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Recent Cases

R. S. S.

of *probable cause* and minor contestants. However, if the will is so worded as to make acquiescence to the will by the legatee a condition precedent to the bequest, the *probable cause* exception is not applicable because the provision against contest is not a forfeiture provision but a conditional limitation upon making the bequest in the first place.[54] This offers also a means of evading the arbitrary rule applicable to bequests in requiring a *gift over*

FRANK PARKS WEAVER.

RECENT CASES

AUTOMOBILES—DUTY OF CITY TOWARD UNLICENSED AUTOMOBILE TO MAINTAIN SREETS. The plaintiff brought suit against the city to recover for personal injuries sustained in an automobile accident alleged to have been caused by the failure of the city to provide sufficient guard rails on a bridge. The automobile was not registered as required by law, and consequently its operation on the highway was in violation of the statute providing that no motor vehicle should be so operated until properly registered. *Held:* The plaintiff was a trespasser on the highway to whom the city owed no duty to keep the streets reasonably safe, and in the absence of such duty, the fact that there was no causal connection between the illegal operation of the vehicle and the injury was immaterial. *City of La Junta v. Dudley*, ..., Colo. ....., 260 Pac. 96 (1927).

This case follows the doctrine laid down in Maine in the leading case of *McCarthy v. Inhabitants of Leeds*, 115 Me. 134, 98 Atl. 72, L. R. A. 1916E, 1212 (1916) and reaffirmed by the same court on several occasions. In Maine, as in the principal case, recovery is denied only in actions against municipal corporations or other public bodies charged with the duty of maintaining the highway in a safe condition. Massachusetts extends the rule so as to deny recovery in all cases. *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816 (1908). Cases holding the contrary of both the Maine and Massachusetts doctrines are: *City of Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664 (1914), *Church v. Kansas City*, 280 S. W 1053 (Mo. App. 1926) *Phipps v. Perry*, 178 Iowa 173, 159 N. W 653 (1916) *Hersman v. Roane County Court*, 86 W Va. 96, 102 S. E. 810 (1920).

No case squarely in point has as yet been decided in Washington. On similar facts recovery has been had against private parties in *State v. Switzer*, 80 Wash. 19, 141 Pac. 181 (1914) and *Johnnsson v. American Tug Boat Co.*, 85 Wash. 212, 147 Pac. 1147 (1915). In *Koch v. Seattle*, 113 Wash. 583, 194 Pac. 572 (1921), the plaintiff recovered from the city, but the defense involved the violation of a city ordinance requiring a driver's permit for persons under the age of eighteen. The present Washington statute, Rem. Comp. Stat. § 6362 (P C. § 234-2) differs slightly from the one in the principal case by providing that any violation of the licensing law shall be a misdemeanor, rather than expressly prohibiting use of an unregistered vehicle. Some distinction has been drawn in some of the decided cases between these different types of statutes, but this would seem to be an unwarranted refinement of interpretation. Considering the fact that licensing laws were passed primarily for purposes of revenue and identification, it logically follows that both prohibitory and punitive statutes were meant to effect enforcement of the law, rather than govern

[54] *Cook v. Turner*, note 1, *supra*, See 12 Am. B. A. J. 236.

civil rights and liabilities. In this light, the principal case seems to rest on a weak foundation, and from all indications probably will not be followed in this state. J. G. G.

CONSTITUTIONAL LAW—VESTED RIGHTS—STATUTE OF LIMITATIONS. *Appellants* as sole trustees of a corporation diverted its assets. Later corporation did business with X Co. which resulted in a judgment in favor of X Co. A receiver was appointed and the diversion of assets discovered but the Statute of Limitations had run against the liability of the trustees for the unlawful diversion. The legislature in 1923 removed the bar of the statute and the receiver brings this action against the appellants. *Held*: A statute of limitations operates upon the remedy only and does not destroy the obligation by a running of the statute. A debtor does not acquire a vested right not to pay a debt which at no time has been destroyed. *Herr as Receiver v. Schwager et al*, 45 Wash. Dec. 111, 258 Pac. 1039 (1927)

