RECENT CASES

ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—PRESUMPTION.—MILLER V. CONTINENTAL ASSN. CO. OF AM., 134 S. W., 1003 (Mo.). *Held*, that where a duly licensed and practicing attorney appears in a court of record as the representative of a party, there is a strong presumption that he is authorized so to appear, and he may not in general be required to establish his authority to do so, except at the instance of the court or his client.

Although it is necessary that an attorney be specially authorized to act for a client, his position as an officer of the court makes it unnecessary for him in the ordinary case, to show his authority in any way, there being a firmly established presumption in favor of it. *Osborn v. United States*, 9 Wheat., 738; *Hill v. Mendenhall*, 21 Wall., 453. In spite of this favorable presumption, however, there is a well recognized discretion in the court to call for proof of an attorney's authority when it sees fit. *King of Spain v. Oliver*, 14 Fed., Case No. 7814; *New York v. Purdy*, 36 Barb. (N. Y.), 266. Moreover, either party may question an attorney's authority to represent his alleged client. *People v. Mariposa Co.*, 39 Cal., 683; *Hess v. Cole*, 23 N. J. L., 116. But his authority to appear can not be controverted on the trial by evidence outside the issues in the case. *Ind. Bloomington & Western Ry. v. Maddy*, 103 Ind., 200. Furthermore the application for the plaintiff's attorney to show authority should be made before plea is filed. *Reece v. Reece*, 66 N. C., 377; *Campbell v. Galbreath*, 5 Watts (Pa.), 423. But the defendant's attorney may be required to show his authority even after he has filed a plea, at the request of the plaintiff. *Blood v. Westbrook*, 50 Mich., 443. Again, pleading the general issue seems to be a waiver of all objections to attorney's authority. *Lucus v. Georgia Bank*, 2 Stew. (Ala.), 147. And by a well settled rule, the question of an attorney's authority to represent an alleged client can not, it is held, be raised collaterally. *Pressly v. Lamb*, 105 Ind., 171. Or upon demurrer. *Gibson v. State*, 59 Miss., 341. Nor should it be set up in a pleading. *North Brunswick Tp. v. Booream*, 10 N. J. L., 257. But must be raised on motion directly for that purpose and supported by affidavits. *Williams v. Butler*, 35 Ill., 544.

AUTOMOBILES—INJURY FROM AUTOMOBILE USED BY BORROWER—OWNER'S LIABILITY.—HARTLEY V. MILLER, 130 N. W., 336 (MICH.),—*Held*, that, in the absence of statutory provision, an owner of an automobile is not liable for personal injury caused by a borrower's negligence, on the theory that an automobile is a dangerous instrumentality, though the owner was in the car at the time; the borrower being in control.

The owner of a vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time of the injury in the business of the owner. *Doran v. Thomsen*, 74 N. J. L., 445. Nor is the owner of an automobile liable for injuries caused by the car when

it is in the possession of a purchaser who is to pay the price out of the proceeds of hiring same. *Braverman v Hart,* 105 N. Y. Supp., 107. Nor is the owner liable when his son is in the machine, but not with his permission, nor under his control. *Reynolds v. Buck,* 127 Iowa, 601. But the owner is liable when the injury is committed while his servant is using the car in the course of his employment. *Curley v. Electrical Vehicle Co.,* 74 N. Y. Supp., 35. However, when the negligent parties are driving an automobile of their employer, but not engaged in his business, nor under his control, there is no lability on their master. *Clark v. Buckmobile Co.,* 94 N. Y. Supp., 771. The mere proof of ownership of the automobile by defendant, without evidence that the machine was being used in the course of his business, is not sufficient to establish defendant's liability.*Lotz v. Hanlon,* 217 Pa., 339. A chauffeur, who, in violation of his employer's instructions, takes out the latter's automobile for his own pleasure, is not acting within the scope of his employment, and his employer is not liable to strangers for his negligence. *Stewart v. Baruch,* 93 N. Y. Supp., 161; *Patterson v. Kates,* 152 Fed., 481. Hence, when plaintiff introduces defendant's chauffeur as a witness, and the latter testifies that he was employed by defendant, but on cross-examination by defendant admits that he was engaged in the prosecution of his own business, contrary to the orders of defendant, at the time of the accident, his testimony justifies the court in granting a non-suit. *Quigley v. Thompson,* 211 Pa., 107. Where plaintiff is injured through the negligence of a chauffeur, who is acting contrary to the orders of his employer, the mere fact that defendant knew that he was careless does not make him liable, since his continued employment of a careless servant is not the proximate cause of the injury. *Danforth v. Fisher,* 75 N. H., 111; *Jones v. Hoge,* 47 Wash., 663. The weight of authority would seem to be that an automobile is not *per se* a dangerous instrumentality. *Steffen v. McNaughton,* 142 Wis., 49; *Slater v. Thresher Co.,* 97 Minn., 305; *McIntyre v. Orner,* 166 Ind., 57; *Cunningham v. Castle,* 111 N. Y. Supp., 1057. The case of *Cunningham v. Castle, supra,* has been overruled by *Ingraham v. Stockamore,* 118 N. Y. Supp., 399, on the ground that the Legislature, by regulating the registration of automobiles, and requiring licenses for chauffeurs, must have considered the automobile a vehicle of more than ordinary danger.

