RECENT CASES.

BANKRUPTCY—EFFECT OF DISCHARGE—JUDGMENT FOR DAMAGES FOR CRIMINAL CONVERSATION.—TINKER V. COLWELL, 24 SUP. CT. 505. *Held*, that a judgment for damages for criminal conversation is one recovered in an action "for willful and malicious injuries to the person or property of another" within the meaning of the Bankruptcy Act, (30 Stat. at L. 550), par. 17, subd. 2, excepting judgments recovered in such actions from the operation of a discharge in bankruptcy. Brown, White, and Holmes, JJ., *dissenting*.

It is by a very just, and well written, liberal interpretation of the statute that this decision is maintained. If interpreted according to strict logic, the statute might have caused this decision to have gone the other way. For criminal conversation can hardly be said to be malicious toward the husband, unless malice be specifically proved. *Livergood v. Greer*, 43 Ill. 213; *Anderson v. Howe*, 116 N. Y. 342; *Com. v. Williams*, 110 Mass. 401. Nor can it be said to be an injury either to his person; *Ryall v. Kennedy*, 52 How. Prac. 517; or to his property. In Re Haensell, 91 Fed. 355.

BANKRUPTCY—FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE.—BEASLEY V. COGGINS, 12 A. B. R. 355.—This was a suit brought by a trustee in bankruptcy to set aside a conveyance made by the bankrupt. No creditor had reduced a claim to judgment. *Held*, that a trustee in bankruptcy may file a bill in equity to set aside a fraudulent conveyance of real estate though neither he nor any creditor has reduced a claim against the bankrupt to judgment.

A creditor must reduce his claim to judgment or exhaust his legal remedies before he can maintain a bill in equity to set aside a fraudulent conveyance of his debtor. *Ellis v. S. W. L. Co.*, 108 Wis. 313; *Case v. Beauregard*, 101 U. S. 690; *Shellington v. Howland*, 53 N. Y. 371. The right of action to recover property fraudulently conveyed prior to adjudication is exclusively in the trustee. *Glenny v. Langdon*, 98 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Pratt v. Curtis*, 6 N. B. R. 139. If a trustee could not attack a fraudulent conveyance which creditors are not permitted to attack the act would be a device to permit a fraudulent conveyance to take effect, provided it might be concealed for the specified four months. *In re Gray*, 3 A. B. R. 647; *In re Leland*, 10 Blatchf. 647. The Bankruptcy Act vested the trustee with the title of all the property fraudulently conveyed by the bankrupt and he acquires his right of action through the Act and not through what may have been done by the creditors. *In re Tollett*, 105 Fed. 425; *In re Duncan*, 14 N. B. R. 33; Section 70-A, *Bankruptcy Act*. The late case of *Sheldon v. Parker*, 11 A. B. R. 169 is directly in point on this question and holds that the law under which the trustee is appointed authorizes him to bring and maintain actions of this character. *Mueller v. Bruss*, 112 Wis. 406; *Hood v. Bank*, 91 N. W. 701.

BANKRUPTCY—JURISDICTION—ADVERSE CLAIM—CONSENT.—IN RE ADAMS, 12 A. B. R. 367.—*Held*, that the merits of a claim to property received from the bankrupt before the filing of his petition as a part payment of a debt and

without reasonable cause to believe that it was intended thereby to give a preference cannot be determined on a summary petition, against the claimant's objection.

In the case of *In re N. Y. Car Wheel W.*, 132 Fed. 203, the court says: "A referee is without jurisdiction in a summary proceeding to require a third person to turn over to a trustee in bankruptcy money or property to which he asserts an adverse claim, where such claim is made with the apparent intention to defend the same and is not merely colorable." Sec. 23-A *Bankruptcy Act; American Trust Co. of Pittsburgh v. Wallis*, 126 Fed. 464; *Bardes v. Hawarden Bank*, 178 U. S. 524. It is otherwise when the claim is asserted in fraud of creditors or is merely colorable. *In re Knickerbocker*, 121 Fed. 1004; *In re Michie*, 116 Fed. 749; *Boyd v. Glucklick*, 116 Fed. 131. Or when the adverse claimant invokes the jurisdiction of the bankrupt court. *In re D. H. McBride & Co.*, 132 Fed. 285. When it is shown that a claim is adversely asserted with an apparent intention to protect the same by the usual process of the law, the bankruptcy court is bound to exercise its power with cautious discretion. *In re Kane*, 131 Fed. 386. The court says in *In re Teschmacher*, 11 A. B. R. 547, that "the adverse claimant is entitled to have his contention examined and judged according to the ordinary and regular process of law."

