RECENT CASES.

ASSAULT AND BATTERY—RETAKING POSSESSION OF PROPERTY—JUSTIFICATION.—STANLEY V. PAYNE, 62 ATL. (VT.). 495.—A defendant, on the expiration of his lease of a farm, obtained the landlord's permission to leave a certain box in the barn. Thereafter defendant visited the farm and told the then tenant that the box was his and that he intended to take it. *Held*, that it was not sufficient to place the tenant in the attitude of a wrongdoer so as to justify the use of force and violence to get possession of the box. Rowell, C. J., *dissenting*.

The right to use force to retake one's personal property from the possession of another has been affirmed in some cases and denied in others without laying down any general rule by which the cases can be harmonized. In a few exceptional cases the party injured is allowed to redress his own wrong, without calling on the aid of the law; 2 Rol. Abr. 543; providing he use no more force than is necessary. *Rex. v. Mitten*, 14 E. C. L. 196. Whether the force used is excessive or not is a question for the jury. *Com. v. Clark*, 2 Met. 23. For example, it has been held a good defense to an action for assault and battery that it was made to recover money of which another had obtained possession with intent to apply it on an execution. *Anderson v. State*, 6 Baxt. 603. As a general rule, however, the owner of a chattel which has come into the peaceable possession of another has no right to retake it by force, whether such possession is lawful or not. *Barnes v. Martin*, 15 Wis. 263; unless he can do so without a breach of the peace. *Stuyvescent v. Wilcox*, 92 Mich. 233. The public peace is a superior consideration to any one man's private property. Therefore the natural right of recaption must never be extended where such exertion must occasion strife and endanger the public peace. 3 Bl. Com. 4.

BOUNDARIES—ESTABLISHMENT BY ACQUIESCENCE—EFFECT.—LAUGHLIN V. FRANCIS, 105 N. W. 360 (IOWA).—*Held*, that a boundary line, established by acquiescence of the owners and recognized as such for more than ten years, is not defeated by a subsequent survey which does not recognize such line.

The authorities are clear and decisive on this point though based on different grounds. They purport to be based on the principles of agreement, acquiescence, practical location, estoppel and statute of limitations. *Tiffany on Real Property*, Vol. I., § 259. In many states continued recognition by adjoining owners of a certain line as the boundary line between their lands is conclusive on both. *Tiffany on Real Property*, Vol. I, p. 581. The court said in *Roberts v. Ivery*, 63 Ga. 622, affirming a decision of a lower court, that "the jury properly recognized the line which the early proprietor endeavored to establish." Tradition being for one party and recent surveys for the other, the jury supported tradition. *Diehl v. Zanger*, 39 Mich. 601; *Bowman v. Dulling*, 39 W. Va. 619; *Dupont v. Starring*, 42 Mich. 492, hold that a long established fence is better evidence of actual boundary, settled by practical location, than any survey made after the monuments of the original survey have disappeared. The reason for these decisions is that it would give too much encouragement to litigation to break up a well established line. If all lines were subject to be corrected by new surveys the confusion of lines and

titles would be incalculable. The general considerations of justice and expediency dictate that the rule followed in these cases is the better one. However, in a few states such recognition of or acquiescence in a line is merely evidence in regard thereto and may be contradicted, *Bohny v. Petty*, 81 Tex. 524; *Whitcomb v. Dutton*, 89 Me. 212: *Hathway v. Evans*, 108 Mass. 267.

CARRIERS—INJURIES TO PASSENGERS BY SERVANTS—DIFFERENT CREWS.—HAYNE V. UNION ST. RY. CO., 76 N. E. 219 (MASS.).—The conductor of one of the defendant's cars threw, in sport, a dead hen at the motorman of the car on which the plaintiff was riding, but missed the motorman and injured the plaintiff. *Held*, that the fact that the conductor was a member of a crew of a car other than the one in which the plaintiff was at the time made no difference as regards the defendant's liability.