CARRIERS OF PASSENGERS—NEGLIGENCE OF SERVANTS OF SLEEPING CAR COMPANY—LIABILITY OF RAILROAD COMPANY.—NELSON V. ILLINOIS CENTRAL RAILROAD COMPANY, 53 So., 619 (MISS.).—*Held,* that agents and servants of a sleeping car company on its cars, which are attached to and become part of the system of transportation used by a railroad company, are agents of the railroad company; and if a passenger on such a car is injured by the negligence of servants of the sleeping car company, the railroad company is liable in the same way and to the same extent as if the injury had occurred in its ordinary passenger coaches.

The general rule laid down in the principal case is upheld by the weight of authority. *Railroad Co. v. Ray,* 101 Tenn., 1; *Gannon v. Railroad Co.,* 141 Iowa, 37; *Railroad Company v. Lipscomb,* 90 Va., 137; *Airey v. Pullman Co.,* 50 La. Ann., 648. It has been held that the railroad company's

liability is limited to acts done by the sleeping car servant in performance of the carrier's contract of transportation, and does not extend to breaches of duty pertaining peculiarly to the contract of the Pullman Company. *Calhoun v. Pullman Co.*, 86 C. C. A., 387; *Taber v. Railway Co.*, 81 S. C., 317. But other courts hold that the railroad company is liable for all the acts of the sleeping car servant, done within the scope of his authority. *Dwinelle v. Railroad Co.*, 120 N. Y., 117; *Railway Co. v. Raine*, 130 Ky. 454. The reason usually assigned for this rule is that the sleeping car has been adopted as a part of the railroad company's train, and is under its control. *Railroad Company v. Church*, 155 Ala., 329; *Railway Co. v. Perkins*, 21 Tex. Civ. App., 508. The passenger has a right to assume that the servants in the sleeping car are the servants of the railroad company. *Thorpe v. Railroad Co.*, 76 N. Y., 402; *Railroad Co. v. Walrath*, 38 Ohio St., 461. The Railroad Company is not relieved of any of the duties which it owes the passenger by reason of the passenger making a separate contract with a sleeping car company for special accommodations. *Campbell v. Railway Co.*, 83 S. C., 448. Nor can the railroad company evade any of its duties by entering into any agreement with the sleeping car company. *Pennsylvania Co. v. Roy*, 102 U. S., 451; *Kinsley v. Railroad Co.*, 125 Mass., 54.

CONTRACTS—CONTRACTS NOT TO ENGAGE IN BUSINESS—LIABILITY OF PARTY.—GALLUP ELECTRIC LIGHT CO. V. PACIFIC IMPROVEMENT CO., 113 PAC., 448 (N. M.).—*Held*, that under a contract not to engage in business in competition with the purchaser of property, the party bound is not precluded from loaning money to others, even though they may use it to embark in business in competition with the purchaser.

It is well established that whenever there is a contract not to engage in a business, it is a question of fact and of the construction of the contract, whether or not the party bound has by subsequent action become liable for breach of the contract. *Booth v. Siebold*, 37 N. Y. Mic., 101. However, it has been held, in accord with the principal case, that if one covenants not to engage in a certain trade he does not violate his contract by merely loaning money to another engaged in such business. 2 *High on Injunctions*, Sec. 1176, p. 975, 2d ed.; *Bird v. Lake*, 1 Hem. & N., 338. Yet, the intention of the parties must be looked to, and loaning money to a competing firm to enable them to establish a competing business has been held to be a breach under a contract not to engage in business directly or indirectly in competition with the purchaser of property. *Davis v. Barney*, 2 Gill & J. (Md.), 382. And where adequate damages cannot be estimated for the breach of such covenant an injunction is the proper remedy. *Baker v. Lottsmeyer*, 75 Ind., 451. If a party so contracting attempts to run such business through his representative, as a subterfuge to escape the penalty of the breach, he will be enjoined. *Barrett v. Ainsworth*, 156 Mich., 35. Furthermore, neither the mode nor the rate, nor the name by which defendant calls his business, makes any difference; the question is, whether or not it is actually a competing business and belonging to the defendant. *Richardson v. Peacock*, 28 N. J. Eq, 151.

DEAD BODIES—RIGHT OF POSSESSION—CIVIL LIABILITY FOR ILLEGAL ACTS—DAMAGES.—HASSARD V. LEHANE, 128 N. Y. SUP., 161.—*Held,* that a mother legally entitled to the possession of the corpse of her son may recover of one illegally dissecting or otherwise mutilating the remains, damages measured by the injury of her feelings caused thereby.