BANKRUPTCY—JURISDICTION—INVOLUNTARY PETITION—AMENDMENT.—IN RE STEIN, 12 A. B. R. 364.—An involuntary petition was filed with all necessary averments to give the court jurisdiction but with a deficiency in the amount. A demurrer was filed and on the same day additional claims were also filed to cure the defect in the petition.—*Held*, that an involuntary petition may not be amended by joining other creditors with claims enough to make up the $500 requisite to confer jurisdiction upon the court.

The court has jurisdiction only when the averments are set out according to the Bankruptcy Act. *In re Scammon*, 6 Biss. 130; *In re Burch*, 10 N. B. R. 150; *In re Rosenfield*, 11 N. B. R. 86. Amendment will be allowed if the original petition alleges a sufficient number of petitioners, other averments being as required, though it is subsequently discovered that there is a deficiency. *In re Stein*, 105 Fed. 749. Also, in case subsequent proceedings develop that the provable claims did not amount to the required sum as set forth in the petition, the court will retain jurisdiction and allow amendment. *Colliers Bankruptcy*, 330; *In re Beddingfield*, 96 Fed. 180. The court distinguishes these cases on the ground that jurisdiction had been assumed and it is upheld in this opinion by the *dicta* in *In re Mackey*, 6 A. B. R. 577, and in *In re Mammoth Pine & L. Co.*, 109 Fed. 308. Cases of this kind are not likely to arise except through clerical error, as did this one.

CONSTITUTIONAL LAW—DUE PROCESS—PUBLIC NUISANCE—ABATEMENT.—MCCONNELL V. MCKILLUP, 99 N. W. 505 (NEB.).—*Held*, that a statutory provision subjecting property of a nature innocent in itself and subject to beneficial use to forfeiture to the state for unlawful user, without providing for a hearing, deprives the owner of his property without due process of law.

Forfeitures are not adjudgable by legislative act, except it may be for a violation of the revenue laws. *U. S. v. Brig Molek*, 2 How. 216; *Henderson's D. S.*, 14 Wall. 414. The legislature has the right to authorize judicial proceedings to be taken for the condemnation of property which they have declared to be a nuisance. *Barbier v. Connolly*, 113 U. S. 27; *Wurts v.*

Hoagland, 114 U. S. 606. A city ordinance which authorizes the seizure and sale of certain animals running at large divests the owner of his property without due process of law. *Donovan v. M. & C. of Vicksburg*, 29 Miss. 248; *Poppen v. Homes*, 44 Ill. 362. A law authorizing the destruction of gaming tables, which are *per se* public nuisances, without trial and compensation, was held unconstitutional in *Lowry v. Rainwater*, 70 Mo. 152, but this is opposed by *M. M. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Cooley, Const. Lim.* 572; *Coe v. Schultz*, 47 Barb. 64; and these last citations are upheld in *Com. v. Kelley*, 163 Mass. 169; *Cook v. Gregg*, 46 N. Y. 439, as to articles, such as fishing nets, declared by statute to be *per se* nuisances. The legislature could not decree the forfeiture of property, not a nuisance *per se*, because it is used in committing a nuisance. *Com. v. Coffee*, 9 Grey 134; *Gray v. Ayers*, 7 Dana 375. The power to abate a nuisance does not extend to the destruction of private property used in creating such nuisance, which is susceptible of use for a lawful purpose. *Chicago v. U. S. & T. Co.*, 154 Ill. 224.

CONSTITUTIONAL LAW—EQUAL PROTECTION—TAXATION—PRIVATE CORPORATION.—ST. LOUIS, ETC., R. Co. v. DAVIS, 132 FED. 629.—*Held*, that the fourteenth amendment of the Constitution of the U. S. forbidding any state from denying "to any person within its jurisdiction the equal protection of its laws," is not violated by a tax on railroad property to nearly its full value when other property in the state is valued at only about 30%.

