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Recent Cases

C. P.

RECENT CASES

AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—DUTY OF CARE.—Deceased was killed while driving his auto on a very foggy night, by reason of running into a house, which was being moved and which at the time of the accident was occupying the whole of the street and was not properly equipped with marking lights. *Held*. That the "drive within the radius of your lights" rule would not be adopted in Washington, and that the rule to be followed in this state is that the driver "must see any object which an ordinary prudent driver under like circumstances would have seen." *Morehouse v. Everett,* 41 Wash. Dec. 303 Pac. (1927).

This case is a definite announcement of the rule to be followed in Washington, since the Court takes up the cases where the point had been discussed before in this state and then finally refuses to follow what they admit to be the weight of authority.

Seven states have decided that it is negligence *per se* to drive at such a speed that the car can not be stopped in time to avoid an obstruction discernible within the driver's vision ahead. *Fisher v. O'Brien,* 99 Kan. 621, 162 Pac. 317, L. R. A. 1917F, 610 (1917), *Harnau v. Haight,* 189 Mich. 600, 155 N. W 563 (1915), *Solomon v. Duncan,* 194 Mo. App. 517, 185 S. W 1141 (1916) *Albertson v. Ansbacher* 102 Misc. 527, 169 N. Y. S. 188 (1918) *Webster v. Pollock,* 15 Ohio App. 102 (1921) *West Constr. Co. v. White,* 130 Tenn. 520, 172 S. W 301 (1914) *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W 629, 25 L. R. A. (N. S.) 40 (1909). This same result was reached in the Washington case of *Ebling v. Nielsen,* 109 Wash. 355, 186 Pac. 887 (1920), but the part of the decision stating this principle was later withdrawn by the Court sitting *en banc. Ebling v. Nielsen,* 113 Wash. 698, 193 Pac. 569 (1920). Therefore Washington cannot now be quoted as upholding the rule for which it is cited in a note in 44 L. R. A. 1397. See also *Devoto v. United Auto Transportation Co.,* 128 Wash. 604, 223 Pac. 1050 (1924). The decision in the latter case and in the principal case seems to be influenced by the fact that there is considerable fog at times in Washington, and in many cases the fog is so thick that the driver can not see ahead at all. If the rule of "drive within the radius of your lights" were applied in such case, the driver would be forced to stop and that would tend to retard and in many cases to stop traffic entirely. Therefore the rule is that the driver should be allowed to proceed in a careful and prudent manner, and whether he does so will be a question for the jury. The rule announced in the principal case has been adopted in the state of Oregon, *Murphy v. Hawthorne,* 117 Ore. 319, 244 Pac. 79 (1926) using a very similar line of argument, as it has also been adopted in the state of Iowa. *Owens v. Iowa County,* 186 Iowa 408, 169 N. W 388 (1918). See 44 L. R. A. 1397 for a collection of the cases upon this point. C. P

AUTOMOBILES—NEGLIGENCE—DUTY OF DRIVER OF AUTOMOBILE.—Defendants were driving east on paved street forty feet wide and devoid of traffic at rate of ten to twelve miles per hour in daytime. Plaintiff's son, aged eight years, was proceeding west close to the northerly curb of street in a coaster wagon, and attempted to cross in a diagonal direction towards opposite side of the street. The boy was struck by defendant's auto and injured. Defendant testified that he did not see child until from three to five feet from the automobile. *Held:* (reversing a judgment of nonsuit in an action tried before the court without a jury) "it was the duty of the driver of the auto to have seen the boy and his wagon as they were running along close to the northerly curb, and particularly should he have seen him when he turned from the curb and went diagonally across the street in front of the auto he was bound to know that a child of the age of this one might undertake to cross the street in front of him." *Pritchard v. Hockett,* 40 Wash. Dec. 380, 249 Pac. 989 (1926).

It will be noted that this decision seems to place an absolute duty upon the driver of an automobile and to leave no longer open the question as to

whether the driver exercising the care of an ordinary prudent man under the same or similar circumstances would have seen the person attempting to cross in front of his automobile, which has been the rule heretofore in this state. *Minor v. Stevens,* 65 Wash. 423, 118 Pac. 313 (1911). All doubt as to the far-reaching effect of this decision would be removed had the case been tried by a jury and had the Court held the plaintiff guilty of negligence as a matter of law, without requiring the issue to be submitted to the jury as a question of fact. Such a holding, however, would seem to be in accord with the weight of authority on this question. *Smith v. Coon,* 89 Neb. 776, 132 N. W 535 (1911) *Burvant v. Wolfe,* 126 La. 787, 52 So. 1025 (1910) *Diamond v. Cowles,* 174 Fed. 571 (C. C. A. 3d, 1909) *Kessler v. Washburn,* 157 Ill. App. 532 (1910). The operation of an automobile upon a city street necessitates great care on the part of the driver. *Lampe v. Jacobsen,* 46 Wash. 533, 90 Pac. 654 (1907). The driver of an automobile is bound to anticipate that other travelers, both in carriage and on foot, will use the highway, and hence it is his duty to have his machine under reasonable control so as to avoid injury to such travelers. *Deitchler v. Ball,* 99 Wash. 483, 170 Pac. 123 (1918) *Locke v. Green,* 100 Wash. 397, 171 Pac. 245 (1918). A driver is bound to see persons in the street ahead of him when his view is unobstructed. *Warner v. Bertholf* 40 Cal. App. 776, 181 Pac. 808 (1919) *Russell v. Scharfe,* 76 Ind. App. 191, 130 N. E. 437 (1921). As to children, a greater amount of care is required than in the case of a grown person. *Blair v. Kilbourne,* 121 Wash. 93, 207 Pac. 953 (1922). The reason underlying the requirement of a greater amount of care upon the part of an automobile driver is based upon the theory of a dangerous instrumentality. *Minor v. Stevens,* 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, 2 N. C. C. A. 309 (1911). G. E. C.

