void on the ground that it deprived them of their property without due process of law Plaintiffs' applications for

temporary injunctions were granted by a statutory court sitting pursuant to section 266 of the Judicial Code (24 Fed. (2d.) 455), and defendants appealed to the Supreme Court of the United States where the cases were considered together. *Williams v. Standard Oil Co.,* 48 S. Ct. 115.

Mr. Justice Sutherland delivered the opinion of the court affirming the order, in which he held that though foreign corporations must comply with conditions precedent to doing business prescribed by a state, a state cannot impose conditions requiring relinquishment of rights guaranteed by the Federal Constitution and that the sale of gasoline was not a "business affected with a public interest" justifying regulation and therefore, the act in question, being indivisible, was unconstitutional and void in its entirety, as it deprived plaintiffs of their property without due process of law.

"It is well settled by recent decisions of this court," said Mr. Justice Sutherland, "that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest'—Affirmatively, it means that a business or property in order to be affected with a public interest, must be such or be so employed that it has been devoted to a public use and its use is thereby in effect granted to the public.—Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect to its maintenance—Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country."

J. S. Angelino.

CORPORATIONS—In absence of wrongful purpose, stockhloder has right to examine list of stockholders' names and addresses, which by-law requires secretary to keep.

In the case of *State ex rel Lee v. Goldsmith Dredging Co.,* S. C. of Washington, 1928, it appears that the plaintiff was the purchaser of several shares of stock in the defendant corporation and thereafter made an application to the proper officers to inspect all its books and records. The by-laws of the company provide

that the secretary "shall keep a stock book containing the names of all stockholders of record since the organization of the company, showing the amount of stock held, the residence, time of acquiring stock, time of transfer, etc." It is admitted by the officers of the company that the plaintiff was refused access to the book containing the names and addresses of the stockholders.

French, J., in delivering the opinion of the court, said the interests of the stockholders, and the public-at-large would be better protected by holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation. When request for such an examination is made and it is refused the burden is upon the officers so refusing to show that the purpose for which the examination is sought is illegitimate. No improper purpose on the part of the plaintiff is found in this case and the judgment of the lower court granting a writ of mandate to compel the officers to permit the examination is affirmed.

James A. Allan.

CRIMINAL LAW—Buyer of liquor held guilty of conspiracy to transport.

In the indictment in the case of *United States v. Kerper et al,* reported in 29 Fed. (2d) 744, defendant Norris was charged on two counts with conspiracy with Kerper, the other defendant, to transport liquor in violation of (a) the National Prohibition Act (27 USCA) and (b) of section 240 of the Criminal Code (18 USCA 390).

Norris, a banker, lived in New York. Kerper, his bootlegger, had his headquarters in Philadelphia. Norris, by telephone, would from time to time order whisky, placing about twelve orders within a year. Upon receipt of the orders, Kerper would send whisky by express disguised as paint, ink, olive oil, etc. As the court points out in its opinion, "he (Norris) did not sell or intend to sell any of it, nor did he take any part in its transportation, other than as above stated."

From this state of facts the court draws two interesting conclusions of law, to wit: That the mere purchase of liquor is not

an offense under the National Prohibition Act, but that where one gives repeated orders for whisky to a bootlegger located in another city, who transported whisky to buyer by express, pursuant to agreement, receiving payment for whisky so transported, such purchaser is guilty of conspiracy to transport liquor.

