

RECENT CASES

CONTRACTS—WHAT LAW GOVERNS—CAPACITY TO CONTRACT.—HAMMERSTEIN v. SYLVA, 124 N. Y. SUP. 535.—*Held*, The capacity of an operatic singer, domiciled in the United States, to contract for services in the United States, is governed by the laws of that country, where the contract was made in France.

The general rule is that the law governing the capacity to contract is the law of the place where the contract is made. *Gates v. Bingham*, 49 Conn., 275; *Appeal of Huey*, 1 Grant Cas., 51; *U. S. v. Garlinghouse*, Fed. Cas., No. 15,189; 4 Ben., 194; *Story's Conflict of Laws*, sec. 103. The law governing the validity of a contract, validity including capacity, is that of the place where made. *Scudder v. Union Nat. Bank*, 91 U. S., 406; *Baxter Nat. Bank v. Talbot*, 154 Mass., 213; *Union Nat. Bank v. Chapman*, 169 N. Y., 538. But, where the intent is that the performance shall be in a state or country other than the place of contracting, the validity, obligation and effect is determined by the law of the place of performance. *Butler v. Myer*, 17 Ind., 77; *Pittsburg, Cincinnati, Chicago, and St. Louis R. R. Co. v. Sheppard*, 56 Ohio, 68, *Contra*. Even where the contract is made with a view to performance elsewhere, it has been held that the capacity to contract is governed by the law of the place where made. *Campbell v. Crampton*, 2 Fed., 417. In England, the rule is that "the personal capacity to enter into any contract is to be decided by the domicile"; *Guefratte v. Young*, 4 DeG. & Sen., 217. But, in America, the English rule has been held in a very few cases; then the domicile and place of making contract were the same. *Matthews v. Murchison*, 17 Fed., 760; *Augusta Ins. & Banking Co. v. Morton*, 3 La. Ann., 417.

DAMAGES—LIQUIDATED DAMAGES OR PENALTY—PURPOSE OF AGREEMENT.—FLORENCE WAGON WORKS v. SALMON, 68 S. E., 866 (GA.).—*Held*, that where a designated sum is inserted into a contract for the purpose of deterring one or both of the parties from breaching it, it is a penalty; but where it is inserted as the result of a *bona fide* effort of the parties to liquidate in advance and agree upon the sum that should represent the damages which would be actually sustained in the event of a breach, it will be upheld and enforced (unless unconscionable or oppressive), especially in cases where the damages cannot be readily estimated according to some legal standard or measure of damage.

As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty is held to depend upon the meaning and intent of the parties as gathered from the full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject matter of the agreement. *Hosmer v. True*, 19 Barb. (N. Y.), 106; *Marsh v. Allubough*, 103 Pa. St., 335; also in determining whether an amount named in the contract is to be taken as penalty or liquidated damages, courts are influenced largely by the reasonableness of the transaction and

are not restrained by the form of the agreement or by the terms used by the parties, or even by their manifest intent which shall be carried out only as far as it is right and reasonable. *Davis v. U. S.*, 17 Ct. Ct., 201. It has been held that the use of the word "penalty" or "liquidated damages" with the sum named is not conclusive on the point. *Miller v. Elliott*, 1 Ind., 484; *Davies v. Freeman*, 10 Mich., 188. It is the tendency and preference of the law, however, to regard a sum stated to be payable, if the contract is not fulfilled, as a penalty and not as liquidated damages. *Wallis v. Carpenter*, 13 Allen (Mass.), 19; *Whitfield v. Levy*, 35 N. J. L., 149. And where the damages provided for in the agreement are disproportionate to the several covenants therein provided, in some cases being grossly excessive and in others entirely inadequate, they will be construed as a penalty rather than as liquidated. *Clement v. Cash*, 21 N. Y., 253; *Watts v. Sheppard*, 2 Ala., 425. But if from the nature of the contract the damages cannot be calculated with any degree of certainty the stipulated sum will be held to be liquidated damages, otherwise a penalty. *Lynde v. Thompson*, 2 Allen (Mass.), 456.

DEATH—EVIDENCE—DISAPPEARANCE IN FACE OF FATAL DANGER.—IN RE MILLER, 124 N. Y. SUPP., 825.—*Held*, that though the unexplained disappearance of a man is not a sufficient foundation for the presumption of his death, yet where the testator in a stormy night attempted to reach a houseboat in which he lived and the evidence tended to show that he was drowned in the effort, and that his body was carried out to sea and he was never seen after such time, it justified a finding of death.