Since at common law there could be no such thing as property in human remains, *in re Brick Presbyterian Church,* 3 Edw. Ch. (N. Y.), 155; *Bessemer Land and Imp. Co. v. Jenkins,* 111 Ala., 135, no action for civil damages would lie for injuries to a dead body. *2 Blackstone Comm.,* 429; *King v. Sharp,* 7 Cox C. C., 214. However, according to the modern rule, property in the nature of a trust is recognized in human remains. *Pettigrew v. Pettigrew,* 207 Pa. St., 313. And there is a well recognized rule in the United States of the right of posession of a corpse for Christian burial in a public cemetery. *Page v. Simonds,* 63 N. H., 17; *Dogert v. Indianapolis,* etc., 13 Ind., 134. Accordingly, the wife may recover damages for an unauthorized dissection of the husband's body, mental anguish being an element in determining damages. *Larson v. Chase,* 47 Minn., 307. So a father may recover for an unauthorized autopsy upon the body of his child. *Burney v. Childrens Hosp.,* 169 Mass., 57. Or, the nearest of kin may recover for the mutilation of a dead body, and the mental anguish may be considered in determining damages. *Magher v. Driscoll,* 99 Mass., 281; *Koeber v. Patik* 123 Wis., 453. In Rhode Island it has been held that while an injury to the possession of a dead body is not a subject for which the common law would give relief, yet equity will enjoin any infringment upon such rights. *Pierce v. Swan Point Cemetery,* 10 R. I., 227. Furthermore, it is the rule in other jurisdictions that since there could be no property in the cadavery of an intestate, a personal representative cannot maintain an action for damages for willful or negligent mutilation of the body, although he may sue for injuries to the wearing apparel to the decedent. *Griffith v. Charlotte R. R. Co.,* 23 S. C., 25. So, it has also been held that there could be no recovery for mental anguish caused by the dead body of a relative being thrown from a wagon by the negligence of a railroad train, where there was no mutilation of the body. *Hockenhammer v. Lexington and E. Ry. Co.,* 24 Ky. Law Rep., 2383.

ELECTIONS—CONTEST—JURISDICTION.—BRADBURY V. WIGHTMAN, 134 S. W., 511 (Mo.).—*Held,* that where a legislative provision gave the courts jurisdiction over contested elections of all public officers, except Governor and Lieutenant-Governor, and also ordered that the General Assembly should designate the courts to have such jurisdiction, but the Assembly mentioned those public officers, over contests for whose offices the Supreme Court was to have jurisdiction, specifically by name, and later a public office was created; that the Supreme Court had no jurisdiction over such office. Graves, J., *dissenting.*

The case under discussion is based on the maxim, "*Expressio unius est exclusio alterius,*" that is, the expression of certain things in a statute

presupposes the exclusion of things not mentioned; *Johnson v. Southern Pa. Co.*, 117 Fed., 462; *Perkins v. Thornburgh*, 10 Cal., 189; and so the enumeration of property which may be exempted from taxation is a limitation on the power of the legislature to exempt any other property. *Consol. Coal Co. v. Miller*, 236 Ill., 149. And it has been held that even should the court be convinced that some other meaning is intended by the law-making power and even though literal interpretation should defeat the purpose of the enactment, yet the statute must be literally construed. *State v. Insurance Co. of North America*, 71 Nebr., 320; *Black on Interpretation of Statutes;* Ch. 3, Sec. 26. *Doe v. Considine;* 6 Wall (U. S.), 458. There is, however, strong authority for the proposition that the above-mentioned maxim should not be permitted to defeat the intention of a legislature; *Swick v. Coleman*, 218 Ill., 33, and so it has been held that when a statute read, "whether the second marriage shall take place in England or elsewhere." This has been held to apply to places outside the King's dominions, *Rex v. Russell* (1901), A. C., 446 (*overruling, MacLeod v. Att'y.-General of U. S. Wales* (1891), A. C., 455. This is especially held to be true when a class of things is mentioned and a new office of such class has come into existence since the passage of a statute. *State v. Frederickson*, 101 Me., 37; *Commonwealth v. Sylvester*, 13 Allen (Mass.), 247; *Keith v. Quinney*, 1 Ore., 364. It has also been held that the meaning of one statute may be supplied by reference to another statute. *Commonwealth v. Goding*, 3 Met. (Mass.), 130; *United Societies v. Bank*, 7 Conn., 456. So it seems also that the intention of a legislature, when so discovered, must be followed though contrary to the letters of the statute. *Sedgwick on Com. and Stat. Law, 232*, and this extension of interpretation applies especially when the act deals with a genus, the later office being a species. *Reg. v. Smith*, L. R., 1 C. C., 110; *Lane v. Cotton*, 12 Modern, 485, and thus a statute authorizing counties to take stock in railroads was held applicable to stock of railroads formed under a subsequent statute. *Stebbins v. Pueblo Co.*, 2 McCrary (U. S.), 196.

