RECENT CASES

ASSIGNMENT—SALARY OF OFFICERS.—IN RE WILKES, 97 PAC. 677 (CAL.).—*Held,* that a city officer could not assign his monthly salary until it is fully earned.

The general rule of law on this point seems to be, that an assignment by a public officer, such as an assessor or a sheriff, of his unearned salary is invalid and contrary to public policy. *Stevenson v. Kyle,* 42 W. Va. 229; *Bowery National Bank v. Wilson,* 122 N. Y. 478. But this rule has been excepted to in several jurisdictions and it has been held. that a policeman elected for a term of four years with salary payable monthly, can make a valid assignment at the beginning of the month, of wages to be earned during that month. *Manly v. Bitzer,* 91 Ky. 596. Even a city officer, chosen for a year and liable to be removed from office at will of mayor, whose salary was payable quarterly, may legally make an assignment of a quarter's salary before the quarter expires. *Brackett v. Blake,* 7 Metc. (Mass.) 335. Analogous to these holding, it was said that the salary of a circuit judge to become due is a "possibility coupled with an interest," and as such, capable of being assigned. *State v. Hastings,* 15 Wis. 83.

CARRIERS—FREIGHT SHIPMENT—MISTAKE IN RATE.—HAURIGAN V. CHICAGO & N. W. RY. CO., 117 N. W. 100 (NEB.).—Under a statute similar to the second section of the Interstate Commerce Act it was *held,* that a contract between a railroad company and a shipper to transport merchandise for a less rate than that usually and regularly charged to others for similar and contemporaneous service is void, even though such rate was agreed to by mistake, and an action will not lie against the carrier for a breach of the contract, if it exacts the regular rate.

The English authorities hold that at common law, a carrier is not bound to carry at equal rates for all customers under like condition. *Garton v. B. & E. R. Co.,* 1 B. & S. 112; *McDuffee v. Portland & Rochester R. R. Co.,* 52 N. H. 430. In this country the courts have generally held otherwise on grounds of public policy. *C. & A. R. Co. v. People in ex rel.,* 67 Ill. 11; *Schofield v. Railway,* 43 Ohio St. 571. And that statutes prohibiting discrimination are merely declaratory of the common law. *Messenger v. Pennsylvania R. R. Co.,* 36 N. J. L. 407; *Sandford v. Railway,* 24 Pa. St. 378. *Contra: Fitchburg R. R. Co. v. Gage,* 78 Mass. 393; *Johnson v. Railway,* 16 Fla. 623. Under the Interstate Commerce Act and similar statutes it has been held that a contract for other than the schedule rate is absolutely void, even though made by mistake. *Gerber v. Wabash R. R. Co.,* 63 Mo. App. 145; *Chicago, R. I. & P. R. R. Co. v. Hubbell,* 54 Kans. 232; *Contra: Mobile & A. R. R. Co. v. Dismukes,* 94 Ala. 131. And where the plaintiff cannot recover without relying upon the void contract he must fail in his action. *Hancock v. L. & N. R. R. Co.,* 145 U. S. 426; *Rowland v. New York, etc. R. R. Co.,* 61 Conn. 103.

CORPORATIONS—TRANSFER OF SHARES—BONA FIDE PURCHASERS.—O'DEA V. HOLLYWOOD CEMETERY ASS'N., 97 PAC. 1 (CAL.).—*Held,* that where a corporation has the right to issue its shares for cash or upon credit, and is not required to have the certificate show on what terms it is issued, purchasers of shares have no right to assume that the stock is fully paid, and no estoppel by representation can be invoked against the corporation.

Nearly all the states hold that when stock is issued as full paid, or without anything on the certificate to show that it is not full paid, purchasers have a right to rely upon the representation unless they have notice that it is false. Therefore, *bona fide* purchasers are not liable for calls, either to the corporation or to creditors, if in fact, the shares are not fully paid for. *Marshall on Corporations,* Sect. 315. And this rule applies in England as well as the United States. *Bush's Case,* 9 L. R. Ch. App. 554. Although shares of stock are not, strictly speaking, negotiable instruments, courts speak of them as *quasi-negotiable,* and when they are issued as paid in full, and as such sold in the open market, the purchaser is not bound to suspect fraud where everything seems fair and conformable to the requirements of law. *Brant v. Ehlen,* 59 Md. 1. And, further, a party, purchasing a certificate of stock which does not state whether it is paid up or not, may assume that it is paid up and will be protected in that assumption. *DuPont v. Tilden,* 42 Fed. 87.