The point was directly ruled in *Davie v. Briggs*, 97 U. S., 628, where a person when last heard from was faced with the same peril it was held that this circumstance may raise a presumption of death without regard to the duration of the absence. Rulings on the same line are found in *Travellers' Insurance Co. v. Rosch*, 23 Ohio, 491; *Lancaster v. Washington Life Ins. Co.*, 62 Mo., 121. *In re Buckham's Will*, 5 N. Y. Supp., 565. But the mere absence of a person from the commonwealth without being heard from for any period short of seven years is not sufficient to raise a presumption of death. *State v. Henke*, 58 Iowa, 457; *Newman v. Jenkins*, 27 Mass., 515. In support of which it has been set down as a rule that where a person is once shown to have been living, there is a presumption that he continues to live until the contrary is proved. *Lane v. Fulke*, 103 Ill., 58; *Smith v. Knowlton*, 11 N. H. 191; *Emerson v. White*, 29 N. H., 482. However, the weight of authority is distinctly stated in the case of *Eagle v. Emnett*, 4 Bradf., 117, where it was held that "the fact of death may be found from absence of less than seven years coupled with other circumstances tending to show it."

EMINENT DOMAIN—PUBLIC SERVICE CORPORATION—PRIOR PUBLIC USE.—STATE EX REL EVERETT & CHERRY VALLEY TRACTION CO. v. SUPERIOR COURT OF KINGS COUNTY, 110 PA. 428 (WASH.).—*Held*, that one public service corporation may condemn and take a portion of the right of way or property of another when there is a necessity therefor, and when the

land sought to be condemned may be taken without material detriment or injury to the claimant corporation.

Property held and used by one corporation for a public use cannot be appropriated by another for its use, without authority clearly expressed, or implied from the fact that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. *Penn. Ry. Co. v. Western Union Telephone Co.*, 195 U. S., 540. But it is held that one railroad company cannot under the general statutes of eminent domain, condemn for right of way purposes the land of another railroad corporation already in actual and necessary use for railroad purposes. *Atchison, T. and S. F. Ry. Co. v. K. M. & O. Ry. Co.*, 67 Kan., 580. And so land appropriated to a public use cannot be appropriated to another public use, in the absence of a statute clearly conferring authority to make a second seizure. *City of Seymour v. Jeffersonville, Madison, and Indiana R. R.*, 126 Ind., 466; *Louisiana & N. W. Ry. Co. v. Vicksburg, S. P. Ry. Co.*, 112 La., 915. Yet land occupied by a railroad as its right of way may be taken by the State under eminent domain, to the same extent as the property of private citizens, either for the use of another railroad or for a public highway. *T. H. A. and N. M. Ry. Co. v. Detroit, L. & N. Ry. Co.*, 62 Mich., 564. And property belonging to a railroad company not in actual use, and not necessary to the proper exercise of the franchise, may be taken for the purpose of another railroad company under the general railroad law. *B. & O. v. Pittsburg, W.*, and *K. K. Ry. Co.*, 17 W. Va., 812; *A. & W. Ry. Co. v. A. B. & A. Ry. Co.*, 124 Ga., 125.

EVIDENCE—MAILING LETTER—RECEIPT OF LETTER.—LAWYER V. GLOBE INS. CO., 127 N. W., 615 (S. D.).—*Held*, that where there was proof of the mailing of a letter with the postage prepaid, properly addressed, notifying an insurer of the placing of a mortgage upon the insured property, such proof was sufficient to sustain a finding that the letter was actually received by the insurer.

The general ruling on this point is that the addressing, stamping, with the necessary amount of postage, and mailing of a letter is *prima facie* evidence of its receipt. *Ripley Nat. Bank v. Latimer*, 64 Mo. App., 321; *Bloom v. Wanner*, 25 Ky. Law Rep., 1646. And it is held that a letter is mailed if placed in a street letter box. *Reynolds v. Maryland Casualty Co.*, 30 Pa. Super. Ct., 456. Or even handed to a railway mail clerk on board a mail car. *Watson v. Richardson*, 110 Iowa, 673. Likewise there is a presumption that an uncalled-for letter with a return card in the corner was returned to the addressee. *Hedden v. Roberts*, 134 Mass., 38. Furthermore, the postmark of the office in which a notice is mailed is generally considered *prima facie* evidence of the time when it was mailed. *New Haven County Bank v. Mitchell*, 15 Conn., 206. And in the same manner it has been held that presumption of delivery results from the intrusting to a telegraph company for transmission of a message properly addressed. *Perry v. German-American Bank*, 53 Neb., 89. However, there is no conclusive presumption of law that a letter properly addressed and mailed was received. *First Nat. Bank v. McManigle*, 69 Pa. St., 156; *Greenfield Bank v. Crofts*, 86 Mass., 447.