A state is prohibited by the fourteenth amendment from discriminating between different persons of a class. *Santa Clara County v. Southern Pac. R.*, 118 U. S. 394. It may, however, impose different taxes on different classes, provided the classification is reasonable. *Railroad Tax Cases*, 13 Fed. 722. What is reasonable depends upon the particular circumstances in each case. The supreme court in *Mobile, etc., R. Co., v. Tenn.*, 153 U. S. 486, declined to state what would constitute reasonableness. In *Nashville, etc., R. Co. v. Taylor*, 86 Fed. 168, it was declared unreasonable to single out and subject a special class of persons to oppressive taxation. To constitute railroad property a special class and tax it disproportionately, this being the only railroad in the state, would probably ordinarily be held unreasonable.

CORPORATIONS—PRIVATE—DIRECTORS—TRUSTEES FOR STOCKHOLDERS.—STEWART V. HARRIS, 77 PAC. 277 (KAN.).—*Held*, that where a director buys stock of a stockholder, he occupies such a fiduciary relation to the stockholder as to require a full disclosure of matters affecting the value of the stock.

The directors are not trustees for either the corporation or its stockholders in the strict sense of the term. *Haspes v. Car Co.*, 48 Minn. 174; *Deaderick v. Wilson*, 8 Baxt. 108. They are agents of the stockholders as a body, and not individually. *Allen v. Curtis*, 26 Conn. 456; *Smith v. Hurd*, 12 Metc. 371; *Marshall, Corp.*, 565, 1022. The weight of authority is to the effect that in dealings between them and stockholders involving stock transfers, they are in the position of strangers. *Deaderick v. Wilson, supra; Board of Comm. v. Reynolds*, 44 Ind. 509; *Carpenter v. Danforth*, 52 Barb. 581. But these same cases imply that, as regards the management of corporate affairs, they are quasi-trustees for the stockholders. See also 3 *Pom. Eq. Jur.* 1090. And a very well reasoned opinion in *Oliver v. Oliver*, 118 Ga. 362, holds them to be so far fiduciaries toward the stockholders as to require, in the purchase of stock from them, a full disclosure of all material particulars. But purchases

in open market are perhaps to be distinguished from those at private sale. As against subscribers for stock, there must be a full disclosure in prospectuses of a company. *New Brunswick Ry. v. Muggeridge*, 1 Dr. & Sm. 363; *2 Pom. Eq. Jur.* 881; and for any failure in this respect the directors may be held. *Edgington v. Fitzmaurice*, 29 Ch. Div. 459; *Cent. Ry. v. Kisch*, L. R. 2 H. L. 99.

CRIMINAL LAW—FORMER JEOPARDY—SINGLENESS OF TRANSACTION.—MANN v. COMMONWEALTH, 80 S. W. 438 (KY.). Defendants broke into a house at night with intent to steal money, which they abstracted from the householder's pocket, and on his awakening shot him. *Held*, that the burglary and the shooting do not constitute a single transaction out of which two offences cannot be carved, so as to render a conviction of the shooting a bar to the prosecution of burglary.

The concurrence of opinion among the courts of the various states with the above decision is quite general. The same individual may at the same time and in the same transaction commit two or more distinct crimes, and an acquittal of one will not be a bar to punishment for the other. *State v. Standifer*, 5 Porter 523. In *People v. Warren*, 1 Parker C. C. 338, a trial and acquittal on an indictment for an attempted killing of one was considered no bar to a subsequent indictment charging the same defendant with attempting to kill another by the same act. Nevertheless a decision essentially contrary to these was rendered by the court of Vermont in *State v. Damon*, 2 Tyler 390, but it is said in a note to *Archibald's Crim. Pr. & Pl.*, 112 to be against the weight of authority and repugnant to reason, and by *Bennett & Heard, L. C. C.*, 534 to be clearly not law.

CRIMINAL LAW—SECURING EVIDENCE—PARTICIPATION IN ACT BY HIM AGAINST WHOM IT IS COMMITTED.—PEOPLE v. MILLS, 70 N. E. 786 (N. Y.).—A district-attorney, being informed of a plot to make away with certain pending indictments, himself obtained them and secured their delivery to the accused by one of his agents, in pretended furtherance of the scheme. *Held*, that nevertheless the accused was guilty of the crime of stealing them. O'Brien and Bartlett, JJ., *dissenting*.

