RECENT CASES

ASSAULT AND BATTERY—PROVOCATION—MITIGATION.—BAUMGARTUER V. HODGDON, 116 N. W. 1030 (MINN.).—In an apparently friendly discussion as to the merits of a certain horse, carried on by the parties to this action and others,the plaintiff, in a good-natured way, remarked either that the defendant had "a thing of a horse," or that the horse was 'the damnedest looking horse" plaintiff ever saw. Whereupon, defendant flew into a passion and violently assaulted plaintiff, inflicting serious injuries to his person. *Held,* that the Trial Court in charging the jury that neither remark could be considered in mitigation of damages, committed no error.

Mere words spoken, however much they may be calculated to excite and irritate, do not justify an assault and battery. *Richardson v. Zuntz,* 26 La. Ann. 313. But they may constitute a ground for the reduction of damages. *Donnelly v. Harris et al.,* 41 Ill. 126; *Byers v. Horner,* 47 Md. 23. To be within this class, the words relied on must be such as to induce a presumption that the violence done was committed under immediate influence of the feelings and passions excited by them. *Chandler v. Newton,* 13 Ky. Law. Rep. 927; *Butt v. Gould,* 34 Ind. 552. In addition to the foregoing, it is essential that the words relied on must be such as to heat the blood or arouse the passions of a reasonable man. *Daniel v. Giles,* 108 Tenn. 242.

BIGAMY—INTENT—PEOPLE V. SPOOR, 85 N. E. 207 (ILL.).—*Held,* that in a prosecution for bigamy, a *bona fide* belief in the death or divorce of the first wife is no defense, as the criminal intent is inferred from the criminality of the act itself. Vickers, J., *dissenting.*

It is laid down in *Reynolds v. U. S.,* 98 U. S. 145, that ignorance of fact but not of law, may tend to show lack of criminal intent. That ignorance of law is no defence is well settled. *State v. Robins,* 28 N. C. 23; *In re Ven Pelt,* 1 City Hall Rec. 137. But as regards ignorance of fact as a defence to a prosecution for bigamy, the cases are in irreconcilable conflict. In England, it is well settled that on the principle of *actus non facit reum nisi meus sit rea,* an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent one, is a good defense. *Hearne v. Garton,* 2 E. & E. 66. Some states in this country have adopted a like view. *Squire v. State,* 46 Ind. 459; *State v. Stank,* 9 Ohio Dec. 8. But in Massachusetts the English doctrine is repudiated, it being declared that the crime consists of doing the unlawful act, and criminal intent is not essential. *Commonwealth v. Hayden,* 163 Mass. 453. To the same effect are *Dotson v. State,* 62 Ala. 141; *State v. Hughes,* 58 Ia. 165.

BAILMENT—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.—JOHNSON V. PERKINS, 62 S. E. 152 (GA.).—*Held,* that in all cases of bailment, after proof of loss, the burden of proof is on the bailee to show diligence.

The general rule in actions of negligence is that the burden is on the

plaintiff, not only to show an injury done him by the defendant, but also to show that it was due to the defendant's negligence. *Turtellot v. Rosebrook,* 11 Met. 460. But the amount of evidence necessary to make out a *prima facie* case differs according to the circumstances. *Cooley on Torts,* Vol. 2, p. 1414. In actions against bailees based on negligence, it is held by some authorities that the mere proof of loss or injury does not alone make out a *prima facie* case, but that the plaintiff must prove that loss was due to the neglect of the bailee. *Story on Bailments,* § 410; *Cross v. Brown,* 41 N. H. 283; *Brown v. Johnson,* 29 Tex. 43. The weight of authority, however, holds that in such cases a failure to fulfill a duty by a bailee or an injury done in fulfilling it makes out a *prima facie* case and shifts the burden of proceeding to the defendant. *Boise v. Hartford and N. H. R. Co.,* 37 Conn. 272; *Stewart v. Stone,* 127 N. Y. 500. Following this rule, the Georgia Code, § 2896, provides that "in all cases of bailments after proof of loss, the burden of proof is on the bailee to show proper diligence." *Cent. R. R. Co. v. Anderson,* 58 Ga. 393.