CRIMINAL LAW — CONVICTION — SENTENCE — JURISDICTION.—EX PARTE CLENDENNING, 97 PAC. 650 (OKL.).—*Held,* that when a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the lapse of the time involved in the sentence and after the term, to issue commitment on such judgment. Williams, C. J. *dissenting.*

A sentence is indivisible and must not be uncertain as to the time of commencement. *Larney v. Cleveland,* 34 Ohio St. 599. So, after any part of a sentence has been executed, the power of the court to inflict further punishment upon the defendant is exhausted. *Parker v. State,* 51 Miss. 535; *People v. Felker,* 61 Mich. 110. Thus, a suspension on good behavior has been held to furnish sufficient punishment as to constitute part of a sentence and oust the court of jurisdiction. *People v. Allen,* 155 Ill. 61. In Massachusetts, it seems that the court may at its discretion suspend sentence either generally or indefinitely. *Commonwealth v. Dowdican,* 115 Mass. 136. And an analogous rule exists in some states where it is held that suspension of sentence until payment of costs, does not constitute any part of a sentence. *Gibson v. State,* 68 Miss. 241; *State v. Crook,* 115 N. C. 760. But it is otherwise, if there is coupled with it an order by the court to do some act which might constitute a part of a sentence, as an order to abate a public nuisance. *State v. Addy,* 43 N. J. L. 114; *Commonwealth v. Foster,* 122 Mass. 317.

CRIMINAL LAW—JUDICIAL NOTICE—INTOXICANTS.—CRIPE V. STATE, 62 S. E. 567 (GA.).—*Held*, that the courts may take judicial notice of the fact that lager beer is an intoxicating malt liquor.

In most jurisdictions to-day, lager beer is judically noticed as an intoxicating liquor. *Bandalow v. People*, 90 Ill. 218; *Adler v. State*, 55 Ala. 16. It has been expressly made so by statute in some states, where previously the courts only took judicial notice of the fact that spirituous liquors were intoxicating. *Commonwealth v. Bubser*, 14 Gray 83; *Shaw v. State*, 56 Ind. 173. The term "beer," without qualification, is by the weight of authority insufficient to enable the courts to notice it judicially as intoxicating. *Hansberg v. People*, 120 Ill. 21; *U. S. v. Ducournau*, 54 Fed. 138. Although in some jurisdictions the word alone is sufficient. *Maier v. State*, 2 Tex. Civ. App. 296; *Kerkow v. Bauer*, 15 Neb. 150. The Court of Appeals of New York, however, has laid down the rule that "beer" is not judicially known to be intoxicating. *Blatz v. Rohrbach*, 116 N. Y. 450; *People v. Hart*, 24 How. Pr. 289.

CUSTOM AND USAGES—CONTRACTS.—POSTAL TELEGRAPH COMPANY V. WILLIS, 47 So. 380 (MISS.).—Where a firm had delivered to a telegraph company a telegram accepting plaintiff's offer to sell cotton, it was *held*, that plaintiff, who had allowed the firm to retract their acceptance by telephone while the telegram lay undelivered in the company's office, could not show, to establish liability of the telegraph company for negligent delay in delivery, a custom in the cotton business whereby a telegraphic acceptance of an offer does not become binding until actually delivered to the addressee.

Instances often occur in which a contract may be explained and controlled by a custom prevailing among men engaged in a certain line of business. *Cothran v. Ellis*, 107 Ill. 413. But no person can be recognized in this country, the effect of which is to supercede a settled rule of commercial law. *Frith v. Barker*, 2 Johns 327; *Cove v. Heisiey*, 19 Pa. St. 243. *Contra*: *Adams v. Norris*, 64 U. S. 353. Nor can custom be shown to establish a liability on a fixed state of facts, or to show the origin of the relations by which the parties became responsible to each other. *Ulmer v. Farnsworth*, 80 Me. 500; *Bowe v. Hyland*, 44 Minn. 88. Usage is a mere incident to a contract and is immaterial where no contract is shown as already existing. *Moore v. Eason*, 11 Fed. 568; *Fitley v. Chicago*, 103 U. S. 155.

DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS.—EAGAN V. BROWN, 112 N. Y. SUPP. 690.—Where defendant leased a floor in a building provided with steam power to the plaintiff, and afterwards cut off the steam power, thereby destroying the plaintiff's business, *held*, that plaintiff could recover damages for loss of future profits. Hooker, J., *dissenting*.

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered as either arising naturally; *i. e.*, according to the usual course of things from such breach of contract itself; or such as may reasonably be sup-

posed to have been in the contemplation of both parties at the same time they made the contract as the probable result of the breach of it. *Hadley v. Baxendale,* 9 Exch. 341; *Stilwell v. B. Mfg. Co.,* 139 U. S. 147. Thus, it is held that a carrier cannot be liable for loss of profits to a plaintiff due to the failure or delay of the carrier to deliver, *Thomas v. Wabash, St. L. & P. Ry. Co.,* 62 Wis. 642, unless the carrier had notice of the special use. *Brock v. Gale,* 14 Fla. 523. Although the authorities in both England and the United States are thoroughly agreed upon the principle laid down in *Hadley v. Baxendale, supra,* they differ greatly in the application of it. *Stilwell v. B. Mfg. Co.,* 139 U. S. 147. Thus, where there is a breach of contract to repair by the lessor, it is held by some authorities that there can be no recovery for loss of profits. *Winne v. Kelley,* 34 Iowa 339; *Rogers v. Bemus,* 69 Pa. St. 432. *Contra*: *Stewart v. Lanier House Co.,* 75 Ga. 582. But in all cases where a recovery for loss is sought, the amount must not be merely possible or even probable, but must be proved with a reasonable degree of certainity. *Pollock v. Gantt,* 69 Ala. 373; *White v. Miller,* 71 N. Y. 118.

DEAD BODIES—CIVIL LIABILITIES.—RUSHING V. MEDICAL COLLEGE OF GEORGIA, 62 S. E. 563.—*Held,* a husband is entitled to the dead body of his wife for burial, and in the condition in which death leaves it; but a slight incision by the attendant surgeon in a hospital to ascertain the cause of death, authorized by the board of health of the city in which the hospital is located, and in obedience to the requirements of a city ordinance, in order that a certificate of burial may be obtained not otherwise obtainable, where there is no cutting or removal of any limb or organ, and the incision is properly closed and not visible when the body is clothed, does not infringe this right.

At common law, no property right existed in a dead body. *2 Bl. Com.,* 429. But the right to bury and protect a corpse is a legal right which courts protect. *In re Widenning Beekman St.,* 4 Bradf. Rep. 503. And there is a *quasi* property right or interest in a dead body of a human being, so as to sustain a civil action for its wilful or negligent mutilation. *Wynkoop v. Wynkoop,* 42 Pa. 293. But the mutilation must be done unlawfully. *Larson v. Chase,* 47 Minn. 307. And not for purpose of discovering the cause of death in a careful manner. *Foley v. Phelps,* 1 App. Div. 551.

EVIDENCE—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS.—COMMONWEALTH V. FISHER, 70 ATL. 865 (PA.).—*Held,* that where a prisoner charged with murder dictates letters to his wife, which are delivered by her to the district attorney, such letters are inadmissable, as permitting the wife to testify against her husband. Mitchell, C. J., and Potter, J., *dissenting.*

