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Recent Cases

W. B. W.

Engle v. Davenport[27] illustrates the effect of the *Johnson* case. The action was first brought in a state court and on appeal[28] the Supreme Court of California held that the lower court had no jurisdiction. The decision in the *Johnson* case was handed down the next month, and this action was again brought in the state court and judgment recovered for the plaintiff. This was affirmed by the Supreme Court of the state.[29] The result of this latest development is clear, and the interpretation of the act now seems to be definitely settled. It may be said, therefore, that Section 33 of the Jones Act provides that the plaintiff may bring his action thereunder in a state court, if he so elects, regardless of the fact that there is a diversity of citizenship, and the defendant may not remove the cause to the federal court.[30] The same is true if the plaintiff elects to bring his action in the federal court, both he and the defendant being residents of the same state.[31]

Clifford M. Langhorne.

RECENT CASES

CARRIERS—STREET RAILWAYS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE.—A, who was familiar with the location of the tracks and loading platform at the point where the accident occurred, stood waiting for a street car in such a position that she was struck and killed by the overhanging side of defendant's passing interurban car. *Held.* (1) The pedestrian is charged with notice of the extent of the vehicle's overhang; failure to warn the pedestrian of the overhang does not constitute negligence; and the train crew may presume that the person will exercise ordinary prudence and avoid the vehicle; (2) the fact that the car was operated at a rate of speed in excess of that permitted by a city ordinance does not charge the defendant with negligence unless the speed was the proximate cause of the injury *Beach v. Pacific Northwest Traction Co.*, 35 Wash. Dec. 184, 237 Pac. 737 (July, 1925).

(1) Undisputed evidence showed that the illuminated car was visible for three hundred yards down a straight track, and that a warning gong was

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sonably certain that the provision is not intended to affect the general jurisdiction of the District Courts as defined in section 24, but only to prescribe the venue for actions brought under the new act of which it is a part."

[27] 288 Pac. 710 (Aug. 25, 1924).

[28] 1924 A. M. C. 758 (Mar. 25, 1924).

[29] The court said, after discussing the *Johnson v. Panama R.* case: "It follows that if this provision merely defines the 'venue' of an action, the theory that such provision conferred 'jurisdiction' upon a particular court is no longer tenable; and, in the absence of any other provision purporting to divest of jurisdiction, those courts, both state and federal, which prior to the enactment of the Merchant Marine Act had jurisdiction of such actions, such jurisdiction may be presumed to continue."

[30] See: *Ullrich v. N. Y., N H. & H. R. R. Co.*, 193 Fed. 768 (1912) *De Atley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591 (1912) *Jones v. Kansas City Southern Ry. Co.*, 137 La. 178, 68 So. 401 (1915) *Pankey v. Atchison, T. & S. F Ry. Co.*, 180 Mo. App. 185, 168 S. W 274 (1914).

[31] See: *Panama R. Case, supra.*

sounded as it approached the *locus in quo*. Therefore the primary question that arises is whether or not there is an affirmative duty on the persons operating a street railway to affirmatively warn persons not passengers of the dangers arising out of the overhanging sides and ends of their vehicles. Citing with approval the cases of *Gannaway v. Puget Sound Traction, Light & Power Co.*, 77 Wash. 655, 136 Pac. 267 (1914) and *Leftbridge v. Seattle*, 130 Wash. 541, 228 Pac. 302 (1924), the court said that there was no such duty. The case at bar goes slightly farther than either of the cases cited in that it holds that the persons in charge of the vehicle may presume that the pedestrian will exercise ordinary prudence and step out of the way. The cases differ slightly on their facts in that the accidents in the two earlier cases were caused by the projecting rear ends of street cars as they rounded corners, while in the case at bar the deceased was struck by the overhanging side of a car passing on a straight track. The decision is a progressive one, and is supported by the weight of authority.

(2) At the time of the injury the car was approaching at an estimated speed of thirty miles an hour, in violation of a city ordinance. Following the rule in *Burlie v. Stephens*, 113 Wash. 182, 193 Pac. 684 (1920), the court held that where the violation of the ordinance is not the proximate cause of the injury, there is no imputation of negligence arising from the bare violation of the ordinance.