Consent to a crime by him against whom it is committed is ordinarily no defense. *Reg. v. Clisin*, 8 Car. & P. 418; 1 *Bish. Cr. Law*, 259. Nor can the participation avail where the accused has himself committed all the essential acts. *State v. Jansen*, 22 Kan. 498; *State v. Hayes*, 105 Mo. 76. Under this rule would fall those cases where the crime is more directly against the peace of the state and the agent, by becoming a party to it, furnishes the opportunity for its commission, as in the illegal sale of lottery tickets. *People v. Noelke*, 94 N. Y. 137. But where the crime is against an individual and he instigates it, there would seem to be no liability on the part of the accused. *O'Brien v. State*, 6 Tex. App. 665; *People v. McCord*, 76 Mich. 200; *King v. McDaniel*, 2 East P. C. 665. Nor where consent destroys an essential element of the crime; *People v. Liphardt*, 105 Mich. 80; 1 *Wharton, Cr. Law*, 751 i; even though the accused thinks the consenting person is acting merely as his agent. *Williams v. Ga.*, 55 Ga. 391. But passively to permit a crime to be committed does not prevent a conviction. *Warner v. State*, 72 Ga. 745; *State v. Jansen, supra*. And though consent may prevent conviction for one crime, it may not destroy another cognate to it which is involved in the same transaction. *Reg. v. Johnson*, Car. & M. 218.

DESCENT AND DISTRIBUTION—MURDER OF ANCESTOR.—IN RE KUHN'S ESTATE, 101 N. W. 151 (IOWA).—*Held*, that a widow who was the murderer of her husband takes her distributive share of his estate as a matter of contract and is not deprived by a statute providing that "no person who feloniously takes the life of another shall inherit from such person any portion of his estate."

Authority on this point of law is extremely meager. In *Owens v. Owens*, 100 N. C. 240, it was held that a wife who was convicted and imprisoned for life as an accessory to the murder of her husband is not barred of her right of dower. This case is criticised in *Riggs v. Palmer*, 115 N. Y. 506, as being opposed to the fundamental maxims of the common law, such as that no one shall be allowed to take advantage of his own wrong, or acquire property by his own crime; the court held that an heir or donee who murdered his ancestor will not be permitted to have any benefit as such heir or donee. The rule in New York now is that the murderer takes the title to the property at law but equity will compel him to hold as trustee *ex maleficio*, for the representatives of his victim. The heir was held entitled to the property of his murdered ancestor in *Dum v. Millikin*, 3 Ohio Cir. Dec. 491; *Carpenter's Estate*, 170 Pa. St. 203; *Shellenberger v. Ransom*, 41 Neb. 631, *overruling* on rehearing previous decision in 31 Neb. 61.

EQUITY—ELECTION.—TRIPP V. NOBLES, 48 S. E. 675 (S. C.).—A husband provided in his will that his wife should have a life estate in certain real estate which she already owned and he also left her a certain amount of personal property. She would have received an equal amount of personal property by the statute of distributions. *Held*, that in accepting the personal property she exercised an equitable election to take under the will and thus was entitled only to a life estate in the realty. Walker and Douglas, JJ., *dissenting*.

The dissenting opinion seems to be more in accordance with the general principles of the law. The doctrine of election, as stated in *Bispham's Equity*, *6th Ed.*, 418, obtains only when there is a benefit received by the one put to election. In the present case no extra benefit was received by taking under the will. The cases sustaining the majority opinion are those where an actual benefit was received, although its acceptance entailed greater burdens. The case of *Stone v. Vandermark*, 146 Ill. 312, held that acceptance of a provision which the acceptor would have received anyway did not constitute an implied election. Somewhat similar was *Compher v. Compher*, 25 Pa. 31. The better rule would seem to be that, when the actions of the distributee are entirely consistent with taking against the will, election under the will will not be implied. 2 *Story, Equity*, 11 *Ed.*, 375; *Edwards v. Morgan*, 13 Price 782; *Thurston v, Clifton*, 21 Beav. 447.

EVIDENCE—PRIVILEGED COMMUNICATIONS—PHYSICIAN—CONSTRUCTION OF STATUTE.—BATTIS V. CHICAGO, R. I. & P. R. Co., 100 N. W. 543 (IOWA).—*Held*, that a statute, providing that confidential communications made to a physician should be privileged, shall be extended to include all knowledge and information acquired, by the physician, while in his professional capacity. Deemer, C. J., and Weaver, J., *dissenting*.