GRAND JURY—QUALIFICATION OF JUROR.—MASON v. STATE, 53 So., 153 (ALA.).—Held, that one who has been a butcher, shedding the blood of animals, with its sight and smell, for seventeen years, is not disqualified from serving on a grand jury in a murder trial.

The right of a party charged with an indictable offense to an impartial grand jury is as unconditional as his right to any jury whatever. *State v. Gillick*, 7 Ia., 287. A juror may be challenged to the favor when he is not altogether indifferent, or might unconsciously be swayed to one side. 1 *Chitty's Criminal Law*, Sec. 544. Such a challenge is a question of fact, to be determined by triers, or by the court, the triers being waived and the issue submitted. *Schoeffler v. State*, 3 Wis., 823. By statute the judge may take the place of the triers. *Licett v. The State*, 23 Ga., 57; *State v. Knight*, 43 Me., 11; *U. S. Rev. Stat.*, 2nd ed. Sec. 819. It is a good cause of challenge that a juror has expressed an opinion as to which party ought to prevail. *The Justices v. Road Co.*, 15 Ga., 39; *Stewart v. The State*, 13 Ark., 720. But the fact that a man is a member of a political party, and a strong partisan, does not affect his qualification as a grand juror. *United States v. Eagan*, 30 Fed., 608. Nor is a juror disqualified because he is a member of the same fraternal organization as plaintiff. *Reed v. Peacock*, 123 Mich., 244.

MASTER AND SERVANT—FELLOW SERVANTS—STREET RAILWAY MOTOR-MEN.—MILTON'S ADM'X v. FRANKFORT & U. TRACTION CO., 129 S. W., 322 (Ky.).—Held, that motormen of colliding cars of a street railway system, though employed by the same company, are not fellow servants so as to preclude a recovery by one from the company for injuries caused by the negligence of the other in the course of their employment.

All who serve the same master, deriving authority and compensation from the same source, and are engaged in the same general business are fellow servants. *Wonder v. Balto & Ohio R. R. Co.*, 32 Md., 411. The determining question is whether the servant causing the injury did so in discharge of a duty owed to the common master. *American Telephone and Telegraph Co. v. Bower*, 20 Ind. App., 32. And it is generally held that the crew of one train are the fellow servants of the crew of another train running on the same road. *Baldwin on American Railroad Law*, 252; *Oakes v. Mase*, 165 U. S., 363. However, the rule that a master is not responsible to one of its servants for an injury inflicted from the neglect of a fellow servant is not adopted to its full extent in some states. *Railway Co. v. Keary*, 3 Ohio St., 201; *Louisville and Nashville Railroad Co. v. Collins*, 2 Duvall, 114. The Supreme Court adopted the modified rule in *Chicago and Milwaukee Railroad v. Ross*, 112 U. S., 377, but later reversed this decision. *New England Railway Co. v. Conroy*, 175 U. S., 343.

MORTGAGES—FORGED MORTGAGE—ESTOPPEL.—ROTHSCHILD ET AL. v. TITLE GUARANTEE & TRUST CO., 124 N. Y. SUP. 442.—Held, that, where A, after discovering that her son had forged her name to a mortgage, without fraudulent intent and without any design to shield her son, had made two

payments of interest, her duty to inform the mortgagee of the forgery was not such as to estop her from claiming its invalidity.