W S. T.

COMMUNITY PROPERTY—RIGHT OF HUSBAND TO MAKE GIFT OF COMMUNITY PERSONAL PROPERTY WITHOUT JOINING WIFE.—The son borrowed $3,000 from the bank, his father joining as accommodation maker. Upon default, demand was made upon the father, who offered, as part payment, a certificate of deposit issued by the bank to him for $1,000. The bank refused to accept it as part payment, but allowed it to be placed as collateral while attempts would be made to collect the note. This was unsuccessful. The father died while the certificate was still in the bank, and his estate brought suit against the bank for the certificate, claiming that the debt of the son and the father was not a community debt, and that the wife not being a party to the matter was entitled to her community share in the certificate.

Held: The transaction, including the signing of the note by the husband and the giving of the security was for the benefit of a son of both members of the community in which each were equally interested. When the husband used the community personal property for this purpose, even though the wife is not joined, he will be held to be acting as statutory agent of the community. *Stevens v. Naches State Bank*, 36 Wash. Dec. 119, 238 Pac. 918 (1925).

The husband, under the statute, has the control and right of disposition of community personal property, and must exercise that control for and on behalf of the community only. *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917).

A disposition of community property must be in the interest of the community, and a gift is therefore void. *Parker v. Parker* 121 Wash. 24, 207 Pac. 1062 (1922).

But according to the reported case, if a father assists a child of the spouses with community personal property, he will be deemed to have aided the community and therefore acting as statutory agent for the community.

W B. W

CONTRACTS—WHETHER CONTRACT GIVING POWER TO DEFENDANT TO "DETERMINE CONCLUSIVELY" CERTAIN FACTS WOULD BE ENFORCED.—Defendant signed a grower's contract to deliver his fruit crop to plaintiff, a co-operative association, for marketing purposes. The contract provided that it should be inoperative unless 4,200 carloads of apples were signed up before March 1, 1921. The contract further provided that "the tonnage shall be conclusively ascertained by the association by a tabulation of the tonnage estimated in each of the contracts signed." The board of directors of the association, acting in good faith, determined that the required tonnage had been obtained, basing its determination upon figures furnished by the officers of the association. The figures furnished by the officers were dishonest and fraudulent. *Held*. That even though the directors acted fairly and honestly, if it appeared that the information upon which they acted was unfair and dishonest, their determination would not be held conclusive against defendants. *Wenatchee District Co-Operative Association v. Mohler* 35 Wash. Dec. 96, 237 Pac. 300 (1925).

This case is not, at first blush, in accord with the case of *Washington Wheat Growers' Association v. Leifer* 132 Wash. 602, 232 Pac. 339 (1925), when a board of directors was allowed to determine, conclusively certain facts, under a contract similar to the one in *Wenatchee District Co-Operative Association v. Mohler*. But the cases are easy to reconcile since the element of fraud appears only in the case of *Wenatchee District Co-operative Association v. Mohler* and forms a very distinct line between the two cases.

The latter case is well considered, and apparently in harmony with the weight of authority C. P

CONTRACTS—WHETHER FILLING IN AMOUNT OF BLANK IN A CONTRACT OF GUARANTY WAS A MATERIAL ALTERATION.—Defendant Denbeigh owed the plaintiff $2,217. The parties entered into a contract by which Denbeigh agreed to pay the existing indebtedness during the term of the new contract and the plaintiff agreed to supply Denbeigh with certain merchandise. A contract of guaranty was signed by the other defendants by which they agreed to pay the existing indebtedness and any future indebtedness. A blank was left for the amount of the existing debt. After the defendants signed the guaranty, the plaintiff, without defendant's knowledge or consent, filled the blank in, in the sum of $2,217, which sum the defendants admitted on trial to be the correct indebtedness. The defendants contend that such filling in was a material alteration releasing them from liability as guarantors. *Held*. That since the guarantors agreed to pay the existing indebtedness, the insertion of the correct amount was not a material alteration. *T R. Watkins Co. v. Denbeigh*, 35 Wash. Dec. 338, 138 Pac. 13 (1925).