CARRIERS—LIABILITY OF CARRIER—DUTY OF SHIPPER TO INSPECT CAR.—CLEVELAND, C., C. & ST. L. RY. CO. v. LOUISVILLE TIN & STOVE CO., 111 S. W. 358 (KY.).—*Held,* that it is not the duty of a shipper to inspect a car furnished by a carrier, or to exercise care to know whether the car is in condition; but he may assume that the carrier would not have directed the placing of the goods in the car unless it was suitable.

The duty to inspect vehicles of conveyance lies upon the carrier. *Empire Transp. Co. v. Wamsutta Oil Co.,* 63 Pa. St. 14, and it is an insurer as against such perils as arise from the use of defective or inadequate instruments of carriage. *Terre Haute & I. R. Co. v. Crews,* 53 Ill. App. 50; *Costigan v. Michael Transp. Co.* 33 Mo. App. 269. The weight of authority is that it may be relieved of this responsibility as insurer when the shipper retains an inspector to select and approve the cars to be used. *Carr v. Schafer,* 5 Colo. 48; and when there is a distinct contract relieving from such liability. *Gage v. Tirrell,* 91 Mass. 299; *South & N. A. R. Co. v. Wood,* 66 Ala. 167. But it has been held that a mere provision in a contract of carriage accepting car is not sufficient to waive defect. *Wallingford v. Columbia & G. R. Co.,* 26 S. C. 258. And, likewise, the mere knowledge by the shipper of unsuitable condition of car is insufficient to relieve carrier. *Pratt v. Ogdensburg & L. C. R. Co.,* 102 Mass. 557; *Schwinger v. Raymond,* 83 N. Y. 192.

CARRIERS—VALIDITY OF EXPRESS RECEIPTS—EXEMPTIONS FROM LIABILITY.—GREEWALD V. WEIR, 111 N. Y. SUPP. 235—The Interstate Commerce Act of Feb. 4, 1887, provides that any carrier shall be liable for the loss of property, and that no contract shall exempt such carrier from the liability thereby imposed. In an action brought under this act, *held,* that the clause in an express receipt, attempting to limit the carrier's liability to $50.00, or to exempt it from all liability in excess of that sum was void. Dayton, J., *dissenting.*

A carrier and the shipper may agree upon the value of the property to be shipped and limit the liability of the carrier accordingly. *Coupland v. Housatonic R. R. Co.,* 61 Conn. 531; *Groves v. Lake Shore & Michigan*

So. R. R. Co., 137 Mass. 33; or if the contract fixed a maximum value of the property, and it was agreed that in case of loss the recovery should not exceed that value, this is equally binding. *Alair v. Northern Pac. R. R. Co.*, 53 Minn. 160; *Hart v. Penn. R. R. Co.*, 112 U. S. 331. But the decisions are practically uniform in holding that a carrier cannot by special contract limit its liability to an arbitrary sum, fixed without reference to the value of the property. *Ullman v. Chicago & Northwestern R. R. Co.*, 112 Wis. 150; *Louisville & Nashville R. R. Co. v. Owen*, 93 Ky. 201.

CONTEMPT—DISOBEDIENCE TO DECREE—ORAL ADVICE OF JUDGE.—LEWIS V. BRENNAN, JUDGE, 117 N. W. 279 (IOWA).—Where a decree requires a building to be closed, as a nuisance, as against its use for all purposes, *held*, that the owner, in breaking into and using building, is guilty of contempt, though the judge orally advised the sheriff to close it temporarily only.

Judges merely as judges cannot exercise judicial power. *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456; *Whitlock v. Wade*, 117 Iowa 153. The laws fix the time, place, and manner in which judges shall sit as a court. *Blair v. Reading*, 99 Ill. 600. It is the duty of a judge to command, not to advise, and his orders must be reduced to writing. *Savings Bank v. Ball-bearing Chain Co.*, 118 Iowa, 688; *In re Thomas's Estate*, 26 Col. Supp. 110. A reliance upon his oral advice and verbal directions will not excuse a contempt for disobeying his decrees. *Capet v. Parker*, 3 Sandf. 662; *Tremain v. Richardson*, 68 N. Y. 67.

DAMAGES AND MUTILATION OF DEAD BODY—MENTAL SUFFERING.—KYLES V. SOUTHERN R. CO., 61 S. E. 278 (N. C.).—*Held*, that where the rights of one legally entitled to the custody of a dead body are violated by mutilation of body or otherwise, the party injured may in an action for damages, recover for the mental suffering caused by the injury.