ELECTION OF REMEDIES—ACTS CONSTITUTING ELECTION—IN RE DYE'S ESTATE—113 PAC., 839 (N. M.).—*Held*, that an appeal from a judgment dismissing an action by an heir to revoke the probate of a will on the ground of infancy is not abandoned because the heir, when of age, brings a second suit to revoke the probate. Wright and Roberts, JJ., *dissenting.*

The case under discussion is in opposition to the rule that a party who prosecutes a second suit for the same cause, after judgment against him on the first suit, waives his right to prosecute further the former suit. *Ehrman v. Astoria R. R.*, 26 Ore. 377; *Moore v. Floyd*, 4 Ore., 101; *Liebuck v. Stahle*, 66 Iowa 749. Especially does this hold good when the complainant's bill has been abated and he files another bill in the same court, and during its pendency sues out a writ of error to a higher court. *Carr v. Casey*, 20 Ill. 637. Nor can a party prosecute his appeal from a judgment at law and his petition in chancery at the same time, and if he so does, the appeal at law is waived. *Gordon v. Ellison*, 9 Iowa, 317. The same under consideration, however, finds some support in the doctrine that no act is so decisive as to constitute a conclusive election unless the

remedial right on which the act is based is wholly irreconcilable with the remedial right which the subsequent action seeks to enforce. *Conner v. Palinquist,* 61 Ill., App. 551; *Heidelbach v. Na'l. Bank,* 33 N. Y. Supp. 794. And it has been held that where a plaintiff has recovered judgment, realizing merely a nominal sum, that this does not preclude his asserting in a subsequent action that he has a lien on the personalty of the defendant. *Wemple v. Hawenstein,* 46 N. Y., Supp. 288. So a suit on a note against a corporation is no bar to a second suit against the signers of the note who were officials of the corporation. *Bank of Brooklyn v. Wallis,* 32 N. Y., Supp. 381.

EXECUTORS AND ADMINISTRATORS—ATTORNEY OF ADMINISTRATION—RIGHT TO COMPENSATION.—GOODMAN V. GRIFFITH, 134 S. W., 1051 (Mo.).—*Held,* that an attorney does not forfeit his right to compensation from the estate for services rendered the administrator and his wife in presenting a claim in their favor against decedent's estate. Norton J., *dissenting.*

Subject to the general requirement of good faith and reasonable prudence, an executor or administrator is entitled to employ and pay an attorney for advice in reference to the management of the estate. *Smyley v. Reese,* 53 Ala., 89; *Roll v. Mason,* 9 Ind., App. 651. An attorney's fees contracted in procuring letters of administration is not a proper charge against the estate. *Wilbur v. Wilbur,* 17 Wash., 683; *In re Byrne's Estate,* 122 Cal., 260. But such fees are allowed an executor in contesting a will. *Bradley v. Andress,* 30 Ala., 80; *Bratney v. Curry,* 33 Ind., 399; *contra, In re Parson's Estate,* 65 Cal. 240. But where legal proceedings are made necessary by wrongful acts of the administrator or executor then the attorney cannot collect his fees from the estate. *Jacoway v. Hall,* 67 Ark., 340; *Ross v. Battle,* 113 Ga., 742. And contrary to the principal case, an estate is not chargeable with the services of an attorney which are rendered an administrator as an individual. *Wilkinson v. Ward,* 42 Ill., App. 541; *Noble v. Jackson,* 132 Ala., 230. But where it concerns him both personally and officially it is proper to apportion the counsel fees. *Roll v. Mason,* 9 Ind., App. 651; *Nelson v. Bush,* 9 Dana (Ky.), 104.

GAMING—ACTION TO RECOVER MONEY LOST—PAYMENT.—MANN V. GORDON, 110 PAC., 1043 (N. M.).—*Held,* that a plaintiff who engaged in a gambling transaction, and paid his loss by check some six weeks later, could recover under a statute providing that any person losing money at gambling might recover. Wright and Parker, JJ., *dissenting.*

The general common law rule is to the effect that money lost at gaming, when the parties are in *pari delicto,* may not be recovered. *Weyburn v. White,* 22 Barb. (N. Y.), 82; *West v. Holmes,* 26 Vt., 530, though equity might grant relief to the loser; *Thomas v. Watson,* 9 Md. 536, note, and would not allow the innocent indorsee of a note given for gaming to sue the drawer. *Talbot v. Hubble,* 2 Strange, 1154. By statute, however, in some jurisdictions, the loser may recover at law. *Jacob v. Clark,* 115 Ky., 255; *Trumbo v. Finley,* 18 S. C., 305. But the majority opinion in the

case under discussion is contrary to the general American and English rule, that money subsequently and voluntarily paid after a transaction, with full knowledge of the facts, cannot be recovered, though the claim was invalid. *Cobden v. Kendrick,* 4 Durnford & East T. R., 431; *Flower v. Lance,* 59 N. Y., 603; *Beecher v. Buckingham,* 18 Conn., 110. Even though more was paid than was allowed by law. *Selby v. U. S.,* 47 Fed., 800. Nor can a set-off be maintained under such circumstances. *U. S. v. Clement & Newman,* Crabbe, 499.

