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Benjamin M. Quigg, Jr.
University of Michigan Law School

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ADMINISTRATIVE LAW — FEDERAL POWER COMMISSION — RIGHT OF COMPETITOR TO INTERVENE IN PROCEEDINGS FOR INVESTIGATION OF GAS RATES — In a proceeding before the Federal Power Commission for investigation of gas rates of Cities Service Gas Company, petitioners (competing coal companies) asked for leave to intervene and to present evidence showing the economic effect a reduction of gas rates would have on the demand for petitioners' coal. The application to intervene was denied, and petitioners appeal therefrom. *Held,* appeal dismissed. The right of petitioners to intervene depends entirely upon whether under the statute [1] the matter which they wish to present is a factor which must be considered by the commission in its rate determination. The statute provides that in its fixing of rates and charges the commission may give consideration to the cost of the property of the gas company, the depreciation thereof, and other factors which may bear upon the fair value of such property,—but nowhere in the act is it suggested that the effect of a gas rate upon a competing fuel industry may be considered in a proceeding for the establishment of a gas rate. The petitioners are therefore without right under the act to intervene. *Alston Coal Co. v. Federal Power Commission,* (C. C. A. 10th, 1943) 137 F. (2d) 740.

ASSIGNMENT — EFFECT OF PARTIAL ASSIGNMENT OF FUTURE WAGES — Employees of plaintiff received treatment at defendant hospital, and as evidence of their indebtedness to defendant, executed partial assignments of their future wages. These assignments were represented by notes, to which were attached instruments assigning varying sums out of wages to be applied each week or month on the notes. These sums varied from one dollar per week to ten dollars per month. Plaintiff has refused to accept the assignments or to make deductions from employees' wages; and plaintiff now brings this action to enjoin defendants from demanding the acceptance by plaintiff of the assignments, and from proceeding to enforce upon plaintiff any liability thereon. The injunction was granted and defendant appeals. *Held,* judgment affirmed. Partial assignments of a chose in action are recognized as an equitable assignment thereof, and the assignee will be protected so long as the enforcement of the assignment does not work a substantial hardship upon the debtor. Under the particular facts of the present case (i.e. the shortage of office workers, burden of clerical work imposed by government taxes and social security law, the long periods over which deductions would be required to be made, and the liability which would be imposed on plaintiff for deductions wrongfully made) the court found that enforcement of the assignments would be a substantial hardship on the plaintiff, subjecting it to expense and risk which should be properly borne by defendant, and imposing upon plaintiff tasks which could be easily performed by a collec-

[1] 52 Stat. L. 821 §§ 4, 5 & 6 (1938).

tor employed by defendant. *Orr Cotton Mills v. St. Mary's Hospital* (S. C., 1943) 26 S. E. (2d) 408.[1]

CONTEMPT — A CASE IS "PENDING" IN A TRIAL COURT SO AS TO MAKE POSSIBLE A CONTEMPT OF THAT COURT WHILE THE CASE IS PENDING IN HIGHER COURT ON APPEAL — Petitioner Berlandi had been convicted of larceny in the municipal court of the city of Boston; the following day, after appeal had been filed in the superior court, petitioner Walkins met the chief justice in the court room, made certain false representations to him, and asked that Berlandi be allowed to withdraw his appeal and that the finding of guilty be revoked.[1] The chief justice charged the petitioners with criminal contempt in conspiring and attempting to impede the administration of justice by seeking to secure the release of a person known to them to be guilty. Upon hearing, the petitioners were convicted of criminal contempt, and they now present petitions for writ of error. The contention of petitioners is, inter alia, that the jurisdiction of the municipal court to convict them for criminal contempt had terminated because at the time of the alleged representations the case against Berlandi was not "pending" in the municipal court, there having been already a conviction against him in that court and an appeal pending in the superior court; and they further contend that it was too early for the jurisdiction of the court to again attach, there having been no revival thereof by a withdrawal of the appeal under the statute. *Held,* conviction affirmed. "It is possible very effectually to poison the flow of the fountain of justice before it begins to flow," and for that reason the power to punish for contempt should arise early in a case. At the time of the alleged representations the case against Berlandi was pending in the municipal court as shown by two lines of reasoning: first, there was an alternative of leaving the case in the superior court for disposition of the appeal if the attempt to exercise improper influence in the municipal court failed, but the withdrawal of the appeal and revival of the jurisdiction of the municipal court was an essential element of the conspiracy—it was not too early to "poison the fountain of justice" with respect to the disposition of the case in the municipal court; second, there remained in the municipal court a specific jurisdiction of this case concurrent with the jurisdiction of the superior court, a jurisdiction which could be invoked as of right by the convicted party, and the attempt to improperly influence the court was made in anticipation of invoking such jurisdiction. The specific case was therefore "pending" in the municipal court for the purpose of withdrawal of the appeal as a preliminary step toward final disposition of the case in that court. *Berlandi v. Commonwealth,* (Mass., 1943) 50 N. E. (2d) 210.