BANKS AND BANKING—LETTER OF CREDIT—RIGHTS OF ISSUING BANK WHEN GOODS ARE DEFECTIVE.—The plaintiff bank at the request of S., a buyer under a sales contract, issued an irrevocable letter of credit in favor of the defendant, the seller. The letter of credit consisted of a promise to honor drafts "covering a shipment of steel products" when accompanied by specified shipping documents. The defendants, in due time, presented the drafts, accompanied by the necessary documents in proper form; whereupon the drafts were paid by the plaintiff bank. S. was unable to take up the drafts and the plaintiff commenced this action against the defendant to recover the amount of the drafts. It was alleged in the complaint that the goods delivered by the defendant were not of the kind and quality specified in the sales contract, and were of much less value than the goods contracted for. The defendant's demurrer to the complaint was sustained. *Held.* The demurrer was properly sustained. *Bank of East Asia v. Pang,* 40 Wash. Dec. 433, 249 Pac. 1060 (1926).

No obligation to honor the draft rests upon the bank unless the accompanying documents strictly comply with the requirements of the letter of credit. *Lamborn v. Lake Shore Banking & Trust Co.,* 188 N. Y. S. 162 (App. Div. 1921) affirmed 231 N. Y. 616, 132 N. E. 911 (1922) *National City Bank v. Seattle National Bank,* 121 Wash. 476, 209 Pac. 705, 30 A. L. R. 347 (1922) *Moss v. Old Colony Trust Co.,* 246 Mass. 139, 140 N. E. 803 (1923) *Old Colony Trust Co. v. Lawyers' Title & Trust Co.,* 297 Fed. 152 (C. C. A. 2d, 1924). If the bank does honor the draft, despite the fact that the shipping documents are not in conformity with the requirements of the letter of credit, it cannot recover from the customer, the buyer, in case the goods are defective. *Bank of Montreal v. Recknagel,* 109 N. Y. 482, 17 N. E. 217 (1888). If the documents on their face comply with the conditions of the letter of credit, then as between the bank and the buyer, the bank is protected in honoring the draft. *Benecke v. Haebler* 58 N. Y. S. 16 (1899) affirmed 166 N. Y. 631, 60 N. E. 1107 (1901) *Frey & Son v. E. R. Sherburne Co.,* 184 N. Y. S. 661 (App. Div. 1920) *Tocco v. Rinando,* 248 Mass. 244, 143 N. E. 905 (1924) *International Banking Corp. v. Irving National Bank,* 283 Fed. 103 (C. C. A. 2d, 1922). Nor does any obligation rest upon the bank to investigate a claim by the buyer that the goods delivered do not comply with the terms of the sales contract. *Laudisi v. American Exch. Nat. Bank,* 239 N. Y. 234, 146 N. E. 347 (1924)

First Wisconsin Nat. Bank v. Forsyth Leather Co., 206 N. W (Wis.) 843 (1926). The most difficult situation arises where the bank itself asserts as a defense to an action by the seller, or as the basis of an action against the seller, as in the principal case, that the goods delivered are defective. As between the bank and innocent third persons this defense is clearly not available. *Bank of Plant City v. Canal-Commercial T. & S. Bank*, 270 Fed. 477 (C. C. A. 5th, 1921). In accord with the holding of the instant case, that even as between the bank and the seller, the bank "deals only in documents" and is not concerned with any of the conditions of the sales contract, see *O'Meara v. National Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925), *Imbrie v. Nagase & Co.*, 187 N. Y. S. 692 (App. Div. 1921). A contrary result was reached in *Old Colony Trust Co. v. Lawyers' Title & Trust Co., supra*, (holding that the bank need not pay the draft, where although the warehouse receipt tendered by the seller was valid on its face, the goods had not in fact been stored). It would seem to be the business understanding of both parties, that the bank relies not alone upon the credit of the buyer for security but also upon the goods themselves. This being true, those conditions of the sales contract relating to value, such as quality or quantity, might well be held to be implied conditions of the letter of credit contract. The result of the principal case, however, works no undue hardship upon the bank, as it may protect itself by writing into the letter of credit such express conditions as it sees fit. For an excellent discussion of the legal rights and liabilities incident to letters of credit, see W E. McCurdy, *Commercial Letters of Credit*, 35 HARV. L. REV. 539, 715. B. B.

BUILDING CONTRACTS—EFFECT OF DEATH ON NECESSITY OF PERFORMANCE.—The intestate during his life time was a building contractor and at the time of his death had partly completed two buildings which were completed by intestate's administrator. P, a creditor of the estate, objected to the entry of the final account and order of distribution presented by the administrator on the ground that the administrator had no authority to complete the two contracts since such contracts were personal and were terminated by the death of the contractor. *Held:* The general rule is that it is the duty of an administrator to perform the contracts of his intestate unless the acts to be performed are personal. Ordinarily a building contract is not to be brought within that class of contracts which are deemed to have been entered into because of the skill or taste of the person required to perform it. Hence the personal representative not only may, but is bound to, complete such a contract. *In re Burke's Estate*, 198 Cal. 163, 244 Pac. 340, 44 A. L. R. 1341 (1926).