The rule is well settled that any wilful, material alteration of a written instrument made after its execution by one of the parties releases the non-consenting parties from any obligations under the instrument. *Cline v. Goodale*, 23 Ore. 406, 31 Pac. 956, 959 (1893) *American Pub. Co. v. Fisher* 10 Utah 147 37 Pac. 259 (1894) 1 AMER. & ENG. ENCYC. OF LAW 502 Dunbar, C. J., in *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969 (1893). The reason for the rule is twofold: (1) because tampering with written instruments is contrary to public policy (2) because the identity of the instrument is destroyed. 2 C. J 1176, 7 1 R. C. L. 969.

The alteration must be material. It must change the legal effect of the

instrument so as to change the rights, obligations or relations of the parties. *Turner v. Billagram,* 2 Cal. 523, 4 (1852) Dunbar, C. J., in *Murray v. Peterson,* 6 Wash. 418, 33 Pac. 969 (1893) 7 L. R. A. 743. If the legal effect remains unchanged leaving the rights, obligations and relations of the parties as originally regulated by the parties, the alterations or additions are not deemed material. *Humphry v. Crane,* 5 Cal. 173 (1855) *Kleeb v. Bard,* 12 Wash. 140, 40 Pac. 733 (1895) *Young v. Borzone,* 26 Wash. 4, 66 Pac. 135 (1901). Even though the evidentiary value of the instrument may be enhanced, as long as the legal effect of the instrument remains the same, it has been held that the filling in of a blank is an immaterial alteration. *Dr. Ward's Medical Co. v. Wolleat,* 199 N. W (Minn.) 738 (1924). *Contra: Watkin's Medical Co. v. Fornea,* 135 Miss. 690, 100 So. 185 (1924). The addition merely makes the instrument conform with itself and supplies nothing further than that which would be implied without it. *Sill v. Reese,* 47 Cal. 347, 8 (1874) *Dr. Ward's Medical Co. v. Wolleat,* 199 N. W 738 (Minn.) (1924).

For cases *contra* see *Watkin's Medical Co. v. Payne,* 180 N. W (N. D.) 968; *J R. Watkin's Medical Co. v. Miller* 40 S. D. 505, 168 N. W 373 (1918) (these cases are discussed in the case at bar).

The dissenting judge with his two concurring colleagues base their position on the ground that to permit an addition to the written instrument after execution, is to open the door to fraud. In the case at bar, however, the defendants admitted that the amount inserted was correct. It would seem, then, that since the legal effect of the instrument remains unchanged by the insertion of the correct indebtedness owing, the decision in the instant case is sound.

C. H.

CRIMINAL LAW—EVIDENCE—PRESUMPTION OF OWNERSHIP FROM LICENSE.—Appellant and another were jointly convicted of the crime of being a jointist. *State of Washington v. Jukich,* 36 Wash. Dec. 1, 238 Pac.—(1925). The only evidence introduced *in re* the appellant's participation in the crime was the fact that a license to run a soft drink parlor at the place raided was issued to him. Appellant rebutted this presumption of ownership by evidence showing that he had sold the establishment to someone else who applied to the city council for a license five days before the raid. This evidence was not contradicted in any way. The Supreme Court held it was error for the trial court to refuse a directed verdict of not guilty, maintaining that the case should never have gone to the jury. No evidence was introduced by the State to show that the defendant was there "conducting and maintaining the place," and there was evidence to the contrary which was not denied. The principle enunciated by the Supreme Court is—"a presumption (here the presumption of ownership by the issuance of the license in appellant's name) is not evidence of a fact but purely a conclusion." See also *Scarpelli v. Wash. Water Power Co.,* 63 Wash. 18, 114 Pac. 870 (1911), also *Anning v. Rothschild & Co.,* 130 Wash. 232, 226 Pac. 1013 (1924). In both the above cases the case of *Peters v. Lohr,* 24 S. D. 605, 124 N. W 853 (1910), was quoted where the court in speaking of the effect and character of "presumption" says, "a presumption is not evidence of anything and only relates to the rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue." For a discussion of presumption see WIGMORE ON EVIDENCE, §§2490 2491 and ELLIOTT ON EVIDENCE, §§91 and 23.

