RECENT CASES.

CARRIERS OF GOODS—LOSS THROUGH ACT OF GOD—PREVIOUS NEGLIGENCE.—EMPIRE STATE CATTLE CO. v. ATCHINSON, T. & S. F. RY. CO., 135 FED. 136. Property was negligently delayed in transportation. But for this delay it would not have been subjected to a subsequent danger in which it was totally destroyed, which danger was occasioned by an act of God, reasonably unforseen.—*Held*, that the negligent delay was not the proximate cause of the injury.

The negligence must be the proximate cause of the loss. *Scott v. Baltimore, C. & R. S. Co.*, 19 Fed. 56. The Federal courts have been constant in upholding this doctrine since the Supreme Court first laid it down in *Ry. Co. v. Reeves*, 77 U. S. 176 (1869). See also *Lamont v. Nashville & C. R. Co.*, 56 Tenn. 58; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304. Other courts, for reasons which seem very plausible, have failed to agree with the above. *Michaels v. N. Y. Central Ry. Co.*, 30 N. Y. 564; *Meyer v. Vicksburg, R. Co.*, 41 La. Ann. 639. Especially do the courts so hold where the delay amounts to a violation of contract. *Cassiday v. Young*, 43 Ky. 265; *Denison v. N. Y. Central Ry. Co.*, 3 Lans. 265. And where the delay was caused by carrying the goods out of the usual and direct route. *Merchants Despatch Co. v. Kahn*, 76 Ill. 520. The Federal courts have sustained their position where the destruction resulted during the continuance of the negligent delay. *Thomas v. Lancaster Mills*, 71 Fed. 481. The contrary is held in *Hernsheim v. Newport News Co.*, 35 S. W. 1115; *Meyer v. Vicksburg, etc., R. Co., supra.*

CARRIERS OF PASSENGERS—INTERSTATE COMMERCE—WHAT CONSTITUTES.—STATE v. SEAGRAVES, 85 S. W. (Mo.). 925.—*Held*, that carrying passengers on a steamboat is not interstate commerce, although the boat may touch the shores of different states.

Where the real destination of stock was a yard across the boundary of the state, it was held that its carriage did not constitute interstate commerce. *Moore v. Moore*, 41 Mo. App. 176; *Scammon v. Ry. Co.*, 41 Mo. App. 194. It has been held that goods whose points of departure and destination are in the same state, though passing through an adjoining state in their transit, are not in interstate commerce, *Seawall v. Ry. Co.*, 119 Mo. 222; but this resulted from a misunderstanding of *Lehigh Valley R. Co. v. Penn.*, 145 U. S. 192, and is now settled *contra*. *Hanley v. Ry. Co.*, 187 U. S. 617. And where commerce is carried by way of the high seas, though from one port in a state to another in the same state, it is under federal control. *Lord v. S. S. Co.*, 102 U. S. 541. But see *N. O. Exch. v. Ry. Co.*, 2 Int. Com. R. 375; *State v. Ry. Co.*, 41 N. W. (Minn.) 1047.

CONSTITUTIONAL LAW—POLICE POWER—EXTRA BURDENS ON MERCHANTS USING TRADING STAMPS.—MONTGOMERY v. KELLY, 38 So. 67 (ALA.).—A city ordinance required merchants giving trading stamps to pay a license in addition to that required of other merchants engaged in the same line of business, but not giving trading stamps. *Held*, that the ordinance was an attempt, under the guise of a license tax, to fix a penalty on a merchant for conducting his business in a certain way, and was therefore unconstitutional under the "life, liberty and pursuit of happiness" clause, and also under the clause "to protect the citizen in the enjoyment of life, liberty and property."

This case is unique as are most of the cases under this rapidly growing subject. The police power embraces the protection of the lives, health and property of the citizens, the maintenance of the good order and quiet of the community, and the preservation of the public morals. *Beer Co. v. Mass.*, 97 U. S. 25; *Thorpe v. R. Co.*, 27 Vt. 149. Of course it must be used as a police power and not as a pretext to avoid unconstitutionality. *R. Co. v. Hoboken*, 41 N. J. L. 71; *Mayor v. R. Co.*, 32 N. Y. 261. As to what does not lie in the police power, it is easier to distinguish the separate cases as they arise than to formulate a general rule. For example, a grant to registered pharmacists of the right to sell patent or proprietary medicines, without requiring them to make any inspection or examination of the same, but denying such right to other persons or firms, is unconstitutional. *Noel v. People*, 188 Ill. 587.