District Judge Kirkpatrick of the U. S. District Court of the Eastern District of Pennsylvania, before whom the case was tried, said: "We agree that the mere purchase of liquor is not an offense under the National Prohibition Act, and that the purchaser cannot be convicted of aiding and abetting the sale.—It does not follow, however, that where the transportation is required by agreement, there may not be an indictment of the buyer and seller for conspiracy to transport, even though what is contemplated is simply the delivery of the thing sold. Transportation of intoxicating liquor is made a distinct substantive offense by the Act.—Of course, mere knowledge that a crime is about to be committed does not make the inactive party a conspirator. —But in respect to transportation, Norris did far more than know and acquiesce.—By his repeated orders for whisky, telephoned from New York to Philadelphia, he became a party to an agreement which required Kerper to transport the liquor, and he promised to pay him for doing it. The conclusion is (1) that a conviction may be had of a buyer and seller of liquor for conspiracy to transport liquor, in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer; and (2) that an order by a purchaser to a bootlegger, located at a distance, to deliver liquor, followed by transportation, delivery, and payment is sufficient evidence of such agreement." *J. S. Angelino.*

CRIMINAL LAW—Justice taxing fees against defendant held disqualified for pecuniary interest, making judgment void.

Application for a writ of habeas corpus by Taylor West, in a Texas case found in 12 S. W. (2nd) 216, to obtain his release from custody after a commitment issued by a justice of the peace following his conviction for a misdemeanor. It was shown that the justice taxed against appellant fees amounting to $7.65 and that such fees were the only compensation of the justice in said case, and it was further shown that had appellant not been convicted the justice would have received no fees.

The appellant contended that because of the pecuniary interest of the justice in the case to the extent of the fees, that the justice was therefore disqualified to sit in the trial of the case, and that any judgment rendered by him would be null and void in consequence of the provision of Sec. 11, Article 5 of the state constitution, which forbade any judge to sit in a case in which he is interested. The fact that the legislature, in attempting to fix the fees of office, unfortunately made fees of the justice of the peace in ordinary criminal trials payable only in consequence of conviction could have no further effect than to disqualify any justice who claimed, collected, or attempted to collect such fees, but if any compensation were provided from other sources, or if the duly qualified justice should see fit to exercise his prerogative to try such cases without compensation, it would seem plain that there would be no disqualification, and therefore no legal hindrance to the continued functioning of the justice within the jurisdictional limitations fixed by the Constitution. The instant case by its manifestation of the taxing against appellant of the fees allowed by the statute to the justice of the peace, evidenced the disqualification of the justice because of interest in the outcome of the case. Judgment of the lower court was reversed and release of the appellant ordered.

Walter E. Parent.

INFANTS—Minor, misrepresenting age in purchasing automobile destroyed by fire and unable to restore parties to original status, could not recover purchase price.

One Watters, a minor, brought suit by another as next friend against H. H. Arrington, as administrator, doing business as Arrington Buick Company, to recover money which he had paid to defendant on the purchase of an automobile, under a contract which, because of his minority, he sought to disaffirm. It was shown that plaintiff was under nineteen years of age at the time of making the contract, that he had been working as a nickel plater and drew a weekly wage of from forty to fifty dollars, the greater part of which he spent as he pleased. Plaintiff paid about four hundred dollars to the defendant and kept and used the car from September 1926 until April 1927 when it was destroyed by fire while in his possession. Car was insured for benefit of purchaser and seller and insurance was collected, the greater share of

which was retained by the defendant in satisfaction of the remainder of the purchase price, only a small portion going to plaintiff who testified at time of filing suit that he did not then have even that amount of money and could not have restored it. Arrington testified that plaintiff told him that he was twenty-one and did his own trading and was his own man. This testimony was corroborated by a salesman of defendant but denied by the plaintiff. The jury found for defendant and plaintiff excepted to his motion for a new trial being overruled. *Watters v. Arrington,* 146 S. E. (Ga.) 773.

The court said that the case was controlled by the decision in the case of *Hood v. Duren,* 125 S. E. 787. In that case it was held that a defendant, though a minor, will be "estopped from exercising his privilege of avoiding a fair and reasonable contract upon the ground of his minority at the time the agreement was made, where it appears that he has received, enjoyed, and consumed its irrestorable benefits; and where it appears that the plaintiff, dealing in good faith, was induced to act to his injury by reason of the false and fraudulent misrepresentations of the defendant with respect to his apparent majority, and that, in view of all the surrounding facts and circumstances, the plaintiff was justified in accepting such representations as true, and was free from fault or negligence on his own part, such as failure to use all ready means of ascertaining the truth touching the defendant's apparent majority." The defendant was not negligent in failing to ascertain the truth as to plaintiff's age and was justified in relying upon the representations made. Plaintiff's denial of having made such representations made a question for the jury and they having found for the defendant this court will not set aside the verdict.