[1] Cf. "Enforceability in Equity of Partial Wage Assignments," 40 MICH. L. REV. 455 (1942); cf. generally annotation on enforceability in equity of assignment of part of a debt without the debtor's consent, 80 A. L. R. 413 (1932).

[1] Mass. Gen. L. (1932) (Ter. Ed.) c. 278 § 25, as amended by Mass. Laws, 1937, c. 11. Municipal Court has jurisdiction to receive the personal withdrawal of the appeal of a person convicted and to determine whether to "order the appellant to comply with the sentence appealed from" or to "revise or revoke" the sentence imposed.

CORPORATIONS — POWER OF DIRECTORS TO RESCIND OR MODIFY ACTION CALLING STOCK FOR REDEMPTION — On April 30, 1943, the board of directors of defendant company, pursuant to provision of the articles of incorporation, adopted a resolution calling the entire outstanding class A common stock for redemption on July 1, and the officers of the corporation were directed to deposit the necessary funds with the redemption agent. On June 16 the directors adopted a resolution modifying their previous action and changing the call for redemption from a mandatory to an optional one. Plaintiff is a holder of shares of class B common stock, which by the charter is subject to preference and priorities accorded to the class A stock as to dividends and liquidation, and is further subject to certain rights in the class A stock of conditional joint control of management. Plaintiff denies the power of the directors to modify its action of April 30, and brings this declaratory judgment action for a determination in respect thereto. From a judgment for defendant, plaintiff appeals. *Held,* reversed; the resolution of April 30 materially changed the entire corporate structure, and the substantial advantage in the elimination of class A preferences and management control thereby accrued to the class B. stockholders. The resolution was unconditional in form and immediately created vested rights in both class A and class B stockholders. The charter provision permitting redemption was in the nature of a continuing option which required only the action of the directors to make a binding contract; that action having been taken the class A stockholders became creditors and the class B stockholders were irrevocably freed from existing restrictions and preferences. That being so, the directors could not withdraw or cancel or modify their action to the prejudice or detriment of class B stockholders. *Taylor v. Axton-Fisher Tobacco Co.* (Ky., 1943) 173 S. W. (2d) 377.[1]

COURTS — MAY JUDGE BE COMPELLED TO DECIDE CASES WITHIN A GIVEN TIME WHERE HE HAS UNREASONABLY DELAYED? — In action of original jurisdiction in the Supreme Court of Pennsylvania [1] the Attorney General filed a petition for a writ of mandamus against the three judges of the courts of common pleas of *W.* County to decide certain cases long pending in that court. All of the judges filed answers, two of which were not challenged by the Attorney General, but to the third reply filed by Judge *K.* (in which the judge merely averred "his failure to dispose of said cases was and is due to his ill health") was filed a demurrer. The court adjudged this latter defense to be properly demurrable, the averment of "illness" being too indefinite and uncircumstantial to constitute a well-pleaded defense. The court took judicial notice of the nature of this "illness" and found it to be no excuse for failure to perform the duties of office. A preemptory writ of mandamus was directed to issue forthwith ordering Judge *K.* to consider, adjudicate, and submit to the court en banc of *W.* County within sixty days decisions in twenty-five cases theretofore assigned to him. *Commonwealth v. Keenan,* (Pa., 1943) 33 A. (2d) 244.[2]