A widow's primary right to bury the body of her deceased husband is generally recognized. *Hackett v. Hackett*, 18 R. I. 155; *Weld v. Walker*, 130 Mass. 422. And a wanton or negligent mutilation of the body is actionable. *Doxtator v. Chicago & W. Mich. R. Co.*, 120 Mich. 596; *Burney v. Children's Hospital*, 169 Mass. 57. Some courts hold that the violation of this right naturally contemplates injury to the feelings and allow compensation to be recovered for the mental suffering. *Larson v. Chase*, 47 Minn. 307; *Rcinham v. Wright*, 125 Ind. 536. This rule seems to be followed only in those states which hold that damages for injury to the feelings alone is sufficient ground for recovery. *Wells Fargo Co.'s Express v. Fuller*, 13 Tex. Civ. App. 610; *Chapman v. Western Union*, 90 Ky. 265. The rule is repudiated in other states. *Long v. Chicago, R. I. T. Co.*, 15 Okl. 512; *Pa. R. R. Co. v. Butler*, 57 Pa. St. 335.

EMINENT DOMAIN—RIGHTS OF PROPERTY OWNERS—WHEN ACQUIRED.—SIMPSON V. BERKOWITZ, 110 N. Y. SUPP. 485. Where public officers passed a resolution condemning lands, *held*, that property owners acquire no vested rights in such proceedings until the report of the Commissioners of Appraisal is finally confirmed.

While some states hold that the confirmation of the commissioners'

report in condemnation proceedings completes the taking, and that mutual rights are thus vested,—*Clough v. Unity,* 18 N. H. 75; *Fischer v Catiwissa R. Co.,* 175 Pa. St. 554.—by far the greater number of authorities hold that the taking is not complete, and the mutual rights are not vested until payment or the security thereof has been given, or until there has been an entrance into possession. *Baltimore v. Musgrave,* 48 Ind. 272; *Carson v. Hartford,* 48 Conn. 68; *Chicago v. Barbian,* 80 Ill. 482. Nor does a judgment assessing the amount of damages to be paid, bind the party seeking the land to take the same and pay the damages assessed. *Gear v. Dubuque & S. C. R. Co.,* 120 Iowa 523.

FIXTURES—LANDLORD AND TENANT.—OGDEN V. GARRISON, 117 N. W. 714 (NEB.).—*Held,* that the execution of a new lease in which the tenant did not expressly reserve fixtures erected by him under a preceding lease, does not deprive him of the right to remove them.

The above decision is not in harmony with the weight of authority holding that, if a tenant enters into a new lease, making no mention of a former lease and with no reservation for removal of fixtures, placed under the former lease, his right to remove is thereby precluded. *Spencer v. Commercial Co.,* 30 Wash. 520; *Williams v. Lane,* 62 Mo. App. 66. And this general rule is applied even when the possession is continuous. *Loughran v. Ross,* 45 N. Y. 792; *Watriss v. National Bank of Cambridge,* 124 Mass. 571. But in accord with the case at hand, some courts have ruled, that if a tenant, having fixtures on the premises, secures a new lease in the nature of an extension of the old lease, and the new lease reserves no right to remove fixtures, the landlord had no right to restrain removal at or before expiration of second lease. *Radey v. McCurdy,* 209 Pa. St. 306. In another instance it was held, that if a tenant accepts a new lease from a subsequent purchaser while in possession which failed to reserve fixtures, his right of removal was not lost. *Daly v. Simonson,* 126 Ia. 717.

HUSBAND AND WIFE—TORTS BY HUSBAND AGAINST WIFE—LIABILITY.—SYKES V. SPEER, ET AL, 112 S. W. 422 (TEX.).—*Held,* that a wife cannot sue her husband for torts committed by him against her person or reputation while the marriage relation exists.

At common law, a wife could not sue her husband for any injury to her person, committed during their coverture. *Freethy v. Freethy,* 42 Barb. 641. Nor would an action against him lie for an injury to her reputation. *Mink v. Mink,* 16 Pa. Co. Ct. 189. And the right to sue is not conferred upon wife under modern statutes. *Longendyke v. Longendyke,* 44 Barb. 367. Public policy forbids that a wife should have a right to sue husband, and therefore, unless expressly granted in direct terms by statute, the common law rule is in force. *Main v. Main,* 46 Ill. App. 106.

NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE.—CAMINEZ V. BROOKLYN Q. C. & S. R. CO., 111 N. Y. SUPP. 384. *Held,* that where plaintiff was riding with the driver of a furniture truck at the time the plaintiff was injured in a collision between the truck and one of the defendant's street cars, plaintiff was not chargeable with the negligence of the driver, but was bound to show that he exercised the care the situation demanded.

Some authorities hold that if the plaintiff is under the direction of a third party whose negligence combines with that of the defendant in causing the injury, he cannot recover, for the negligence of the third party will be imputed to him. *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479; *Paynee v. C., R. I. & P. R. Co.*, 39 Iowa 523. This doctrine is, however, denied by the weight of authority. *La Bernina*, L. R. 12 P. D. 58; *Randolph v. O'Riordon*, 155 Mass. 331. And it is laid down by the courts that follow this rule, that the plaintiff must have exercised ordinary care under the circumstances of the case to have prevented the injury. *G. H. & S. A. R. Co. v. Kutac*, 72 Tex. 643; *Dean v. Penn. R. Co.*, 129 Pa. 514. But where the plaintiff stands in such a position to third persons that he can direct or control their movements, the negligence of such third persons is to be imputed to him. *Knightstown v. Musgrove*, 116 Ind. 121.

NEGLIGENCE—LICENSEE—USE OF FOOTPATHS.—PHIPPS V. OREGON R. & N. Co., 161 FED. 376 (WASH.).—*Held*, that one who, without objecting, knowingly, and for a long time, permits the public to use his premises, for the purpose of traveling across the same upon a well-established path, cannot, without giving notice, render the same unsafe to the injury of those who have used the highway and have no notice of the changed condition without responding in damages for the resulting injury.

A licensee may be one, who, either alone or in common with the public, has for a long time used a footpath over lands of another with his knowledge and without objection. *Norfolk & W. R. R. Co. v. DeBoard's Admr.*, 91 Va. 700. Many states hold that one is not liable for negligence, not willful, to a licensee using his premises. *Redigan v. Boston & Me. R. R.*, 155 Mass. 44; *Lingenfelter v. Balt. & O. S. R. R.*, 154 Ind. 49. But the weight of authority modifies this rule and holds that there is a duty attached to the owner of premises to use ordinary care to protect licensees from unusual dangers in the same created by his own positive acts. *Rooney v. Woolworth*, 68 Conn. 167; *Payne v. N. Y., N. H. & H. R. R. Co.*, 104 N. Y.. 362. Where licensees use railroad premises for a footpath, the company is not restricted in the ordinary operation of its road. *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243. But where a path has been used daily by numbers of people as licensees, the owner is bound to anticipate their presence with reasonable regard for their safety. *Pomponio v. N. Y., N. H. & H. R. R. Co.*, 66 Conn. 528.

TELEGRAPHS—CIPHER MESSAGES.—WESTERN UNION TELEGRAPH CO. V. MERRITT, 46 So. 1024 (FLA.).—*Held*, where the message is delivered for transmission in cipher and is unintelligible except to the sender and addressee, and no explanation is made to the operator as to its import and importance, the telegraph company is liable for transmitting it incorrectly in nominal damages only, or at most the sum paid for its transmission and delivery.

It is a general rule that damages resulting from the breach of a contract which were not contemplated by defendant, but arise from special circumstances unknown to him, cannot be compensated. Hence, in many jurisdictions, where a message does not show upon its face that it relates to transactions of importance and that pecuniary loss will probably result

unless it is promptly and correctly transmitted, as where it is written in cipher, recovery will be limited to nominal damages, or at most the price paid for sending the message. *Alheles v. Western Union,* 37 Mo. App. 554; *Cannon v. Western Union,* 100 N. C. 300. But it is also a general rule that the direct loss resulting from the breach of a contract may be recovered even though it is wholly unexpected, and, consequently, some courts have held that the direct damage resulting from breach of a contract to transmit a cipher message is the value of the information contained, and that this value and not the consideration paid for sending the message should be the measure of damages. *Western Union v. Fotman,* 73 Ga. 285; *Am. Union Tel. Co. v. Doughtery,* 89 Ala. 191.