D. M. Donahue.

INNKEEPERS—United States—Liability for Loss by Fire —Hospital in Government Park. Hot Springs, Arkansas, for many years has been one of the famous resorts of the South, and the Arlington Hotel at that place became known throughout the land. This hotel was destroyed by fire on April 5, 1923, and the New Arlington has been erected in its place. The destruction of the former hotel building gave rise to the litigation here under consideration. Elizabeth H. Fant, Mary L. Fortune and R. T.

Fant brought suits against the Arlington Hotel Company to recover damages for the destruction of their personal property while they were guests at the hotel. Plaintiff recovered in the trial court and the decision was affirmed by the Supreme Court of the state. The defendant therein then sued out a writ of error in the Supreme Court of the United States. *Arlington Hotel Company v. Fant, et al,* 73 L. ed. 281.

In 1913 the Arkansas legislature passed a statute relieving innkeepers from liability for the destruction of the property of their guests by fire, except in cases of negligence. All that is sufficiently clear, and plaintiff in error would have been thereby freed from responsibility, had not the legislature of the state previously ceded to the United States the plot of ground on which the hotel was built, and given to the federal government exclusive jurisdiction over the same. This tract was reserved from sale in 1832 while Arkansas was still a territory, because of the medicinal quality of the hot springs included therein. When Arkansas was admitted to the Union in 1836, however, the United States did not retain exclusive jurisdiction over the land owned by the federal government. The Arkansas legislature, therefore, subsequently granted to the federal government exclusive jurisdiction over the same, the state reserving only the right to serve its process within the borders and to tax the privately owned buildings therein, and this grant was accepted by Congress in 1904. At the time the federal government acquired exclusive jurisdiction over the Park the common law was in force in the state of Arkansas, and under the common law an innkeeper is an insurer of the personal property of his guest against fire. Since the hotel operated by plaintiff in error was within the boundaries of the National Park, the statute of 1913 passed by the legislature of Arkansas did not make one whit of change in the liability of the Arlington Hotel Company. The national government had exclusive jurisdiction over the property on which the hotel of plaintiff in error was situated and the Arkansas statute could have no force there.

Plaintiff in error contended that the cession to the United States was invalid because the United States had no power to receive the grant. The chief purpose for which the park is maintained, however, is a military hospital, erected in 1886 by an ex-

penditure of one hundred thousand dollars, for the dispensing of medical treatment to soldiers and sailors. This is evidently a purpose for which the United States has power to acquire property, and the fact that the general public is also allowed to benefit from these springs, because of the abundance of water, does not deprive the United States of the right to acquire the property. The federal government has the right to lease the site for the hotel, and the liability of plaintiff in error for damages must be determined by the laws of the United States. The common law responsibility has not been changed by enactment of Congress and therefore the Arlington Hotel Company is liable for the loss of the personal property of its guests occasioned by the fire of 1923.

Decision of lower court affirmed.

Henry Hasley.

INTOXICATING LIQUORS—The case of the *Commonwealth v. Johnson,* 146 S. E. 260, recently handed down by the Supreme Court of Appeals of Virginia, held that one indicted under the prohibition laws may be convicted on purely circumstantial evidence.