INNKEEPER—LOSS OF PROPERTY OF GUEST—CARE REQUIRED OF INNKEEPER.—GIBLYN V. HAUF, 126 N. Y., SUP. 581.—*Held,* that where a guest left a hotel in October, 1908, in debt to the proprietor, claiming to have left a chest with its contents, and made no inquiry about it until November, 1909, when she tendered the amount of her debt and demanded delivery of the chest, and made no efforts to have its whereabouts discovered until March, 1910, such unexcused delay is sufficient to throw upon the guest the burden of proving actual negligence on the part of the innkeeper in failing to keep and restore the property left. Giegerich, J., *dissenting.*

The prevailing view is that he is liable like the carrier, for all goods of the guest lost in the inn, unless the loss happened by act of God, or a public enemy, or by fault of the owner. *Mason v. Thompson,* 9 Pick. (Mass.), 280; *Cunningham v. Bucky,* 42 W. Va., 671. Whatever view is adopted, it is agreed that upon loss or injury to the goods being shown, the innkeeper is *prima facie,* and the burden is on him of establishing such facts as will exonerate him. *Howe Mach. Co. v. Rease,* 49 Vt., 477. It is generally held that after the relation of guest ceases, the innkeeper appears liable only as an ordinary bailee for the goods his departing guest may have left in his care. *Adams v. Clem,* 41 Ga., 665. According to one view the liability of an innkeeper in such cases is merely that of a gratuitous bailee, who is responsible only for gross negligence. *O'Brien v. Vaill,* 22 Fla., 627. But some cases show a tendency to enlarge the liability of the innkeeper under such circumstances, beyond that of a bailee without compensation, and to hold him liable as a bailee holding property upon which he has a lien as a security for a sum due so as to be bound for ordinary care. *Giles v. Fauntleroy,* 13 Md., 126. So some courts hold, where a guest pays his bill and departs, leaving his property behind, the innkeeper is merely a gratuitous bailee of the party, and in case of its loss is only liable for gross negligence. *Miller v. Peeples,* 60 Miss., 819; *O'Brien v. Vail, supra.* But other cases hold he is responsible for want of ordinary care. *Murray v. Marshall,* 9 Colo., 482. And where the guest leaves without paying his bill, the innkeeper is only liable as a gratuitous bailee for goods left with him. *Lawrence v. Howard,* 1 Utah, 142. As a general rule it would seem that a guest does not have to prove negligence of the innkeeper in order to hold him liable. *Burrows v. Trieber,* 21 Md., 320; *Carter v. Hobbs,* 12 Mich., 52.

INSURANCE—MUTUAL BENEFIT ASSOCIATION—RIGHTS OF BENEFICIARY.—SAVAGE V. MODERN WOODMEN OF AMERICA, 113 PAC., 802 (KANS.).—*Held,*

that where the designation of a person as beneficiary in a mutual benefit association is made in pursuance of an agreement, founded upon sufficient consideration, the person so designated cannot be changed by the member, unless by reason of countervailing equities, although the rules of the order permit the member to change the beneficiary at will.

There is some conflict of authority as to the right of a member of a mutual benefit association to change the beneficiary originally designated The weight of authority is, however, that such act is permissible. *Hoept v. Supreme Lodge K. of H.*, 113 Cal., 91; *Carpenter v. Knapp*, 101 Iowa 712; *Ingersoll v. Knights of Golden Rule*, 47 Fed., 272; *Book v. Book*, 1 Ont. L. R., 86. But there is authority for the view that the beneficiary acquires a vested interest, as in an ordinary insurance policy. *Weisert v. Nuell*, 81 Ky., 336; *Love v. Clune*, 24 Colo., 237; *Black v. Valley Mutual*, 52 Ark., 201. Especially if the constitution or the certificate itself gives no power to change the original beneficiary. *Locomotive Engineers v. Winterstein*, 58 N. J. Eq. 189; *Johnson v. Hall*, 55 Ark., 874. Nevertheless, some jurisdictions, which hold generally that the member may change the beneficiary, rule that this power is lost in the case of a contract between the member and the beneficiary. *Carter v. Carter*, 35 Ind., App. 73; *Smith v. N. B. Society*, 123 N. Y., 85. And so the member cannot change the beneficiary when named in consideration of past, present, or future advances. *McGraw v. McGraw*, 190 Ill., 604; *Leaf v. Leaf*. 92 Ky. 166. Nor when the beneficiary promises to pay the assessments and does so. *Maynard v. Vanderwerker*, 24 N. Y., Sup. 932. There are, however, cases which hold that even in the case of contracts, such as above, the member retains the right to change the beneficiary, whose remedy is solely for the breach of the agreement with him. *Sabin v. Grand Lodge A. O. U. W.*, 6 N. Y., St. Rep. 151; *Sovereign Camp W. W. v. Broadwell*, 114 Mo. App. 471, on the ground that the power of appointment is a matter between him and the lodge and cannot be limited by his contract with a third person. *Learned v. Tallmadge*, 26 Barb. (N. Y.), 444.

JUDGMENT—RES JUDICATA—ACQUITTAL OF CRIMINAL OFFENSE.—STATE *v.* ROACH, 112 PAC., 150 (KAN.).—*Held*, that an acquittal upon a criminal charge is not a bar to a civil action brought against the defendant by the state, although, in order to recover, it must prove him to have been guilty of the offense.