Common carriers are under an obligation arising out of the nature of their employment and on grounds of public policy to provide for the safety of their passengers. *Penn. Co. v. Roy*, 102 U. S. 451. So they are liable for the wilful or negligent acts of their employees which result in injury to passengers; *Gillenwater v. Madison & Indianapolis Ry. Co.*, 5 Ind. 339; there being a special duty to protect passengers against the insults and violence of their own servants; *S. Kan. Ry. Co. v. Rice*, 38 Kan. 398; as well as a contract with the passengers to secure them against personal rudeness, abuse and violence. *Spohn v. Mo. Pac. Ry. Co.*, 101 Mo. 407. There seems to be no reason why this doctrine of liability of the company for the acts of its servants should be confined to those on a particular car and so it was held, in *Atlanta St. Ry. Co. v. Bates*, 103 Ga. 333, that there was no reason why common carriers should not be liable for the acts of all their servants and not merely the ones having in charge the particular car on which the injured passenger was at the time of the injury.

CARRIERS—PASSENGERS' EFFECTS (MONEY)—LOSS—LIABILITY.—KNIERIEM V. N. Y. CENT. & H. R. R. CO., 96 N. Y. SUPP. 602.—Plaintiff and wife were passengers on defendant's railroad. Owing to an accident to the road, the plaintiff sustained the loss of $1,800 carried in the hand bag of his wife. *Held*, that to recover, the jury must be satisfied that the money or part of it was necessary for a prudent person to carry, allowing reasonably for accident or illness or sojourning. McLaughlin and Patterson, JJ., *dissenting*.

In a case decided in New York in 1850, it was held that carriers were not liable for money carried by passengers in their trunks, even though the amount was only sufficient for traveling expenses. *Grant v. Newton*, 1 E. D. Smith, 95. Similarly in *Doyle v. Kiser*, 6 Ind. 242, the passenger was allowed to recover value of clothing lost in a bag, but not money. These cases have generally been overruled and it is held that passengers may recover for money lost to the extent of that which is necessary, etc., for the journey. *Johnston v. Stone*, 30 Tenn. 419; *Mo. Pac. Ry. Co. v. York*, 2 Wilson, Civ. Cos. Ct. App. (Tex.) 639; *Merrill v. Grinnell*, 30 N. Y. 594. The last case holds that the amount of money to be recovered is to be governed by the requirements of the entire proposed journey and not for a particular portion thereof. In cases of gross negligence even more may be recovered. *Jordan v. Fall River R. Co.*, 59 Mass. 69. The carrier's liability does not extend to money carried for the purpose of making purchases. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; nor to large sums not expressly put in its charge with notice. *Hutchings v. Western, etc. R. Co.*, 25 Ga. 61; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85.

CARRIERS—TERMINATION OF RELATION—NOTICE TO CONSIGNOR.—ADLER V. WEIR, 96 N. Y. SUPP. 736.—Where an express company transported the goods to the consignee and tendered delivery to him, which the consignee refused to accept, its duty as carrier was performed, and although it failed to notify the consignor of the consignee's refusal to accept the goods, *held* that it was not liable for the subsequent loss of the goods by theft, in the absence of proof of negligence as a bailee.

This case seems to follow the general trend of modern decisions; *Kremer v. Southern Ex. Co.*, 46 Tenn. 356; and the rule is well settled where a railroad company is the common carrier, that no notice is required. *Gregg v. Ill. Cent. Ry. Co.*, 147 Ill. 550; *Merchant's Dispatch Trans. Co. v. Hallock*, 64 Ill. 284. But see *American Sugar Refining Co. v. McGhee*, 21 S. E. 383 (Ga.). This doctrine, however, has been held to have no application to the duties and applications of an express company where the undertaking is to deliver in person; *Baldwin v. Am. Ex. Co.*, 23 Ill. 197; and, it is the duty of such express company to notify the consignor of the goods, and when this is done, the company is relieved of its responsibility as a common carrier, but not before. *Am. Merchant's Union Ex. Co. v. Wolf*, 79 Ill. 430.