Communications from patient to physician were not privileged at common law. *Boyle v. Northwestern Mut. Relief Assoc.*, 95 Wisc. 320. This was based on grounds of public justice. *Rex v. Gibbons*, 1 C. & P. 97. But in most states statutes have been enacted making such communications privi-

leged. *Conn. Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250. This is on the ground of public policy. *Davis v. Supreme Lodge*, 165 N. Y. 159. The privilege extends not only to communications, but to all information acquired by observation while in attendance. *Finnegan v. Sioux City*, 112 Iowa 232.

HIGHWAYS—OBSTRUCTION—INJURIES TO ONE COASTING.—REUSCH V. LICKING R. M. Co., 80 S. W. 1168 (KY.).—*Held*, that one coasting on a street and injured by colliding with a vehicle left standing over night in the street, cannot recover from the one who, without knowing that the street was being used for coasting, left the vehicle there.

Coasting in public highways is a nuisance, for it endangers the safety and comfort of the public, and obstructs the public in the exercise of a right common to all. *Wilmington v. Vandergrift*, 1 Marv. (Del.) 5. On the other hand, a highway cannot be used as a place for standing or storing vehicles of any description. *Turner v. Holzman*, 54 Md. 148; *Cohen v. New York*, 113 N. Y. 532. And one who permits his property to obstruct a highway is liable to a traveller who is injured by such obstruction. *Linsley v. Bushnell*, 15 Conn. 225. But persons who use the highway for purposes of playing are not travelers. *Blodgett v. Boston*, 8 Allen (Mass.) 237.

HIGHWAYS—OBSTRUCTIONS—SPECIAL DAMAGES—FERRY.—PARSONS V. HUNT, 81 S. W. 120 (TEX.).—*Held*, that when the only road leading to one terminus of a ferry is closed to travel, the owner of the ferry suffers special damage, differing in kind and degree from that suffered by the general public.

Persons owning land on a part of a street not closed to travel are not deprived of any vested right entitling them to compensation when some other part of the street is so closed. *State v. Elizabeth*, 54 N. J. L. 462. The fact that obstructions are of a public character and create a public nuisance gives no right of action to individuals unless they suffer damage peculiar in kind. *Cummins v. Seymour*, 79 Ind. 491. Though one public way is closed, if there is another still kept open, the property owner sustains no actionable damage, though he suffer inconvenience and loss thereby. *Fearing v. Irwin*, 55 N. Y. 486. But it seems that a private right of action arises when access to the system of public streets is substantially prevented. *Stanwood v. Malden*, 157 Mass. 17. This decision accords with the present case, in which such access is equally necessary at each terminus.

INSURANCE—PROOF OF LOSS.—TEUTONIA INS. CO. V. JOHNSON, 82 S. E. 840 (ARK.).—Where a fire policy provides that insured shall within 60 days after the fire furnish proofs of loss, and that no action shall be sustainable till after compliance with all conditions, nor unless commenced within 12 months from the date of fire, *held*, that furnishing such proof within the 60 days is necessary, and that it is not enough that they are furnished within the year.

A number of well considered cases have decided this question the other way. *Kenton Ins. Co. v. Downs*, 90 Ky. 236, where the terms of the policy were substantially the same as in the principal case; *Ins. Asso. v. Evans*, 102 Pa. 281; *Tubbs v. Ins. Co.*, 84 Mich. 646; *Steel v. German Ins. Co.*, 93 Mich. 81, distinguishing the case of *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, where there was an express stipulation making delay in filing proof of loss a ground for forfeiture of right of action. In New York delay in furnishing proof of loss within the time required by the policy has been held to

work a forfeiture of a right of action, but the decision is based rather on the unreasonableness of the delay than on the failure to comply strictly with the requirements of the policy. *Blossom v. Ins. Co.*, 64 N. Y. 162; *Quinlan v. Ins. Co.*, 133 N. Y. 356. Moreover, "in the construction of contracts of insurance that interpretation is to be adopted which is most favorable to the insured." *Ethington v. Ins. Co.*, 55 Mo. App. 129; *Merrick v. Germania Ins. Co.*, 54 Pa. 277. Forfeitures are not favored in law and courts will not construe contracts so as to effect a forfeiture if they can reasonably do otherwise. *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84.