Much reliance is placed by our Court upon the case of *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483 (1885). The court in the *Campbell* case, in its controlling opinion, while recognizing when real or personal property has been acquired by prescription or adverse possession, the removal of the bar of the statute of limitations by a legislative enactment, passed after the bar has become perfect, deprives one of property without due process of law, decided only that in actions upon debt, contract, or any class of action in which a party does not become invested with the title to property by the Statute of Limitations, the legislature may by a repeal of the Statute of Limitations, even after the right of action thereon is barred, restore to the plaintiff his remedy thereon, and divest the other party of the statutory bar.

From a review of the cases it will be seen that the great weight of authority follows the dissenting opinion in the *Campbell* case in holding that when a right of action has become barred under existing laws, the right to rely upon the statutory defense is a vested right that cannot be rescinded or disturbed by subsequent legislation. *Board of Education v. Blodgett*, 155 Ill. 441, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348 (1895), *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 79 N. W 433, 74 Am. St. Rep. 871 (1899).

The case of *Chambers v. Gallagher* 177 Cal. 704, 171 Pac. 931 (1918) which is within the clear weight of authority cites the case of *City of Seattle v. DeWolf*, 17 Wash. 349, 49 Pac. 553 (1897) with approval, but this Washington case is not in point as it deals with assessments against property wherein the action, by statutory interpretation by our court, is against the property only and is not a personal action although intended to be so by the legislature.

Many cases of course support the view adopted by the Washington Court but in several instances the courts holding with Washington have doubted the soundness of these decisions in later cases. *Robinson v. Robbins D. D. & Repair Co.*, 238 N. Y. 271, 144 N. E. 579 (1924) *Whitehurst v. Dey*, 90 N. C. 542 (1884).

R. S. S.

DEATH—RIGHT TO RECOVER—DEPENDENCY OF PARENT. The plaintiff as personal representative of the deceased, a minor, brought this action under Rem. Comp. Stat. §§ 183, 183-1 (P C. §8259, § 8260) to recover damages for the death of the minor, by electrocution, from defective wiring, due to the negligence of the defendants. *Held*: In order to maintain this action under Rem. Comp. Stat. §§ 183, 183-1, for the benefit of the parent, there must be a dependency on the part of the parent for support, at the time of the death of the child, the statute making the basis of the action dependency· and that small payments given the parent at irregular intervals, the parent herself working and earning wages, is not a sufficient

dependency. *Grant v. Libby, McNeil & Libby*, 45 Wash. Dec. 57, 258 Pac. 842 (1927).

The principle, that although there need not be an absolute dependency, yet that there must be some substantial dependency from necessitous want, at the time of the child's death; and that mere small payments, or promises to support in the future, the parent being able to earn a livelihood, is not sufficient dependency, is in accord with the decisions in Washington. *Bortle v. Northern Pac. Ry. Co.*, 60 Wash. 552, 111 Pac. 788, Ann. Cas. 1912B, 731 (1910) *Kanton v. Kelley*, 65 Wash. 614, 118 Pac. 890 (1911) *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092 (1913) *Broughton v. Oregon-Wash. Ry. & Nav. Co.*, 137 Wash. 135, 241 Pac. 963 (1925). This principle is also in accord with the decisions in jurisdictions having similar statutes. *Duval v. Hunt*, 34 Fla. 85, 15 So. 876 (1896) *Central of Georgia Ry. Co., v. Henderson*, 121 Ga. 462, 49 S. E. 278 (1904) *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386 (1900). It would seem therefore that there can be no recovery in the principal case under the facts in any event, unless there is another statutory provision making the basis of the recovery something other than dependency. Rem. Comp. Stat. § 184 (P. C. § 8264), allows the father, or in case of his death or desertion, the mother, to sue for the death of a minor child. The recovery is based upon loss of service; and is limited to such loss of service only from the time of the child's death to the time when he would have reached the age of majority. The damages are considered substantial. *Macheck v. Seattle*, 118 Wash. 42, 203 Pac. 25 (1921) *Howe v. Whitman County*, 120 Wash. 247, 206 Pac. 968 (1922) *Broughton v. Oregon-Wash. Ry. & Nav. Co., supra, Skidmore v. Seattle*, 138 Wash. 340, 244 Pac. 545 (1926). Proof that the child is healthy, and of average intelligence, is sufficient to make out a case for recovery. *Blair v. Kilborune*, 121 Wash. 93, 207 Pac. 953 (1922). Apparently there could have been a recovery in the principal case, had the action been brought under Rem. Comp. Stat. § 184 (P. C. § 8264).