CORPORATIONS—MUNICIPAL—DEFECTIVE SIDEWALK—CONSTRUCTIVE NOTICE. —CITY OF OTTAWA V. HAYNE, 73 N. E. 384 (ILL.).—*Held*, that in an action against a city for injuries caused by an obstructed sidewalk, plaintiff may show by a watchman employed by private persons that the obstruction was observed by him, in order to prove constructive notice to the city.

The acts and declarations of private persons as to the unsafe condition of a sidewalk are admissible to show notoriety. *Chase v. Lowell*, 151 Mass. 422; *McGrail v. Kalamazoo*, 94 Mich. 52. But in *Hinckley v. Somerset*, 145 Mass. 326, it is held that a conversation between a person previously injured at the same place and others, not officers of the town, is inadmissible. In showing constructive notice of defect, the distance from the city hall may be proved. *Masten v. Troy*, 50 Hun 485. The fact that no repairs have been made on the walk for a long time is also competent evidence on this point. *Alberts v. Vernon*, 96 Mich. 549. It must appear, however, that the city had reason to anticipate the defect. *Stellwagen v. Winona*, 54 Minn. 460; *Lincoln v. Pirner*, 59 Neb. 634. A municipality may be charged with constructive notice even though the fact of the defect has not become notorious. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Anderson v. Albion*, 64 Neb. 280.

CORPORATIONS—MUNICIPAL—EXCAVATIONS OF STREETS—LATERAL SUPPORT. —DAMKOEHLER V. MILWAUKEE, 101 N. W. 706 (WIS.).—*Held*, that where a city negligently excavates a street so as to take away the lateral support of an adjoining lot, thereby causing the soil to fall in, it is liable to the owner of the lot for such injury.

It has been held that there is no liability on the part of a city for taking away lateral support so as to injure an abutting owner, for it is not a taking of private property for public use. *Rome v. Omberg*, 28 Ga. 46. Other cases hold that a city is liable to the same extent as an individual. *Stearnes v. Richmond*, 88 Va. 992; *Nichols v. Duluth*, 40 Minn. 389. The true rule seems to be that the city is not liable when it makes the excavations with ordinary skill and care. *Quincy v. Jones*, 76 Ill. 231; but is liable if it takes away the support negligently, thereby causing an injury to the adjoining owner, *Parke v. Seattle*, 5 Wash. 1; the test of the city's liability being the manner in which it does the work. *Wright v. Wilmington*, 92 N. C. 156.

CORPORATIONS—PRIVATE—AGREEMENT TO SUBSCRIBE FOR STOCK.—WOODS MOTOR VEHICLE CO. V. BRADY, 73 N. E. 674 (N. Y.).—The defendant subscribed to the stock of a corporation to be organized to "deal" in automobiles. A corporation was subsequently organized for the purpose of

"manufacturing, leasing, purchasing and selling automobiles" and other vehicles. *Held*, that the subscription was not enforceable by such corporation, where the defendant was not one of the incorporators and refused to pay his subscription, and did not subscribe for the stock, nor in any way ratify the subscription agreement. Gray, Bartlett and Haigh, JJ., *dissenting*.

Under conditions similar to those in this case, some courts have held that any change is sufficient to release a man from his agreement to subscribe, because he has the right to say *non haec in foedera veni. Zabriski v. Ry. Co.*, 18 N. J. Eq. 178; *Central Ry. Co. v. Collins*, 40 Ga. 582. Or as expressed in *U. L. & C. v. Towne*, 1 N. H. 44, an assent to amendments extending the objects, increasing the powers, or enlarging the liabilites of the corporation is not to be presumed, but must be expressly shown. But the general view is that the change must be material, radical or fundamental. *Haskell v. Worthington*, 94 Mo. 560; *M. T. Corp. v. Swan*, 10 Mass. 384. Thus a mere change of name does not release the subscriber. *Glenn v. Springs*, 26 Fed. 238. But he is released if the change effects the identity of the stock. *James v. C. H. & D. R. Co.*, 2 Dis. (O.) 261. So a corporation formed for the "purpose of producing electricity and power," cannot maintain an action on a subscription to a corporation to be formed "for the purpose of furnishing the incandescent system of electric lighting." *M. E. L. & P. Co. v. Johnson*, 109 Cal. 192.

EVIDENCE—CRIMINAL LAW—LETTER FROM ACCUSED TO WIFE.—HAMMONS v. STATE, 84 S. W. 718 (ARK.).—*Held*, that a letter from the accused to his wife, intercepted and never delivered to her, is admissible. Battle and McCulloch, JJ., *dissenting*.