State of Washington v. Jukich clearly follows the rule of presumptions

as stated in the case of *Vernarelli v. Sweikert*, 123 Wash. 694, 213 Pac. 482 (1923), which is to the effect that a presumption has probative value when the testimony contradicting it is only that of an interested party. Then the case should properly go to the jury. If the testimony contradicting the presumption is that of a disinterested witness then the court should grant a nonsuit in the event that the state or opposing party has no further evidence. In the instant case *(State v. Jukich)* the Supreme Court decided that the appellant's witnesses, contradicting the presumption of ownership, were all disinterested and their testimony was unimpeached in any way, thus bringing the case clearly within the general rule. J. H.

NEGLIGENCE—DUTY OF ABUTTING PROPERTY OWNER TO KEEP SIDEWALKS CLEAR OF SNOW AND ICE.—A, the plaintiff, leaving a theatre operated by the defendants B and C, through a regular exit, leading to an alley alongside the theatre, slipped upon the sidewalk immediately in front of the exit, by reason of its being covered with snow and ice. The defendants had cleared the sidewalk in front of the theatre, but had done nothing with that on the alley side, the snow still being there as it had fallen the day before. *Held*. There was no duty upon the defendants to remedy the unsafe condition of the walk caused by the depositing of the snow thereon by the elements. *Ainey v. Rialto Amusement Co.*, 35 Wash. Dec. 4, 236 Pac. 801 (1925).

The holding in this case is in accord with the preceding Washington case of *Zellers v. Seattle Lodge No. 92, B. P O. E.*, 94 Wash. 32, 161 Pac. 834 (1916), and *City of Seattle v. Shorrock*, 100 Wash. 234, 170 Pac. 590 (1918), and with what is overwhelmingly the weight of authority "So far as defects in it (the street, sidewalk, etc.) result wholly from the operations of nature, the proprietor at whose front they exist is without responsibility for them." *City of Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189 (1881). In the present case, the court quotes the rule as expressed in 13 R. C. L. 41b that "In the absence of a statutory provision to the contrary, the owner or occupant of property owes no duty to pedestrians to keep the sidewalk in front of it free from ice and snow coming thereon from natural causes or to guard against the risk of accident by scattering ashes or using other like precautions, and will not be liable in damages to persons injured by reason of his failure to do so. Nor does a storekeeper owe any greater duty in this regard to customers leaving his store than he does to the ordinary pedestrians."

It is equally indisputable that where the abutting owner has by his negligence created or increased the danger from snow or ice, he may be held liable.

The court cites *City of Hartford v. Talcott, supra, McGrath v. Misch*, 29 R. I. 49, 69 Atl. 8, 132 Am. St. 798 (1908) *Dahlin v. Walsh*, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. (N. S.) 615 and note (1906) *New Castle v. Kurtz*, 210 Pa. St. 183, 105 Am. St. 798, 69 L. R. A. 488, 59 Atl. 989, 1 A. & E. Ann. Cas. 934 and note (1904) *Hanley v. Fireproof Bldg. Co.*, 107 Neb. 544, 186 N. W 534, 24 A. L. R. 382 and note (1922).