E. G.

EVIDENCE—REPUTATION OF PLACE—JOINTISTS. The defendants were charged with being "jointists." There was evidence of sales of intoxicating liquor at the place by each of them. Evidence of the reputation of the place was admitted on behalf of the state. It was held that the reception of this evidence of reputation was reversible error. The court here relies upon and follows the earlier cases of *State v. Stuttard*, 143 Wash. 426, 255 Pac. 663 (1927) and *State v. Mavros*, 144 Wash. 340, 258 Pac. 21 (1927) wherein they held that by proof of sales the defendants were shown to have actual knowledge of the character of the place and that it was not then permissible to prove presumptive knowledge of its character by this kind of evidence. *State v. Costello et al.*, 45 Wash. Dec. 477, 260 Pac. 1073 (1927).

For a discussion of the principles involved in these cases see page 33, *ante*.

FRAUDS, STATUTE OF—BROKER'S COMMISSIONS—DESCRIPTION OF PROPERTY. Plaintiff sued to recover commissions as a broker in procuring a purchaser for real estate described in the written contract of employment as the "Centralia Hotel." *Held*: The description of the property was not sufficient to comply with Rem. Comp. Stat. § 5825 (P. C. § 7745) requiring such contracts to be in writing. *Farley v. Fair*, 144 Wash. 101, 256 Pac. 1031 (1927).

To meet the requirements of this statute, the writing evidencing the agreement must be so complete in itself, as not to require a resort to parol evidence to establish any material element, such as the description of the land. *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C, 1239 (1913) *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 Pac. 599 (1913). The description of the land in broker's con-

tracts of employment is sufficient if it meets the requirements of a sufficient description under any other phase of the statute of frauds, such as for specific performance of contracts for the conveyance of real estate. *Baylor v. Tolliver* 81 Wash. 257, 142 Pac. 678 (1914) *Cushing v. Monarch Timber Co., supra.* The decision in the principal case is in accord with a long line of Washington cases, based principally on the holding in *Thompson v. English,* 76 Wash. 23, 135 Pac. 644 (1915) where a description of land in a broker's contract as "79 acres in Sec. 30, Township 2 N., Range 3E., W M., Clarke County, Washington" was held insufficient, as the description could not be applied to any definite tract of property without resort to parol evidence because it did not specify which 79 acres in the section was intended. That case adopted the rule in *Cushing v. Monarch Timber Co., supra,* that parol evidence may be resorted to for the purpose of applying the description contained in a writing to a definite tract of property and to ascertain its location on the ground, but never for the purpose of supplying deficiencies in a description so incomplete as not to describe anything. The description must be in itself capable of application to something definite before parol testimony can be admitted to identify any property as the thing described. In other jurisdictions there is a general uniformity in regard to the rule of law involved, but a wide divergence of opinion as to the question of fact whether a given description is sufficient to identify the property intended. A receipt for a part of the purchase price of a well-known city hotel property which specifically designated the hotel by name, and no more, is a sufficient description to satisfy the statute of frauds. The identity of the hotel site being fixed, the city and county records establish the boundaries and quantity. *Henry v. Black,* 210 Pa. St. 245, 59 Atl. 1070, 105 Am. St. Rep. 802 (1904). A memorandum of a contract for the sale of land, described as that "known as the Star & Crescent Furnace in Cherokee County, near Rush Texas" may be aided by extrinsic evidence to identify the land referred to. *Daniels v. Rogers.* 96 N. Y. S. 642 (1905). An examination of the Washington cases, indicates that as a practical matter, the description of land in broker's contracts, must be a legal description of the land, identifying it with absolute certainty on the face of the contract.

