

CASE AND COMMENT

1. In *Sprey vs. Kiser*, 102 S. E. 708, the North Carolina court held a druggist civilly responsible for the death of a baby resulting from the sale of a dangerous drug. The court further held on the facts, that the action was properly brought in contract or tort. Generally speaking, a druggist is liable for injuries to, or death of a person, resulting from the sale of dangerous drugs, but the liability rests upon the principle of negligence. The druggist owes his customers the legal obligation of ordinary care in the sale of his products; but ordinary care is a relative term. It means the highest degree of care and caution consistent with the conduct of the business. The decision in this case places druggists in the legal category of public servants, such as innkeepers and carriers, and reflects a progressive tendency to extend the liability of all persons who render service in any form to the public, for all injuries resulting from their negligent acts.

2. The Court of Appeals of Georgia renders an interesting decision in the case of *Metropolitan Life Ins. Co. vs. Hand*, 102 S. E. 647, wherein it is held that in an action on an insurance policy the conviction of insured for manslaughter did not render inadmissible his evidence that the death of the insured was accidental. The court does not discuss the principle at length nor cite any authority in support of it. The question involved here is disputed, however, by a few courts, but the decision in the case is clearly sound. A judgment of conviction in a criminal action is inadmissible to establish the facts upon which it is based in a civil action. It does not vary the rule of

law in this case that judgment was sought to be contraverted as to those facts. The proceedings are entirely different and no rule of *res adjudicata* sanctions the reciprocal admissibility of civil and criminal judgments for the reason that their purposes differ, the procedure differs, the rules of evidence differ and the proceedings do not affect the identical parties. Those cases admitting a criminal judgment as evidence in a civil action are exceptional, as where the civil action is based directly on the judgment. The case is therefore properly decided.

3. In *Ellington vs. Rides*, 102 S. E. 510, the North Carolina Court held that a person who installs a machine on the premises of another is an invitee and can hold the owner liable for defective condition thereof even though the injury results while the plaintiff is doing an act not strictly within the terms of the invitation. The court said: "A slight departure in the ordinary aberrations or casualties of travel do not change the rule of liability and hence the protection of the law is extended to him while lawfully on that portion of the premises reasonably embraced within the object of his visit." This decision is questionable. An owner of premises is liable for negligent condition thereof only as long as the invitee exercises the invitation strictly in accordance with its terms. This the plaintiff failed to do in going to another part of the property as the case showed merely for curiosity and not for a reason connected with the object of his invitation. The instant, therefore, he exceeded the terms of his invitation the relation between the parties was suspended, he be-

came a mere trespasser and should bear the risks resulting from his own misconduct.

4. *Cobble vs. Royal*, 219 S. W. 118, a Missouri case, was an action to recover on a mutual benefit insurance certificate. In denying a recovery the court held that a by-law, providing that proof of death can not be based on the legal presumption of death arising from seven years' absence and substituting a like rule based on expectancy of life of insured, was valid. The court gave as its reason the fact that the seven years' absence presumption is a mere rule of evidence and can be abrogated by contract. The case is intensely instructive and contains a valuable dissenting opinion. The decision, limiting it to the facts, is sustainable. A member of a society is conclusively bound by all its by-laws provided they are legal and reasonable. There was no contention in the case that it was void because unreasonable, the only argument being that it was illegal. Now, a by-law is illegal if it violates some principle of public policy whether it be manifested by a statute or by a common law rule. The seven years' absence presumption is, as the court stated, a mere rule of evidence which can be abrogated by contract and is not a rule of public policy like a clause making decision of the society conclusive. The distinction established in the case is therefore valid and is applied generally throughout the law of contract. Rules of evidence can be abrogated by contract, but principles of public policy are beyond the power of abrogation by the parties.

5. *Hurlbut vs. Bradley*, 109 Atl. 171, a Connecticut case, holds that an indorser of a note discharged by

failure of holder to give him notice of dishonor, removes his liability by a promise to pay the note. This is the rule of the Law Merchant and under the Uniform Negotiable Instruments Law. The decision is absolutely sound. When an indorser is discharged by failure to receive notice of dishonor, the debt itself is not discharged, but only the indorser is personally relieved from the obligation to pay the note. When he promises to pay it therefore he waives the defense that he would otherwise possess, revives the original obligation and is liable as though notice of dishonor had been regularly given.

6. The recent Illinois case of *Ford vs. Greenwalt* establishes an important precedent. The Supreme Court held that where a will shows by its terms that it was not intended to be revoked by marriage of the testator, the intention is controlling and the statutes does not revoke the will. In other words the decision substantially holds the statute is not an arbitrary rule of law, but is a mere rule of evidence, the operation of which can be avoided by appropriate testamentary expression. The opinion of the court, while not entirely logical, is interesting, and no doubt properly and reasonably construes the statute. The statute as above stated provides that if a single man makes a will his subsequent marriage revokes it. The policy of the statute is to induce him by revoking his original will to make a second will, thereby reconsidering the provisions of the original instrument, in view of the altered conditions in person and property resulting from the marriage. But *cessante ratione, cessat lex*: where the reason for a law ceases to apply, the law itself no longer exists. Hence in this

case since, when he made his will he contemplated marriage, he considered the changes it would create and naturally it can be inferred that he moulded the will to meet such post-marital conditions. There was, therefore, no reason for holding the statute applicable and court effectuating the clearly defined intention of the testator, probated it as his last will.

There are several miscellaneous recent decisions on varied subjects in the law. For instance, in *Gibbs vs. Almstone*, 176 N. W. 173, the Minnesota court held that under rule of

avoidable consequences, a person who has sustained injury is not legally required to submit to an operation.

Again, in *O'Connor vs. McCabe*, 176 N. W. 43, the South Dakota court held that equity will reform a voluntary conveyance of realty in an action between grantee and heirs at law of grantor.

Lastly, in *Elms vs. Flick*, 126 N. E. 66, the Ohio court held, a father who had provided an automobile for the general use of the family, was not liable for negligence of his son who at time of injury was driving several of his friends on a pleasure trip.