This question has not been uniformly treated by the courts. Many decisions hold, with the principal case, that if the husband's letters are delivered by the wife herself to a third person, they remain privileged communications. *Selden v. State,* 74 Wis. 271; *Wilkerson v. State,* 91 Ga. 729. Some courts have even held that such letters are inadmissible against the husband no matter how they were obtained, as the privilege attaches

to the communication itself. *Mercer v. State,* 40 Fla. 216; *Scott v. Commonwealth,* 94 Ky. 511. But the greater number of authorities hold that if the letters are not voluntarily delivered by the wife, the privilege does not attach and they are admissible. *State v. Hoyt,* 47 Conn. 540; *Geiger v. State,* 6 Neb. 545. In direct conflict with the principal case is the rule laid down in *People v. Hayes,* 140 N. Y. 484. It was there stated that if a written confidential communication is given to a third party, by the one to whom it is addressed, the protection is waived and it may be treated like any other communication. In Massachusetts it is held, that the privilege of the statute as to confidential communications between husband and wife extends only to private conversations and not to written communications. *Commonwealth v. Caponi,* 155 Mass. 534.

EVIDENCE—TELEPHONE CONVERSATION—ADMISSABILITY.—BARRETT ET AL. V. MAGNER ET AL., 117 N. W. 245 (MINN.).—Where a witness secured telephone connection with the place of business of a party and was told that he was not in but would be called, and soon after another voice answered and a conversation took place similar to a personal conversation between the same parties a few days before, *held,* that such conversation was admissable, even though the identity of the party called to the 'phone was not established by his admission or by a recognition of his voice.

It is an accepted rule that a telephone conversation is admissable in evidence. *Thompson & W. Co. v. Appelby,* 5 Kan. App. 680; *Murphy v. Jack,* 142 N. Y. 215, the fact of its being uncertain and unreliable not excluding it, but merely affecting the weight attached to it. *Shawyer v. Chamberlain,* 13 Ia. 742. But it is always necessary to lay a foundation for the admission of such evidence, by showing the identity of the person answering. *Mo., P. & R. Co. v. Heidenheimer,* 82 Tex. 195. To this end, testimony as to the admission of his identity by the party answering or, as to the recognition of his voice, is considered the proper means. *Gall v. Wolliver,* 103 Ill. App. 71. Where the identification of the office or place of business amounts to an identification of the person, it is a sufficient foundation to show that a connection was secured with such office or place of business. *Guest v. Hannibal & St. J. R. Co.,* 77 Mo. App. 258. *Contra: Kimbank v. Ill., C. & E. Co.,* 103 Ill. App. 632.

INNKEEPERS—LIABILITY FOR OFFENSIVE ACTS OF EMPLOYEES.—DE WOLF V. FORD, 112 N. Y. SUPP.—*Held,* that an innkeeper is liable to a guest for the offensive acts of an employee, and that the plaintiff may recover compensatory damages for injuries to her feelings and personal humiliation suffered.

An old English case laid down the rule that an innkeeper is an insurer of the goods and chattels of his guest but not of his person. *Calye's Case,* 8 Coke 32. And in the scarcity of decisions upon this point, a California court has relied upon this case for the common law rule, and has held that an innkeeper is not bound to protect his guests from acts of violence by his servant or other persons, if he does not negligently employ or admit persons of known violent and disorderly propensities who will probably

assault and maltreat his guests. *Rahmel v. Lehndorf,* 142 Cal. 681. And Tennessee holds similarly that an innkeeper is not an insurer of the persons of his guests, but is merely to exercise reasonable care that his guest may not be injured by anything happening by his negligence. *Weeks v. McNulty,* 101 Tenn. 495. Nebraska, however, refuses the early English rule, and holds that the liability of an innkeeper for the safety of his guest should be the same as that of a carrier to a passenger. *Clancy v. Barker,* 98 N. W. 440. In several cases, not strictly analogous to the case in point but similar thereo, there is a tendency to hold that an innkeeper is liable for injuries to the person of the guest through acts of the servant. *Rommel v. Schambacher,* 120 Pa. St. 579; *Curran v. Olsen,* 88 Minn. 307.

MANDAMUS — TO ORDINARY — FUNDS WRONGFULLY DISBURSED.— HUTCHESON V. MANSON, ORDINARY, 62 S. E. 189 (GA.).—*Held,* that mandamus will lie to compel an ordinary to pay over money which by law it is his duty to pay for certain purposes, out of a particular fund even though that fund, which has come into his hands, has all been wrongfully disbursed and hence, is not in his possession.

