RECENT CASES.

ASSIGNMENTS—EQUITABLE ASSIGNMENTS—CHECKS.—KUHNES v. CAHILL, 104 N. W. 1025 (IOWA).—*Held,* the giving of a check on a general deposit fund in a bank, amounts to an equitable assignment *pro tanto* of the fund.

The weight of authority, both in England and this country, is in opposition to the above ruling. *Laclede Bank v. Schuler,* 120 U. S. 511; *Com. ex rel. Atty. Gen. v. American Life Insurance Co.,* 162 Pa. 586. The provision of the negotiable instrument act, section 189, follows the current American law. As construing this section see *Baltimore etc. Ry. Co v. First National Bank,* 47 S. E. 837. The minority ruling, however, is set forth in *Springfield Marine and Fire Insurance Co. v. Peck,* 102 Ill. 265; *Farmers Bank and Trust Co. v. Newland,* 97 Ky. 464. As to effect between parties see *Pease v. Laudaner,* 63 Wis. 20. But an order payable out of a particular fund may operate as an equitable assignment. *Florence Mining Co. v. Brown,* 124 U. S. 391; also *Fortier v. Delgardo,* 122 Fed. 604, where check operated as an assignment.

BANKS AND BANKING—INSOLVENCY—TITLE TO DEPOSIT.—CLARK v. TORONTO BANK ET AL., 82 PAC. 582 (KAN.).—*Held,* that where a bank fails and passes into the hands of a receiver after it has issued a draft upon a correspondent bank in which it has funds on deposit, and the drawee has notice of the receivership before the draft is presented for payment, the title to such deposit passes to the receiver, and the holder of the draft, in the absence of any special circumstances, is entitled to no priority over other creditors of the failed bank.

The giving of a draft does not operate as an assignment of the funds standing to the credit of the drawer. *Duncan v. Berlin,* 60 N. Y. 153. Checks drawn in the usual form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request, are of the same legal effect as an inland bill of exchange, and do not amount to an assignment of the funds of the drawer in the bank. *Lunt v. Bank of North America,* 49 Barb. 221; the almost universally accepted rule being that to constitute an assignment, the order must specify the particular fund upon which it is drawn. *Atty. Gen. v. Continental Life Ins. Co.,* 71 N. Y. 325. There are, on the other hand, authorities which hold that a draft operates as an assignment of the funds on which it is drawn *pro tanto* from the very time it is drawn and delivered, on the ground that, the assignor having received a consideration for the draft, his equities are inferior to those of the payee of the draft, and as the assignee stands in the shoes of the assignor he has no better equities than the assignor. *First National Bank v. Coates,* 8 Fed. 540; *Daniels on Negot. Instruments,* sec. 1643.

CARRIERS—LOSS OF FREIGHT—DAMAGES—LIMITATION.—HAYES v. ADAMS EXPRESS CO., 62 ATL. 284 (N. J.).—On delivering to a common carrier a drop curtain of ordinary character and value, the shipper received as a voucher therefor an instrument in which it was stated that, when the shipper omits to declare the value of goods, he agrees that the value does not exceed $50.00. *Held,* that the responsibility of the carrier for the real value in case of loss was not thereby restricted unless the shipper had knowledge of the stipulation; and his knowledge that the carrier's charges depend upon the value of the goods is not sufficient to render the limit of liability obligatory.

In this country the rule is well established, that notices limiting liability are of no avail, unless assented to by the shipper. *Transportation Co. v. Newhall,* 24 Ill 466; *Dorr v. Navigation Co.,* 11 N. Y. 485. Burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims

that one exists. *McMillan v. R. R. Co.,* 16 Mich. 79; *Navigation Co. v. Bank,* 6 How. 344. A notice can at the best only amount to a proposal for a special contract which requires the assent of the other party. *Hollister v. Nawlan,* 19 Wend. 234. But it is held that acceptance of a bill of lading as receipt constitutes an assent to the terms embodied in it; *Kirkland v. Dinsware,* 62 N. Y. 171; *Groce v. Adams,* 100 Mass. 505. But to have this effect the receipt or bill must be delivered before the transportation is entered upon by the carrier and while it is still in the power of the shipper to recall the goods. *Transportation Co. v. Furthman,* 149 Ill. 66; *Wilde v. Transportation Co.,* 47 Iowa, 247. If the shipper does nothing to mislead the carrier and the latter makes no inquiries, the shipper is not bound to state the character or value of the goods. *R. R. v. Fraloff,* 100 U. S. 24. But if the carrier has given general notice that he will not be liable unless the value is made known to him at the time of delivery, such notice, if brought home to the knowledge of the owner is as effectual in qualifying the acceptance of the goods as a special agreement. *Bank v. Brown,* 9 Wend. 85; *Philips v. Earle,* 8 Pick. 182. The effect of notices of this class is to do away with the necessity for a special inquiry in each case. *Batson v. Donovan,* 4 Barn. and Ald. 21.

CONSTITUTIONAL LAW—CLASSIFICATION OF CITIES—SPECIAL LEGISLATION.—SAMPLE V. PITTSBURG, 62 ATL. 201 (PA.).—*Held* that an act, providing that, where two cities are contiguous and in the same county, the smaller may be annexed to the larger, where the only two cities in the Commonwealth that are contiguous and in the same county are Pittsburg and Alleghany, is unconstitutional, since it is evident that the act was intended to legislate locally for them.

This case illustrates how far the courts will, in construing a statute, consider the motives behind legislation. It is a fundamental principle of constitutional law that the courts will not inquire into legislative motives except as they may be disclosed on the face of the acts or may be inferrable from their operation considered with reference to the condition of the country and existing legislation. *Hing v. Crowley,* 113 U. S. 703. But in this class of cases the courts hold that classification of cities must not be purely arbitrary and without reasonable necessity. Thus it was held that a classification into seven classes was unconstitutional in Pennsylvania but that a division into three classes, one of which included a single city, was reasonable. *Wheeler v. Phila.,* 77 Pa. 338. And an act applicable only to such cities as may adopt it is void. *Reading v. Savage,* 120 Pa. 198. Thus it is very often difficult to distinguish these cases. The following general principles have been generally recognized. Legislation must not be special or local and must relate to corporate municipal powers. *In re Washington Street,* 118 Pa. 192. If the classification is upon its face artificial or unnecessary the courts will declare it void. *Ayer's App.,* 122 Pa. 266.

COMMON CARRIERS—EMPLOYEES AS PASSENGERS.—SOUTHERN INDIANA RY. CO. V. MESSICK, 74 N. E. 1097 (IND.).—*Held,* that a servant employed by a railroad company and riding home after the day's work on a work train, is an employee, and not a passenger.

It has been held that a person, in the employ of a railroad, is a passenger when being carried to and from his work on a work-train *Gillenwater v. Ry. Co.,* 5 Ind. 339, 61 Am. Dec. 101. But the weight of authority has decided that where a person engaged in the construction or repair of a railroad, as a laborer working with a gravel train or a carpenter repairing a bridge, is carried to and from his work without charge and is injured in the course of transportation by the negligence of the carrier or his servants, such carrier will not be liable to the employee as a passenger. *Ryan v. Ry. Co.,* 23 Penn. St. 384; *Russel v. R. R. Co.,* 17 N. Y. 134; *Seaver v. R. R. Co.,* 14 Gray 466. An employee of a carrier of passengers while riding in connection with the performance of his duty is not a passenger. *Gillshannon v. R. R. Corp.,* 10 Cush. 228; *Vick v. R. R. Co.,* 95 N. Y. 267. But if the employee is travelling on his own business, though he pays no fare, he is a passenger. *R. R. Co. v. Muhling,* 30 Ill. 9; *P. & R. R. R. Co. v. Derby,* 14 Howard 468. If a reduction of wages is made on account of the transportation furnished the employee, he is is then considered a passenger. *O'Donnell v. R. R. Co.,* 59 Pa. St. 239.

CONSTITUTIONAL LAW—FEDERAL LICENSE TAX—STATE AGENCIES.—SOUTH CAROLINA v. UNITED STATES, 26 SP. CT. 110.—*Held*, that the Federal government may levy the license taxes, prescribed by the internal revenue laws for dealers in intoxicating liquors, upon the dispensing and selling agents of a state, which, in the exercise of its sovereign power, has taken charge of the business of selling such liquors.