Among the veritable host of other citations on this point are: *Van Dyke v. City of Cincinnati, et al.*, 1 Disney 532 (1857) *Kirby v. Boylston Market Assoc.*, 14 Gray 249 (1859) *Flynn v. Canton Co. of Baltimore*, 40 Md. 312 (1874) *Steinbeck v. John Hauck Brewing Co.*, 7 Ohio App. 18 (1916) *Sneeson v. Kupfer*, 21 R. I. 560, 45 Atl. 579 (1900) *Sanborn v. McKeagney*, 229 Mass. 300, 118 N. E. 263 (1918) *City of Seattle v. Shorrock, supra; Zellers v.*

B. P O. E., supra; Hart v. Wright, 235 Mass. 243, 126 N. E. 383 (1920) *Boechler v. City of St. Paul,* 149 Minn. 69 182 N. W 908 (1921) *Tiffany v. F Vorenberg Co.,* 238 Mass. 183, 130 N. E. 193 (1921) *Russell v. Sincoe Realty Co.,* 293 Mo. 428, 240 S. W 147 (1922) *Pickett v. Waldorf System,* 241 Mass. 569, 136 N. E. 64 (1922). H. S.

NUISANCE—GROUNDS FOR INJUNCTION—LANDLORD AND TENANT.—Appellants leased storeroom to respondents "to be used as and for a meat market and for the sale of meat and meat products." The lease contained a restrictive clause against carrying on any dangerous, noxious or unlawful business therein or a business tending to depreciate or injure the reputation or value of the premises. Tenants above complained of noise and vibration from motor driven refrigerating plant installed by respondents. Appellant sought to enjoin its operation, on the ground that it was a violation of the restrictive clause of the lease. Evidence showed that the plant was of a type in ordinary use in such a business, was installed with knowledge of appellants, similar to one operated by previous tenants, and that the plant was operated in a proper manner. *Held.* That the lease of the premises for a particular use carried with it a license to carry on such business by the ordinary methods and with the usual appliances; that it was an implied covenant of the lease; that such right was not affected by the restrictive clause as the exercise of such right was not dangerous or injurious to the building; that the loss, if any, should be on the lessor if, due to the construction of the building, more noise and vibration resulted than was anticipated. *Jurek v. Walton,* 35 Wash. Dec. 46, 236 Pac. 805 (1925). The court distinguishes the case of *Spokane Stamp Works v. Ridpath,* 48 Wash. 370, 93 Pac. 533 (1908), where machinery installed in the storeroom of a hotel had not been contemplated and could not be inferred from the lease and where there had been no designation of purpose in the lease. The operation of the machinery in that instance prevented the use of the hotel parlor and the letting of rooms.

The principal case is in accord with the apparent general rule stated in *Karl v. Jackson,* 12 Ohio App. 477 (1920), *i. e.,* "Provisions in the lease authorizing the carrying on of a certain business in the leased premises constitute a license to carry on the stipulated business by the usual methods and with ordinary care." "All doubts as to the construction of a restriction are to be resolved in favor of natural rights and against the restriction." *Dietrich v. Ezra Smith Co.,* 12 Ohio App. 243 (1920). In regard to the element of acquiescence brought out in the principal case, *Mahoney Land Co. v. Cayuga Inv. Co.,* 88 Wash. 529, 153 Pac. 308 (1915), is in point. "After encouraging and acquiescing in the erection of private garages the owner of a nearby apartment house cannot restrain their operation as a nuisance although they proved a great annoyance to its tenants where it was not claimed that the garages were used in an unusually noisy or disorderly manner." L. S.

SEEPAGE WATERS—RIGHT TO AUGMENTED FLOW OF STREAM—BENEFICIAL USE OF STREAM.—Certain springs were located on appellant's land, the waters of which flowed into a creek. In the irrigation season the flow of the springs was increased by certain seepage waters surrounding reservoirs and ditches, which seepage waters the lower court held to belong to the appellants. To save the expense of mechanically elevating the water for irrigation purposes, the appellants had allowed the seepage water to flow into the creek and had

then taken out an equal amount of water from a point higher up on the creek, whence they could irrigate by gravitation. The trial court enjoined appellants from taking the water from the point above, and limited their use to such seepage waters as could be appropriated and put to beneficial use upon the land only where the springs arose. *Held.* That, reversing the judgment below, in the absence of injury to others appearing, appellants were entitled to take an equivalent amount of water at a point further up the creek and also to use such water on any lands belonging to them regardless of location of springs. *State v. American Fruit Growers,* 35 Wash. Dec. 86, 237 Pac. 498 (1925).