Johnson, a white man, was jointly indicted with one Hester Lewis, a colored woman, and arraigned on the charge of violating the liquor law. When the state prohibition enforcement officers called at the home of the defendant Lewis they found the defendant Johnson there in a bedroom with the defendant Lewis. A shotgun was found in the room and shells fitting the gun were found in the coat-pocket of the defendant Johnson. A still, mash, and other equipment used in the manufacture of intoxicants were found in the house. A neighbor of Mrs. Lewis testified that, while he had never seen Johnson enter or leave the Lewis home, he had often seen him there between the hours of six and seven o'clock in the morning, and between the hours of five and six o'clock in the afternoon. Another witness testified that he had frequently seen Mrs. Lewis and Johnson riding together. The reputation of the accused as a liquor law violator was bad.

The court held that in the instant case conviction on purely circumstantial evidence could be sustained, despite the fact that in every case wholly dependent on circumstantial evidence, the evidence must be scanned with great caution, and can never

justify a verdict of guilty unless the circumstances proved are of such potent character as to produce in a fair and impartial mind a moral conviction beyond a reasonable doubt.

Francis T. Ready.

MUNICIPAL CORPORATIONS—City acquiring a municipal aviation field or airport under authority of statute has no power to sublet it to a private individual.

Original proceeding in quo warranto by the State, on relation of C. W. Mitchell, County Attorney of Montgomery County, against the city of Coffeyville, to determine whether the city might sublet its airport to a private individual and authorize him to operate it for the convenience of all aviators who should choose to use it on reasonable terms, and to keep the profits, if any, for himself. *State ex rel. Mitchell v. City of Coffeyville,* 274 Pac. (Kansas) 258.

The statute under which the airport was acquired read: "That whenever in the opinion of the governing body in any city in the state of Kansas, the public safety, service and welfare can be advanced thereby, such governing body of such city may acquire by purchase or lease and maintain a municipal field for aviation purposes, and pay the expense of such purchase, lease or maintenance out of the general funds of the city. Such field may be used for the service of all aircraft and pilots desiring to use same." Pursuant to that authority the city leased a tract of land for a municipal airport, with an option to buy the same, and several months later sublet it to one Bennett, an aeronaut who practised his profession under the name of the Bennett Flying School. By the terms of the contract, Bennett was granted exclusive rights over the entire airport, and was authorized to fix prices for the services of the airport and for the transportation of passengers.

The question in the case was whether the city had the corporate power to sublet the airport to a private individual, which it was contended by the State that it had not. No such right was expressly conferred by statute, the Court said, and quoted the case of *City of Leavenworth v. Rankin,* 2 Kan. 357, to the effect that: "Municipal corporations are creations of law and can exercise only powers conferred by law and take none by implication. In making contracts they must act within the limits and

observe the regulations prescribed. Persons contracting with such corporations must inquire into their powers at their peril." The fact that the unauthorized power which the official board or governmental agency assumes to exercise may be a good stroke of business will not justify it. *State ex rel v. Bradbury,* 123 Kan. 495, 256 Pac. 149.

It was contended by the city that power to sublet the airport might be implied from a statute providing that cities should have power to make such orders concerning the real property of the municipality "as may be deemed conducive to the interests of the city, and to provide for the improvement; regulation and government of the same", and further, "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers;" also, "to exercise such other and further powers as may be conferred by law." The Court, however, held that neither the statute quoted nor any other could be interpreted to confer upon the city the corporate power to sublet its municipal airport, nor to confer upon a private individual, as lessee of the city, the exclusive privilege of managing it for his private profit; and the fact that the lease contemplated that the lessee's charges must be reasonable, and that the aviation services furnished must be open to all aviators alike, would not excuse the city's exercise of a corporate power for which there was no statutory authority.

J. J. Canty.

NEGLIGENCE—Generally, manufacturer or furnisher of an article not imminently dangerous is not liable to third party for negligence.

This was an action by the administrator of Charles S. Payton against the Childers Electric Co. et al. (*Payton's Administrator v. Childers Electric Co. et al,* 14 S. W. (2nd) 208, Ky. Feb. 15, 1929.), for damages for intestate Payton's death, caused by his coming into contact with an electrically charged wire. From a judgment of dismissal the plaintiff appeals.