[1] Cf. generally "Dividend Rules and Mistaken Precedent," 18 IND. L. J. 111 (1943).

[1] As provided in Pa. St. Const. Art. 5 § 3; 12 Pa. St. § 1914.

[2] Cf. annotation on contempt for disobedience of mandamus by judges and clerks of court, 30 A. L. R. 150 (1924).

DECEDENTS' ESTATES — PERSONALTY INSUFFICIENT TO PAY DEBTS — HEIR OR DEVISEE ENTITLED TO RENT FROM LAND UNTIL SOLD TO PAY DEBTS — Certain lands were devised by testatrix as part of her residuary estate to nieces and nephews. The will further provided for payment of debts and funeral expenses, and also gave the executor the power to sell the real estate. The orphans' court in 1937 decreed the estate to be insolvent or likely to become insolvent, but there has been no sale or order for sale of the land, and in the meantime the administrator c.t.a. has been collecting rents therefrom. The orphans' court has decreed that such rents were the property of the devisees and unavailable to pay testatrix's debts. The propriety of this decree was the only question argued on appeal. *Held,* decree affirmed. Rents are an incident of land, and at the death of the owner go with the land to his heirs or devisees. Even though the personal estate of decedent is insufficient to pay debts, the heir or devisee is entitled to the rents until the land is actually sold; and the existence of the power of sale given by the will, at least until the exercise thereof, does not affect the rights of the devisees. This follows from the fact that the land is not an asset in the hands of executors or administrators, but is merely held as agent for heirs and devisees—it must first be sold and then the proceeds will be considered as an asset for payment of debts. The direction in the will for the payment of debts creates an equitable lien upon testatrix's estate which creditors may enforce in the event there is insufficient personalty to pay debts, but this charge does not make the lands an asset in the hands of the administrator, and until the creditor enforces his lien the income therefrom belongs to the devisee. *In re Boyle's Estate,* (N.J. Prerog. 1943) 30 A. (2d) 827.[1]

GIFTS — NON-TRANSFERABLE UNITED STATES POSTAL SAVINGS CERTIFICATES ARE PROPER SUBJECTS OF GIFT CAUSA MORTIS — By stipulation of the parties it is agreed that the postal savings certificates in question were delivered under such circumstances as to constitute a valid gift causa mortis, provided that such certificates could be made the subject of a gift causa mortis. The contention of plaintiff that the certificates could not be the subject of a valid gift was based on provisions of the certificates that they were "not transferable" and "not negotiable." Plaintiff sues as administrator of the alleged donor to recover possession of the certificates; the circuit court dismissed the petition, and on appeal it was *held,* affirmed. Any chose in action which creates a liability against a third person, and which is held by the donor and is his property, whether legal or equitable, is the subject of a valid gift causa mortis by mere delivery. The fact that an instrument is "not negotiable" does not prevent assignment thereof, but merely makes recovery by the assignee subject to any intervening equities. Neither does the use of the words "not transferable" affect the title, or right of possession, or validity of any transfer—such provisions have effect only as regards liability of the government for payment. The judge of the circuit court had obtained a ruling from the Postmaster General stating that the department would make payment of the proceeds of postal savings certificates to any person found by a court of competent jurisdiction to be donee of a valid gift causa

[1] Cf. "Probate and Administration: Disposition of Rents and Profits of Realty," MONT. L. REV. 148 (Spring, 1941). Cf. also WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3rd ed., §§ 337, 338, 463, 464, (1923).

mortis of the certificates; and inasmuch as postal regulations would be no bar to defendant's recovery on the certificates, judgment for defendant donee was affirmed. *Blair v. Kirchner* (Ill. App., 1943) 49 N.E. (2d) 292.