This rule is not based on the mere fact that one proceeding is criminal and the other civil, but on the fact that in the criminal proceeding defendant's guilt must be proven beyond a reasonable doubt, while in the civil action a fair preponderance of evidence is sufficient. *U. S. v. Donald-Shulz Co.*, 148 Fed., 581; *State v. Bradnack*, 69 Conn., 212; *Riker v. Hooper*, 35 Vt., 457. As a general rule, a judgment rendered on the merits by a court of competent jurisdiction precludes and bars subsequent litigation between the same parties, or their privies, on the same cause of action. *Oman v. Stone Co.*, 134 Fed., 64; *Stearns v. Fire Ins. Co.*, 124 Mass., 61. Furthermore, the constitutional provision that no man shall be twice punished for the same offense has been held to bar the state from bring-

a civil action to enforce another penalty against a defendant who has been convicted of the same offense in a criminal proceeding. *Coffey v. U. S.*, 116 U. S., 436. But this decision has been limited by the case of *Stone v. U. S.*, 167 U. S., 178, so that it does not apply where the purpose of the civil action is dissimilar from that of the criminal proceeding. The rule laid down in the case of *Stone v. U. S., supra,* has been upheld in a great many cases. *State v. Meek,* 112 Iowa, 338; *In re Campbell,* 197, Pa., 582; *In re Attorney,* 86 N. Y. 563; *McGrath v. Board of Excise,* 18 N. Y., Sup. 884; *State v. Miller,* 48 Me., 576; *State V. Corron,* 73 N. H., 434. It is well settled that a judgment in a civil proceeding is no bar to a civil action brought by an individual against the same defendant, since a private wrong inflicted by a criminal act is not merged in the public wrong, nor is the public prosecution intended to supersede or preclude the private action. *Fowle v. Child,* 164 Mass., 210; *Breinig v. Brienig,* 26 Pa. 161. The weight of authority is that such a judgment is inadmissible as evidence in the civil action. *Doyle v. Gore,* 15 Mont., 212; *Railway Co. v. O'Quin,* 124 Ga., 357; *contra, Bankston v. Folks,* 38 La. Ann., 267.

JUDGMENT—TRANSFER TAXES—EFFECT OF JUDICIAL PROCEEDINGS IN ANOTHER STATE.—IN RE CUMMINGS' ESTATE, 127 N. Y., Sup. 109.—*Held,* that in a proceeding to impose a transfer tax on a resident decedent's estate, the state is not bound by a decision in another state, in a proceeding to which it was not a party, that decedent resided there and that his personalty was distributable according to the laws there. Ingraham, J., *dissenting.*

Under the Constitution of the United States each state is bound to give full faith and credit to the judgment of the courts of other states in the Union. But the constitutional provision does not require that one state shall within its territory, enforce the laws of another state. *Dunham v. Dunham,* 57 Ill., App. 475. The judgments of sister states are given, generally, the same effect as they have in the states where they were rendered and no more. *Cannon v. Brame,* 45 Ala., 262; *Bank of North America v. Wheeler,* 28 Conn., 433. In no case, however, are they given effect where the court had no jurisdiction. *Jones v. Warner,* 81 Ill., 343; *Pennoyer v. Neff,* 95 U. S., 714. And a court's determination of its own jurisdiction is not final. *Sheldon v. Wabash R. Co.,* 105 Felt., 785. It is the general rule that two states cannot tax at the same time the same property, nor has a state jurisdiction to tax property and interests lying outside of its borders. *Railroad Co. v. Jackson,* 7 Wall, 267. Real estate is governed by the law of the *situs* and being subject to the jurisdiction of the courts of the state where it is situated cannot be directly affected by the judgment of a court of another state. *Clarke's Appeal,* 70 Conn., 195; *Cooper v. Hayes,* 96 Ind., 386. Tangible personal property situated within a state can be taxed without regard to the residence of the owner. *People v. Board of Trustees,* 48 N. Y., 390. And it seems that the same rule governs in the case of transfer and inheritance taxes. *In re Lord's Estate,* 97 N. Y., Sup. 553; *In re Lewis' Estate,* 203 Pa., 211.

LIBEL AND SLANDER—WORDS ACTIONABLE—ALLEGATIONS IN PLEADING.—CARPENTER V. GRIMES PASS MINING CO., 114 PAC., 42 (IDAHO).—*Held*, that the ends of justice and the public good can be best served by allowing litigants to freely plead any material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the issue under inquiry.