The decedent was employed by the Duffy Ice Co. and it was his duty to operate an overhead electric crane whereby blocks of ice were transported from tanks to a storage room. It was while operating the said crane that the decedent was killed.

After the defendants had demurred to the petition and it was

amended several times, the plaintiff refused to plead further and the petition was dismissed. The only question on appeal was as to the sufficiency of the amended petition. This petition charged in substance that defendant Louisville Electric Co. negligently constructed and installed the electric crane, a thing imminently dangerous when put to the use intended, considering the manner in which it was constructed and installed, and that as a result of defendant's negligence the decedent, an employee of the purchaser, was killed.

The general rule is that the manufacturer, contractor or furnisher of an article is not liable to a third person who has no contractual relation with him for negligence in the construction, manufacture or sale of such article, but there are exceptions to this rule, as has been recognized in several cases. *(Olds Motor Works v. Shaffer,* 145 Ky. 616. *Macpherson v. Buick Motor Co.,* 217 N. Y. 382.) One of the exceptions to the rule is laid down in *Huset v. J. I. Case Threshing Machine Co.,* 120 Fed. 865, 61 L. R. A. 303: "An act of negligence on the part of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life, is actionable by third parties who suffer from the negligence."

In *Macpherson v. Bucik Motor Co., supra,* the company was held liable when an automobile manufactured by the company and purchased from a dealer collapsed because of a defective wheel.

The rule applicable in the instant case is that the manufacturer or installer of an article which is not inherently dangerous, but which by reason of negligent construction is manifestly dangerous when put to the use for which it is intended, is liable for any injury sustained by a person therefrom, which injury might have been reasonably anticipated.

In the present case it was incumbent upon the defendant company to use the utmost care and caution in the construction, reconstruction and repair of the crane, and any negligence would make the machine imminently dangerous to a person coming in contact with the machine while in use. The operator had a right to rely on the implied representation of the manufacturer that the machinery was properly installed and free from defects.

Judgment was affirmed as to the Childers Co. but reversed as to the defendant Louisville Electric Mfg. Co. with directions to overrule the demurrer to the fourth amended petition and the motion to make more specific.

John P. Berscheid.

SEARCHES AND SEIZURES—Search warrant not necessary for search of woodlands, pastures or fields on suspicion that offense has been committed.

C. C. Perry and another were convicted on a charge of having the unlawful possession of a still, intoxicating liquor, and mash, and were sentenced to pay a fine of $50, and to serve thirty days in the county jail. From this conviction an appeal was taken. *Perry et al v. State,* 274 Pac. (Okla.) 686.

It was contended by the defendants that the search was illegal as having been made without a search warrant. Upon this point the record showed that the still, whisky and mash were found in some brush about a quarter of a mile from the residence house. The court held that in such a case, no search warrant was necessary, declaring that "it is well settled that no search warrant is necessary to search fields, woods, pastures, or land not within the curtilage or immediate proximity of the residence", and affirmed the conviction.

J. J. Canty.

CONSTITUTIONAL LAW—Ferries—Exclusive Lease—Bridge as Violation. John Larson obtained from the state of South Dakota a lease or franchise permitting him to operate a ferry across the Missouri River. The state statute under which said franchise was granted provided that no other lease should be granted acrosss the same stream within a distance of two miles from the ferry landing described in the lease. Plaintiff invested $14,000 in equipment and began the operation of the ferry. During the existence of the lease, in 1923 and 1924, the defendant erected a free bridge across the Missouri River within two miles of the ferry landing. This, plaintiff avers, has resulted in the destruction of his franchise. He contends that the lease or franchise was a contract with the state and that the building of the bridge was a breach of that contract for which the state is liable in damages. Defendant filed a demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause

of action. The sustaining of the demurrer was upheld by the Supreme Court of the state, which ruling was affirmed by the Supreme Court of the United States. *Larson v. State of South Dakota,* 73 L. Ed. 277.