INSURANCE — COMPUTATION OF TIME OF DURATION OF AN ACCIDENT INSURANCE POLICY — Plaintiff had obtained judgment in the sum of $10,000 against defendant for injuries sustained in an automobile accident occurring at 11:30 P.M. March 6, 1935. *M* Insurance Company had issued a policy of liability insurance to defendant, and plaintiff obtained leave to make insurance company a new party defendant and then filed a supplemental petition asking a judgment against the company for $5,000, the amount of the policy, in partial satisfaction of the judgment already obtained against principal defendant. The insurance company denied liability, *inter alia*, on the ground that the policy had expired at twelve o'clock noon, March 6, 1935, it having become effective, by its terms, at twelve o'clock noon on September 6, 1934, to continue in full force and effect for the term of six months.[1] Judgment for plaintiff in accordance with supplemental petition. The Court of Appeals affirmed; and the insurance company's motion to certify the record having been allowed the case came before the supreme court for review. *Held*, judgment affirmed by a three to two decision. In accordance with the general rule that all doubts and ambiguities should be resolved in favor of the insured, and the company having failed to specify the hour at which the insurance was to expire, the court held that the policy continued in effect until midnight of March 6, 1935. Fractions of a day are not generally considered in the legal computation of time; a contract which by its terms expires on a certain day remains in force for the whole day, unless by express wording it is limited to a certain time of day upon which it expires. *Dissent*, the fiction of disregarding fractions of a day has no application where the accrual or termination of rights or liabilities is specifically fixed in terms of fractions of a day—as was the present case, where the policy was to expire six months after twelve o'clock noon September 6, 1934. *Greulich v. Monnin, et al*, (Ohio, 1943) 50 N.E. (2d) 310.

JUDGMENT — POWER OF EQUITY TO SET ASIDE DEFAULT JUDGMENT WHERE FAILURE TO FILE ANSWER WAS BASED ON MISTAKE OF FACT — In a prior suit defendant had obtained a default judgment dated December 27, 1940, (default entered June 4, 1940) against this plaintiff upon an assigned claim for medical expenses. Thereafter several levies were made upon plaintiff's salary, on which collections were made after plaintiff obtained partial release of her wages according to statutory provisions.[1] This is a suit in equity (filed February 24, 1941) to set aside and vacate that default judgment. The trial court found that within the time allowed for filing her answer in the prior suit (namely, on May 24, 1940) an answer was mailed to the clerk of the court

[1] Defendant's check for renewal premium was received and accepted by insurance company on March 8, 1935, without notice of cancellation, lapse, or requiring a one dollar reinstatement fee—thus indicating that company did not consider policy lapsed.

[1] Cal. Code Civ. Proc. (Deering, 1941) § 690.11.

and also a copy to the opposing attorney, but both copies were lost in the mails and plaintiff did not learn of such loss until execution was levied upon her salary after a default judgment had been taken; that by reason of such mistaken belief plaintiff was prevented from interposing a meritorious defense which she had to said suit; that plaintiff was not negligent in the loss of the answer; that plaintiff was not guilty of laches; and that defendant had wilfully delayed in the prior proceeding until plaintiff's rights were barred by lapse of time. Superior court granted decree vacating the judgment and awarding a money judgment against defendants for amount collected by levies on plaintiff's salaries. Defendants appeal. *Held,* affirmed; the evidence supports the findings of the trial court. Failure to prevent the entry of a default judgment clearly was caused by the mistaken belief that an answer had been filed. From the consequences of such a mistake of fact, equity will grant relief even though such party was somewhat negligent (in this case, in not discovering the failure sooner), so long as the opposing party is not prejudiced by the negligence. In establishing that plaintiff has a meritorious defense to the default judgment it is not necessary to show "an absolute guarantee of victory;" it is sufficient that proof of the allegations made would result in a judgment in the trial court which would be more favorable than the default judgment which was entered. *Dissent,* mailing is not filing, and it is the duty of litigants to see that papers are, in fact, filed in the clerk's office. From such mistakes relief will not be granted unless complainant presents case with diligence—and diligence does not appear from the facts of this case. *Hallett v. Slaughter* (Cal. 1943) 140 P. (2d) 3.[2]