Seepage or percolating waters are "vagrant wandering drops, moving by gravity, beneath the surface of the ground in any and every direction along the line of least resistance." 27 R. C. L. 1168; *City of Los Angeles v. Hunter* 156 Cal. 603, 105 Pac. 755 (1909).

The question of ownership of such seepage waters was avoided in the case at bar because not raised on appeal. In accordance with the unchallenged ruling of the trial court, the seepage water was assumed to be the property of the persons owning the land on which the springs were located. This assumption is in accord with the English rule first announced in 1843, giving an absolute right (proprietory) to seepage and percolating waters. *Acton v. Blundell,* 12 Mess. and W 324 (1843). The English rule seems to have been recognized in this state. *Miller v. Wheeler* 54 Wash. 429, 103 Pac. 641 *Mason v. Yearwood,* 58 Wash. 276, 108 Pac. 608, 30 L. R. A. (N. S.) 1158 (1910). However, Washington has also recognized the so-called American or "reasonable use" rule (27 R. C. L. 1174), which allows the owner only the reasonable and not the absolute use of percolating waters on the theory that adjoining landowners have correlative rights to percolating water. *Patrick v. Smith,* 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740 (1913) *Nielson v. Spooner* 46 Wash. 14, 89 Pac. 155 (1907).

It does not appear that in the first Washington cases which apparently state the English rule that the owner was making an unreasonable use of the water· hence, they are not necessarily inconsistent with the reasonable use doctrine.

Seepage water may be conveyed along any natural stream of this state so long as the ordinary high water mark is not raised. Sec. 3 *Water Code,* Laws of 1917, p. 447, Rem. Comp. Stat. § 7353, Pierce's Code § 7205. Where no one is prejudiced thereby, a change in point of diversion of a stream may be made. *Osborne v. Chase,* 119 Wash. 476, 205 Pac. 844 (1923) *Kidd v. Laird,* 15 Cal. 162 (1861). Since, under the decisions, a landowner is entitled to the reasonable use of percolating waters, in the absence of prejudice to another, he should be permitted to use the waters in a manner most beneficial to himself. If to make such beneficial use, he allows the seepage water to flow into and augment the stream, it would seem logical and just as the court points out, to allow him to take out an equivalent amount of water at a point further up the stream. A. R.

STATUTE OF FRAUDS—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.—A contracted to deliver certain stock to B, when B had paid $3,000, $50 per month from July, 1917 to July, 1922. B having completed his payments seeks to enforce the contract. A denies the allegations of the complaint. On the trial he objects to evidence of an oral promise, on the grounds that the

contract was void by the Statute of Frauds, being by its terms not to be performed within a year. *Held:* The objection should be sustained. The statute, Rem. Comp. Stat. § 5825, makes such contracts void, not voidable. The objection may be raised any time, since it goes to the question of whether or not a cause of action is stated. The statute is not simply a shield of which the defendant may avail himself only by pleading it. *Hendry v. Bird,* 35 Wash. Dec. 99, 237 Pac. 317 (1925).

The court disposes of the many cases to the contrary, from other jurisdictions, by pointing out that they were decided under statutes which followed the original statute, 29 Car. II, c. 3 (1677 A. D.), which says: " no action shall be brought whereby to charge any person upon a contract not to be performed within a year, unless some note or memorandum thereof shall be in writing and signed by the party to be charged, or some other person thereunto by him lawfully authorized." Some of these cases were not decided under just such statutory wording, but were profoundly influenced by cases which had been decided under that form of words. Our statute says such contracts are void, unless, etc.

It is often said under the older form of words, that the statute affects the remedy, not the substantive law. *Maddison v. Alderson,* 8 App. Cas. 467, 488 (1883) *Morris v. Baron,* [1918] A. C. 1. It is also sometimes said to be in the nature of a rule of evidence. *Townsend v. Hargreaves,* 118 Mass. 325 (1875), *Bird v. Munroe, 22* Am. Rep. 571 (Me.) *Leroux v. Brown,* 12 C. B. 801 (1852).