CARRIERS—TORTS OF SERVANT—DAMAGES.—SEABOARD AIR LINE RY. V. O'QUIN, 52 S. E. 427 (Ga.).—*Held*, where a common carrier undertakes, through its servants, to exercise its rights to eject from its cars passengers who have been guilty of disorderly conduct, it acts at its peril in determining their identity and the carrier will be liable for damages if one is ejected wrongfully notwithstanding the good faith of the servant.

Directly supporting the decision in the above case are *Higgins v. Watervliet Turnpike & Ry. Co.*, 46 N. Y. 23; *Cooley on Torts*, 631; *Coleman v. N. Y. & etc. R. R.*, 106 Mass. 160; *Cincinnati, &c., Ry. Co. v. Cole*, 29 Ohio, (N. S.) 126. A street railway company will be held liable for conductor's wrongful ejection of a passenger from the car under a mistaken idea that the latter was about to violate the rules of the company. *Denver Tran. Co. v. Reed*, 4 Colo. App. 500. So it is liable though conductor actually is forbidden to act as he did. *Turner v. North Beach & M. R. Co.*, 34 Cal. 594. Such acts of ejection are within the scope of his agency. *Terre Haute & I. R. Co. v. Fitzgerald*, 47 Ind. 791. The reasons for these decisions is well stated in *Passenger R. Co. v. Young*, 21 O. St. 518; *Goff v. Gt. Nor. Ry. Co.*, 30 L. J. Q. B. 148, states that since the masters must act through servants and they put persons of their own selection in positions requiring the exercise of discretionary authority and with the means of doing the injury, they have really caused it to be done and should be held liable. It is their misfortune that they have trusted servants who have ventured to disobey instructions, but it ought not also to be the misfortune of others who had no voice in their selection. Again by relegating the responsibility to the master it will tend to make the latter more careful in his selection of servants, thus safeguarding the interests of the passengers. The great weight of authority is in support of these cases, but some few cases hold to the contrary. So it has been held that the company is not liable when the servant exceeds his authority. *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455; *Ill. Cent. R. Co. v. Downey*, 18 Ill. 259.

COMMON CARRIERS—PASSENGERS.—BUSCH V. INTERBOROUGH RAPID TRANSIT CO., 96 N. Y. SUPP. 747.—*Held*, that one, by purchasing a ticket for transpor-

tation on an elevated railroad, depositing it in a box provided therefor, and going on the platform, becomes a passenger, entitled to treatment as such.

It is generally held, that one who enters a railroad station and purchases a ticket intending to board a passenger train soon to arrive is a passenger; *Atchison, Topeka and Santa Fe Ry. Co. v. Hollaway*, 80 Pac. 31 (Kan.); *Central Ry. and B'king Co. v. Perry*, 58 Ga. 461; and it is also held that the contractual relation between passenger and carrier begins as soon as the passenger comes within the sphere of peril incident to street cars, where a car has been signalled and has stopped to take on passengers. *Holzenkamp v. Cincinnati Traction Co.*, 2 Ohio N. P. (N. S.) 157; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202. But the mere purchase of a ticket does not make one a passenger. The ticket must be bought with the intention of taking passage on a train scheduled to depart within a reasonable time. *Fremont, Elkhorn and Mo. Valley Ry. Co. v. Hagblad*, 101 N. W. 1033 (Neb.); *Vandegrift v. West Jersey and Seashore Ry. Co.*, 60 Atl. 184 (N. J.) In *Lake Street Elevated Ry. Co. v. Burgess*, 200 Ill. 628, it was held that a party upon the platform of an elevated railroad station, with the knowledge of the company that she intended to take a train, was a passenger when approaching to board a train.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—TERRITORIAL INEQUALITY.—PEOPLE EX REL. ARMSTRONG V. WARDEN OF CITY PRISON OF NEW YORK, 76 N. E. 11 (N. Y.).—*Held*, that a statute regulating the keeping of employment agencies in cities of the first and second class is not, because it applies only to cities of the specified classes, in violation of Const. U. S., Amend. 14, guaranteeing the equal protection of the laws.