MANDAMUS—TELEPHONES—COMPELLING INSTALLATION—BAWDY HOUSE.—GODWIN V. CAROLINA TELEPHONE AND TELEGRAPH CO., 48 S. E. 636 (N. C.).—*Held*, that one who was avowedly a keeper of a bawdy house could not by *mandamus* compel the installation of a telephone therein.

A corporation, public in character, and holding a virtual monopoly, is bound to serve impartially and without unjust discrimination all who apply for its service. This rule is applied to telephone companies. *Missouri v. Tel. Co.*, 23 Fed. 539; *Tel. Co. v. Tel. Co.*, 4 Daly (N. Y.) 527; *Tel. Co. v. Com.*, 114 Pa. St. 592. *Mandamus* is the proper remedy for failure, *Mahan v. Tel. Co.*, 93 N. W. 629; *State v. Tel. Co.*, 93 Mo. App. 349, although superseded by statute in New York. *Peo. v. Tel. Co.*, 41 N. Y. App. Div. 17. But *mandamus* will not lie where the ultimate object is unlawful or against public policy, or to compel unauthorized or illegal acts. *Supervisors v. U. S.*, 18 Wall. 71; *Chicot Co. v. Kruse*, 47 Ark. 80; *Ex parte Clapper*, 3 Hill (N. Y.) 458. In view of this latter principle, the correctness of the decision in the principal case is indisputable.

MASTER AND SERVANT—ASSUMPTION OF RISK—MASTER'S COMMAND.—HENRIETTA COAL CO. V. CAMPBELL, 71 N. E. 863 (ILL.)—*Held*, that a servant does not assume the risk involved in carrying out a direct command of the master, provided he exercises a reasonable degree of care.

The question here considered is one which has received much attention from the courts and the decisions have differed so widely that it is very difficult to lay down any satisfactory rule of law regarding it. The present case states the liability of the master more broadly than has been done in many jurisdictions. The decision, however, is not only in harmony with the previous Illinois cases cited therein but is also the rule in Missouri. *Stephens v. Hannibal & St. J. R. Co.*, 96 Mo. 206. In many cases, on the other hand, it is held that if the master had no knowledge of the danger involved in obedience to his directions he is not liable. *O'Neil v. O'Leary*, 164 Mass. 287; *The Pilot*, 82 Fed. 111. Nor is his liability increased by the fact that his command was accompanied, (as in the present case), by abusive and profane language. *Williams v. Churchill*, 137 Mass. 243; *Coyne v. U. P. R. Co.*, 133 U. S. 370. When a servant cannot perceive, by the exercise of ordinary care, any danger in obeying the master's orders, he does not assume the risk. *Eicholz v. Niagara Falls H. P. & M. Co.*, 174 N. Y. 519. He may recover even if it were apparent that some danger existed. *Allen v. Gilman Co.*, 127 Fed. 609. But if the act is one which an ordinary prudent man would not undertake he cannot recover. *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201. The tendency of the later decisions seems to be in favor of the rule as laid down in Illinois and Missouri and to allow a servant to recover when he was exercising ordinary care in obeying the master's direct orders and injury resulted therefrom.

Shear & Red. Neg. 5th Ed. Sec. 186; cited with approval in *Allen v. Gilman Co., supra.*

PARTNERSHIP—REALTY—CONVERSION INTO PERSONALTY—EXPRESS AGREEMENT.—BARNEY v. PIKE, 87 N. Y. SUPP. 1038.—A partnership was formed to purchase marsh lands with the partnership capital, to be "reclaimed, and sold and converted into money" and to divide the proceeds, profits and losses among the partners in proportion to their several interests. *Held*, that the parties intended there should be an equitable conversion, and that the estate of the deceased partner passed under his will as personalty.