The same doctrine has been laid down by the Supreme Court of Washington in the case of *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A, 417 (1910), where, however, the testator had covenanted for himself, his executors and administrators to perform the covenants of a building contract. The Court said: "There was nothing in the contractual relationship existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building, or any part thereof, when completed, should be the product of his own personal labor and skill, either as a laborer, mechanic or artist. He no doubt expected to perform his contract through the labor and skill of others, to a large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death; while there is eminent authority to the contrary."

Lord Coke in 1615 in the case of *Quick v. Ludborrow*, 81 Eng. Reprint 25 (1688), said: "If a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform them." See *Bambrick v. Webster Groves Presby. Church Ass'n*, 53 Mo. App. 225 (1893), *Chamberlain v. Dunlop*, 126 N. Y. 45, 22 Am. St. Rep. 807 (1891), *Jann v. Browne*, 59 Cal. 37 (1881), Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231 (1912).

In almost all of the cases discussed and cited above the courts have said *obiter* that if a contractor was selected to construct a building because of his personal ability and skill that such a contract would be considered personal and would be terminated by his death. There do not seem to be, however any cases which have directly so held and unless the contract expressly provided for the personal attention of the party contracting to erect a building the courts would probably be reluctant so to hold not only in the light of the prior decisions but also in view of the situation in which the parties to such a contract would find themselves by virtue of such a holding. R. S. S.

CONTRACTS—RESCISSION—LACHES.—Plaintiff who lived in Wisconsin purchased a note and mortgage on real estate in Seattle from the defendant. Plaintiff believed that the mortgage covered improved property free and clear of all encumbrances, having been led to such belief by defendant's fraudulent misrepresentations. The land was in fact vacant, a fact which plaintiff learned about a year after the sale. Several months later she ascertained that unpaid local assessments and taxes were a lien against the realty. A month thereafter, June, plaintiff made repeated efforts to collect interest which was unpaid. She continued these efforts ineffectually until September when threat of foreclosure was made. Nothing was then done until December when the action of rescission for fraud was brought and, though allowed in the lower court, was not allowed on appeal, the Supreme Court holding: Plaintiff is barred by laches, the right to rescind for fraud being waived where action was not begun until ten months after discovery of the fraud, and only after repeated efforts to collect were unavailing and abandoned. *Kellner v. Rowe,* 137 Wash. 418, 242 Pac. 353 (1926).

Where one with knowledge of the facts constituting the fraud unreasonably delays bringing his action for rescission, the court will infer that he has waived the fraud at some time during the delay and elected to stand on the voidable contract. *McEvoy v. M. Samuel & Sons,* 121 Atl. (Pa.) 189 (1923). By inferring a waiver and election the court must presume an intent and though such is at best but a presumption, yet by denying him the right to prove his actual intent, the presumption is made conclusive. It is to be noted in the principal case that the relative positions of the parties had not changed adversely to the party sought to be charged. *Lindblom v. Johnson,* 92 Wash. 171, 158 Pac. 972 (1916). The general rule in regard to laches as a bar to the action of rescission for fraud is that one must delay with knowledge of the essential facts of the fraud. *Simon v. Goodyear Metallic Shoe Co.,* 105 Fed. 573, 44 C. C. A. 612 (1900) *Bach v. Tuck,* 26 N. E. (N. Y.) 1019 (1891) *Richardson v. Lowe,* 149 Fed. 625 (C. C. A. 8th, 1906). Moreover, the weight of authority favors the view that one is held to such knowledge if he has such means of finding out as he is bound to avail himself of. *Capital Security Co. v. Davis,* 60 So. (Ala.) 498 (1912) *Garstang v. Skinner* 134 Pac. (Cal.) 329 (1913) *Geo. Pac. Ry. Co. v. Brooks,* 6 So. (Miss.) 467 (1889) *Whitney v. Bissell,* 146 Pac. (Ore.) 141 (1915) *Coffman v. Viquesney,* 84 S. E. (W Va.) 1069 (1915) *Redgrave v. Hurd,* 20 Ch. Div. (Eng.) 1, *McNair v. Sockriter* 201 N. W (Ia.) 102 (1924) *Scott v. Empire Land Co.,* 5 F (2d) 873 (1925) *Hogan v. Ross,* 205 N. W (Ia.) 208 (1925) *Barr v. McCauley,* 240 S. W (Tex.) 961 (1922). For cases holding actual knowledge alone can be the basis of laches, see *Hall v. Bank of Baldwin,* 127 N. W (Wis.) 969 (1910) *Baker v. Lever* 67 N. Y. 304 (1876) *Slaybach v. Raymond,* 87 N. Y. S. 931 (1904). It has been held that a well founded suspicion of the fraud would justify bringing the action. *Cunningham v. Pettigrew,* 169 Fed. 335 (C. C. A. 8th, 1909). A person having knowledge of the fraud must bring his action for rescission within a reasonable time or as many courts put it, "with reasonable promptness." *Blake v. Merritt,* 101 Wash. 56, 171 Pac. 1013 (1918). This promptness is that which a man of ordinary prudence would exercise under the same or similar circumstances. Failure to bring the action within a reasonable time after knowledge constitutes the defense of laches (1) when some intervening change in the condition or relation of the parties adversely affecting the rights of the person sought to be charged takes place. *Lindblom v. Johnson,* 92 Wash. 171, 158 Pac. 972 (1916) *Knuckolls v. Lea,* 29 Humph. (Tenn.) 577 (1850) *Monast v. Manhattan Life*