It has been found hard to define satisfactorily the police power of a state It is held in the case of *Hayes v. Missouri*, 120 U. S. 68, that the Fourteenth Amendment does not prohibit legislation which is limited by the territory within which it is to operate, but merely that all subjected to such legislation shall be treated alike, and in the much-quoted case of *Budd v. New York*, 143 U. S. 517, it is said that a statute operating equally on all elevator owners in places having 130,000 population or more, though not applying on owners in places of less than 130,000 population, does not deprive the owners of the equal protection of the law within the meaning of the Fourteenth Amendment. Where part of a state is thickly settled and another part has but few inhabitants it may be desirable to have different systems of judicature for the two portions and the Fourteenth Amendment could never have been intended to prevent this. *Missouri v. Lewis*, 101 U. S. 23. Mr. Justice Field, concurring in *Butchers' Union Company v. Crescent City Company*, 111 U. S 746, says that the common business and callings of life, the ordinary trades and pursuits which are innocuous in themselves, and have been followed in all communities from time immemorial, must be free in this country to all alike upon the same conditions and without any legislative restrictions.

CRIMINAL LAW—OBJECTIONS TO INDICTMENT—WAIVER.—KLAWANSKI ET AL. V. PEOPLE, 75 N. E. 1028 (ILL. SUP.).—*Held*, that advantage can be taken upon writ of error of an indictment which charges no criminal offense notwithstanding a plea of guilty to it. Wilkin, Boggs and Hand, JJ., *dissent.*

In the case of *Fletcher et al. v. The State*, 7 Eng. 169 (Ark.) it was held that by a plea of guilty the defendant only confesses himself guilty in manner and form as charged in the indictment, and if the indictment charges no

offense against the law none is confessed. Fatal defects in indictments may be raised for the first time on appeal. *Pattee v. State*, 109 Ind. 545; *Cancerni v. People*, 18 N. Y. 128. But where the defect is merely formal and curable by amendment it cannot be raised for the first time on appeal. *People v. Kelly*, 99 Mich. 82. So an objection that an indictment charging two persons with a misdemeanor in running a horse race in the street of a town is insufficient, because it does not allege that defendants ran together, is too late, if taken for the first time on appeal. *King v. State*, 3 Tex. App. 7. But failure to demur to an indictment for burglary which charges that the defendants entered, etc., with intent to commit a felony, without stating what particular felony, does not waive the objection. *People v. Nelson*, 58 Cal. 104. And (as in case at hand) where defendant pleaded guilty and was convicted without moving to quash, or in arrest, or reserving any exception, it was held in *Henderson v. State*, 60 Ind. 296, that the indictment might be questioned in the first instance in the Appellate Court on assignment of error, and several courts hold that the sufficiency of an indictment may be questioned for the first time in the Supreme Court on appeal. *O'Brien v. State*, 63 Ind. 242; *Hays v. State*, 77 Ind. 450; *State v. Caldwell*, 112 N. C. 854.

Criminal Law—Right of Accused to Confront Witnesses—Constitutional Provision.—Cremeans v. Commonwealth, 52 S. E. 362 (Va.).—*Held*, that it is not error to force the accused into trial in the absence of his witnesses, when it appears to the court that the motive is a mere pretext for delay. Caldwall, J., *dissenting*.

The tendency has been to support this proposition. *Hooker v. Rogers*, 6 Cowen 577; *King v. Pearce*, 40 Mo. 223; *The King v. D'Eon*, 1 Bl. Rep. 510. The rule is the same in criminal cases as in civil cases. *People v. Vermilyea*, 7 Cowen 383; *The King v. D'Eon, supra*. The motion must show due diligence to procure the testimony, and that there is a reasonable probability that it can be obtained; *Robinson v. Glass*, 94 Ind. 211; and that it can be procured in a reasonable time. *Brown v. Moran*, 65 How. Pr. 349. The applicant must know the witnesses' whereabouts, *Carberry and Case v. Warrell*, 68 Miss. 573. The Massachusetts' courts seem to hold that the witness must be within the jurisdiction of the court. *Com. v. Millard*, 1 Mass. T. R. 6.