M. M.

GIFTS—CAUSA MORTIS—INTENTION—DELIVERY. The testator in Minnesota about to undergo a surgical operation wrote a letter to his sister in Washington, stating that in case he should die she was to have $5000 from a mortgage due him. In a subsequent letter he stated that he had written in order that she would have something to show that there would be from $75,000 to $80,000 worth of property and that his sister should have no difficulty in obtaining the $5,000. Upon his death the sister claimed the money as a gift as against the estate. *Held*: This is merely an attempted testamentary disposition as there is nothing more than an expressed desire that in case of death the beneficiary shall receive a certain amount. *Steuer v. Lang,* 45 Wash. Dec. 235, 259 Pac. 722 (1927)

The general rule is that in order to constitute a gift *causa mortis* there must be: first, an intention on the part of the donor to make a present gift; second, it must appear that the gift was made under the apprehension of death, and third, that there is actual, symbolic or constructive delivery during the life time of the donor divesting him of all control over the subject matter of the gift, subject to his right to revoke it during his life. *In re Slocum's Estate,* 83 Wash. 158, 145 Pac. 204 (1915) *Jackson v. Lamer* 67 Wash. 385, 121 Pac. 857 (1912) *Johnson v. Colley,* 101 Va. 416, 44 S. E. 721 (1903) *Newton v. Snyder* 44 Ark. 42 (1884) *Noble v. Gorden,* 146 Cal. 225, 79 Pac. 883, 8 L. R. A. (N. S.) 828 (1905) 28 C. J. 684.

The principal case is in accord with the weight of authority in holding that there must be an intention to make a present gift, and not a mere intention to make a gift in the future.*Basket v. Hassel,* 107 U. S. 602,

2 Sup. Ct. Rep. 415, 27 L. ed. 500 (1892) *Baldwell v. Gadenough*, 170 Mich. 114, 135 N. W 1057 (1912) *Fauley v. McLaughlin*, 80 Wash. 547, 147 Pac. 1037 (1914) *Wronker v. Jacobs*, 164 N. Y. S. 764 (1917). The intention to make the gift need not be announced by the donor in express terms, but may be inferred from the facts attending the delivery. *Atward v. Atward*, 15 Wash. 285, 46 Pac. 240 (1896).

What will constitute a sufficient delivery requisite to sustain the transaction depends very largely upon the nature of the subject matter of the gift and the situation and circumstances of the parties. If the thing given is capable of being delivered and the conditions are such as will permit, actual delivery must be made. *Newsome v. Allen*, 86 Wash. 678, 151 Pac. 111 (1915) *Shankle v. Spahr* 45 Va. 472 (1917) On the other hand the court looks to the intention of the parties as an essential element, and force will be given to their acts where the intent clearly appears and the best delivery has been made which could be made under the circumstances. *May v. Jones*. 87 Iowa 185, 54 N. W 231 (1899) *Crook v. First Nat. Bank*, 183 Wis. 31, 52 N. W 113, 35 Am. St. Rep. 17 (1892) *Taylor's Estate*, 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855 (1893) *White's Estate*, 129 Wash. 544, 225 Pac. 415 (1924) *Phinney v. State*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119 (1904) *Vining v. Butler*, 138 Wash. 646, 244 Pac. 961 (1926).