JURY — IMPEACHMENT OF VERDICT BY AFFIDAVITS OF JURORS SHOWING MISCONDUCT OF BAILIFF — *D* was convicted of failing to support an illegitimate child; his motion for new trial was overruled, whereupon he made application for rehearing on said motion, stating that he now has learned additional facts to the effect that, contrary to law, communications had been made to the jurors by a court bailiff during the jury's deliberations. In support of this application affidavits of three members of the jury were filed showing that when the foreman informed the bailiff that the jury could not agree, the bailiff replied "you can't do that. You must reach a decision if you have to stay here for three months." Thereafter another vote was taken, and a verdict of guilty was returned, one of the jurors testifying that she changed her vote only because she understood the jury must reach a decision. This conduct of the bailiff was a violation of his statutory duties,[1] and was prejudicial to the defendant. It was the position of the state that the verdict could not be impeached inasmuch as no foundation had been laid, as required by the "aliunde rule" which is followed by this court. The application for rehearing was denied by the trial court, and said judgment was affirmed by the court of appeals. *Held,* reversed and remanded for new trial. Under the so-called "aliunde rule" a verdict of a jury

[2] Rehearing denied, August 19, 1943. Cf. annotation on relief from default judgment where there was failure to appear based on misunderstanding of attorneys, 69 A. L. R. 1136 (1930).

[1] Ohio General Code, (Page 1939) § 13448-1. "Such officer or officers [bailiff] shall not permit a communication to be made to them [the jurors] nor make any himself, except to ask if they have agreed upon a verdict, unless by order of the court."

may not be impeached by evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by competent evidence from another source. The reason for the adoption of this rule is that a juror comes into court with bad grace in attempting to prove his misconduct. If such is the basis for the rule, then there is no basis for its application here where the testimony is as to events of misconduct of others, which constitute no part of the jurors' deliberations. *State v. Adams* (Ohio, 1943) 48 N.E. (2d) 861.[2]

LABOR LAW — EMPLOYER NOT LIABLE FOR CONTEMPT OF N.L.R.B. REINSTATEMENT ORDER WHERE NO HEARING HAD AS TO AMOUNT OF BACK PAY AND AVAILABILITY OF FORMER JOBS — C.C.A. HAS JURISDICTION TO REFER THESE MATTERS BACK TO N.L.R.B. — N.L.R.B. instituted proceedings against respondent for enforcement of its order of June 19, 1942, in which it found respondent guilty of unlawful discrimination in discharging two employees on July 11, 1941, and directed reinstatement with back pay. The only question arises with reference to one employee, concerning whom respondent alleges that since November 22, 1941, it has had no position of the same grade and seniority available, on which date, by reason of business necessities, it would have been required to discharge him; respondent therefore denied liability under the order except from date of discharge to November 22, 1941, and requested a decision by the board upon such evidence before the board should move to enforce its order. This request of respondent was denied by the board. The board now attempts to enforce its order, and respondent moves to refer the proceedings back to the board.[1] *Held,* motion granted. Section 10 (e) of the N.L.R.A. gives the circuit court of appeals jurisdiction to refer back to board any issues concerning which there is material additional evidence, the failure to adduce which is considered reasonable; by reason of the board's refusal to hear evidence the failure to "adduce" was reasonable, and a reference of issues back to the board is here proper. The approved procedure of the board in regard to amount of back pay (and presumably with respect to reinstatement orders also, although no information on this point was submitted to the court) is to defer the matter until the board's order has been "enforced." As to the amount of back pay and availability of position for reinstatement the employer must have opportunity to present evidence to the board, and until such a hearing has been had the court will not proceed by contempt of an order which does not definitely prescribe what the employer is to do. The court ordered the questions of reinstatement and back pay referred back to the board to find the facts and to make an appropriate order, at which time the board may move to make definite the enforcement order. *N.L.R.B. v. New York Merchandise Co., Inc.* (C.C.A. 2nd, 1943) 134 F. (2d) 949.[2]