Dead Bodies—Mutilation—Action by Surviving Husband.—Jackson v. Savage et al., 96 N. Y. Supp. 366.—*Held*, that a husband has a right of action for the dissection of the body of his deceased wife without his permission or without the permission of his wife given during her lifetime.

The question as to whether a husband or wife has a right of action for the mutilation of the remains of the deceased has been much discussed. It resolves itself into a question of property in a dead body. There was at common law no such right of property. Lord Coke is reported as saying: "*Cadaver nullius ni bonis.*" Blackstone says,: "Though the heir has a property in the monument and escutcheons of his ancestor, he has none in his dead body or ashes." 2 Bl. Com. 249. Wharton says: "*Corpus humanum non recepit estimationem.*" In support of this view, *Griffith v. Chorlotte C. & A. R. Co.*, 23 S. C. 25, held that an administrator of a deceased person had no right of action for the mutilation of the body of his intestate. However, to-day the great weight of authority is to the effect that there is such property, *quasi*-property, or interest in the dead body of a human being as to sustain a civil action for its wilful mutilation. *Larson v. Chase*, 47 Minn. 307, held that a widow has a right of action for the unlawful mutilation of the remains

of her dead husband. This ruling seems to be more in consonance with our enlightened and humane views.

DEED—DELIVERY—RIGHT OF RECALL.—NOBLE V. TIPTIN ET AL., 76 N. E. 151 (ILL.).—*Held*, that where a grantor encloses a deed in an envelope and gives it to a custodian to be delivered after grantor's death unless recalled by him, there is no delivery of the deed, and it never becomes operative, although delivered by the custodian after the grantor's death.

In general, a deed delivered by the grantor to a third person with directions to have it handed over to the grantee immediately after his death is valid; *Latham v. Udell*, 38 Mich. 238; even though given to wife of grantor, and grantor expressed dissatisfaction with terms of same two days before his death. *Squires v. Summers*, 85 Ind. 252. But, if grantor does not part with control by act, word, or both, the subsequent delivery after his death is not valid. It was held in *Morse v. Slason*, 13 Vt. 296, that where a deed is delivered to one in trust for the grantee to take effect at the grantor's death unless he shall otherwise direct during his lifetime, and he dies without giving any further directions, the deed, at the death of the grantor, takes effect as his deed from the first delivery, it being said that a deed of this character was in the nature of a testamentary disposition of real estate and was revocable without any express reservation of that power. *Belden v. Carter*, 4 Am. Dec. 185. But the weight of authority is overwhelmingly to the effect that the grantor must loose control over the deed.

DIVORCE—COUNSEL FEES—ALLOWANCE TO WIFE.—DEAN V. DEAN, 96 N. Y. SUPP. 472. Plaintiff's wife had left him and having obtained a divorce valid in Ohio but void in New York, she married in Ohio. Under oath she denies charges of adultery and asks for counsel fees. *Held*, that the above facts are no bar to her right to counsel fees.

It is a well established rule that the court will make allowance to the wife for the prosecution of a divorce suit, whether the bill be filed by or against her. *Amos v. Amos*, 4 N. J. Eq. 171; *Ex parte King*, 27 Ala. 387; unless there is an undenied charge of adultery against her. *Bissell v. Bissell*. 3 How. Prac. 242. Emphasis is laid on the fact that the wife must not be wholly in the wrong. *Strong v. Strong*, 1 Abb. Prac. N. S. (N. Y.) 358; *Miller v. Miller*, 43 How. Prac. 125. So the case in hand presents an apparent contradiction to the principle in the case of *Munson v. Munson*, 60 Hun. (N. Y.) 189, where it was laid down upon good authority that a marriage in a foreign state where a valid divorce had been obtained, was ground for divorce on charge of adultery if in original domicile the divorce was void. In *Blake v. Blake*, 80 Ill. 523, it is shown that the allowance is largely within the discretion of the court. But if the wife cannot easily defray expenses the allowance must be made. *Douglas v. Douglas*, 13 Abb. Prac. (N. S.) 291. So too, the pecuniary condition was made a test in *Miller v. Miller*, 1 Wkly. N. Cas. 415.