A mortgagor is not estopped from setting up the invalidity of his mortgage, unless there has been some fraud, misrepresentation, or concealment on his part. *Jones on Mortgages*, Sec. 631; *Brewster v. Madden*, 15 Kansas, 249. Where a person makes payments to an innocent holder of a promissory note to which his name has been forged, in order to screen the forger, he is estopped from setting up forgery. *Buck v. Wood*, 85 Me., 204. But mere silence is not a basis of estoppel unless there is not only a right, but a duty, to speak. *Cautley v. Morgan*, 51 W. Va., 304. Only in the case where a party to a suit, by his silence when he ought to speak, has naturally induced conduct on the part of his adversary, is he estopped to take advantage of any act or omission, so induced to the latter's disadvantage. *Fair Haven & W. R. Co. v. City of New Haven*, 77 Conn., 667. But equitable estoppel, as in this case, cannot arise from one's silence or inaction, unless the one seeking relief knows that he ought to speak, or has caused another to change his position to his injury. *Griffin v. Nichols, Shepard & Co.*, 51 Mich., 575. *Columbia State Bank v. Carrig*, 3 Neb. (unof.), 592.

MUNICIPAL CORPORATIONS—JUDICIAL ACT—LIABILITY.—*AUSTIN v. CITY OF DUNKIRK*, 124 N. Y. SUPP. 248.—*Held*, that in an action for personal injuries from falling on a sidewalk, the construction of such sidewalk was a judicial act on the part of defendant for which it is not liable and the submission of its liability to the jury was error.

A municipal corporation in planning a public work acts judicially and when proceeding in good faith, is not liable for error of judgment; while in constructing its work, it acts ministerially and it is bound to see that it is done in a reasonable and skillfull manner. *City of Chicago v. Norton Milling Co.*, 96 Ill., 580. The determination of the plan of a public work is in the nature of a legislative action, the lawful exercise of which can neither be a wrong nor be transferred to courts or juries from the body to which it belongs. *City of Lansing v. Toolan*, 37 Mich., 152; *Conlon v. City of St. Paul*, 70 Minn., 216; *Wells v. Atlanta*, 43 Ga., 67. And if the work is done precisely in accordance with the plan the city is exempt from liability. *Clemence v. City of Auburn*, 66 N. Y., 334. But a city has no right to plan or create an unsafe or dangerous condition. *Gould v. City of Topeka*, 32 Kan., 485. For such a rule would tend to relieve municipal corporations of carelessness and increase the dangers to persons using the street. *Kiernan v. Mayer*, 14 N. Y. Ap. Div., 156. So some courts hold that a city will be liable if the construction is manifestly dangerous, although the city adopted the plans approved by skillful engineers. *Waters v. City of Omaha*, 76 Neb., 855. And the city will be liable if the judicial act is performed negligently. *Donahue v. City of New York*, 3 Daly, 65. And the city can not escape liability because of defect of original plan. *Stone v. City of Seattle*, 30 Wash., 65; *McDonald v. City of Duluth*, 93 Minn., 206. But other courts have held negligence must only be in the subsequent management and not in the original plan. *Lansing*

v. Toolan. Supra; City of Augusta v. Mettle, 115 Ga., 124; *Clemence v. City of Auburn*, 66 N. Y., 334.

PUBLIC LANDS—CONVERSION OF GUM FROM BOXED TREES—INNOCENT PURCHASERS OF PRODUCT.—UNITED STATES *v. WATERS-PIERCE CO.*, 180 FED. REP. 309.—*Held*, where gum taken from trees on public land under homestead entry, in violation of law, was sold to distillers, and by them manufactured with other gum into turpentine and resin, which was sold to an innocent purchaser, that the United States has no title to such products which will support an action of conversion against the purchaser.

In general, where trees, minerals, or other products are severed from the land by an intentional trespass, that property severed still belongs to the owner of the land, and he may reclaim it wherever found, and in whatever condition it may be at the time. *Cooley on Torts* (3rd. ed.), 72. New York carries this doctrine very far. *Silsbury v. McCoon*, 3 N. Y., 379.. If the trespass was unintentional, or by mistake, whether the owner can recover depends upon the relative value of the originals and the expenditures upon the same, upon how great is the disparity between the original materials and the property sought to be reclaimed, and upon the relative injustice and hardship upon the parties. *Wetherbee v. Green*, 22 Mich., 310; *Isle Royal Mining Co. v. Hertin*, 37 Mich., 332; *Eaton v. Langley*, 65 Ark., 448; *Lake Shore & Michigan Southern Railroad Company v. Hutchins*, 32 Ohio St., 571. But the importance of enhancement in value is questioned in *Strubbee v. Trustees Cincinnati Railway*, 78 Ky., 481. There are exceptions and qualifications to the general rule as to intentional trespasses. Even those who purchase from the trespasser acquire no better title than the trespasser. *Anderson v. United States*, 152 Fed. Rep., 87. But the rights of third parties, when they intervene, and when full protection can be given to the innocent party whose goods have been wrongfully used, will be protected. *National Park Bank v. Goddard*, 30 N. Y. Supp., 417. Also, the owner, if he has notice of the conversion and knowledge that sales are to be made, cannot recover the property from a purchaser in good faith, or hold him responsible for the conversion. *Preston v. Witherspoon*, 109 Ind., 457; *Foster v. Warner*, 49 Mich., 641. Without such notice or consent the owner may recover from an innocent purchaser. *Strubbee v. Trustees Cincinnati Railway, supra*.

SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.—HARDWOOD LUMBER CO. *v. ADAM AND STEINBRUGGE*. 68 S. E. (GA.), 725.—*Held*, that in a suit for breach of contract for failure to deliver certain goods, of a specified quality and sold at a specified price, the measure of damages is the difference between the contract price and the market price at the time and place of delivery.

The courts are universally agreed on the above rule, and hold it invariably where the contract is executory and the purchase price not having been paid. *Saxe v. Penokee Lumber Co.*, 159 N. Y., 371. *Bartlett v. Blanchard*, 13 Gray (Mass.), 429. But the parties may expressly stipulate beforehand what the measure of damages shall be in case of a breach of

contract. *Street v. Chapman*, 26 Ind., 142; *Sawyer v. McIntyre*, 18 Vt., 27. Where perchance there is no market price at the stipulated place of delivery, the weight of authority upholds the rule that the prevailing market price at the nearest market, plus the cost of transportation to the place of delivery is the proper means of estimating the damages. *Grand Tower Miss, Ect. Co. v. Phillips*, 23 Wall., 471. *O'Gard v. Ellsworth*, 83 N. Y. Sup., 120. If the contract price be equal or less than the market price, in such case no actual damages can be recovered. *Buckley v. Holmes*, 19 Ill. Ap., 530. Providing there be any special damages, the court will not presume them, but they must be alleged and proved. *Strauss v. Scott*, 59 N. Y. Sup., 826. Some courts have also allowed nominal damages, in cases where the market price was equal or less than the contract price. *Moses v. Rasin*, 14 Fed., 772. In case no time has been fixed for delivery, damages will be estimated with reference to the time of the refusal to deliver. *Williams v. Wood*, 16 Md., 220; *Eastern R. Co. v. Benedict*, 10 Gray (Mass.), 212.

STREET RAILROADS—CARE REQUIRED—RIGHT OF PARTIES ON TRACK.—*MERRILL v. SHEFFIELD Co.*, 53 So., 219 (ALA.).—*Held*, that a street company's right to use a track is superior to the traveller's, in that it is the latter's duty to vacate the track in favor of the car, since it is confined to that part of the street.

The above decision is in harmony with the weight of authority holding that a street railway's right to use that part of the street occupied by its tracks is paramount to the rights of persons travelling or driving thereon. *Moore v. Railroad*, 126 Mo., 265; *Heffron v. Railroad*, 28 N. Y. Supp., 518; *Shea v. Railroad*, 44 Cal., 414. The drivers of vehicles must avoid undue interference with this superior right, but the law protects them from the negligence of the car company. *Railroad v. Zeiger*, 78 Ill., App., 463. This does not apply to street railway crossings, where neither street car nor vehicle has a right superior to the other. *O'Neil v. Railroad*, 129 N. Y., 125. However, this street right is not exclusive and drivers need only use reasonable precautions and give free and unobstructed passage when necessary for cars to pass. *Finkelstein v. D. D. Railroad*, 105 N. Y., 655; *Hicks v. Railroad*, 124 Mo., 115. But it is exclusive in the sense that the public must give way when the street car company has occasion to use the tracks for its traffic. *Ward v. Railroad*, 8 N. J. L., 23. The only limitation is that the cars have preference in the use of its tracks. *Adolph v. Railroad*, 65 N. Y., 554. Other courts have laid down the rule that neither car nor vehicle has a right superior to that of the other, but each must exercise its right with due regard to that of the other and that their rights are mutual and co-ordinate. *Railroad v. McKewan*, 80 Md., 593; *Swan v. Railroad*, 93 Cal., 179.