Our court, however, seems to take the view that our statute affects the substance of the contract, for it says such contracts are a mere nullity.

This holding appears necessary to give effect to the plain words of the statute, yet it raises some peculiar considerations.

It is usually held that a memorandum made by one party after the contract has been concluded, will operate to bind that party. This is logical enough if the statute affects only the remedy. But in Washington where the contract is absolutely void, a mere nullity, surely a subsequent memorandum could not bind anyone, unless a new contract were made.

Another difficulty arises. Suppose X and Y enter into a contract in which each party assumes obligations to be performed in the future. If there is only a memorandum signed by X, then X cannot enforce the contract against Y, because Y did not sign, and that makes it void, a nullity, as the court declares. It is submitted if it were Y instead of X seeking to enforce the same contract, in the words of our court, speaking in another connection: "We cannot conceive of such a thing as a contract that is void under the Statute of Frauds, and yet can be the foundation of a legal obligation arising out of nothing else." It may be objected that the contract is not absolutely void, and a nullity, but merely unenforceable against Y. However, it appears that that is the direct opposite of the holding in the principal case.

It is the above line of reasoning which prompted the holding in Idaho and Michigan, that the memorandum must be signed by both parties. *Houser v. Hobart, 22* Idaho 735, 127 Pac. 997, 43 L. R. A. (N. S.) 410 (1912), *Kess v. Finch,* 25 Idaho 32, 135 Pac. 1165 (1913) *Wilkinson v. Heavenrich,* 58 Mich. 574, 26 N. W 139, 35 Am. St. Rep. 708 (1886) *Telephone Co. v. Kadus,* 140 Mich. 367, 103 N. W 814, 112 Am. St. Rep. 714 (1905), *Adams v. Harrington,* 154 Mich. 198, 117 N. W 551, 19 L. R. A. (N. S.) 919 (1908). It is significant

that our court cites a Michigan case, *Scott v. Bush*, 26 Mich. 418 (1873), in support of the proposition that the contract is a nullity under such a statute as ours.

The vast weight of authority is that only the defendant in that particular action need have signed. This is perfectly understandable under the older form of statute and under the theory that it was only the remedy and not the substance which was affected. Though even then Lord Redesdale found difficulty in enforcing a contract in which there was no mutuality of obligation. *Lawrenson v. Butler* 1 Sch. and Lef. 13. See also Chancellor Kent's dictum in *Clason v. Bailey*, 14 Johns. 483 (1817). Allen, J. in *Justice v. Lang*, 52 N. Y 323 (1873), had difficulty finding any consideration for a valid contract if only one person were bound. But the law was settled otherwise, and only the defendant's signature was required. The case of *Justice v. Lang*, 42 N. Y 494 (1879), interpreted the new statute, which resembled our own, in the same manner as the old, largely on the authority of cases decided under the old statute. *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911 (1893), and *Mathews v. Mathews*, 154 N. Y. 288, 48 N. E. 531 (1897), show from another angle that New York regards the statute as affecting the remedy rather than the substance of the contract. They are directly opposed to the principal case.

In our own Reports the interesting case of *Wright v. Grocery Co.*, 105 Wash. 383, 177 Pac. 818 (1919), holds that only the defendant need have signed. The point is not discussed except to remark that the weight of authority so held, and then the court went on to say, "This seems to rest on the theory that the statute is in the nature of a rule of evidence, necessitating written in place of parol proof." The principal case seems to recognize that the contract is void in substance. This may weaken the holding in the *Wright* case to some degree. There are two cases cited in the *Wright* case, *Tingley v. Bellingham Bay Co.*, 3 Wash. 644, 33 Pac. 1055 (1893) *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, 70 Pac. 247 (1902). But both of them concern contracts for the future sale of land. Now our statutes do not require these to be in writing. But the court does require it, probably on the grounds that that particular clause of the statute 29 Car. II. c. 3, may be in force in Washington as part of the common law. As was pointed out before, that statute affects only the remedy. Hence these cases might be distinguished from those arising under our statute, Rem. Comp. Stat. § 5825. O. B. K.