[2] Cf. Annotation on admissibility of jurors' affidavits to show improper acts of third persons, 90 A. L. R. 242 (1934); cf. also 31 L. R. A., N. S., 930 (1911).

[1] Under § 10 (e) National Labor Relations Act, 49 Stat. L. 453; 29 U. S. C. A. § 160 (e).

[2] Cf. "Reinstatement with Back Pay under the Wagner Act," 89 UNIV. PA. L. REV. 648 (1941); cf. generally annotation on computation of back pay 133 A. L. R. 1217 (1941).

TORTFEASORS — UNDER WHAT CIRCUMSTANCES SUBJECT TO JOINT JUDGMENT — A joint judgment was rendered in favor of plaintiff against defendant railroad companies and defendant city of Cleveland for personal injuries sustained when automobile in which plaintiff was riding struck a hole in a street bridge over railroad right of way. The plaintiff charged that city was liable because of its failure to perform its statutory duty of keeping the streets in repair; that *C* railway was liable for failure to keep pavement between its rails in repair, as required by its franchise contract with the city; and that *N.P.* railroad was liable because it failed to keep the bridge in repair as required by ordinance. Defendants appeal. *Held*, judgment for defendant *N.P.* railroad, it appearing that no request to repair had been made by the city as required by the ordinance. As to the city and *C* railway, reversed and remanded. By reason of failure to perform the obligation of its contract with the city to keep the pavement between its tracks in repair, a primary liability for injury rested upon *C* railway; however, the liability, if any, of the city was secondary, being predicated upon its statutory duty to keep its streets in repair and free from nuisance. In order to warrant a joint judgment against tort feasors they must be in pari delicto as to the tortious act—it is apparent here that there was no concert of action upon the part of these two defendants resulting in a single wrongful act, but rather separate wrongful acts, not necessarily concurrently existing, arising upon a different basis of liability. To allow joint judgments against parties primarily and secondarily liable would mean that such indemnity could not be recovered inasmuch as no contribution is allowed between joint tort feasors who are in pari delicto. *Larson v. Cleveland Ry. Co.* (Ohio, 1943) 50 N.E. (2d) 163.[1]

TORTS — MALICIOUS INJURY OF A PERSON IN THE PRACTICE OF LAW — Plaintiff's action is based on an alleged conspiracy to ruin plaintiff and drive him out of the practice of law. The complaint filed sets forth that defendants filed a fraudulent complaint for disbarment against plaintiff in the Supreme Court of New Jersey, known to them to be false, charging, inter alia, that plaintiff attempted to unlawfully extort money from defendant; that said complaint was heard before the Board of Bar Examiners; and that by said board's report plaintiff was found not guilty of the charges. Malice and lack of reasonable grounds to believe that the charges were true are alleged by plaintiff, and general damages in the nature of loss of business reputation, mental anguish and contempt of friends and associates are averred. Defendants interpose motion to strike the complaint. *Held*, motion denied. This is an action on the case setting forth a malicious conspiracy, the fraudulent disbarment complaint being used to effect its purpose and to cause damage to plaintiff. The conspiracy is pleaded merely as aggravating the charge and to enable plaintiff to recover against the three defendants as joint tort feasors—the gravamen of the charge is acts, maliciously done, calculated to injure plaintiff in his reputation and business.