Ins. Co., 79 Atl. (R. I.) 932 (1911) *Plympton v. Dunn*, 20 N. E. (Mass.) 180 (1889), *O'Neale v. Moore*, 88 S. E. (W Va.) 1044 (1916). Or where the rights of third parties have intervened raising new rights and obligations because of the delay. *Monast v. Manhattan Life Ins. Co.*, 79 Atl. (R. I.) 932 (1911), *Dunfee v. Childs*, 59 W Va. 225, 53 S. E. 209 (1906). (2) If plaintiff has done any act during the period of delay inconsistent with an intention to rescind. *Dill v. Camp*, 22 Ala. 249 (1853). (3) If an intention to waive the fraud may be inferred from such delay. *McEvoy v. M. Samuel & Sons*, 121 Atl. (Pa.) 189 (1923), *Auto Finance Co. v. Rosenheim*, 73 Pa. Super. Ct. 546 (1920). (4) If an election to treat the contract as valid instead of voidable may be inferred from the delay. *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24 (1910), *Blank v. Aronson*, 187 Fed. 241, 109 C. C. A. 327 (1911) *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317 (1906). Subdivisions (3) and (4) *supra* are practically the same in basis and result; however, most courts seem inclined to demand more unreasonable delay to establish waiver than election. Well reasoned cases may be found which support the doctrine laid down in 2 BLACK ON RESCISSION, §§ 546, 547, that is: To entitle one to rescind he is only required to act with reasonable promptness, and a liberal extension of the rule is allowed when the delay has not been willful nor exercised for an improper motive, *Prescott-Phoenix Oil & Gas Co. v. Gilliland Oil Co.*, 241 S. W (Tex.) 775 (1922) and there is no inequity in enforcing rescission, founded upon some change in the condition or relations to the property of the parties. *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. ed. 738 (1891). T. M. G.

CRIMINAL LAW—JURY—TRIAL.—The jury in a criminal case not having reported a verdict, the judge caused the jury to be brought into court, and inquired how it was divided numerically, though not in whose favor the majority stood. *Held*. This was reversible error. *Brasfield v. United States*, —— U. S. ——, 71 L. ed. ——, 47 Sup. Ct. 135 (1926).

The practice of making such inquiry, particularly when it is followed by an instruction emphasizing the duty of the jury to reach a verdict, was condemned in the *United States v. Burton*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. ed. 482 (1905). But the judgment was reversed on another ground, so that it has not been understood whether the Court actually should grant a new trial for such a cause. The inquiry in the *Burton* case was followed by a charge which standing alone would have been considered justifiable, *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. ed. 91 (1894) *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. ed. 528 (1896), but the two together were regarded as having a tendency to coerce the minority jurors. The two elements seem to have concurred in *St. Louis & S. F Co. v. Bishard*, 147 Fed. 496 (C. C. A. 8th, 1906), a civil case which was reversed for that reason. The same was true in *Stewart v. United States*, 300 Fed. 769 (C. C. A. 8th, 1924), and *Nigro v. United States*, 4 F (2d) 781 (C. C. A. 8th, 1925), where the same result was reached.

In *Bernal v. United States*, 241 Fed. 339 (C. C. A. 5th, 1917), and *Quong Duch v. United States*, 293 Fed. 563 (C. C. A. 9th, 1923), it was considered not necessarily ground for a new trial. The comparatively few cases from the state courts seem to take the same view. *Eady v. State*, 168 Ark. 731, 271 S. W 338 (1925) *Evans v. State*, 165 Ark. 424, 264 S. W 933 (1924), and cases there cited; *Flahive v. State*, 10 Ga. App. 401, 73 S. E. 536 (1912). In *Murchison v. State*, 153 Ark. 300, 240 S. W 402 (1922), the practice is justified as enabling the court to determine intelligently the prospect of a verdict, and accordingly to know whether or not to discharge the jury. See also *State v. Finch*, 71 Kan. 795, 81 Pac. 494 (1905).

It is a singular circumstance that so few decisions on the specific point are to be found, but this is probably to be explained on the ground that most courts have considered in each case whether or not all the circumstances together did in fact constitute improper influence by the court upon the jury. Such was the view taken in *Lindstrom v. Seattle Taxi Co.*, 116 Wash. 307, 199 Pac. 289 (1921), a civil case in which the inquiry was said not to be commended, but was not considered to warrant a reversal. The principal case,

however, seems to fix the rule in the federal courts, that any such inquiry is of itself erroneous and the basis for a new trial. O. B. K.

CRIMINAL LAW—PUNISHMENT OF SUBSEQUENT OFFENSES—HABITUAL CRIMINAL.—Following the verdict of the jury, convicting petitioner of felony, but prior to sentence, the prosecuting attorney filed an information charging the petitioner with being an habitual criminal. Petitioner sued out writ of prohibition to prevent his being tried on this charge, the contention being that at time of filing information in last conviction, the prosecuting attorney should have averred in such information that he was an habitual criminal and that a conviction would be sought on this charge. *Held.* (Parker, J., dissenting) There being no statutory provision applicable, no constitutional right is denied by the procedure herein since the allegation of the prior conviction in the information or indictment and proof thereof, would so prejudice the jury that the accused would be denied the right to a fair trial. *State ex rel. Edelstein v. Huneke, J.,* 40 Wash. Dec. 289, 249 Pac. 784 (1926).