EVIDENCE—OWNERSHIP OF PROPERTY—CONCLUSIONS.—HAWLEY V. BOND, 105 N. W. 464 (S. D.).—In an action to recover property levied on, alleged to belong to plaintiff and not to the judgment debtor, plaintiff was asked who was the owner at the time of the levy, over an objection that the question called for the witnesses' opinion, and not for a fact. *Held*, that the plaintiff was entitled to testify that the property was hers.

Ownership of personal property, as a rule, can be proved as a fact; *Pickler v. Reese*, 171 N. Y. 577; *Rasco v. Jefferson*, 38 So. 246 (Ala.); *Steiner v. Tranum*, 98 Ala. 315; and, if there is a real dispute as to the net effect of these facts, these may be brought out in detail on cross-examination; *Wigmore on Evidence*, sec. 1960; but there is authority for saying that when the question of transfer is the direct issue in the case, then the best evidence must be produced. *Simpson v. Smith*, 27 Kans. 565; *Street v. Nelson*, 67 Ala. 504. Still other authorities hold that the question of ownership is the opinion of a witness as to a mere conclusion of law and hence is inadmissable. *Dunlap v. Hearn*, 37 Miss. 471; *Richmond v. Brewster*, 2 N. Y. Supp. 400; *Babe v. Baker*, 44 Ill. App. 578.

LIBEL.—NICHOLS V. DAILY REPORTER CO. 83 PAC. 573. (Utah).

Defendant printed and distributed cards on one side of which were the words "Vote for honest Jake Bosch for delegate," and on the other side "Explanatory—Mr. C. A. Nichols owes the Daily Reporter Co. a balance of $34.25 for printing done in 1894. Draw your own conclusions and vote for Mr. Nichols if you think he is unable to pay." Plaintiff was candidate for the office of delegate in a typographical union. *Held*, not libelous *per se*. Bartch, C. J. *dissents*. It would be otherwise if plaintiff were engaged in an occupation where credit was necessary.

LICENCES—MERCHANTS—PERSONS INCLUDED.—STATE EX REL. TOWN OF SIGOURNEY V. NELSON, 105 N. W. 327. (IOWA).—Code Sec. 700 gives to cities and towns power to define by ordinance who shall be considered transient merchants. *Held*, that this can be construed as a grant of power to declare one engaged simply in soliciting orders or making delivery of goods on behalf of another as a transient merchant, when, by universal acceptance of the business world he is not such.

In the case of *Seaton Mays v. The City of Cincinnati*, 1 Ohio St. 272, it was held that it is not part of the franchises of municipal corporations to change the meaning of English words; that where, under charter the council was prohibited from assessing charge on persons bringing provisions to the markets in wagons, etc., but allowing them to prevent huckstering and forestalling, an ordinance defining hucksters as "any person, not a farmer or butcher, who shall sell, etc., any commodity not of his own produce and manufacture" and requiring such person to take out licence, is void. The city council has no power under the city charter, to enact by ordinance, that soliciting orders for future delivery of goods shall be deemed and taken to be peddling, within the meaning of the code, such soliciting not being "peddling" within the proper meaning of the word. *City of Davenport v. Rice*, 75 Ia. 74. The leading idea of a hawker or peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them and who actually does sell them to purchasers, in contradistinction to a trader who has goods for sale, and sells them, in a fixed place of business. *Com. v. Ober*, 12 Cush. 495. A peddler fully embraces persons engaged in going through the city from house to house and selling milk to different persons. *City of Chicago v. Barree*, 100 Ill. 61. Taking orders for goods to be manufactured is not peddling. *Town of Spencer v. Whiting*, 68 Iowa 678. An ordinance requiring transient merchants to pay a licence is discriminating in favor of resident merchant, and in conflict with Art. I. Sec. 8 of the Constitution of the United States and void. *The Town of Pacific Junction v. Dyer*, 64 Iowa 38; *The City of Marshalltown v. Blum*, 58 Iowa 184.