There is a tendency in the law today toward making delivery of evidentiary value only, and if there is clear cogent evidence of an intention to pass title the transfer will be complete. 24 COL. L. REV. 767 *Hawkins v. Union Trust Co.*. 187 App. Div. 472, 175 N. Y. S. 694 (1919). But where the intention of the donor is clearly ascertained and fairly consummated within the meaning of well established rules, it is not to be thwarted by a narrow and illiberal construction. *Devol v. Dye*, 125 Ind. 321, 24 N. E. 246 (1890) *Stevenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173 (1883) *Ellis v. Secor*, 31 Mich. 185 (1875) *MacKenzie v. Steves*, 98 Wash. 17, 67 Pac. 50 (1917) *Waste v. Grubbe*, 43 Ore. 406, 73 Pac. 206 (1903). R. L. J.

MARRIAGE—EFFECT OF INFORMAL OR ILLEGAL MARRIAGE—VOID OR VOIDABLE. H. and wife were married in 1924. In 1927 H. died leaving his wife surviving. H.'s heirs filed a complaint in which it was alleged that the wife was feeble minded at the time of the marriage and prior thereto. *Held*. That the complaint be dismissed. A marriage between persons of a class that the statute says may not marry, the statute being accompanied by provisions of a regulatory sort and providing for punishment of its offenders, is not void, in the absence of an express declaration in the statute that such marriages are void. *In re Hollingsworth's Estate*, 45 Wash. Dec. 419, 261 Pac. 403 (1927).

In construing marriages contracted in violation of the provisions of the Washington Statutes relating to mental capacity of the parties (Rem. Comp. Stat. § 8439; P. C. § 3723) the language of the statute being directory only, to be voidable and not void, the supreme court of this state has taken a position in accord with the great weight of authority. *Bennett v. Bennett*, 169 Ala. 618, 53 So. 986, L.R.A. 1916C, 693 (1910) *State v. Smith*, 101 S.C. 293, 85 S.E. 958 (1915). Washington has adopted a similar construction of the statute providing for the ages at which the parties may lawfully marry. *In re Hollopeter* 52 Wash. 41, 100 Pac. 159 (1909) *Cushman v. Cushman*, 80 Wash. 615, 142 Pac. 26, L.R.A. 1916E, 732 (1914) *Tisdale v. Tisdale*, 121 Wash. 138, 209 Pac. 8 (1922). Under the great weight of authority the same rule of construction is applied to statutes requiring a ceremonial marriage. *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826 (1877) *Ziegler v. Cassidy*, 220 N.Y. 98, 115 N.E. 471 (1917) *In re Love*, 42 Okla. 478, 142 Pac 305, L.R.A. 1915E, 109 (1914). Washington, however, has taken a different view in construing this statute (Rem. Comp. Stat. § 8441, P. C. § 3709) and has repeatedly held that the requirement of a ceremonial marriage is absolutely man-

datory and that a marriage consummated in violation thereof is void, although the statute does not expressly make it so. *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651, 16 L.R.A. 699 (1892) *Kelly v. Kitsap County*, 5 Wash. 521, 32 Pac. 554 (1893) *Meton v. State Industrial Ins. Comm.*, 104 Wash. 652, 177 Pac. 696 (1919). A few jurisdictions hold that a violation of any of the statutory marriage requirements will make the marriage void. *Comm. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411 (1879) *Norman v. Norman*, 121 Cal. 620, 54 Pac. 143 (1898) *Morrill v. Palmer* 68 Vt. 1, 33 Atl. 829 (1895) *Huard v. McTeigh*, 113 Ore. 279, 232 Pac. 658, 39 A.L.R. 528 (1925). While Washington has adopted two apparently inconsistent rules of interpretation in construing the marriage statutes, the distinction is perhaps warranted by the different considerations of policy involved in the two statutes. G. F A.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—ZONING ORDINANCE—EXCLUSION OF PHILANTHROPIC INSTITUTION FROM RESIDENCE DISTRICT. The city of Seattle enacted a general zoning ordinance. Relator is the trustee of a home for aged people, a philanthropic institution, which has for many years been situated in a district which by this ordinance is limited to single residences and certain other minor uses. Philanthropic institutions are excluded from such a district. Relator proposes to erect an entirely new and modern building to be used as a home for the aged, on the same site as the present building. This new building is to have twice the capacity of the old home. This action of mandamus is brought to compel the city building department to issue the necessary permit. *Held*. (four judges dissenting) That the action be dismissed. *State ex rel. Seattle Title Trust Co. v. Roberge*, 144 Wash. 74, 256 Pac. 781 (1927).