This decision emphasizes an important qualification of the doctrine recognized ever since the case of *McColloch v. Maryland*, 4 Wheat. 316, namely, that when a state assumes control of an industry or engages in an activity which is not an instrumentality of government, its agencies are not exempt from taxation by Congress. It had already been decided that where a state engages in selling liquors it cannot control the importation. *Vance v. Vandercock*, 170 U. S. 438; *Sholmberger v. Pa.*, 171 U. S. 1. The United States cannot tax the salaries of state officials. *The Collector v. Day*, 11 Wall. 113, nor the revenue of a municipal corporation derived from its loan of capital to a railroad. *U. S. v. B. & O. R.*, 17 Wall. 322. Nor may it tax the income of municipal bonds held by an individual. *Pollock v. F. L. & T. Co.*, 158 U. S. 601. In all the foregoing cases the tax was upon an agency of government. The distinction now made clear was suggested in the case of *National Bank v. Com.* 9 Wall. 353. It was there said: "It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." A charge which is not in its nature a tax may be levied. This was decided in the *Head Money Cases*, 112 U. S. 580, and in *Veazie Bank v. Fenno*, 8 Wall. 533, where a tax upon circulating notes of state banks for the purpose of destroying their circulation was held valid.

CONSTITUTIONAL LAW—FORMER JEORARDY—CONVICTION IN APPELLATE TRIBUNAL.—TRONO v. UNITED STATES, 26 SP. CT. 121.—*Held*, that the Supreme Court of the Philippine Islands may, upon appeal of the accused, reverse the conviction below and convict for higher offense.

"No man is to be brought into jeopardy of his life more than once for the same offense" is from Blackstone, 4 *Bl. Com.* 335. *Bank v. Brown*, 9 Wend. matter of practice, *Winsor v. Reg.*, 7 B. & S. 276. But in this country the principle is fundamental, has been adopted by the Federal Constitution, and, although that clause is not binding upon the states, it is recognized by Constitution or under the common law in all the states. *U. S. v. Keen*, 1 McLean 429; *Livingston v. New York*, 8 Wend. 85, 100. As a general rule a party to a cause may waive any right the law has given him. *Brown v. Webber*, 6 Cush. 560 This right is waived by application for a new trial. *Gannon v. People*, 127 Ill. 507; *People v. Hardson*, 61 Cal. 378. The courts are, however, in direct conflict upon the extent of this waiver. The dissenting opinion shows the great weight of authority opposed to this decision. The ruling judge, however, has shown the weighty reason favoring it and it is significant that New York, Missouri, Virginia, Georgia, Indiana, Kansas and Kentucky adopted this rule by statute or constitutional amendment after the courts had fixed the law by judicial decision. *See editorial comment.*

CONTRACTS—LOCATION OF DEPOTS—PUBLIC POLICY.—ENID RIGHT OF WAY & TOWNSITE CO. v. LILE, 82 Pac. 811.—A contract which provides that, for a consideration, the location of a railroad corporation shall be at a certain without regard to the question of the needs of the people, or the public conpoint, without regard to the question of the needs of the people, or the public convenience, is held to be against public policy. Burford, C. J. Burnell and Pancoast, JJ., *dissenting*.

A contract with a land owner, in consideration of certain land for a right of way, to erect a depot thereon, is valid. *Watterson v. Railroad Co.*, 74 Pa. St. 208. Equity will not compel specific performance of a contract to locate a depot at a certain point and at no other point in a town. *Marsh v. Farburg & W. W. R. R. Co.*, 64 Ill. 414. Company may contract to locate a station at one point but may not contract not to locate at other points. *Tex. & St. L. R. R. v. Roberts*, 60 Tex. 545. A contract not to build a depot at a certain place for one year is not *per se* against public policy. *Tucker v. Allen*, 16 Kan. 323. A contract to build a depot at a certain place would not be against public

policy. *Workman v. Campbell,* 46 Mo. 305. Nor would a contract to maintain it there perpetually. *R. R. Co. v. Dawson,* 62 Tex. 260. The authorities agree that the railroad company may not bind itself either to build or refrain from building depots in such a manner that an inducement may be furnished to a possible neglect of the convenience of their patrons. *R. R. Co. v. Matthew,* 104 Ill. 257 and note to *R. R. Co. v. Ryan,* 11 Kan. 602.