A ministerial officer, into whose hands specific funds are intrusted, may be compelled by mandamus to disburse them in the manner prescribed by law. *People v. Edmonds,* 15 Barb. 529; *Ingerman v. State,* 129 Ind. 225. The duty is imperative upon him, not discretionary. *Baker v. Johnson,* 41 Me. 15; *People v. Fogg,* 11 Cal. 358. And the fact that the money authorized by legislature to be applied to one contingency has been exhausted in paying another, is no excuse. *People v. Stout,* 23 Barb. 338. There are decisions, however, holding that mandamus can be granted only to the extent of the funds remaining in the officer's hands, although he may have improperly disposed of a part of them which he should have turned over. *Duval County Com'rs v. Jacksonville,* 36 Fla. 196; *Board of Education v. Boyd,* 58 Mo. 276.

NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF OWNER.—CAHILL V. E. B. & A. L. STONE & CO. ET AL., 96 PAC. 84.—*Held,* an owner of premises, over which there is a path used by the public with his knowledge and consent, who places a dangerous and concealed obstruction in the path, is liable for injuries sustained thereby to a person using the path.

The same rules apply to this case as to the *"Turn-Table Cases." Stout v. Railroad Co.,* 17 Wall. 657; *Koons v. Railway Co.,* 65 Mo. 592. The owner of a dangerous place or machine must guard the public from the danger attachel to it. *Young v. Harvey,* 16 Ind. 314. In *Beck v. Porter,* 68 N. Y. 283, it was held that an owner of land may be liable, who makes an excavation so near the highway as to be dangerous to travelers. And some cases hold that it makes no difference how great the distance is from the highway if the excavation is dangerous to the public. *City of Norwich v. Breed,* 30 Conn. 535. The cases *contra* rest on the theory that the owner owes no duty to the public. *Cusick v. Adams,* 115 N. Y. 55.

OFFICERS—RESIGNATION—WITHDRAWAL.—STATE V. MURPHY, 97 PAC. 391 (NEV.).—*Held,* that a sheriff who presented to the board of county

commissioners his resignation, to take effect on a designated future day, could before such day withdraw it, notwithstanding the board's acceptance thereof. Talbot, C. J., *dissenting*.

A resignation cannot be withdrawn after it is complete. *State v. Augustine,* 113 Mo. 21. At common law a resignation amounts to nothing until it has been accepted by the proper authority. *Hoke v. Henderson,* 4 Dev. (N. C.) 29. But in those jurisdictions which have not adopted the common law rule, as Alabama, Indiana, California, and Nevada, the acceptance or rejection of a resignation in no way affects the resignation and the appointee may withdraw his resignation at any time before it becomes complete. *Parmater v. State,* 102 Ind. 90. Where the resignation is unconditional and has been transmitted to the proper authority, it cannot be withdrawn as it becomes effective immediately. *State v. Fitts,* 49 Ala. 402; *Mimmack's Case,* 97 U. S. 430. But a resignation expressed to take effect at a future date may be withdrawn at any time before the time specified. *State v. McGrath,* 64 Mo. 139.

RAILROADS—INJURIES TO PERSONS AT CROSSINGS—DUTY TO STOP, LOOK, AND LISTEN.—CABLE V. SPOKANE & INLAND EMPIRE R. R. CO., 97 PAC. 744 (WASH.).—*Held,* that a failure of a person to stop, look, and listen before crossing a railroad constituted negligence, and would prevent him from recovering damages for injuries received.

The prevailing doctrine on this point is that a person approaching a railroad must stop, look, and listen before crossing. *Groton v. The Erie Railway Co.,* 45 N. Y. 660; *Allen v. Maine Central R. Co.,* 82 Me. 111. And that a failure to do so constitutes negligence *per se. Aiken v. Penn. R. Co.,* 130 Pa. St. 380. However, it has been held in some courts that there is no such duty. *C. T. & N. W. R. Co. v. Bush,* 12 Tex. Civ. App. 291. And that a failure to do so does not necessarily constitute negligence so as to bar a recovery against the defendant. *T., St. L. & K. C. R. R. Co. v. Cline,* 135 Ill. 41. Nor is negligence attributable to one for attempting to drive over a railroad crossing, without stopping and looking, when by doing so he could not have seen the train which caused the injury. *Pithy v. Hannibal & St. Jo. R. R. Co.,* 88 Mo. 306. *Contra*: *Fletcher v. Fitchburg R. Co.,* 149 Mass. 127.