In cases involving the constitutionality of zoning ordinances two distinct questions are presented: (1) Are zoning ordinances in general valid, and, (2) is the ordinance in question valid as applied to the particular facts of the relator's case? *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 Sup. Ct. Rep. 114, 71 L. ed. 303 (1926) *Willerup v. Village of Hempstead*, 199 N.Y.S. 56 (1923) 10 MINN. L. REV. 48. That a municipality may in the exercise of the police power enact a general zoning ordinance is now settled beyond controversy. *Euclid v. Ambler Realty Co., supra.* The principal case sustains the particular exclusion in question, in part, on the ground that it is justified by aesthetic considerations, the court taking the position that aesthetic considerations constitute a proper basis for the exercise of the police power, they being embraced in the general concept of "public welfare." The prevailing view is to the effect that aesthetic consideration alone are not a sufficient basis for the exercise of the police power. *Mayor of Wilmington v. Turk*, 14 Del. Ch. 392, 129 Atl. 512 (1925) *Comm. v. Boston Adv. Co.*, 188 Mass. 348, 74 N.E. 601 (1905) *People v. Murphy*, 195 N.Y. 126, 88 N.E. 17 (1909). *Cf., contra, State ex rel. Civello v. New Orleans*, 154 La 271, 97 So. 440, 33 A.L.R. 260 (1923). In the only other case that has thus far arisen involving the exclusion of a philanthropic institution from a residence district by zoning ordinance, the exclusion was held invalid. *Village of University Heights v. Cleveland Jewish Orphan's Home*, 20 F (2d.) 743 (C.C.A. 6th, 1927), certiorari denied, — U.S. — 48 Sup. Ct. Rep. 141, 72 L. ed. (adv. ops) 220 (1927) A possible ground of distinction, however, exists between that case and the principal case, as there the proposed buildings would comply with the ordinance in all structural respects. It would seem that the Washington Court in so far as it bases its decision on aesthetic grounds has taken a somewhat broader view of the scope of the police power than has heretofore been generally recognized. The result, however, in view of the fact that the capacity of the institution was to be doubled, can probably be sustained on some of the more commonly recognized bases for the exclusion of analogous types of uses from residence districts, such as the increase of traffic and congestion, and the shutting off of light and air. See in particular the discussion with reference to the exclusion of apartment houses from residence districts in *Euclid v. Ambler Realty Co., supra.* B. B.

NEGLIGENCE—INJURIES FROM BREACH OF CONTRACT—RIGHTS OF THIRD PARTIES. One Pearson left his car with defendant garage to have the steering gear repaired. In the evening he called for the car and was told that it had been repaired as requested. The next morning he left for a trip with plaintiffs as his guests. When out about 170 miles the automobile, because of the defective steering gear, which defendant had not attempted to repair, failed to keep the road, turned over, and plaintiffs were injured. The question arose whether defendant owed a duty to plaintiffs separate and apart from its contract with Pearson to repair. *Held*. Plaintiffs have no cause of action. The simple breach by the defendant of its contract to repair the steering gear of the automobile did not give rise to a duty to third parties separate and distinct from the contract. *Hanson v. Blackwell Motor Co.*, 143 Wash. 547, 255 Pac. 939 52 A. L. R. 851 (1927).

The general rule undoubtedly is: "Negligence which consists merely in the breach of a contract will not afford ground for an action by anyone, except a party to the contract, or a person for whose benefit the contract was avowedly made. But where, in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission."—Shearman & Redfield, LAW OF NEGLIGENCE (6th Ed. 1913) Sec. 116.