True, the lease to plaintiff did constitute a contract, but the real question to be decided is whether or not the erection of the bridge by the state constituted a breach of that contract. Plaintiff contends that it was an impairment of the obligation of the contract and that as such it contravenes the federal constitution.

No prohibition against bridges is found in the lease. Certainly plaintiff could have enjoined the operation of another ferry within two miles of his own, but he contends that by implication his exclusive franchise also prohibited the inauguration of other modes of travel across the river. Here, however, he runs into a principle which is decisive of the question. Public grants must always be construed strictly and the grantee acquires no rights thereunder by implication. *United States v. Arredondo,* 6 Pet. 691, 738, 8 L. Ed. 547, 564; *Jackson ex dem. Hart v. Lamphire,* 3 Pet. 280, 289, 7 L. Ed. 679, 682; *Beaty v. Knowler,* 4 Pet. 152, 165, 7 L. Ed. 813, 817; *Providence Bank v. Billings,* 4 Pet. 514, 561, 7 L. Ed. 939, 955. "As the whole community is interested in retaining it (in that case, the taxing power) undiminished, that community has the right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." *Providence Bank v. Billings, supra.* The court further called attention to the following cases which reject the contention that an exclusive ferry franchise should be construed to cover all methods of travel and transportation across the water: *Dyer v. Tuskaloosa Bridge Co.,* 2 Port. 296, 27 Am. Dec. 655 (Ala. 1835); *Piatt v. Covington & C. Bridge Co.,* 8 Bush, 31 (Ky. 1871); *Snidow v. Giles County,* 123 Va. 578, 96 S. E. 810 (1918); *Dibden v. Skirrow,* (1908) 1 Ch. 41, 1 B. R. C. 333, 12 Ann. Cas. 252.

The holding in the instant case is consonant with the weight of authority. In concluding the court said: "We can hardly say, therefore . . . . that an exclusive grant of a ferry franchise, without more, would prevent a legislature from granting the right to build a bridge near the ferry. Following the cases in this court in its limited and careful construction of public grants,

it is manifest that we must reach in this case the same conclusion."

Judgment affirmed. *Henry Hasley.*

CONSTITUTIONAL LAW—Ordinance prohibiting storage of more than three automobiles in buildings occupied as living quarters, held within police power, and not void as denying due process or natural rights. In the Missouri case of *Bellerive Inv. Co. et al v. Kansas City,* 13 S. W. 2nd 628, the plaintiffs files a bill in equity to enjoin the defendants from enforcing an ordinance which provided that "No person, firm, or corporation shall use, occupy, operate, manage, or let any living or sleeping quarters over any room, place, or establishment in which more than three automobiles shall be kept, stored, parked, placed or sheltered at any one time; and no person, firm, or corporation shall keep, store, park, place or shelter more than three automobiles at any one time underneath any room, place, or establishment used, occupied, operated, managed or let for living or sleeping quarters." The appellants contend that the enforcement of the ordinance amounts to the taking or damaging of their respective properties, and of their rights of free and full enjoyment and user thereof, without due process of law, and without providing for, or tendering, the payment of compensation for such taking or damaging of their respective properties and property rights for public use and is therefore unconstitutional. But the court held that such automobiles are ordinarily driven under their own power, and contain gasoline, lubricating oils, and electric storage batteries; that there is a continuous and constant danger and possibility that the gasoline and oil will drip on the floor and by rapidly vaporizing form highly inflammable, volatile and explosive gases which may be readily ignited when coming into contact with a flame or spark, which may be occasioned through the carelessness of persons in and about such compartments, or from putting the automobiles into operation, or from defects in the storage batteries, or from defects of other mechanical parts or appliances and thereby cause fire or explosions which are usually accompanied by excessive volumes of smoke, fumes, and gases of an extremely suffocating nature so as to constantly endanger the lives of those who inhabit the building and so is a valid exercise of the police power of the state. *Walter E. Parent.*