RECENT CASES

ACCORD AND SATISFACTION—PAYMENT OF CLAIM IN FULL—EFFECT—CARAVIA V. LEVY, 119 N. Y. Supp. 160.—*Held,* that the cashing by a creditor of a check containing the words, "paid in full," signed by the debtor, is not an accord and satisfaction unless there is a genuine dispute between the parties as to the amount due.

In the absence of statutory provision to the contrary the payment by the debtor of part of a liquidated or certain sum of money then due and the receipt of that partial sum by the creditor with the agreement that the original debt shall be thereby extinguished does not operate as an accord and satisfaction. *Abelson v. Gordon,* 74 N. Y. Supp. 863; *McIntosh v. Johnson,* 51 Neb. 33. *Contra, Clayton v. Clark,* 74 Miss. 499. Moreover, the giving of a receipt in full does not affect the general rule. *St. Louis (Etc.) R. Co. v. Davis,* 35 Kan 464. But Connecticut holds to the contrary. *Aborn v. Rathbone,* 54 Conn. 444. If, however, a release under seal is given in return for the payment of a lesser sum than the debt, the whole debt is discharged in those jurisdictions distinguishing between sealed and unsealed instruments. *Hosler v. Hursh,* 151 Pa. St. 415. Moreover, if the debtor gives to the creditor in addition to the partial payment some new consideration there will be a valid accord and satisfaction. *Williams v. Blumenthal,* 27 Wash. 24. Such consideration may be the payment of the lesser sum in some different place, manner, or time, than that required by the original contract. *Boyd v. Moats,* 75 Iowa 151; *Jones v. Perkins,* 29 Miss. 139. And the payment of a lesser sum which is secured also constitutes a valid discharge of a larger unsecured sum. *Post v. Springfield Nat. Bank,* 138 Ill. 559. If the debt is unliquidated or in dispute payment of a lesser sum than is claimed constitutes an accord and satisfaction if that payment is accepted as payment in full. *Nassoiy v. Tomlinson,* 148 N. Y. 326.

CONSTITUTIONAL LAW—DEBT—IMPRISONMENT.—KIMBRELL V. BERRY, 67 S. E. 226 (S. C.).—*Held,* that a judgment in an action of tort is not a "debt" within the meaning of the Constitution which provides that no person shall be imprisoned for debt except in cases of fraud.

A judgment recovered on a tort is, for many purposes, such as, for instance, the interpretation of constitutional or statutory provisions exempting homesteads from liability for debt, regarded as a debt. *Delliger v. Tweed,* 66 N. C. 206; *Smith v. Omans,* 17 Wis. 395. In interpreting the common constitutional clause which provides that there shall be no imprisonment for debts, however, the overwhelming weight of authority is that a tort judgment is not a debt within the provision, and the body of him against whom the judgment stands may be taken in satisfaction. *People v. Cotton,* 14 Ill. 414; *Lower v. Wallick,* 25 Ind. 68; *In re Mowry,* 12 Wis. 52. In fact, the only state in which the contrary interpretation is given is California. *Ex parte Prader,* 6 Cal. 239. The ground most often assigned for the majority rule is, that the apparent intent of the

framers of the Constitution was simply to relieve from hardship, those innocent and honest contract debtors who, because of misfortune, were not able to pay, and it was not their purpose to aid those tort feasors who were guilty of evil doing. *Moore v. Green,* 73 N. C. 394. It has been held, however, that, where the plaintiff has waived the tort in order to sue in assumpsit, the judgment thus obtained is a debt within the constitutional provision. *Goodman v. Griffs,* 88 N. Y. 629, 639.