[1] Cf. generally annotation on joinder in one action at law of persons not jointly liable, one or the other of whom is liable to the plaintiff, 41 A. L. R. 1216 (1926); also annotation on joint liability of master and servant for tort of servant, 12 L. R. A., N. S., 669 (1908). See "Indemnity Among Joint Tort Feasors," 18 NOTRE DAME LAW. 36 (1942).

The right to pursue a lawful business is a property right that the law protects against unjustifiable interference; and any intentional act which in the ordinary course would impede the enjoyment of such right is a wrongful invasion and is treated as tortious. *Stein v. Schmitz* (N.J. 1943), 32 A (2d) 844.

TORTS — RES IPSA LOQUITUR NOT APPLICABLE TO BREAKING OF BEVERAGE BOTTLE IN HANDS OF PURCHASER — On August 3, 1943, two California courts handed down decisions reversing lower court holdings, involving the same principles of law, and reaching the same result. In one case [1] a fourteen-year-old girl purchased several bottles of chocolate milk fom defendant's dairy, and while carrying them back to school one of the bottles "just broke" in her hand. In the second case [2] a coca cola bottle "exploded" in plaintiff's hand while she was moving some bottles into the refrigerator from the place where defendant's driver had put them. In each of these cases the plaintiff made no attempt to prove specific facts tending to show either that the bottle was defective or that defendant was negligent in delivering it in a defective condition, but based the claim solely on inferences of negligence and defective condition merely from the breaking of the bottle. Judgment in each case for plaintiff had been obtained in the lower court, and defendants appeal from these judgments. *Held*, reversed in both cases. The essential elements of a claim based on res ipsa loquitur are that the allegedly defective instrumentality must have been in the exclusive control of the defendant and that the facts proved by plaintiff admit of the single inference that the accident would not have happened unless the defendant had been negligent. In both of the present cases the defective article was out of the physical control of defendants, but by showing no intervening cause, either, in the first case, the hitting together of the milk bottles, or, in the second case, disturbance of the cases of coca cola after delivery, this objection is overcome. However, breaking of bottles alone is not sufficient to permit the inference of negligence either in failing to discover the defect or in causing it. In neither case did plaintiff introduce evidence to show that defendant could have employed means of discovering the flaw more effective than those already used by them (i.e. approved, modern methods of manufacture and bottling, and multiple checking), so that from the facts shown there was no basis of an inference of lack of reasonable care.[3] *Honea v. City Dairy, Inc.*, (Cal. 1943) 140 P. (2d) 369; *Escola v. Coca Cola Bottling Co. of Fresno, et al* (Cal. Dist. Ct. App. 1943) 140 P. (2d) 107.

TRIAL — REPETITION OF SAME INSTRUCTION TO JURY IS ERROR — Plaintiff recovered a judgment for $5,000 against defendant for personal in-

[1] Honea v. City Dairy, Inc., (Cal. 1943) 140 P. (2d) 369.

[2] Escola v. Coca Cola Bottling Co. of Fresno, et al (Cal. Dist. Ct. App., 1943) 140 P. (2d) 107.

[3] Cf. generally annotation on applicability of res ipsa loquitur to "explosions" of bottles 4 A. L. R. 1094 (1920), 8 A. L. R. 500 (1920), 39 A. L. R. 1006 (1925), 56 A. L. R. 593 (1928), 28 L. R. A., N. S., 949 (1910), and L. R. A. 1916 E, 1094. Cf. also "Tort Liability of Manufacturers to users of their Goods," 25 MARQUETTE L. REV. 173 (1941); "Torts—Application of Res Ipsa Loquitur Doctrine in Bottle Explosion Cases," 3 WASH. & LEE L. REV. 343.