EJECTMENT—WHEN LIES—STRETCHING WIRES OVER LAND.—BUTLER V. FRONTIER TEL. CO., 92 N. Y. SUPP. 684.—Under the N. Y. Code Civ. Proc. declaring an action of ejectment to be "an action to recover immediate possession of property," *held,* that an owner may maintain ejectment against one who has taken possession of the space above the surface of the land to the extent of stretching wires across it. Nash and Hiscock, JJ., *dissenting.*

The question involved in the present case is one which has been variously decided. At common law ejectment would not lie for anything whereon entry could not be made. *2 Crabb on Real Property,* 710. It was first held in New York that it would lie for anything attached to the soil of which the sheriff could deliver possession. *Jackson v. May,* 16 Johns. 184. But later in *Sherry v. Frecking,* 4 Duer 452, such action was held maintainable where the injury consisted of overhanging eaves, on the theory that land extends upwards as well as downwards as far as the owner of the subjacent soil may see fit to extend it; *3 Kent's Com.* 487; this case being overruled by *Aiken v. Benedict,* 39 Barb. 400, and *Vrooman v. Jackson,* 62 Hun. 362, holding nuisance to be the proper remedy. Thus the present case reverses the former New York rule and is in accord with the weight of recent authority. *Murphy v. Bolger Bros.,* 60 Vt. 723; *McCourt v. Eckstein* 22 Wis. 153. But that nuisance is the proper remedy, see *Wood, Nuis.* Sec. 105; *Tyler, Eject.* 38.

HUSBAND AND WIFE—AFFECTIONS—ALIENATION.—GREGG V. GREGG, 75 N. E. (IND.).—*Held,* that a divorced wife is entitled to maintain an action against her former mother-in-law for alienation of the affections of her husband by acts maliciously done, which were calculated to produce such result.

There is very little conclusive authority on this proposition in the decisions of the courts of this country or in England. *Duffies v. Duffies,* 8 L. R. A. 420. At common law a wife could not maintain an action against one who wrongfully and maliciously enticed her husband from her. *2 Bl. Com.* p. 142 This disability of the wife was due to the legal fiction that the husband and wife were one person, *i. e.,* the husband. *Walker v. Cronin,* 107 Mass. 555. Some courts go so far as to hold that not even under the modern statutes, allowing married women to sue, can a wife maintain an action against another for enticing away her husband or alienating his affections. *Tiffany, Domestic Relations,* p. 79. By the great weight of authority, however, since the loss of services is not necessary to the action and the right to each other's society and comfort is reciprocal, a wife may maintain such action. *Warren v. Warren,* 50 N. W. 842; *Mehrhoff v. Mehrhoff,* 26 Fed. 13. A case directly in point, *Williams v. Williams,* 50 Col. 51, holds that a wife may maintain an action against a mother-in-law who wrongfully enticed her husband to abandon her.

INSURANCE—BENEFICIAL ASSOCIATIONS—WARRANTIES OF ASSURED.—CALDWELL V. GRAND LODGE UNITED WORKMEN OF CALIFORNIA 82 Pac. 781. (CAL.). —*Held,* that one who joins a beneficial association and agrees to abide by and conform to all rules and regulations *warrants* statements made as to relationship of beneficiary to him.

An application for membership directing payment to "M. H., wife" is not a warranty that M.H. is applicant's wife as applicant is not yet a member and so not bound by the constitution. *A. O. U. W. v. Hutchinson,* 6 Md. 399. Where the beneficiaries are limited to wife and children a false statement that beneficiary is applicant's wife vitiates the policy. *Smith v. Baltimore & O. R. Co.,* 81 Mo. 412. Stipulation that violation of a "condition" shall render the contract void does not constitute a statement a warranty where the statement is referred to as a "representation." *Vivar v. K. of P.,* 52 N. J. Law 455. Nor is failure to disclose the existence of another living wife a fraud upon the association. *Story v. Williamsburgh, etc.,* 95 N. Y. 474. Even if applicant

be honestly mistaken in his statements his certificate will be void if it contains a clause that the answers are "truthful and full." *Johnson v. Chosen Friends,* 10 N. J. Law 346. But that statements affect applicant's rights only in so far as he knows them to be untrue see *Thomas v. A. O. U. W.,* 12 Wash. 500. Where the application requires applicant to state "so far as he knew" facts concerning relatives and to "answer" questions about himself, the latter statements were held to be warranties. *Mayer v. Eq. Life Assn.,* 49 Hun. 336.