The opinion of the majority of the Court seems to be against the great weight of authority and the Court says in the principal case: "An exhaustive review fails to disclose a single case where the fact of a second conviction was sought to be determined by indictment regularly found at the close of a trial upon a felony charge and before valid sentence was passed, as was done in this case." In states where the statute imposes a greater punishment for a second offense than for the first, the fact that the offense charged is a second violation must be alleged in the indictment. Notes, 9 Ann. Cas. 768; 22 Ann. Cas. 1000. Where the statute imposes an additional penalty for repeated convictions, the indictment for a subsequent offense must allege such prior convictions. *People v. King,* 64 Cal. 338, 30 Pac. 1028 (1883) *Watson v. People,* 134 Ill. 374, 25 N. E. 567 (1890) *Commonwealth v. Walker* 163 Mass. 226, 39 N. E. 1014 (1895) *Bandy v. Hehn,* 10 Wyo. 167, 67 Pac. 979 (1902) *Evans v. State,* 150 Ind. 651, 50 N. E. 820 (1898) 31 C. J. 734. The cases generally hold that the former convictions must be alleged in the indictment. A different rule apparently prevails in South Carolina, where it is controlled by statute. *State v. Kelly,* 89 S. C. 303, 71 S. E. 987 (1911) *State v. Parris,* 89 S. C. 140, 71 S. E. 808 (1911). The authorities cited by the majority opinion in the main case do not seem to sustain the Court. The only authority to substantiate the Court's decision lies in the fact that it has been the custom to follow the procedure as herein followed since the Act of 1903, Rem. & Bal. Code § 2178, although subsequently repealed in 1909. In the final analysis the Court rests its opinion upon the fact that this procedure adopted by the majority opinion is consonant with the legislative intent at the only time such intent was expressed, and the rule followed in this case protects every right of the petitioner. G. F A.

DIVORCE — CUSTODY OF CHILDREN — GROUNDS FOR AWARD.— The plaintiff brought action for divorce from her husband. The defendant answered and by cross-complaint sought a divorce as against the plaintiff. An interlocutory decree of divorce was granted in favor of the cross-complainant and against the plaintiff. The custody of two girls, aged three and eight years, was awarded to the parents of the husband. The plaintiff appealed from the judgment awarding the custody of the children. *Held.* Before children of the tender age of those here to be considered are to be taken from the mother and given to others, it should be shown clearly that the mother is an unfit and improper person to be intrusted with their custody. *Prothero v. Prothero,* 137 Wash. 349, 242 Pac. 1 (1926).

At common law the father was entitled to the custody and control of his minor children, this right being accorded him because of his obligation to maintain, protect and educate them. *Ex parte Boaz,* 31 Ala. 425 (1858) *McShan v. McShan,* 56 Miss. 413 (1879) *People ex rel. Snell v. Snell,* 77 Misc. Rep. 538, 137 N. Y. S. 193 (1912) *Denny v. Denny,* 118 Va. 79, 86 S. E. 835 (1915), 9 R. C. L. 471. The mother's right was secondary to that of the father, but upon his death, or sometimes upon a showing of his incompetency, the rights of the mother were recognized as being prior to those of all others. *People*

v. Wilcox, 22 Barb. (N. Y.) 178 (1854), *Cowls v. Cowls,* 3 Gilman (Ill.) 435, 44 Am. Dec. 708 (1846), *In re Linder's Estate,* 13 Cal. App. 208, 109 Pac. 101 (1910) *Brackett v. Brackett,* 77 N. H. 75, 87 Atl. 252 (1913).

Gradually, considering the statutes and the discretionary powers of the court, it has come to be the generally recognized rule that the welfare of the child is the chief consideration in controversies of this kind and the court must exercise a judicial discretion. *Beyerle v. Beyerle,* 155 Cal. 266, 100 Pac. 702 (1909) *Cohn v. Scott,* 231 Ill. 556, 83 N. E. 191, 121 Am. St. Rep. 342 (1907), *Colson v. Colson,* 153 Ky. 68, 154 S. W 380 (1913), *Wandersee v. Wandersee,* 132 Minn. 321, 156 N. W 348 (1916) *Chamberlin v. Chamberlin,* 194 App. Div. 470, 185 N. Y. S. 98 (1920), 9 R. C. L. 475; Note, 41 L. R. A. (N. S.) 565; KEEZER: MARRIAGE AND DIVORCE, (2d ed. 1923), § 589. With this doctrine the decisions of Washington are in accord. *Kentzler v. Kentzler* 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21 (1891), *Carey v. Hertel,* 37 Wash. 27, 79 Pac. 482 (1905), *Kane v. Miller,* 40 Wash. 125, 82 Pac. 177 (1905), *Pierce v. Pierce,* 52 Wash. 679, 101 Pac. 358 (1909), *Wingard v. Wingard,* 56 Wash. 354, 105 Pac. 833 (1909) *Sorge v. Sorge,* 112 Wash. 131, 191 Pac. 817 (1920), *Ericson v. Ericson,* 114 Wash. 485, 195 Pac. 234 (1921). Under most modern statutes, and in Washington under Rem. Comp. Stat. § 6907, P C. § 1423, the father and mother, if not unsuitable, are equally entitled to the custody of the children. *Newby v. Newby,* 55 Cal. App. 114, 202 Pac. 891 (1921), *Spratt v. Spratt,* 151 Minn. 458, 185 N. W 509 (1921), *Delle v. Delle,* 112 Wash. 512, 192 Pac. 966 (1920), KEEZER: MARRIAGE AND DIVORCE, (2d ed. 1923), § 587. And the court may, in its judicial discretion, award their custody to either, or to third persons, as may seem best for the welfare of the children. *Keesling v. Keesling,* 42 Ind. App. 361, 85 N. E. 837 (1908), *Collins v. Collins,* 76 Kan. 93, 90 Pac. 809 (1907), *Shallcross v. Shallcross,* 135 Ky. 418, 122 S. W 223 (1909), *Sorge v. Sorge,* 112 Wash. 131, 191 Pac. 817 (1920), Note, 41 L. R. A. (N. S.) 568. The parental right, however, is recognized as prior, and children will not be taken from their parents and given to others merely because they are better provided financially to rear and educate them. *Curtis v. Curtis,* 46 Wash. 664, 91 Pac. 188 (1907), *Lovell v. House of The Good Shepherd,* 9 Wash. 419, 37 Pac. 660 (1894), *Buchanan v. Buchanan,* 93 Kan. 613, 144 Pac. 840 (1914), *Ex Parte Livingston,* 151 App. Div. 1, 135 N. Y. S. 328 (1912).