UNFAIR COMPETITION—PAINTING CABS OF ONE COMPANY TO RESEMBLE THOSE OF ANOTHER COMPANY.—The plaintiff, AB Taxicab Company, had for four years been operating a fleet of cabs, all painted in the same distinctive manner, the color of yellow predominating. It had in the meantime, by extensive advertising and excellence of service, built up a considerable good-will. Emphasizing the color scheme, they identified their cabs and business by the names "Yellow Cab" and "Yellow Cab Company." With this situation existing, the defendants, C, D and E, individual cab owners and drivers, repainted their cabs, yellow being also the dominant color in their newly applied color scheme. The similarity was sufficient to confuse prospective taxicab patrons, as proven by a number of specific instances. Patrons, deceived by this similarity, hailed and entered the defendants' cabs, believing them to be those of the plaintiff. Moreover, the plaintiff company was unjustly accused of charging the higher prices which were levied by the defendants. *Held*. Plaintiff entitled to an injunction preventing the defendants from operating cars thus deceptively

painted. *Seattle Taxicab Co. v. Oliver DeJarlais,* 35 Wash. Dec. 7, 236 Pac. 785 (1925).

The court here quoted and affirmed the rule as laid down in the case of *Pacific Coast Condensed Milk Co. v. Frye & Co.,* 85 Wash. 133, 147 Pac. 865 (1915), although the prior case was, on its facts, decided differently. The court says in the *Frye* case: "Irrespective of technical trade-marks, courts have long recognized the right of the first user of a distinctive dress of goods to protection against use by another of a similar dress or name in unfair competition. The basic principle of the doctrine of unfair competition, though variously expressed, is exceedingly simple. It is just this—no dealer or manufacturer has the right by any name, mark, sign, label, dress or other artifice, to represent to the public that the goods sold by him are those manufactured or produced by another, thus passing off his goods for those of such other to the latter's injury." The rule condemns "what would be reasonably calculated to deceive the common or usual purchaser of the given article when exercising ordinary care."

Although there were certain differences which could be observed upon examination, in the appearances of the rival cabs, yet they were not such as would be noticed by the casual user. The court points out that "the majority of the taxicab business is done at night when details and appearances of the cab are not readily discernible," that "usually the passenger-to-be is in a hurry and intent mainly on reaching his destination promptly," and it says "still more important, the incapacity of the ordinary person to observe or consider details or make comparisons unless his attention thereto be definitely invited, must also be remembered."

The court pays its respects to the general rule, recognized in the *Frye* case, *supra,* that "primary colors as such may not be appropriated and monopolized," but stands upon the qualification that such primary colors shall not be used in a manner so as to deceive. "Respondents might have freely used yellow and black as fancy dictated, so long as they did not so use them as to deceive those members of the public seeking to employ appellants (plaintiffs) and cause their cabs to be engaged in place of those operated by appellant." The *Frye* case, and the case of *Vittucci Co. v. Merline,* 130 Wash. 483, 228 Pac. 292 (1924), are distinguishable, in that in neither of them was the similarity deceptive.

Mr. Justice Parker dissents from the opinion of the rest of the court, insisting that "the use of yellow as a dominant color for a taxicab, or anything else, is as much the common property of everybody as is black or any other common color." And he says, "The respondents' motives in the use of this, what I conceive to be a common right, is a question with which we have no concern." It might be noted that one of the defendants explained his fondness for yellow with the statement that a yellow dog had once saved his life!

A question of pleading also arose in the case, by reason of the joinder of the three individual cabmen, between whom no concert of action was alleged. The complaint had originally contained allegations of damages and a prayer for pecuniary relief regarding the same, but these were stricken, leaving only the request for an injunction. The court held that as only injunctive relief was sought, the parties might be joined, quoting 30 Cyc. 129.

H. S.