The court holds that this case comes within the general rule first quoted, and the rule is put upon two grounds: (1) That to allow others than the parties to a contract to sue for breaches thereof would open up an endless class of litigation, permitting contracts to be reopened even after the parties thereto had completed the contracts and settled all accounts. With such a rule there is no point at which such actions would stop. *Winterbottom v. Wright*, 10 Mees. & W 109, 11 L. J. (Ex.) 415, (1842). (2) If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. *Marvin Safe Co. v. Ward*, 46 N.J.L. 19 (1884), quoted with approval in *Ninneman v. Fox*, 43 Wash. 43, 86 Pac. 213 (1906) *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 Pac. 1112 (1891).

The present case is distinguished from cases in which a guest of a tenant may sue a landlord in tort for injury resulting from latent or obscure defects known to him and unknown to the tenant, in that the landlord owns and controls the premises either directly or through an agent, while the defendant here did not own the automobile and was not in control of it at the time the accident occurred.

The case is also distinguished from the cases of goods manufactured defectively, in that here the defendant actually did nothing, whereas in the cases of goods manufactured there was an active misfeasance. The court points out that they are expressing no opinion as to their decision had the defendant undertaken to repair the steering gear and had negligently done the work, since that question was not before them.

W S. G.

SEARCHES AND SEIZURES—EVIDENCE—SEARCH WITHOUT A WARRANT OF A HOME AS AN INCIDENT TO AN ARREST MADE AWAY FROM THE HOME OF THE PERSON ARRESTED. Defendant, who was suspected of having committed a murder in a certain rooming house, was arrested on the street while on his way from the scene of the alleged crime to his room at a hotel in the same town. Following the arrest, he was taken to the police station and subjected to an examination in the progress of which he made known the place of his room at the hotel. Police officers, without a search warrant, immediately went and searched the room, finding therein a pistol holster which fitted the automatic pistol taken from defendant's person. On the trial, the holster was admitted in evidence over defendant's objection that it had been obtained by an unlawful search. On

appeal, *held*, (1) that the great weight of the evidence sustained the finding of the trial court that the defendant had consented to the search, and (2), by way of a full paragraph of dictum, that even if the search of the room had been made without defendant's consent, the court would hold the search lawful as an incident to the arrest. *State v. Evans*, 45 Wash. Dec. 38, 258 Pac. 845 (1927).

The foregoing decision is undoubtedly correct on the first ground stated, since consent waives the requisite of a search warrant. 24 R.C.L. 723; *State v. Tucker* 137 Wash. 162. But the holding next suggested in the paragraph of dictum is without support in the authorities (the court cites none) and is squarely contrary to the epochal decision rendered two years earlier by the Supreme Court of the United States in *Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925). In that case, the defendant, in company with persons suspected of a felony under the federal antinarcotic act, was observed to leave his home and go to the home of one Alba, where he was arrested while delivering some narcotics. While the defendant was being taken to the police station, certain of the revenue agents and police officers, without a search warrant, went to defendant's house, several blocks from the scene of the arrest, and on search found a can of cocaine, which, over defendant's objection, was admitted in evidence at the trial. It was held by the United States Supreme Court, reversing both federal courts below that the "search cannot be sustained as an incident to the arrest." The Court speaking through Mr. Justice Butler, says: "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. *But the right does not extend to other places.* Belief, however well founded, that an article is concealed in a dwelling house, furnishes no justification for a search without a warrant. The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment." Further authorities are collected in 32 A.L.R. 697 51 A.L.R. 434. It has even been held that where a person is arrested on his premises just outside of his house, the house cannot be searched as an incident to the arrest without a warrant. *United States v. Steck*, 19 F (2d) 161 (1927) It is to be noted that in the Agnello case, *supra*, the officers who observed the defendant coming from his house to the scene of the crime where he produced the cocaine had reasonable ground upon which they might have asked for a search warrant, whereas in the instant case in this state where the defendant was arrested with a revolver in his possession while on his way from the scene of the murder to his home (of the location of which the officers had no knowledge until told by the defendant) had no particular grounds to suspect that his room contained any evidence of crime, but were merely engaged in a fishing expedition, and probably could not have sufficiently described any item to be searched for had they been required to ask for a warrant.