This decision, which is based upon the fact that the articles of partnership amounted to an express agreement that realty should be treated for all purposes as personalty, is in harmony with all the decisions in this country. *Maddock v. Astbury*, 32 N. J. Eq. 181; *Mallory v. Russell*, 71 Iowa 63. Where there is no such agreement, it is held in England, that there is an "out and out" conversion for all purposes, the real estate, upon death of a partner, going to his personal representatives. *Essex v. Essex*, 20 Beav. 442; *Darby v. Darby*, 3 Drew. 495. The American rule, adhered to in all the states, is that partnership realty is treated in equity as personalty so far as is necessary to pay debts and adjust equities between the partners, and that the remainder descends to the heir as real estate. *Shanks v. Klien*, 104 U. S. 18; *Lowe v. Lowe*, 13 Bush. (Ky.) 688

RAILROADS—REMOVAL OF TRESPASSERS—LIABILITY FOR INJURY.—POWELL v. ERIE RAILROAD CO., 58 ATL. 930 (N. J.).—A trespasser, while attempting to board a moving railroad car, released his hold because of a brakeman's throwing pieces of coal at him. *Held*, that the company was not liable for injuries to him resulting therefrom. Hendrickson and Vroom, JJ., *dissenting*.

The general rule is that a railway company is liable to a trespasser forcibly ejected by its servants from one of its trains while moving at a dangerous speed. *R. Co. v. Reagan*, 52 Ill. App. 488; *Carter v. Ry. Co.*, 98 Ind. 552. See also *Rounds v. R. Co.*, 64 N. Y. 129. And a similar rule, without regard being had, however, to the degree of speed, was enunciated in *Ry. Co. v. Mother*, 5 Tex. Civ. App. 87; while, in an action for injuries received by a trespasser, it has been held that the only question to be submitted to the jury was whether or not the trespasser was pushed from the train by a brakeman while it was in motion. *Thurman v. L. & N. R. Co.*, 34 S. W. 893. Where one got upon a car, intending to ride without paying, the conductor ordered him off with a show of force, and he was hurt, it was held to be a question for the jury whether he was in fault in jumping, and that his fault in getting on did not constitute contributory negligence. *Kline v. R. Co.*, 37 Cal. 400. And when a boy boarded a moving freight train, and was ordered off while the train was moving at a lower rate of speed than when he boarded it, it was held a question for the jury whether the conductor's acts constituted negligence and would render the company liable. *Thompson v. R. Co.*, 72 Miss. 715. In the principal case the court says: "It is absurd to say that by merely gaining a foothold upon the moving train he could impose a duty upon the railroad company either to permit him to ascend or to stop the train for his convenience," but the decision seems to be based upon the theory that the throwing of the coal did not actually force the trespasser to leave the train.

WATERS—RIPARIAN RIGHTS—IRRIGATION.—CLEMENTS v. WATKINS LAND CO., 82 S. W. 665 (TEX.).—*Held*, that, as irrigation is not a natural use of water, a riparian proprietor cannot exhaust the supply for such purposes as against irrigation rights of lower proprietors.

This decision is noteworthy in that it practically aligns the State of Texas with the common law rule, and squarely repudiates the doctrine of prior appropriation developed and prevailing in a group of the arid states headed by Colorado. *Oppenlander v. Ditch Co.*, 18 Colo. 142; *Stowell v. Johnson*, 7 Utah 215; *Moyer v. Preston*, 6 Wyo. 308; *Bliss v. Grayson*, 24 Nev. 422. *Farnham on Waters and Water Rights*, sect. 604, says: "The Texas courts have carried the right to use water for irrigation purposes further than it has been carried elsewhere, and further than can be supported either by principle or authority." See also *Rhodes v. Whitehead*, 27 Tex. 304. The present case, while not entirely lacking support in the Texas courts, overrules the established doctrine in that state. *Tolle v. Correth*, 31 Tex. 365, established the doctrine that the rule of reasonable use will permit the exhaustion of the water supply for irrigation as against other artificial uses, when the need of irrigation is great and that of other artificial uses relatively unimportant. The broad position of the court while attacked in *Fleming v. Davis*, 37 Tex. 173, and criticised in *Mill Co. v. Ferris*, 2 Sawy. (U. S.) 176, was followed in the later decisions, the doctrine being limited, however, so that the right to irrigate would be subordinate to the right of a lower proprietor to be supplied for domestic purposes. *Baker v. Brown*, 55 Tex. 377; *Irrigation Co. v. Vivian*, 74 Tex. 170; *Barrett v. Metcalf*, 12 Tex. Civ. App. 247.