The mother is usually given the custody of children of tender years, if otherwise fit and competent to care for them, upon the theory that such a child needs a mother's care, and its welfare will be thus furthered. *Meffert v. Meffert,* 118 Ark. 582, 177 S. W 1 (1915), *Riggins v. Riggins,* 191 Ky. 22, 228 S. W 1030 (1921), *Jenkins v. Jenkins,* 173 Wis. 592, 181 N. W 826 (1921), *Smith v. Smith,* 15 Wash. 237, 46 Pac. 234 (1896), *Freeland v. Freeland,* 92 Wash. 482, 159 Pac. 698 (1916), *Smith v. Frates,* 107 Wash. 13, 180 Pac. 880 (1919), KEEZER: MARRIAGE AND DIVORCE, (2d ed. 1923), p. 408. It is from this fact that the statement in the principal case probably derives its root. While the beneficial influences of a mother's care to such a child is perhaps recognized as giving her preference, everything else being equal, the real determining factor is the interest and welfare of the child and not any right that may inhere in the mother. G. W McC.

INSURANCE—CHANGE OF BENEFICIARY—MUTUAL BENEFIT SOCIETIES.—Certificate originally named the father of insured as beneficiary. The father predeceased the insured and the insured, in his last sickness, attempted to designate his brother as the new beneficiary. An application was made out in due form and in compliance with the certificate of insurance and by-laws of the society, but was not sent to the insurance society until after the death of the insured. The certificate of insurance provided that notice of change of beneficiary must be received and entered on the books of the company to be effective and in case the insured died with no named beneficiary the proceeds of the policy would be distributed according to the by-laws of the society. *Held.* The change of beneficiary was effective on the ground that a court of equity would regard that as done which ought to have been done. Also, that since the first beneficiary was dead, the original designation of beneficiary was revoked, and the contract could then be treated as if no designation had been made, and there-

fore the appointment of the plaintiff was a "designation" and not a "change of beneficiary" and not controlled by the regulations relied upon by the defendant. *Brotherhood of Locomotive Firemen and Enginemen v. Ginther* 248 Pac. (Wyo.) 852 (1926).

Beneficiaries under a mutual benefit certificate have no vested interest until the member's death. *Longer v. Carter* 102 Ark. 72, 143 S. W 575 (1912). Therefore the first ground for the holding may be supported on the basis of similar decisions. *Supreme Conclave v. Cappella et al.,* 41 Fed. 1 (1890) *Arnold v. Newcomb,* 104 Ohio St. 578, 136 N. E. 206 (1922) *McGowan v. Supreme Ct. Independent Order of Foresters,* 104 Wis. 173, 80 N. W 603 (1899). The argument used here is that when the insured has done all on his part that is necessary to work a change of beneficiary, that which the insurance company must do is purely ministerial, since the insurance company reserves no right of veto, and the regulations are merely as to the manner of making the change and to provide for notice thereof to the society so that the fact may be made a matter of record. The courts are not in accord on the proposition above stated. See *Heydorf v. Conrack,* 7 Kan. App. 202, 52 Pac 700 (1898) *Abbott v. Supreme Colony, etc. Pilgrim Fathers,* 190 Mass. 67, 76 N. E. 234 (1906). Even the courts which allow recovery on facts such as above require that there must be a valid and *bona fide* attempt to comply with the rules and by-laws of the society. *Vanasek v. Western Bohemian Fraternal Ass'n,* 122 Minn. 273, 142 N. W 333, 49 L. R. A. (N. S.) 141, Ann. Cas. 1914D, 1123 (1913).