Whatever has come to the knowledge of either husband or wife by means of the confidence inspired by the marriage relation cannot afterwards be divulged in testimony, even if the other party be dead. 1 *Greenl., Ev.*, §§ 254, 334, 337; *Jacobs v. Hesler*, 113 Mass. 157; *Aveson v. Kinnaird*, 6 East 188. But a private conversation between husband and wife, who thought no one overheard them, may be testified to by a concealed listener. *Com. v. Griffin*, 110 Mass. 181; *State v. Center*, 35 Vt. 378. There is some conflict among authorities as to whether or not letters between husband and wife, found in the possession of a third party, are admissible in evidence against either. The better rule would seem to be that such letters in the hands of a third person, no matter how he obtained them, are not privileged, but may be admitted in evidence. *Wharton, Crim. Ev.*, § 398; *Com. v. Caponi*, 155 Mass. 534; *State v. Mathers*, 64 Vt. 101. But see *contra*, 1 *Greenl., Ev.*, § 254 a; *Reg. v. Pamenter*, 12 Cox Cr. Cas. 177; *Mitchell v. Mitchell*, 80 Tex. 101.

EVIDENCE—DECLARATION OF AGENT.—CAMPBELL v. EMSLIE, 91 N. Y. SUPP. 1069.—*Held*, that the declarations of an agent may be admissible in evidence though not made during the continuance of the agency or in regard to a transaction pending at the time. Hatch and Laughlin, JJ., *dissenting*.

Admissions, to be admissible, must have been made by the agent while acting within the real or apparent scope of authority, *Charter v. Lane*, 62 Conn. 121; *Thill v. Perkins*, 63 Conn. 478; during the continuance of the agency, *Cooley v. Norton*, 4 Cush. 93; *Dean v. Aetna L. Ins. Co.*, 62 N. Y. 642; in regard to a transaction pending at the very time. *Rockwell v. Taylor*, 41 Conn. 59; *Blanchard v. Blackstone*, 102 Mass. 343. Admissions

by general agents as to past transactions are admissible. *McGenness v. Adriatic Mills*, 116 Mass. 177; *Ins. Co. v. Woodruff*, 26 N. J. L. 541. *Contra, Smith v. N. C. R. Co.*, 68 N. Car. 107; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140.

EVIDENCE—DOCUMENTS—SUPPRESSION—INFERENCE.—STOUT V. SANDS, 49 S. E. 428 (W. VA.).—*Held*, that when a *prima facie* case is made, and doubt is cast upon it by rebuttal evidence, suppression of a document relied upon as evidence by the opposite party raises a strong inference against the party failing to produce it, and determines the point in favor of the other party.

No inference would arise when the document would not be admissible without the opponent's consent. *Merwin v. Ward*, 15 Conn. 377; *Carter v. Troy Lumber Co.*, 138 Ill. 533. The inference is allowable only after notice to produce the document has been given before trial, *Emerson v. Fisk*, 6 Greenl. 290; *Tobin v. Shaw*, 45 Me. 331; and some secondary evidence of the contents of the document has been given. *Cross v. Bell*, 34 N. H. 82: *Jackson v. Johns*, 18 Johns. 331. *Contra, Runkle v. Burnham*, 153 U. S. 216; *Crescent Co. v. Ermann*, 36 La. 841.

EVIDENCE—PERSONAL INJURIES—SIZE OF FAMILY.—ST. LOUIS, I. M. & S. RY. CO. V. ADAMS, 85 S. W. 768. (ARK.).—In an action for personal injuries plaintiff was permitted to testify as to the size of his family and as to the assistance he received from them in his work. *Held*, that the admission of this evidence constituted reversible error.

The fact that the injured party has a family dependent upon him is not ordinarily admissible to enhance damages. *Pittsburg, Ft. W. & C. Ry. Co. v. Powers*, 74 Ill. 341; *Louisville & N. Ry. Co. v. Binion*, 107 Ala. 645. Nor is it competent for plaintiff to prove his pecuniary or social condition in general. *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. 620; *Pa. Ry. Co. v. Books*, 57 Pa. St. 339. In *Moore v. City of Huntington*, 31 W. Va. 842, it is held that the verdict will not be set aside if there is other evidence sufficient to sustain it. If the jury is properly charged as to the measure of damages, the admission of such testimony is not necessarily a cause for reversal. *City of Kinsley v. Morse*, 40 Kan. 577; *Central Pass. Ry. Co. v. Kuhn*, 86 Ky. 578. But the instruction as to the measure of damages must be specific. *Stephens v. H. & St. J. Ry. Co.*, 96 Mo. 207. It is stated in *Youngblood v. S. C., etc., Ry. Co.*, 60 S. C. 9., that when incapacity to support family is a proximate result of the injury, such evidence is admissible. And a similiar conclusion is reached in *San Antonio & A. P. Ry. Co. v. Robinson*, 73 Tex. 277.