MARRIAGE—COMMON-LAW MARRIAGE.—HEYMANN v. HEYMANN, 75 N. E. 1079 (ILL. SUP.).—*Held*, that it is sufficient to constitute a common law marriage if what is done and said evidences an intention by the parties to assume the marriage status, and the parties thereupon enter into the relation of husband and wife.

To make a valid contract of marriage it is essential that "the parties (1) were at the time of making it, willing to contract, (2) able to contract, and (3) mutually did contract in the proper forms and solemnities required by law." 1 Bl. Com. 439. By common law innumerable cases might be cited to show that no celebration is necessary. *Dumarsesly v. Fishly*, 3 A. K. Marsh (Ky.) 368. Nor by civil law. *Hallet v. Collins*, 10 How. (U. S.) 174. But in England, Mass., Md., and N. C., it has been held that celebration is necessary. *The Queen v. Millis*, 10 Cl. & F. 534; *Com. v. Munson*, 127 Mass. 459; *Denison v. Denison*, 35 Md. 361; *State v. Samuel*, 2 Dev. & B. (N. C.) 177; while the Supreme Court of the United States and most other states have held otherwise. *Meister v. Moore*, 96 U. S. 76. Even where statutory provisions exist regulating the form and celebration of marriage, it is commonly held that a marriage valid at common law, even though not solemnized in conformity with the requirements of statutes, will be held valid, unless statute positively declares it void. *Hargraves v. Thompson*, 31 Miss. 211; *Courtright v. Courtright*, (Com. Pl.) 11 Ohio Dec. 412. Where parties agree to take each other as husband and wife and do from then on live professedly in that relation, this constitutes a valid marriage. *Newton v. Southworth*, 7 N. Y. St. Rep. 130; *Overseers v. Overseers*, 2 Vt. 151. But some public recognition of it, such as living together as man and wife, is essential as evidence of its existenee. *State v. Baldwin*, 112 U. S. 490. Sexual intercourse after agreement to marry is not of itself sufficient to consummate marriage. *Sharon v. Sharon*, 72 Cal. 633.

MUNICIPAL CORPORATIONS—TAXATION—SPECIAL ASSESSMENT NOT TAX.—ARNOLD ET AL. V. MAYOR, ETC., OF KNOXVILLE. 90 S. W. 469. (TENN.).—*Held*, assessments for benefits of improvement are not within a constitutional provision as to uniform taxation, such assessment not being regarded a tax. Nail and McAlister, JJ., *dissent* on the ground that, although authority in other states holds with the majority in this decision, nevertheless it is *stare decisis* to hold, in Tennessee, that a special assessment is a tax within the constitutional provision.

TRADE MARKS AND TRADE NAMES—COMBINATION OF PERSONAL AND GEOGRAPHICAL NAMES.—W. R. LYNN SHOE CO. V. AUBURN-LYNN SHOE CO., 62 ATL. 499 (ME.).—In the plaintiff's trademark geographical and personal names were both combined in an original device bearing the words, "Auburn-Lynn Shoes, Auburn, Maine." *Held*, that this arbitrary composite name of the plaintiff's product, with the location of the manufactory expressly added, undoubtedly constituted an impersonal trademark.