ELECTIONS—PRESERVATION OF BALLOTS—INSPECTION.—BRYAN V. YUNGBLUT, 125 S. W. 251 (Ky.).—*Held,* that an inspection of ballots, though demanded by the court for the use of a grand jury investigating offenses against the election laws, is impliedly forbidden by Ky. St.. Sec. 1482 (Russell's St., Sec. 4041), providing for the preservation of ballots, and prohibiting their inspection except in election contests. Carroll, J., *dissenting.*

When the statute requires election officers to seal up the ballots so that they cannot be seen or used, and prohibits the opening of them except in the case of contested elections, they cannot be opened in any other case and the courts have no power in the face of such a statute to compel their production for use as evidence. *Keenan v. People,* 58 Ill. App. 241. Hence, they cannot compel their production before a grand jury for their examination even while investigating election frauds. *Ex parte Brown,* 97 Cal. 83. The object sought by this exclusion is the preservation of the secrecy of the ballot and, although election frauds may be thus allowed to remain undetected, yet the benefits arising from the secret ballot are deemed to outweigh the mischiefs ensuing from fraudulent voting. *Ex parte Arnold,* 128 Mo. 256. It has been held, however, that such statutes are not binding upon a federal court when administering a valid criminal law relating to election frauds and that such court can compel the production of ballots before a grand jury, any law of the State to the contrary notwithstanding. *In re Massey,* 45 Fed. 629. If the officer having the custody of the ballots refuses to produce them at an election contest he may be compelled to do so. *Gibson v. Trinity Church,* 80 Cal. 359. And under some statutes ballots are not excluded as evidence in a criminal proceeding for election offenses. *Com. v. Ryan,* 157 Mass. 403.

EMINENT DOMAIN—COMPENSATION—INJURY TO PROPERTY—ELEMENTS OF DAMAGE—IMPROVEMENT OF STREET—REMOVAL OF SHADE TREES.—MCEACHIN V. MAYOR OF CITY OF TUSCALOOSA, 51 So. 153 (ALA.).—*Held,* a constitutional requirement that a municipality taking property for public use make just compensation for property so taken or injured, gave one whose property is so injured, a right of action for resulting damages, irrespective of whether the fee of the property is in the plaintiff or the taker, so that if the removal of shade trees in the improvement of the street affects the value or enjoyment of abutting property, the owner of such property would have a right of action against the city for damages, though he was not the owner of the trees. Dowdell, C. J., and Sayre, J., *dissenting.*

The weight of authority seems to be opposed to the doctrine laid down in the principal case, most states holding that the ownership of the fee in the streets is a good defence to an action brought against the municipality by an abutting property owner for the destruction of trees in the street in front of his premises. *Gaylord v. King,* 142 Mass. 495; *Castleberry v. Atlanta,* 74 Ga. 164; *Tate v. Greenboro,* 114 N. C. 392. And in *Baker v. Normal,* 81 Ill. 108, it was held that where the fee in the highway is in the municipality the abutting owner obtains no title to the trees even though he planted and cares for them. On the other hand some jurisdictions hold that although a property owner has no claim or control over trees growing in the highway as against the municipality, yet as against third persons injuring or destroying them he may recover. *Rockford G., L. & C. Co. v. Ernst,* 68 Ill. App. 300; *Lovejoy v. Campbell,* 16 S. D. 231. It is well settled that where the abutting owner has the fee in the highway the timber and grass growing thereon are his exclusive property, and he may maintain an action for damage to them. *Barclay v. Howell's Lessee,* 6 Pet. 498; *Woodruff v. Neal,* 28 Conn. 165; *Bolling v. Mayor of Petersburg,* 3 Rand. 563; *Phifer v. Cox,* 21 Ohio St. 248. But as a general rule it is held that a town may cut down trees that obstruct travel, or are dangerous to health, without being liable. *Winter v. Peterson,* 24 N. J. L. 524; *Bills v. Belknap,* 36 Iowa 583; *Wellman v. Dudley,* 78 Me. 29.

GUARANTY—CONTRACT—CONSIDERATION.—J. I. CASE THRESHING MACH. CO. V. PATTERSON, ET AL., 125 S. W. 287 (Ky.).—*Held,* that where an agent of a seller of machinery on being notified by the seller that the intended buyer was insolvent agreed, in order to make the sale, to guarantee the purchase-money notes of the buyer on condition that the buyer should not know of the guaranty, and the condition was performed, the guaranty of the agent, though signed after delivery to the buyer and the delivery of his notes to the seller, was supported by a valid consideration. Nunn, C. J., *dissenting.*