LIBEL AND SLANDER—DAMAGES.—BUTLER V. HOBOKEN PRINTING & PUBLISHING CO., 62 Atl. 272. (N. J.).—In an action for libel, although the words are actionable *per se, held,* damages can not be assessed for physical sickness alleged to have been caused by libelous publication.

Numerous suits by the plaintiff have been brought throughout the country against different newspapers for copying and printing a defamatory article. The damages in the above case were assessed at $3,000. In a suit by her for the publication of the same article in the *Scranton Truth, Butler v. Barret and Jordan,* 130 Fed. 944, the amount recovered was but $900. In the latter case, however, no special damage, as ill health was taken into account. A similar action was brought recently in the Federal Court in Hartford. *Butler v. Morning News of Bridgeport,* and an appeal has been taken to the Circuit Court of the district of New York. The damages awarded in this case were $1,550.

Where words charged are actionable *per se,* jury may consider mental suffering as an element of damage, *Warner v. Publishing Co.,* 132 N. Y. 181; *Graybill v. DeYoung,* 141 Cal. 323; but mental suffering alone does not constitute such special damage as will support an action where words are not themselves libelous. *Terwilliger v. Wands,* 17 N. Y. 54; *Lynch v. Knight,* 9 H. L. C. 598. Sickness and incapacity to labor have, as a rule, been deemed too remote consequences of slanderous words; the contrary holding being entitled to little weight. *Leliff v. Jennings,* 61 Tex. 458.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—SUFFICIENCY.—SCHUCHLER V. COOPER, 62 ATL. 261. (DEL.).—*Held,* a statement by a debtor to a creditor that the debtor did not have the money to make payment, but that his farm was big enough to pay the bill, did not amount to an acknowledgment sufficient to revive the debt, as against limitations.

An acknowledgment of a similar nature to the one under consideration was held to be sufficient to revive the debt against the statute of limitations. *Walsh v. Mayar,* 111 U. S. 31. General rule is there must be an express promise of the debtor to pay the debt or else an express acknowledgment from which his promise to pay may be inferred. *Shepherd v. Thompson,* 122 U. S. 231. A mere acknowledgment, though in writing, of the debt, as having once existed, is not sufficient to raise an implication of such new promise. To have this effect there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation. *Shepherd v. Thompson, supra.* Judge Story said the statute was not designed merely to raise a presumption of payment of a just debt, from lapse of time, but was intended as a statute of repose. *Bell v. Morrison,* 1 Pet. 351. From an acknowledgment of a debt under circumstances that indicate a willingness or liability to pay the same, the law will imply a promise to pay. *Green v. Coos Bay Co.,* 23 Fed. 67. The principle to be adduced from these cases is that in addition to the admission of a present subsisting debt, there must be either an express promise, or circumstances from which an implied promise may fairly be presumed. *Moore v. Bank of Columbia,* 6 Pet. 93. Some states have a rule more lenient to the creditor than the above, *Foster v. Smith,* 12 Conn. 449. Other states require, by virtue of a Code, that the new promise must be in writing. *Choce v. Troffard,* 116 Mass. 529; *Burns v. Harvell,* 32 Ga. 602; *Cleveland v. Duryea,* 1 Cin. R. 324.

MASTER AND SERVANT—EMPLOYER'S LIABILITY ACTS—FELLOW SERVANTS.—FAITH V. N. Y. C. & H. R. R. CO., 95 N. Y. SUPP. 774.—*Held,* that a foreman or inspector of boiler repairs, having a gang of men under his direction in a roundhouse, of which another had general supervision, was acting as a

superintendent, within the meaning of the Employer's Liability Act, when in the absence of the superintendent he was directing boiler repairs.