INJUNCTIONS—INTERLOCUTORY—REVIEW ON APPEAL.—NORTHERN SECURITIES CO. V. HARRIMAN ET AL., 134 FED. 331.—When the judge of a lower court, in granting a preliminary injunction, was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that an order denying the injunction would not be reversible upon appeal. *Held*, that the rule that the appellate court will not interfere with the exercise of the discretionary power of the court, unless it is abused, does not apply, and the question will be determined on the merits. Gray, J., *dissenting*.

This case hardly seems consistent with former decisions. The granting of a temporary injunction rests within the discretion of the court, *Buffington v. Harvey*, 95 U. S. 99.; and this discretion will not be interfered with by a higher court, *Powell v. Howard*, 81 Ga. 359; unless it clearly appears upon

the record that it has been flagrantly abused. *Parker v. Green*, 49 Ga. 624; *Roger v. Tennant*, 45 Cal. 185. It is not an abuse of this discretion to grant an injunction where there is a doubtful case, and the defendant might do acts which would render a final judgment in favor of the plaintiff ineffectual. *Gloversville v. Johnstown Ry. Co.*, 66 Hun 627. It is an abuse to grant an interlocutory injunction where the complaint fails to state a cause of action and is reviewable, *McHenry v. Jewett*, 90 N. Y. 58; unless a doubtful question of law arises from the complaint, when the higher court should defer its decision until a hearing upon the merits by the lower court. *Selchow v. Baker*, 93 N. Y. 59.

NEGLIGENCE—HIGHWAYS—DANGEROUS CONDITION.—SHEPARD V. BELLOW & MERRITT CO., 91 N. Y. SUPP. 999.—*Held*, that where contractors reconstructing a road had given notice to the public of the dangerous condition of the road and plaintiff had actual notice of its condition by recent use, the contractors are not liable for injury to plaintiff resulting from the use of the road while in such condition. Chase and Houghton, JJ., *dissenting*.

A traveler upon the highway must use ordinary care to avoid injury. *Creamer v. R. Co.*, 156 Mass. 320; *Chicago v. Bixby*, 84 Ill. 82. Contributory negligence is not conclusively established by the fact that the injured party had previous knowledge of the highway defect. *Evans v. Utica*, 69 N. Y. 166; *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73. Nor by the fact that injured party might have taken a better and safer part of the highway. *Aurora v. Hillman*, 90 Ill. 61; *Griffin v. Auburn*, 58 N. H. 121. *Contra*, *Wilson v. Charlestown*, 8 Allen 137. Nor by the fact that plaintiff could have seen the defect, if he had looked. *Merriam v. Phillipsburg*, 158 Pa. 78. Only those using the highway in the ordinary mode for travel can recover damages. *Taylor v. Peckham*, 8 R. I. 349; *McArthur v. Saginaw*, 58 Mich. 357.

NUISANCE—PERCOLATION OF WATER.—SCHWARZENBACH V. ELECTRIC WATER POWER CO., 92 N. Y. SUPP. 187.—*Held*, that where defendant had a license from plaintiff to erect a dam and flood his land below the dam, defendant is liable for overflow and percolation of water through the dam flooding other land of plaintiff. Parker and Smith, JJ., *dissenting*.

A person erecting a dam is responsible for all injury caused by it at ordinary stages of water, *Angell, Water Courses, (7th Ed.)*, *sec.* 330; such as drowning neighboring lands by percolation. *Marsh v. Trullinger*, 6 Ore. 356; *Wilson v. New Bedford*, 108 Mass. 261. Also owners of a reservoir which is not sufficiently protected against percolation are liable for injury caused thereby. *Monson v. Fuller*, 5 Pick. 554; *Snow v. Whitehead*, L. R. 27 Ch. D. 588. The American decisions plant the liability on the ground of negligence in construction or in maintenance of dam or reservoir, *Pixley v. Clark*, 35 N. Y. 520; *Mills v. County Commiss'rs*, 108 Mass. 363; whereas the English courts hold that the owners are liable, though not negligent in constructing or maintaining such reservoir. *Rylands v. Fletcher*, L. R. 1 Exch. 265; *Smith v. Fletcher*, L. R. 7. Exch. 305.