It is essential to a valid contract of guaranty that there be a sufficient legal consideration. *Cowles v. Peck,* 55 Conn. 251. Such consideration may consist of any act in the nature of a benefit to the guarantor or to any person at his request, *Williams v. Marshall,* 42 Barb. (N. Y.) 524; or may consist merely of a detriment to the guarantee. *Ferst v. Blackwell,* 39 Fla. 621. It is well established that if the contract of guaranty is made at the same time as the principal contract the one consideration is sufficient to support both the principal and collateral contracts. *Jones v. Kuhn,* 34 Kan. 414; *Parker v. Wetherell,* 44 Ill. App. 95. Moreover, the fact that the contract of guaranty was executed a short time subsequent to the carrying out of the principal contract, does not invalidate the collateral transaction if it was executed pursuant to an understanding had before the performance of the principal contract and was a material inducement to the parting of value by the creditor. *Standley v. Miles,* 36 Miss. 434. But where the guarantor derives no benefit from the principal contract and the contract of guaranty is made at so long a time subsequent to the execution of the principal contract that it cannot be

said to have been a part of it and the creditor has taken no action to his prejudice in reliance upon the guaranty there must be a new and independent consideration to support it. *Peck v. Harris,* 57 Mo. App. 467.

HUSBAND AND WIFE—INJURY TO WIFE—LOSS OF CONSORTIUM—ACTION BY HUSBAND.—BOLGER V. BOSTON ELEVATED RY. CO., 91 N. E., 389 (Mass.).—*Held,* that where a wife received injuries while a passenger on a street car, resulting in her death, and the husband as administrator, recovered for the injury and conscious suffering by her, he could not maintain a separate action for his loss of consortium.

This decision is contrary to the weight of authority. It was held that the husband might recover pecuniary compensation for the loss of consortium, and the expenses to which he was put by reason of her injuries. *Chicago & M. Electric Ry. Co. v. Krempel,* 116 Ill. App. 253; *Washington & G. R. Co. v. Hickey,* 12 App. D. C. 269. In some jurisdictions the actions have been expressly separated, the right for consortium and expenses to which he was put going to the husband and the right of action for the injury going to the wife, or her estate. *Ohio & M. Ry. Co. v. Cosby,* 107 Ind. 32; *Kelley v. N. Y. N. H. & H. Ry. Co.,* 168 Mass. 308. It was held that the husband could sue for the loss of the wife's society between her injury and death, even though it was a very brief period. *Nixon v. Ludlam,* 50 Ill. App. 273. The case in point directly overrules one of the same court where it was held that the husband might sue for the loss of services, consortium and expenses to which he might be put, while she might sue on a separate account. *Duffee v. Boston Elevated Ry. Co.,* 191 Mass. 563.

JUSTICES OF THE PEACE—APPEAL BONDS—DISQUALIFICATION OF SURETIES.—HINES V. INTERNATIONAL HARVESTER CO. OF AMERICA, 66 S. E. 989 (GA.).—*Held,* that where the surety on a bond for a purchase-money attachment in a justice's court is the sole surety on the appeal bond given by the plaintiff in the attachment case, the appeal bond is a nullity, and it cannot be amended at the hearing of the appeal by the addition or substitution of other surety.

The execution and filing of an appeal bond, recognizance, or other security is generally a condition precedent to an appeal from the judgment of a justice of the peace. *Mann v. Lowry,* 58 Miss. 73. The nature of the security to be given on such appeal bond is controlled by statutes whose requirements must be observed in order to confer jurisdiction upon the appellate court. *Brown v. Brown,* 12 S. D. 380. A party to the appeal is usually declared to be an incompetent surety on the appeal bond. *Baumbach v. Cook,* 2 Tex. Civ. App., 100. And likewise in some jurisdictions attorneys are also disqualified from becoming sureties. *Hudson v. Smith,* 111 Iowa 411. But upon the question, whether one who has previously signed some bond made necessary in the action prior to the appeal, is a competent surety on the appeal bond, the decisions are not harmonious, some holding that such surety is not competent, *Osborn v. Hughes,* 93 Ga. 445; and others holding that he is competent. *Witten v.*

Caspary, 15 S. W. 47. When, however, the requirements of the statute have been performed in substance, defects in an appeal bond as to sureties which do not go to the jurisdiction of the appellate court, will not prevent that court from allowing and requiring the appellant to amend his defective appeal bond or to file a new one. *State Sav. & Loan Assoc. v. Johnson,* 70 Neb. 753; *Murphy v. Steele,* 51 Ind. 81.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT—NOTICE.—LOCKHART V. SLOSS-SHEFFIELD STEEL & IRON CO., 51 So. 627 (ALA.). —*Held,* it is not contributory negligence on the part of a servant to fail to give notice within a reasonable time of a known defective condition.