juries alleged to have been sustained as the result of an electric shock. Plaintiff had offered no evidence tending to show any specific negligence, but relied on the doctrine of res ipsa loquitur. Defendant appeals from the judgment for plaintiff and assigns as error, inter alia, the repetition of instructions. Ten instructions were given at the request of plaintiff, four of which in almost identical language advised the jury that they could consider the pain and suffering of plaintiff, and his expenses, loss of health, etc., in assessing plaintiff's damages. *Held*, error; judgment reversed and remanded. The court permits some latitude in giving sufficient instructions to cover every phase of a damage claim, but it could see no justification in repeating practically identical instructions on the subject of damages. *O'Hara v. Central Illinois Light Co.*, (Ill. App. 3rd Dist., 1943) 49 N.E. (2d) 274.[1]

TRUSTS — SPENDTHRIFT PROVISIONS SET UP BY TENANTS BY ENTIRETIES FOR THEIR OWN BENEFIT — *F* and his wife, owners of real estate as tenants by entireties, executed deed of trust to plaintiff for the use and benefit of grantors and for survivor of them during their natural lives, so that neither the property nor income therefrom should be subject to nor liable for debts and engagements of grantors; the corpus of the trust to be held intact to protect the interests in remainder which upon the death of both grantors was to pass by conveyance of the trustee to grantors' daughters, with a contingent grant to grandchildren if the daughters or either of them did not survive grantors. Grantors reserved the right to revoke, alter or amend the trust in part or in its entirety at anytime. At the time of this conveyance defendant was a judgment creditor of *F*, and *F's* wife having since died defendant has now issued a writ of execution upon its judgment and the premises were exposed to public sale. Plaintiff brings this action to restrain defendant from proceeding further against the property and for a declaration clearing cloud cast upon title by defendant's judgment.[1] From a decree dismissing the bill, plaintiff appeals. *Held*, reversed. It is against public policy to permit an owner of property to create for his own benefit an interest in that property which cannot be reached by his creditors. The same contrary public policy is said to exist in the present case so as to make ineffectual a spendthrift provision imposed by tenants by entireties on a conveyance of a life interest to themselves also as tenants by entireties. However, creditors may reach such

[1] Cf. generally annotation on necessity of repeating definitions of legal or technical terms, 7 A. L. R. 135 (1920).

[1] In a previous action (C. I. T. Corp. v. Flint, 333 Pa. 350, 5 A. (2d.) 126, (1939), the present defendant sought to have this conveyance set aside as void under Fraudulent Conveyance Act of 1921 (P. L. 1045, 39 P. S. § 351, et seq.); the court there held that, in as much as the property in question was held by husband and wife as tenants by entireties, the holder of a judgment against husband held it subject to possible extinction as a lien either by survival of the wife or by conveyance of the parties, and such conveyance would not be a fraud on husband's judgment creditor, he having never had any right to the property. The conveyance was thus held to be valid, but the action having been brought under Fraudulent Conveyance Act the court did not undertake to pass upon the effect of the deed. The present action is brought to determine the effect of the spendthrift provisions of the deed, now that the husband has sole ownership of the property for the period of his life.

trust property only to the extent to which settlor retains an interest in the property; interests created in others may not be reached unless the creation of the trust was a disposition in fraud of creditors. Inasmuch as the property here in question was not subject to debts of either spouse, and as tenants by entireties the owners could convey away their entire interest in the property without infringing the rights of their individual creditors, the court held that they may convey away a lesser estate to their daughters (i.e. remainder after grantor's life interest) which may not be reached by creditors of surviving spouse; and the reservation of the power to revoke the trust, in the absence of the exercise thereof, does not subject the remainder interest to claims of settlor's creditors. *Murphy v. C.I.T. Corp.*, (Pa. 1943) 33 A. (2d) 16.[2]

[2] Cf. annotation on right of individual creditors to property held as tenants by entireties, 121 A. L. R. 1022 (1939), 9 L. R. A. (N. S.) 1026 (1907), 42 L. R. A. (N. S.) 555 (1913).