The unusual combination of geographical and personal names makes this case noteworthy and unique. As a general rule trade marks cannot consist of geographical names; *Evans v. Von Laer*, 32 Fed. 153; because their nature is such that they cannot point to the personal origin or ownership of the articles of trade to which they may be applied. *Castner v. Coffman*, 87 Fed. 457. But there is an exception where the adoption by the defendant is not so much to indicate the place of manufacture as to intrench upon the previous use and

popularity of another's trademark. *Lea v. Wolly*, 15 Abb. Practice N. S. (N. Y.) 5. And further where the geographical name, as applied to a certain article of commerce, has acquired a secondary meaning; *Seixo v. Provezende.* L. R. 1 Ch. 192; as where an injunction was issued against the defendant, restraining them from the use of the word Aberon as applied to cements *Newman v. Alvord*, 51 N. Y. 189, or for the use of personal names as trademarks. No man has the right to represent his goods as those of another of the same name, *Burgess v. Burgess*, 3 D. M. and G. 896; for while one is entitled to sell his own product under his own name, yet in doing so he must be careful not to do anything to injure another having the same name. *Walter Baker & Co., Ltd. v. Baker*, 77 Fed. 181. And if the plaintiff has first acquired a reputation for the particular kind of goods, the defendant may be enjoined from selling like goods, except in connection with a clear statement indicating that they are not the goods of the plaintiff. *Allegretti Chocolate Cream Co. v. Kellar*, 85 Fed. 643.

TRADE NAMES—ACQUISITION OF PROPERTY THEREIN—PROTECTION FROM INTERFERENCE.—COHEN V. NAGLE ET AL., 76 N. E. 276.—*Held*, that where a manufacturer of an article has acquired a right of property in a name applied to the article of manufacture, it is fraud on him for another to use the word in selling a similar article in such a way as to mislead the public.

In an early case it was held that while every trader has some particular device, there is no reason for granting an injunction to restrain one trader from using the same mark with another. *Blanchard v. Hill*, 2 Atk. 484. Beginning in 1783 with the case of *Singleton v. Bolton*, 3 Dong. 393 and in 1803, *Hogg v. Kirby*, 8 Ves. 215, there has been established the uniform fundamental principle of the right of protection to a trader in the use of his trade device. The principle of the court is two-fold. The public have the right to know goods of a manufacturer by his mark on them and he has a right to all benefits resulting from this knowledge. *Congress Spring Co. v. Rock S. C.*, 45 N. Y., 291. A name or mark may be valid as such and subject to exclusive use, even though since adoption it has become the common appellative of the article to which it is applied. *Celluloid Mfg. Co. v. Reid*, 47 Fed. 712. One may not use his own name in a manner intended to defraud the public. *Brown Chem. Co. v. Meyer*, 139 U. S. 540. In *El Models Cigar Mfg. Co. v. Gato*, 25 Fla. 886, the defendant in error used his own name E. H. Gato as a mark for his cigars, which the plaintiffs in error marked their cigars with the name of a junior member of the firm G. H. Gates. This was done to take advantage of former's reputation and was fraud.

TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY — CREDIBILITY OF WITNESSES.—CHICAGO UNION TRACTION CO. V. O'BRIEN, 76 N. E. 341. (ILL.).—*Held*, that there is no presumption of law that an unimpeached witness has testified truly, and an instruction to that effect is erroneous, as infringing on the province of the jury.

It is not an error of law for the court, in its charge, in commenting upon the testimony of a witness, to express an opinion as to his honesty. *Hoffman v. N. Y. Cent. & Hud. Riv. R. R. Co.*, 87 N. Y. 25. Moreover, the court may instruct the jury as to the rules of evidence. *Lampe v. Kennedy*, 60 Wis. 110. But the credibility of witnesses and the effect of the testimony given are matters coming within the exclusive province of the jury. *Holloway v. Com.*, 74 Ky. (11 Bush) 344. And so it is error for the court. in its

instructions to assume the truth of any fact in controversy. *Finch v. Bergins*, 89 Ind. 360. And an instruction by the judge to the jury that they are bound to believe a witness unless he has been impeached is erroneous. *St. v. Smallwood*, 75 N. C. 104. The jury have the power to refuse their credit. *The Charleston Ins. & Trust Co. v. Carver*, 2 Gill (Md.) 427. They are the exclusive judges of the credibility of witnesses. *U. S. v. Hughes*, 34 Fed. Rep. 732. And further, they are under no legal obligation to believe it if, from all the facts proved in the case, they think the testimony not reliable. *Creed v. People*, 81 Ill. 569.