It is almost universally held that the failure of a servant to report dangerous conditions to his master, is contributory negligence, and will bar a recovery of damages for injuries received in consequence. *Wood on Master and Servant,* Sec. 335; *Washington & G. R. Co., v. McDade,* 135 U. S. 554; *Pautz v. Plankinton Packing Co.,* 118 Wis. 47; *Dobbins v. Lang,* 181 Mass. 397. This rule has been modified in some jurisdictions, however, the servant being allowed a reasonable time for reporting the defect after it has come to his knowledge, and if that time has not elapsed before the accident, he may recover even though he failed to report the danger. *Fordyce v. Edwards,* 60 Ark. 438; *Missouri K. & T. R. Co. v. Williams,* 28 Tex. Civ. App. 615. On the other hand, if the master is aware of the danger, he cannot rely on the servant's failure to report it as a defense. *Mobile & Birmingham R. Co. v. Holborn,* 84 Ala. 133; *Pank v. St. Louis D. B. Co.,* 159 Mo. 467; *Pennsylvania R. Co. v. McCaffrey,* 139 Ind., 430; *Cushman v. Carbondale F. Co.,* 116 Iowa 618.

MORTGAGES—FORECLOSURE—REVERSAL OF JUDGMENT—SALE FOR TAXES—RESTITUTION AND ACCOUNTING.—NATIONAL SURETY CO. V. WALKER, 125 N. W. 338 (IA.).—A suit to foreclose a mortgage was brought against the mortgagors and V., who had acquired a tax title to the property. V. answered, claiming title under his tax deed, and by cross-petition prayed that his title be quieted against the plaintiff and his co-defendants, the mortgagors. *Held,* that the property having been again sold for taxes to plaintiff pending appeal from the judgment of foreclosure, and the foreclosure judgment having been reversed, V., at least, was entitled to restitution and an accounting. McClain and Evans, JJ., *dissenting.*

On the reversal of the foreclosure decree it is generally held that restitution may be had. *Whitsesell v. Peck,* 176 Pa. St. 170; *Trow v. Messer,* 32 N. H. 361. But the right of a mortgagee, who buys the mortgaged land at a tax sale, to assert the title so acquired against lienors, raises a question as to which of the courts are in conflict. Some hold that the mortgagee cannot assert such title. *Woodbury v. Swan,* 59 N. H. 22; *Schenck v. Kelley,* 88 Ind. 444. This view, however, is supported on the ground of an obligation on the mortgagee to pay the taxes. *Blackwood v. Van Vleit,* 30 Mich. 118; *Moore v. Titman,* 44 Ill. 367. On the other hand, other courts hold such a purchase valid because a mortgagee not in possession as such is under no duty to pay the tax. *Neal v.*

Frazier, 63 Ia. 457; *Waterson v. Devoe,* 18 Kan. 223. That the title relates back to the time of the purchase for the purpose of substantial justice. *Conn. Mut. L. Ins. Co. v. Bulte,* 45 Mich. 113. That it is an election to occupy the relation of purchaser with all the rights and incidents which the law attaches. *Williams v. Townsend,* 31 N. Y. 411. A tax title, however, is paramount to existing estates, becoming absolute after two years. *Langley v. Chapin,* 134 Mass. 82, and is *prime* to all other incumbrances. *In re Douglas,* 41 La. Ann. 765, although it does not affect prior incumbrances. *Monow v. Dows,* 28 N. J. E. 459. And, although the title is one acquired at a second sale of the property for taxes, the purchaser gets a good title. *Diamond Coal Co. v. Fisher,* 19 Pa. (7 Harris) 267, providing the proceedings are regular and the owner has not redeemed. *Atkins v. Hinman,* 7 Ill. 437. Nor is he liable for money paid by the former purchaser under an older assessment, as to which he was not in default. *Smith v. Laumier,* 84 Mo. 672. Only in case the title he acquired is defective, is he liable to make compensation. *Stebbins v. Horton,* 4 Kan. 353.