Employer's Liability Acts which have been adopted in several of the states are framed upon the same plan as the English statute, passed in 1880. 43 & 44 Vict. Cap. 42. The purpose and effect of these acts have been to enlarge the employer's common-law liability. At common law a superintendent was a fellow-servant. *Howels v. London Steel Co.*, L. R. 10 Q. B. 63; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198. But in Ohio and Kentucky all employees have been allowed to recover in the absence of statute. *Little Miami v. Stevens*, 20 Ohio 415; *Louisville, etc., R. R. Co. v. Collins*, 20 Duvall (Ky.) 114. However this may be, the one purpose of the statute clearly was to prevent the plaintiff from assuming the risk of a superintendent's negligence. *Malcolm v. Fuller*, 152 Mass. 160. The courts have not clearly defined "a superintendent" and there has been much doubt in the interpretation of the words "sole and principal duty" which are used in all statutes. Obviously each case must stand upon all the circumstances connected with it. It has been decided that mere superintendence is not always enough to bring the case within the Act. *Onid v. O'Leary*, 164 Mass. 387. Nor does the fact that the employee has charge of the ways, works, machinery, or plant, fix his character as a superintendent. *Staffers v. General Steam Nav. Co.* 10 Q. B. D. 356. Negligence must occur not only during the period of superintendence but in the exercise of it. *Fitzgerald v. B. & A. R. R. Co.*, 156 Mass. 293. A servant may at times act as a superintendent. *Cushman v. Chase*, 156 Mass. 342.

MUNICIPAL CORPORATIONS—POLICE POWER—BILLBOARDS.—CITY OF PASSAIC V. PATERSON BILL POSTING CO., 62 ATL. 267 (N. J.).—A city ordinance requiring that signs or billboards shall be constructed not less than ten feet from the street line, *held*, a regulation not necessary for public safety and not justified as an exercise of the police power, *reversing* 71 N. J. L. 75, 58 Atl. 343.

There has been a determined effort by municipal corporations during the past few years to regulate the size and location of advertising billboards but these ordinances have in many cases been declared invalid as an attempt to appropriate private property without compensation. *Bill Posting Sign Co. v. Atlantic City*, 58 Atl. 342 (N. J.). The first American case on the subject of billboards was *Crawford v. Topeka*, 51 Kan. 756, where ordinance prohibiting such signs within a certain distance of sidewalk was held invalid. The same result was reached in *City of Chicago v. Gunning System*, 114 Ill. App. 377, the regulation here applying to size, location, height, and material of signs; so an ordinance forbidding erection of signs visible from a public park was void. *Com. v. Boston Adv. Co.*, 188 Mass. 348; like ordinance in N. Y. City restraining the use of lots adjacent to parks for such purposes was invalidated. *People v. Green*, 83 N. Y. Sup. 460. The most recent decision in this country is *Bryan v. Chester*, 61 Atl. 894 (Pa.), where an ordinance prohibiting the use of fences for advertising and erection of billboards, was clearly held unconstitutional. The courts of New York have, however, taken a more popular, if less legal, view of billboard legislation. An ordinance that no billboard should be erected more than 6 ft. high without permission of the city council was declared valid as reasonable police regulation. *Rochester v. West*, 164 N. Y. 510; like holding in *Gunning System v. City of Buffalo*, 77 N. Y. Supp. 987, for billboards over 7 ft. in height.. The Federal Courts for New York have followed the law of that state in regarding billboards as nuisances; *Whitmier v. Buffalo*, 118 Fed. 773. But the ordinance was held to have no retroactive effect. The California courts also seem to have followed the New York doctrine. *In re Wilshire*, 103 Fed. 620.

MARRIAGE—EVIDENCE—CONSENT.—STATE V. WILSON, 62 ATL. 227 (DEL.).—*Held*, that, although the witness had lived with the accused as his wife without having been married to him, had introduced him as her husband to her family, and had signed a bail bond in his name as his wife, such facts did not prove a marriage so as to render her incompetent as a witness.