The second ground for the holding in the principal case seems novel and strictly, unnecessary to the decision of the case. However, it is more than mere *dictum* since the Court purports to decide the case upon this point. The Court based its decision on a case similarly decided in Illinois. *Quest v. Brotherhood of Locomotive Firemen and Enginemen,* 230 Ill. App. 321 (1923). It is difficult to reconcile this holding with the terms of the certificate of insurance which provides "should the beneficiary named herein die before said member, or should there be a failure of a proper designation of beneficiary, then in all such cases the amount due upon the certificate shall be paid to the person or persons who may be entitled thereto in order prescribed in the Constitution of said brotherhood." This would seem to fit this case exactly and imply that the naming of a new beneficiary after death of the first named beneficiary would be a "change of beneficiary." Blume, J., writes a strong dissenting opinion in the principal case and the weight of authority seems to be with the dissenting opinion. *Head v. Supreme Council etc.,* 64 Mo. App. 212 (1895) *Modern Woodmen of America v. Puckett,* 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083 (1908). The chief objection to the second holding is that an insurance company would never know when it was safe to pay out the amount of the policy, when the named beneficiary did not appear for at any time someone might claim to be the subsequently named beneficiary and demand the money. G. De G.

Municipal Corporations—Governmental Powers—Proprietary Powers—Ultra Vires Torts.—A municipal corporation authorized to operate "railways" operated a motor bus for profit on a route where it was impracticable to extend the railway system. Through the negligence of the bus driver in operating the bus, the plaintiff was injured. *Held.* (Holcomb, J., dissenting) The operation of the motor bus by the municipality being *ultra vires,* plaintiff's action should be dismissed. *Woodward v. City of Seattle,* 40 Wash. Dec. 55, 248 Pac. 73 (1926).

A municipal corporation is generally not held liable for the negligence of its servants in the performance of functions governmental in nature. The rule is the same whether the injury is incurred in the performance of *intra vires* or *ultra vires* acts. *Jones v. City of Phoenix,* 239 Pac. (Ariz.) 1030 (1925) *Whiteside v. Benton County,* 114 Wash. 463, 195 Pac. 519 (1921) *Seattle v. Puget Sound Light & Power Co.,* 103 Wash. 41, 49, 174 Pac. 464 (1918) *Cunningham v. Seattle,* 42 Wash. 134, 84 Pac. 641 (1906) 19 R. C. L. 1137 28 Cyc. 1257. This view arises out of the theory of sovereign immunity. Shearm. & Redf., Negligence (6th ed.) § 253; McQuillin, Municipal Cor-

PORATIONS § 2623. And in the case of *ultra vires* torts the additional reason is invoked that the policy of the law will not permit a municipality to assume powers and incur liabilities contrary to the intent of the legislature and in violation of the rights of the inhabitants. 19 R. C. L. 1137, 28 CYC. 1257. The harshness of the rule has been severely condemned, and the tendency of the recent cases is towards a material modification of it. Note to *Switzer v. Town of Harrisonburg*, 2 L. R. A. (N. S.) 910, 912; 24 COL. L. REV. 679; see also Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L., J. 1, 129, 229.

The rule of non-liability with respect to governmental functions has, however, no application to the performance of non-governmental duties by the municipality. Hence the same liability that would attach to a private corporation performing the same duties attaches to the municipal corporation. *Strickfaden v. Green Creek Highway District*, 248 Pac. (Idaho) 456 (1926), *Norman v. City of Chariton*, 207 N. W (Iowa) 134 (1926) see also *Whiteside v. Benton County*, 114 Wash. 463, 195 Pac. 519 (1921) 19 R. C. L. 1109· 28 CYC. 1258. Therefore, it is generally held that when a municipality engages in the business of furnishing electricity, light, water, *etc.*, it is not exercising governmental functions, but proprietary powers, and is governed by the same rules of law as are applicable to ordinary business corporations engaged in a like business. *Town of Athens v. Miller* 190 Ala. 82, 66 So. 702 (1914), *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 11 (1900), MCQUILLIN, MUNICIPAL CORPORATIONS §§ 2680, 2681. The operation of a railway by a municipality for profit is a non-governmental duty for which liability of a private corporation should attach. *Texas Employers' Ins. Association v. City of Tyler*, 283 S. W (Tex.) 929 (1926) *Greene v. City of Amarillo*, 244 S. W. (Tex.) 241 (1922), see MCQUILLIN, MUNICIPAL CORPORATIONS § 2685; see also *Asia v. Seattle*, 119 Wash. 674, 206 Pac. 366 (1922). The right to sue the Seattle Municipal Railway for the negligence of its servants is not even questioned in this state. *Boulton v. Seattle*, 114 Wash. 234, 195 Pac. 11 (1921), *Hoopman v. Seattle*, 122 Wash. 379, 210 Pac. 783 (1922). Although there is a conflict of authority on the question, the sounder and prevailing view is that the tort liability of a private corporation is the same whether the tort be committed in the exercise of powers *intra vires* or *ultra vires*. The corporation having assumed to act is deemed to have assumed liabilities commensurate with its acts. A contrary view would deprive an innocent third party of a remedy for damage sustained. *Pronger v. Old National Bank*, 20 Wash. 618, 622, 56 Pac. 391 (1899) 7 R. C. L. 684; 14A C. J. 769, 777.

In the principal case, it would seem that the municipality having assumed to act in a proprietary capacity must be held to have assumed proprietary liabilities. And since, in such a case, tort liability is recognized in the performance of *ultra vires* acts, it would seem that the plaintiff's complaint should not have been dismissed. See, however, *City of Radford v. Clark*, 113 Va. 199, 73 S. E. 571, 38 L. R. A. (N. S.) 281 (1912), 19 R. C. L. 1138.