RAILROADS—INJURY TO ANIMALS ON OR NEAR TRACK—REQUIREMENTS AS TO FENCES.—MILLER V. CHICAGO, B. & Q. R. Co., 105 PAC. 908 (WYO.).—*Held,* that a constitutional requirement making railroads liable for animals killed by them on an unfenced track outside of an incorporated town or village, do not require the fencing of station grounds outside of incorporated cities and villages, where public convenience requires the same to remain open.

It is an almost universal rule that the statutes requiring railroad companies to erect fences and cattle guards along the right of way, do not apply to points where a compliance with the statute would seriously interfere with the company in operating its road, or the public in doing business with the company, as in the case of depot grounds. *Mobile & O. R. Co. v. House,* 96 Tenn. 552; *Chicago & G. T. R. Co. v. Campbell,* 47 Mich. 265; *Robertson v. Atlantic & P. R. Co.,* 64 Mo. 412; *Moses v. Southern P. R. Co.,* 18 Ore. 385; *Contra*: *Buffalo, N. Y. & E. R. Co. v. Bradley,* 34 N. Y. 427. And as a general rule the depot grounds are held to extend to the switch and sidetrack limits. *Chicago, B. & Q. R. Co. v. Hans,* 111 Ill. 114; *Davis v. Burlington, M. & R. Co.,* 26 Iowa 549; *Indiana B. & R. Co. v. Leak,* 89 Ind. 596. But the question of the extent of the depot grounds is usually held to be a matter of fact for the jury to decide. *Railroad Co. v. Newbrander,* 40 Ohio St. 15; *Indiana B. & W. R. Co. v. Hale,* 93 Ind. 79; *Snell v. Minneapolis, S. P. & S. M. R. Co.,* 87 Minn. 253. Private shipping points, however, are not excepted, even though occasionally used by the railroad company. *Kansas City, F. S. & G. R. Co. v. Hays,* 29 Kan. 193.

SALES—BREACH OF WARRANTY—COUNTERCLAIM FOR DAMAGES.—SAPP V. BRADFIELD, 125 S. W. 721 (KY.).—In an action on a note, given for the price of a horse sold to the defendant by the plaintiff, to be used in logging operations, and with a warranty of soundness, *held,* that the defendant could counterclaim as damages only the amount expended on

feed and medical attendance, after notice was given to plaintiff that the horse was worthless, and an offer to return, but not the profits lost, and expenses incurred in hiring other teams to complete his contract with a third person.

The general rule is, that when an article is sold with a warranty of fitness, express or implied, the purchaser without offering to return it or to give notice to the vendor of its defects, may, if sued for the price, recoup damages for such breach. *Bonnell v. Jacobs,* 36 Wis. 59; *Murray v. Smith,* 4 *Daly* 277; *Dukes v. Nelson, Ex'or.,* 27 Ga. 457, or he may bring an action directly on the warranty without complying with these conditions. *Borrikins v. Bevans,* 3 Rawle, 23; *Komejoy v. White,* 10 Ala. 255. Even if the vendor engages that the article shall be returned, if it does not fulfill the warranty, still this does not preclude the vendee from bringing an action for its breach. *Douglas Axe Manufacturing Co. v. Gardner,* 10 Cush. 88. But, if by the agreement the seller is given an opportunity to remedy the defects after he has notice of them, the buyer cannot claim damages for breach of the warranty unless he gave notice, though he did not know what the defect was. *Zimmerman Manuf. Co. v. Dolph,* 104 Mich. 281. In any case the purchaser may bring his action for damages for the breach, although the note given by him is unpaid when he brings it. *Trohreich v. Gammon,* 28 Minn. 476. Even though a judgment has been obtained on the note. *Volland v. Baker,* 32 Neb. 391. Usually the measure of damages for breach of a warranty is the difference between the value of the goods, as they in fact were, and their value if they had been as warranted. *Porter v. Pool,* 62 Ga. 238; *Tiffany on Sales,* p. 248. And whatever losses directly result from the breach, e. g., loss of a crop, due to the inferior quality of seed purchased and sown. *Wolcott v. Mount,* 38 N. J. L. 496. *Contra*: *Butler v. Moore,* 68 Ga. 780; loss of profits due to a poorly constructed refrigerator. *Beeman v. Bantee,* 10 N. Y. St. Rep. 325. But the true rule in respect to special damages is what a reasonable man, with the knowledge of the parties, would have contemplated as the probable result of a breach of warranty had he applied his mind to it. *Tiffany on Sales,* p. 249.