Consensus, non concubitus, facit matrimonium is a rule taken from the civil law and recognized as a fundamental principle to-day. *Dalrymple v. Dal-*

rymple, 17 Eng. Rul. Cas. 11. Hence evidence must establish matrimonial consent. 1 *Fras. Husb. and Wife,* 399; *Campbell v. Campbell,* L. R. 1 H. L. Sec. 200. Marriage cannot be proved by cohabitation alone. *Com. v. Stump,* 53 Pa. 132. And acknowledgment to avoid suspicion does not appear to be enough. *Rose v. Clark,* 8 Paige 574. The evidence, however, need not be direct. Upon showing of certain facts presumption will arise which may become unanswerable. *Campbell v. Campbell, supra.* The proof, to raise such a presumption, must be that the parties held themselves out as married and assumed the rights and duties of the relationship. Their reputation must be general and consistent with matrimonial cohabitation and must not have been illicit in its inception unless facts clearly show a subsequent matrimonial consent. *Dysart Peerage Case,* L. R. 6 App. Cas. 514; *Rundle v. Pegram,* 49 Miss. 756; *Wilcox v. Wilcox,* 46 Hun. 40. In criminal actions where proof of marriage would be proof of guilt the presumption will not be entertained or is rebutted by the presumption of innocence. In such cases there must be actual proof of marriage. *Morriss v. Miller,* 4 Burr. 56; *Clayson v. Wardell,* 4 Comst. 242. Where statutes provide a legal ceremony they are construed as merely directory unless there is an express provision that marriages not following the statute shall be void. *Meister v. Moore,* 96 U. S. 76.

NEGLIGENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.—AXELROD V. NEW YORK CITY RY., 95 N. Y. SUPP. 1072—*Held,* that in an action for injuries, plaintiff has the burden of proving freedom from contributory negligence. Patterson, J. *dissenting.*

The decisions upon this point are in direct conflict. The rule has been stated to be that the burden is on the plaintiff to show affirmatively by a preponderance of sufficient evidence not only that the negligence of the defendant contributed to the accident but also that the plaintiff was entirely free from negligence proximately causing the injury. *Thomas, Negligence,* 357; *Chisholm v. State,* 141 N. Y. 246. On the other hand it is said that contributory negligence is purely a matter of defense. *Randall v. Northern Tel. Co.,* 54 Wis. 140; *Robinson v. W. P. R. Co.,* 48 Cal. 409. The weight of authority seems to be against the present case. *McKimble v. B. & M. Railroad,* 139 Mass. 542; *Penn. Canal Co. v. Bently,* 66 Penn. St. 30. The greatest negligence on the part of the defendant will not cure the least negligence contributory to the injury on the part of the plaintiff. *Griffin v. N. Y. Cent. R. Co.,* 40 N. Y. 34. Some states, however, adopt the doctrine of comparative negligence, holding that although the injured person has contributed slightly to his own injury, yet recovery may be had if the defendant was grossly negligent. *Chicago etc. R. v. Johnson,* 116 Ill. 206; *Houston etc. R. Co. v. Gorbett,* 49 Tex. 473.

SLAVERY—RIGHT OF INHERITANCE—JOHNSON V. SHEPHERD, 39 So. 223 (ALA.)—Slaves cohabited and had a child before the war. Upon the death of the mother the father commenced a cohabitation with another slave which continued until after the close of the war, resulting in the birth of another child. *Held,* that though the second child born after the war, was legitimate, he could not inherit from first child who was illegitimate.

It was formerly the law when slavery existed in this country that a slave could not marry, because he could not make a valid contract; *Hall v. United States,* 92 U.S. 27; because the duties of slaves were inconsistent with those of a husband or a wife; *Malinda v. Gardner,* 24 Ala. 719; and because a slave was property. *Howard v. Howard,* 6 Jones (N. C.) 235. But after emancipation the legal relation of man and wife attached upon the theory of a common-law marriage. *Washington v. Washington,* 69 Ala. 281. Hence where slavery was recognized, in the absence of statute, legitimacy of colored offspring was determined by whether birth of child was before or after Sept. 29, 1865. *Malinda v. Gardner, supra.* No such distinction, however, in non-slave state. *Norris v. Williams,* 39 Ohio. St. 554.