SALES—CONDITIONAL PURCHASER—CONDITIONAL SALE—PURCHASE FROM VENDEE.—LOCKWOOD BROS. V. FRISCO LUMBER CO., 97 PAC. 522 (OKL.).—*Held,* that simply intrusting the possession of chattels to another by the owner under a conditional executory contract of sale is sufficient to estop the owner from setting up title thereto against an innocent purchaser thereof for value and without notice of the condition from the person so intrusted.

The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold as against the true proprietor. *Mechem Sales,* § 155. So the weight of authority is that a conditional purchaser of chattels cannot transfer them so as to give his vendee a good title as against

the real owner. *Homans v. Newton,* 4 Fed. 880; *Carter v. Kingman,* 103 Mass. 517. On the other hand, however, some states hold that where goods are sold on condition and resold by the vendee to a purchaser for value and without notice the vendee conveys a good title and the original owner cannot recover them if the condition is broken. *Stadtfeld v. Huntsman & Co.,* 92 Pa. St. 53; *Hall v. Hinks,* 21 Md. 406. The New York Court makes a distinction between voluntary assignees of the conditional vendee and *bona fide* purchasers without notice, holding that the owner had a title paramount to that of the voluntary assignees of the vendee, but subordinate to that of a *bona fide* purchaser. *Wait v. Green,* 36 N. Y. 556.

SEDUCTION—EVIDENCE—ADMISSABILITY.—ANDERSON V. AUPPERLE, 95 PAC. 330 (CAL.).—*Held,* that a child born to the female seduced may be exhibited to the jury though the child is under three months, for the purpose of showing a resemblance to the defendant.

On this point a bare majority of the courts are inclined to hold that it is not error to permit a child to be exhibited to a jury that they may trace a resemblance to one charged with having begotten it. *State v. Horton,* 100 N. C. 443; *Gaunt v. State,* 50 N. J. L. 490. But in many other jurisdictions it is said that the child cannot be exhibited to the jury for the purpose of showing, by its likeness to the defendant, that it is his child. *Hanawalt v. State,* 64 Wis. 84; *Risk v. State,* 19 Ind. 152. In one jurisdiction it was said that a child three months old could not be shown to the jury for the purpose of showing a resemblance to the defendant. *State v. Danforth,* 48 Ia. 43. But a child two years of age may be shown to a jury. *State v. Smith,* 54 Ia. 104. Another jurisdiction held that a child six months old could not be exhibited to the jury as evidence that the defendant was its father. *Overlock v. Hall,* 81 Me. 348. But the question of maturity has been disregarded by some courts, and it has been held that a child may be exhibited to a jury without regard to its age. *Scott v. Donovan,* 153 Mass. 378.

TRUSTS—FOLLOWING TRUST FUNDS.—REAVES ET UX. V. COFFMAN ET AL., 112 S. W. 194.—*Held,* that trust funds wrongfully converted may be followed into other property as far as they can be identified.

That a trust fund wrongfully converted, may be followed into other property as long and as far as it can be identified is a well-settled principle of equity. *Dyer et al. v. Jacoway et al.,* 42 Ark. 186. And identification is ever a prerequisite to the exercise of the right to follow it. *2 Story Eq. Jur.,* § 1259. But if the trust property be money, it is not necessary to point out particular money, yet there must be a preservation of the distinctness of the trust fund. *Doyle v. Murphy,* 22 Ill. 502. And it must be clearly distinguished from other property held by the trustee. *Union Nat. Bank v. Goetz,* 138 Ill. 127. Where lands are purchased by the trustee, it must be clearly proved that they were paid for with trust funds. *Ferris v. Van Vechten,* 73 N. Y. 113. The court always attributes the ownership of trust property in the *cestui que trust,* so long as it can be traced. *2 Hem. & Mil.* 417.