TRIAL—QUOTIENT VERDICT—WASHINGTON LUNA PARK CO. v. GOODRICH, 66 S. E. 697 (VA.).—*Held,* that the finding of scraps of paper in a jury room after it was vacated, with the names of the jurymen thereon, and the amounts opposite their names added together and divided by 12, producing a quotient of between $2,300 and $2,400, did not show a binding agreement to render a quotient verdict; the verdict returned being for $2,000.

A verdict arrived at by chance or lot will be set aside, and where, by previous agreement a verdict is reached by taking the average of the sums named, it is vitiated. *Haight v. Hoyt,* 50 Conn. 583. But an averaged verdict obtained by taking one-twelfth the aggregate amount of the several estimates of the jurors, is not objectionable when there was no antecedent agreement to be bound by the result, and when each

juror deliberately accepted the amount thus ascertained. *Luft v. Lingane,* 17 R. I. 420; *Sullens v. Chic. R. I. & P. Ry. Co.,* 74 Iowa 659. If the amount finally announced as the verdict is less than the quotient obtained after an effort to arrive at a reasonable figure by dividing by twelve, the aggregate of the separate awards of the jurors, it will stand. *Johnson v. Northern Pac. Ry. Co.,* 46 Fed. 347. When the jury has arrived at a quotient verdict by the addition and division, and after being sent back for deliberation returns the same verdict, the judge having instructed the jury as to the proper method of arriving at a verdict, it will stand. *Roy v. Goings,* 112 Ill. 656.

WATERS AND WATER COURSES—PERCOLATING WATERS—DIVERSION—SALE. —MILLER V. BAY CITIES WATER CO., 107 PAC. 115 (CAL.).—*Held,* that the rights of owners of land overlying a water-bearing stratum to withdraw and use the waters are correlative, so that one may not divert such waters for sale elsewhere to the injury of others.

The weight of authority is that the same rights exist in a subterranean stream flowing in a definite and known channel as exist in a surface stream. *Tiffany on Real Property,* Sect. 300; *Whetstone v. Bowser,* 29 Pa. St. 59; *Burroughs v. Saterlee,* 67 Iowa 396. And where these rights are infringed, the owner will be protected. *Keeney v. Carillo,* 2 N. M. 480. In *Taylor v. Welch,* 6 Ore. 198, it is held that every proprietor of land through which a stream of water flows has the right to the use of the water without diminution or obstruction even though it flow in an undefined and unknown channel. On the other hand, the rule has been stated that the owner of soil through which an underground stream flows has no property right to an undisturbed flow on which he could maintain an action for its diversion. *Brown v. Illius,* 27 Conn. 84. As to water in the earth or percolating under the surface, the general rule is that no correlative rights exist between proprietors of adjoining lands in reference to the use of such water. *Chatfield v. Wilson,* 28 Vt. 49; *Mosier v. Caldwell,* 7 Nev. 363; *Delhi v. Youmans,* 45 N. Y. 362, *affirming* 50 Barb. 316; *Chase v. Silverton,* 62 Me. 175. In one case it was said that water percolating through the soil could not be distinguished from the soil itself, and that the owner of the soil was entitled to such water. *Crescent Mining Co. v. Silver King Mining Co.,* 17 Utah, 444. But one owner will not be permitted to waste the water to the injury of his neighbor. *Stillwater Water Co. v. Farmer,* 89 Minn. 58. And in a late case in New Jersey, a city was held liable in damages for an injury caused by the sinking wells on its own land, through which it drew out the percolating water. *Meeker v. East Orange,* 76 N. J. L. 435.