The weight of authority supports the proposition laid down in the principal case. *Dunn v. Southern Ins. Co.*, 116 La. 431; *McGehee v. Insurance Co.*, 112 Fed., 853; *Kemper v. Fort*, 219 Pa. 85. This rule applies also to words spoken by counsel during the course of the trial; *Maulsby v. Reifsnider*, 69 Md., 143; *White v. Carroll*, 42 N. Y., 161; and to remarks of a complainant who is conducting a prosecution before a justice of the peace in behalf of the Commonwealth. *Hoar v. Wood*, 3 Metc. (Mass.), 193. In England, statements made during a trial are absolutely privileged, regardless of their relevancy. *Munster v. Lamb*, 11 Q. B. D., 588; *Scott v. Stansfield*, L. R. 3, Ex. 220. But in America, when the words are not pertinent and material, the rule of protection does not apply. *Moore v. Nat'l. Bank*, 123 N. Y., 420; *King v. McKissick*, 126 Fed., 215. A mere averment that the statements were false and malicious, without alleging that they were not pertinent and material, is insufficient. *Harting v. Shaw*, 130 Mich., 177. Defendant may show that he believed in good faith that they were pertinent and material, and thus rebut the presumption of malice. *Burdette v. Argile*, 94 Ill., App. 171. But where the statements were clearly impertinent, defendant cannot justify by showing his belief that they were true. *McGlaughlin v. Cowley*, 127 Mass., 316. The cardinal inquiry is whether the matter was pertinent to the issue involved. *Crockett v. McLanahan*, 109 Tenn. 517. This is a question of law for the court. *Harlow v. Carroll*, 6 App. D. C., 128; *Jones v. Brownlee*, 161 Mo., 258. In Louisiana, it has been held that defamatory judicial allegations are not libelous and actionable, unless shown to have been false, malicious, and without probable cause. *Lescale v. Schwarz*, 118 La., 718. When libelous matter is contained in pleadings prepared by an attorney, it will be presumed, until the contrary is shown, that his client authorized the act. *Insurance Co. v. Thomas*, 83 Fed., 803. The privilege given by this rule applies only to publication during the trial; hence a newspaper which wrongfully publishes a slanderous account of a judicial proceeding is liable. *Park v. Free Press Co.*, 72 Mich., 560.

RAILROADS—INJURIES TO TREPASSERS—USE OF RIGHT OF WAY.—SOUTHERN RY. CO. V. WILEY, 70 S. E., 510 (VA.).—*Held*, that where railroad tracks have long been used as a pathway with the knowledge and acquiescence of the company, it was bound to keep a reasonable lookout for persons upon the track.

A person who, without permission, walks upon the tracks of a railroad company, is a trespasser, though the portion of the track where he walks is habitually used by pedestrians. *Eggmann v. St. Louis, A. & T. H. R. Co.*, 47 Ill., App. 507. Nor does the mere acquiescence on the part of a company in the use of its track by the public confer any right to use the same. *Wilmurth's Adm'r. v. Ill. Cent. R. Co.*, 25 Ky. Law Rep., 671. But

in some jurisdictions if the use of the tracks continues habitually, with the company's knowledge and without its objection, it is sufficient to constitute the person so using it a licensee. *Minot v. Boston, etc., R. Co.*, 74 N. H., 230; *Swift v. Staten Island Rapid Transit R. Co.*, 123 N. Y., 645. And in respect to trespassers on the track of the company the weight of authority holds that there is no positive duty owing them. *Terre Haute, etc., R. Co. v. Graham*, 95 Ind., 286; *contra, Carter v. Columbia, etc., R. Co.*, 19 S. C., 20. In some jurisdictions the English rule is adopted, that the company is not liable except, after becoming aware of the party's danger, reasonable care was not exercised to prevent injury. *Louisville, etc., R. Co. v. Black*, 89 Ala., 313; *Burnett v. Burlington, etc., R. Co.*, 16 Neb., 332. And the general rule is that a railroad company is not bound to keep a lookout for trespassers. *Terre Haute, etc., R. Co. v. Graham*, 95 Ind., 286; *Mobile, etc., R. Co. v. Stroud*, 64 Miss., 784. In most jurisdictions, in accordance with the principal case, the company is under the duty of using reasonable care to discover and avoid injuring trespassers whom it has reason to anticipate may be on the tracks. *Corbett v. Oregon Short Line Co.*, 25 Utah, 449; *Brown v. Boston, etc., R. Co.*, 73 N. H., 568. Other jurisdictions hold that actual knowledge must be imputed to the company in order to render the company liable for lack of reasonable care. *Cheney v. N. Y. Cent. R. Co.*, 16 Hun. (N .Y.), 415; *Erie R. Co. v. McCormick*, 69 Ohio St., 45.

REFORMATION OF INSTRUMENTS—DEEDS—PARTIES ENTITLED TO SUE.—GREER V. WATSON, 54 So., 487 (ALA.).—*Held*, that a subsequent purchaser may sue to correct a mistake in the description of land made in the conveyance by the original grantor.