C. H.

SALES—FRAUD—ELEMENTS—SCIENTER.—By contract defendants sold to the plaintiff the right to manufacture and sell a patented gas producing plant with the representation that the plants could be manufactured at a cost not to exceed $250 and in an ordinary tin-shop. Plaintiff was compelled to pay to a holder in due course a note given for the above right and here sues to recover the amount so paid and other costs basing his action of fraud and deceit on the above representations. Defendants contend on appeal *inter alia* that *scienter* is a necessary element in these cases, and that they did not know that the above representations were false. *Held:* It is not necessary in order to recover damages or to set aside a contract because of false representations to show that the representations were knowingly, falsely made, but it is sufficient to show that they were made as representations of fact, when the maker was in fact without knowledge of their truth or falsity, even though made innocently or believing them to be true. *Jacquot v. Farmers Straw Gas Producer Co.*, 40 Wash. Dec. 368, 249 Pac. 984 (1926).

A distinction is often made between an action at law for damages and a suit in equity for rescission as to the necessity of averring and establishing *scienter*. As a matter of defense in equity it is only necessary to prove the misrepresentation, and a contract induced by a misrepresentation cannot stand regardless of fraudulent intent and whether made innocently under misapprehension or mistake. *Weise v. Grove,* 99 N. W (Iowa) 191 (1904) *Grim v. Byrd,* 32 Gratt. (Va.) 300 (1879) *Adams v. Reed,* 40 Pac. (Utah) 720 (1895) *Kountze v. Kennedy,* 41 N. E. (N. Y.) 414 (1895). See also cases collected in note to *McFerran v. Taylor* in 1 Rose's Notes, 240. The test in such cases is not whether the defendant knew the statement to be false but only that the representation was false and actually misled the plaintiff. *Kell v. Trenchard,* 142 Fed. 16, 73 C. C. A. 202 (1905) and cases cited.

A few states apply this equity rule in an action at law and do not require proof of *scienter* at all to support an action for deceit. *Magill v. Coffman,* 129 S. W (Tex. Civ. App.) 1146 (1910) *Gerner v. Mosher* 78 N. W (Nebr.) 384 (1899).

The majority of the courts, however, in an action for deceit, require proof of *scienter* that is, knowledge on the part of the maker of the falsity of his representations, or what in law is equivalent to knowledge, *Kimber v. Young,* 137 Fed. 744, 70 C. C. A. 178 (1905) *Kountze v. Kennedy, supra; Morrow v. Franklin,* 233 S. W (Mo.) 224 (1921) *Whitmire v. Heath,* 71 S. E. (N. C.) 313 (1911) *Cobb v. Peters,* 136 Pac. (Ore.) 656 (1913). This requirement as to *scienter* may be satisfied either by showing (1) actual knowledge of the falsity of the representation, *L. C. G. Realty Co. v. Schlesinger-Gilman Constr. Co.,* 164 N. Y. S. 694 (1917), or (2) untrue representations of own knowledge having in fact no knowledge of the truth or falsity thereof, *Bullitt v. Farrar* 12 Minn. 8, 6 L. R. A. 149 (1889), *Kerr v. Shurtleff* 105 N. E. (Mass.) 871 (1914) *Vincent v. Corbitt,* 47 So. (Miss.) 641 (1908), even if believing them to be true, *Hadcock v. Osmer* 47 N. E. (N. Y.) 923 (1897) or (3) false statements when under a special duty to know the truth. *Prewitt v. Trimble,* 17 S. W (Ky.) 356 (1891) *Hoock v. Bowman,* 60 N. W (Nebr.) 389 (1894) *Morrow v. Franklin, supra; Starwich v. Ernst,* 100 Wash. 198, 170 Pac. 584 (1918). The principal case falls clearly within the second class and states the rule sustained by the weight of authority.

However, the principal case merely holds that the evidence was sufficient to warrant the jury in finding that the untrue representations (being of facts susceptible of knowledge and made with the knowledge that they were being relied upon), were made as of the defendant's own knowledge when he had in fact no knowledge of the truth or falsity thereof, and these representations were sufficient to constitute fraud under the well settled law of this and other states. Whether *scienter* must be shown in this state it was not necessary to decide. The Washington Court has held, however, that to constitute actionable fraud *scienter* must be pleaded, *Northwestern S. S. Co. v. Dexter Horton Co.,* 29 Wash. 565, 70 Pac. 59 (1902) *Scribner v. Palmer* 81 Wash. 470, 142 Pac. 1166 (1914), and proved. *Jorgensen v. Albertson,* 129 Wash. 686, 225 Pac. 639 (1924). In the principal case, *Northwestern S. S. Co. vs. Dexter Horton Co., supra,* and *Jorgensen v. Albertson, supra,* relied on by the appellants, are not discussed. The representations in the *Northwestern S. S. Co.* case have at least been distinguished in *Lawson v. Vernon,* 38 Wash. 422, 80 Pac. 559 (1905) as statements of opinion as to the solvency of third persons. This criticism of the *Northwestern S. S. Co.* case, *supra,* was approved in *West v. Carter* 54 Wash. 236, 103 Pac. 21 (1909), but the holding in the *Northwestern S. S. Co.* case, *supra,* has been approved since in *Jorgensen v. Albertson, supra.* Under the holding in the *Jorgensen* case it would seem that *scienter* is required in Washington in an action at law based on fraud, but such knowledge may be imputed where a material matter susceptible of knowledge, is represented as a fact when the declarant has, in fact, no knowledge of the truth or falsity thereof. W E. E.