RAILROADS—TREESPASSERS—WANTON NEGLIGENCE.—REYBURN V. MO. PAC. RY. CO., 86 S. W. 174 (Mo.).—*Held*, that a railroad is liable for the death of a trespasser walking on the track, when the trainmen must inevitably have seen him, but did nothing to warn him of his danger.

The weight of authority seems to be that a trespasser cannot recover in the

absence of wilful or wanton negligence. *Bjornquist v. B. & A. R. Co.*, 185 Mass. 130; *Chicago T. T. R. Co. v. Gruss*, 200 Ill. 195. In some jurisdictions, however, a higher degree of care is required. *McClanahan v. V. S. & R. Co.*, 111 La. 781; *Corbett v. O. S. L. R. Co.*, 25 Utah 449. It is held in *Nolan v. N. Y., N. H. & H. R. Co.*, 53 Conn. 461, and *Kansas City, Ft. S. & M. R. Co.*, 66 Fed. 115, that the railroad is under no obligations to make its track safe for trespassers; while in the very recent case of *Ashworth v. S. R. Co.*, 116 Ga. 635, it is stated that the railroad is not absolutely relieved from anticipating their presence. But it is generally agreed that the railroad owes them no duty until their peril is discovered. *Johnson v. C., St. P., M. & O. Ry. Co.* 123 Iowa 224; *Goodman's Adm'r v. L. & N. R. Co.*, 25 Ky. L. R. 1086. It is necessary to show actual knowledge on the part of the railroad. *Erie R. Co. v. McCormick*, 69 O. St. 45. A trespasser cannot complain of a failure to give warning upon approach to a crossing, *Davis' Adm'r v. C. & O. R. R. Co.*, 25 Ky. L. R. 342; nor that the speed was in violation of a city ordinance. *Ill. Cent. R. R. Co. v. Eicher*, 202 Ill. 556. When, as in the present case, there is an entire failure to warn, recovery is usually allowed. *Mitchell v. B. & M. R. R. Co.*, 68 N. H. 96; *Central R. & B. Co. v. Vaughan*, 93 Ala. 209; *contra, Hale v. C. & G. Ry. Co.*, 34 S. C. 292.

STATUTE OF FRAUDS—EVIDENCE.—CHARLTON v. COLUMBIA REAL ESTATE CO., 6 ATL. 192 (N. J.).—*Held*, that a signed but undelivered lease may be given in evidence to prove an agreement upon the details of a lease pursuant to one of the terms of a previously signed memorandum in writing of an oral agreement for a lease; and if the previous memorandum of agreement for a lease and the signed but undelivered lease, taken together, show a completed agreement upon the terms of a lease, the statute of frauds is satisfied, and specific performance may be decreed. Dixon, Garrison, Swayze and Gray, JJ., *dissenting*.

A complete contract binding under the Statute of Frauds may be gathered from letters, writings, telegrams, etc., between the parties, relating to the subject matter of the contract, and so connected with each other that they may fairly be said to constitute one paper relating to the contract. *Beckwith v. Talbot*, 95 U. S. 289; *Ridgway v. Wharton*, 6 H. L. Cas. 238. But authorities disagree as to the operation of an undelivered deed, some declaring such an instrument to be insufficient as a memorandum under the statute. *Freeland v. Charnley*, 80 Ind. 132; *Parker v. Parker*, 1 Gray 409. Others hold the contrary, provided the deed contain the terms of agreement. *Griel v. Lomax*, 89 Ala. 420; *Thayer v. Luce*, 22 Ohio 62. An undelivered deed, however, may be read in connection with other documents to supply the description of property. *Leonard v. Woodruff*, 23 Utah 494; *Jenkins v. Harrison*, 66 Ala. 345.

TAXATION—TRANSFER—DEBTS—SITUS.—IN RE DALY'S ESTATE, 91 N. Y. SUPP. 858.—*Held*, that debts due within the state from solvent debtors, which are converted into money therein and must of necessity be enforced in the jurisdiction of the state, or not at all, are property within the state and are taxable according to the transfer tax act (Laws 1896, c. 908, § 220). Ingraham, J., *dissenting*.