In view of the fact that Rem. Comp. Stat. section 2240-1 makes it "unlawful for any policeman or other peace officer to enter and search any private dwelling-house or place of residence without the authority of a search warrant issued upon a complaint as by law provided (see later case of *State v. Buckley*, 45 Wash. Dec. 100, where both this statute and *Agnello v. U. S.* were cited with approval), and in view of the fact that an examination of the briefs in the instant case does not show that the decision of *Agnello v. U. S.* was before the court, it is to be hoped that the broad dictum in the instant case will not become the law of this

state without re-examination of the question and a full examination of the authorities bearing on it. Considering the state of the authorities that have squarely passed on the question, the dictum does not appear to be a safe one for peace officers to follow. A. J. S.

SEARCHES AND SEIZURES—INTOXICATING LIQUORS—EVIDENCE—INVALIDITY OF SEVERAL SEARCHES UNDER SAME WARRANT.—Armed with a search warrant authorizing the search of defendant's houseboat for intoxicating liquors, officers made a search but found no liquor and made no return. Two days later the officers returned and made another search under the same warrant and found intoxicating liquor which was used, over defendant's objection, to convict him of a liquor charge. *Held*. that the second search under the same warrant was "unreasonable," and that the evidence found on the search was erroneously admitted. *State v. Moran*, 138 S.E. 366 (W Va. 1927).

This recent decision, which appears to be one of first impression, is of considerable interest in this state because of the dictum of our own court in *State v. Ditmar*, 132 Wash. 501, 513, 238 Pac. 321 (1925) as follows: "One search did not exhaust his powers under it. He could return and continue the search as often as he deemed it necessary until the time limit fixed by the statute for the return of the warrant expired." This language was dictum, inasmuch as the officer did not return to "continue the search," but rather to get some samples of mash which the previous day's search under the warrant had revealed but which had not been taken along at that time. Even on this state of facts there is contrary authority. Cornelius on Search and Seizure, p. 363. The West Virginia court in the reported case quite clearly indicates its view that one search warrant may be used as authority for one search only, since repeated searches under the same warrant savor too much of writs of assistance and general warrants, so abhorrent to the traditions of American liberty. See also 12 MINNESOTA LAW REVIEW 181. It may be suggested, moreover, as another reason, that since a search warrant can be procured only upon a showing of probable cause, if a search is then made disclosing nothing of a contraband character, the probability of the cause for the issuance of the warrant has been sufficiently negatived to make any further searches under the same warrant unreasonable and, hence, that no new search ought to be authorized except upon a new showing of probable cause and the issuance of a new warrant. It would seem that the broad dictum of our own court in *State v. Ditmar, supra*, in view of the facts there before the court, cannot safely be made the basis of advice to peace officers in this state to make successive searches under the same warrant, but that the issuance of a new warrant for a second search is the safest practice. A. J. S.

BOOK REVIEWS

LAW OF THE AIR. By Carl Zollman. Milwaukee: Bruce Publishing Co., 1927, pp. 286.

A book can serve two purposes: It may be a repository of authoritative statement; and it may, by discussion, clarify the framework of the subject matter. One which only serves to clarify, even negatively, where the subject is new and its very novelty apt to create an atmosphere of complexity, has value.

So with this book; for Mr. Zollman has made it clear: (1) That government, through a coordination of the legislative and administrative in the new mode, has occupied the field of air-right, if we may use that term; (2) That a just analysis of the ancient maxim, *Cujus est solum ejus est usque ad Coelum*, furnishes a sound foundation for such appropriation inasmuch as the projection of right thereby suggested is rationally limited to the protection of the enjoyment of a particular species of