It is a general rule of law, based upon a legal fiction, that personal property attends the owner and has its *situs* at his domicile. *Preston v. Boston*, 12 Pick. 7; *In re Euston's Will*, 113 N. Y. 178. In modern times this rule has yielded more and more to the law of the place where the property is

kept and used. *Green v. Van Buskirk*, 5 Wall. 307; *Walworth v. Harris*, 129 U. S. 355. So, for purposes of taxation, personal property may be separated from the owner, and he may be taxed on its account at the place where it is, although not the place of his domicile. *R. R. v. Penn.* (*State Tax on Foreign held Bonds*), 15 Wall. 300; *In re Romaine's Estate*, 127 N. Y. 80. So the *situs* of money on deposit in a bank has been held to be in the state where the deposit is. *In re Romaine's Estate, supra*; *State v. Hamlin*, 86 Me. 495. And the *situs* of a corporation may determine the *situs* of its stock, without regard to the locality of the stock certificates. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189. But the *situs* of a debt has long been held to be the domicile of the creditor. *Cooley, Tax.*, pp. 14, 15; *Kirtland v. Hotchkiss*, 100 U. S. 496. Such is the New York rule. *In re Bronson*, 150 N. Y. 1. But a transfer depends on the laws of the state, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. *R. R. v. Sturm*, 174 U. S. 710; *Blackstone v. Miller*, 188 U. S. 189.

TORTS—INFANTS—DAMAGES—EARNING POWER.—PORTER V. DEL. L. & W. R. Co., 134 FED. 155.—*Held*, that where in an action for injuries by an unemancipated infant, it appeared that she would fully recover before she became of age, she was not entitled to damages for loss of earning power.

In an action by a child against a railroad it may recover for diminished earning powers after it becomes of age, *Ft. Worth & D. C. Ry. Co. v. Robertson*, 14 L. R. A. 781; and the amount of damages it is to be allowed is a question for the judgment and conscience of the jurors guided by circumstances. *Rosencranz v. Lindell Ry. Co.*, 108 Mo. 9; but recovery cannot be had by plaintiff for diminished capacity to earn during minority, for such earnings belong to the father. *Tex. & P. Ry. Co. v. Morin*, 66 Tex. 225. It is error to instruct the jury that the infant's lessened earning power is an element of damages, unless limited to the time from which the child would be entitled to his own earnings. *Chicago Ry. Co. v. Krayenbuhl*, 65 Neb. 889.

TRIAL—INSTRUCTIONS—OPINION OF COURT.—BISHOP V. STATE, 84 S. W. 707 (ARK.).—After the jury had been out for some time they announced that they could not agree, when the court said: "I always have an opinion of the facts of a case, but it is not my province to indicate my opinion to you. It is your exclusive province to settle the fact, and mine to declare the law. However, I will say that if you agree upon the defendant's guilt, and are not able to agree upon the punishment, you may leave that to be fixed by me." In a few minutes the jury found verdict of guilty. *Held*, that such statement by the court was reversible error. Hill, C. J., and Riddick, J., *dissenting*.

The old common law rule that it is competent for a judge to give his opinion of the weight of any part or the whole of the evidence in a cause being tried before it, provided the ultimate decision of the facts be left to the jury, is still followed in the English courts, the U. S. courts, and those of some states. *Belcher v. Prittie*, 4 M. & Scott 295; *Carver v. Jackson*, 4 Pet. 89; *Church v. Rouse*, 21 Conn. 167. But in most states this rule has been changed by constitution or statute forbidding the court to express an opinion as to the weight and sufficiency of evidence. The purpose is to keep unimpaired the province of the jury. *Muller v. Stewart*, 24 Cal. 502; *Frame v. Badger*, 79 Ill. 441; *Com. v. Larrabee*, 99 Mass. 412.

TRIAL—INSTRUCTIONS—UNCONTROVERTED FACTS.—TERRE HAUTE ELECTRIC CO. v. KIELY, 72 N. E. 658 (IND.).—*Held*, that it is not error for the court to assume, in its instruction, the existence of uncontroverted facts.

It has been held that the court cannot assume a fact even though established by proof beyond controversy, *Bal. & Susquehanna R. R. Co. v. Woodruff*, 4 Md. 242; for it would be an invasion of the right of the jury. *Zoune v. Wierson*, 3 Chand. 240. But by the great weight of authority the court may, in its instruction, assume facts which are uncontroverted, *Hall v. Monson*, 90 Iowa 585; even though testified to by only one witness, *First Nat. Bank v. Hatch*, 98 Mo. 376; and such assumptions are not grounds for reversal. *Mooney v. York Iron Co.*, 82 Mich. 263.