The rule laid down by the principal case is supported by the weight of authority. *Sicher v. Rambousek*, 193 Mo., 113; *Stewart v. Brand*, 23 Iowa, 477; *Gwyer v. Spaulding*, 33 Neb., 573; *Hill v. Clark*, 32 Ky. L. Rep., 595; *May v. Adams*, 58 Vt., 74. Where a mistake in the description of land occurs in a series of conveyances under such circumstances as would entitle any one of the vendees to a reformation as against his immediate vendor, the last vendee is entitled to a reformation against the original vendor. *Blackburn v. Randolph*, 33 Ark., 119. But the fact that the subsequent grantee has this right does not bar the first grantee from bringing the suit. *Tillis v. Smith*, 108 Ala., 264. In Colorado it is held that the right to sue for reformation of a deed cannot be transferred merely by a conveyance of the land, and that such a suit must be brought by the original grantee, unless he has expressly assigned it to another. *Norris v. Honestone Co.*, 22 Col., 162. The right of the sub-vendee to reformation of a deed will be enforced against a judgment creditor of the original grantor, and will displace the apparent lien of the judgment on the land omitted from the deed. *Willis v. Gattman*, 53 Miss., 721; *Blackburn v. Randolph, supra.* But equity will not grant such relief against one who has purchased the land in dispute from the original grantor, for value and without notice. *Willis v. Sanders*, 51 N. Y. 384. One who shows no rights under a deed has no equity to have it reformed. *Rowley v. Towsley*, 53 Mich., 329; *Gould v. Glass*, 120 Ga., 50. Hence a deed will not be

reformed at the suit of a sub-vendee who has notice of the fact that the purchase price has not been paid, and who does not tender payment of same. *Hagman v. Shaffner,* 88 Mo., 25. Where a mistake is made in describing land in a deed, but subsequent grantors describe it correctly, the last vendee is not entitled to use the original grantor for reformation, since there is no privity between the parties as to the mistake. *Jackson v. Lucas,* 157 Ala., 51. The statute of limitations does not begin to run against a *bona fide* purchaser without notice until the mistake is discovered and brought to his knowledge. *Hart v. Walton,* 9 Cal. App., 502.

TRADE-MARKS AND NAMES—UNFAIR COMPETITION—TEST.—A. Y. MCDONALD & MORRISON MFG. CO. v. H. MULLER MFG. CO., 183 FED, 972.—*Held,* that the test of unfair competition by the imitation of labels or marks, is not whether a difference can be recognized when the goods are placed side by side, but whether, when they are not side by side, an ordinary prudent person would be liable to purchase the one, believing that he was purchasing the other.

The general rule is in accord with the principal case, in that it does not constitute a practical and valid test that dissimilarities appear only when the articles are placed side by side. *Lawrence Mfg. Co. v. Lowell Hosiery Mills,* 126 Mass., 325; *Monol Tobacco Works v. Gensior,* 32 N. Y. Misc., 87; *Potter v. McPherson,* 21 Hun. (N. Y.), 559. And the weight of authority is to the effect that the similarity must be such that would deceive the ordinary prudent purchaser exercising ordinary care. *Van Camp Packing Co. v. Cruikshanks Bros.,* 90 Fed., 814; *Gannet v. Ruppert,* 119 Fed., 814. A considerable number of cases have gone farther, however, and held that it is an infringment when the similarity be such as is calculated to mislead even ignorant and unwary purchasers that are not cautious. *Brooklyn White Lead Co. v. Masury,* 25 Barb. (N. Y.), 416; *Colman v. Crump,* 70 N. Y., 573. In the case of *Mossler v. Jacobs,* 66 Ill. App., 571, an injunction was sustained preventing the use of the words "Six Big Tailors" as being so simlar to the name of "Six Little Tailors" as to deceive the unwary purchaser. Dissimilarities such as only an expert would detect are infringments. *R. Heinisch's Sons Co. v. Baker,* 86 Fed., 765. But letters or figures applied to merchandise by a manufacturer, for discriptive purposes alone, can not be appropriated b him for his exclusive use as a trade-mark. *Amoskeag Mfg. Co. v. Trainer,* 101 U. S., 51. Furthermore, regard must be taken as to the class of persons who purchase the particular article and the fact that goods are of a class purchased by persons who are easily deceived is a circumstance to be considered. *W. K. Fairbanks Co. v. R. W. Bell Mfg. Co.,* 77 Fed. Rep., 869; *Rickitt v. Kellogg,* 28 N. Y. App. Div., 111.

TRIAL—DEMURRER TO EVIDENCE—CONFLICTING EVIDENCE.—WINGFIELD v. MCCLINTOCK, 113 PAC., 394. (KAN.).—*Held,* that on the trial of a case, where there is conflicting evidence on the one hand tending to establish a material fact, and, on the other to disprove it, it is error for the court to sustain a demurrer to evidence, however strongly in the opinion of the

court the preponderance of evidence may be against the party on whom rests the burden of the issues. Burch, J., *dissenting.*

The principal case is sustained by several other cases. *Jansen v. City of Atchison,* 16 Kan., 358; *Howard v. Blythe,* 32 Tex., 800; *Gregory v. Nesbit,* 35 Ky. (5 Dana), 419. But, although there are no cases to the contrary, the cases *supra,* either expressly or impliedly, held that there is no distinction between a demurrer to evidence and a motion for non-suit. The question raised by a motion for non-suit is, whether or not the points raised by the evidence are competent to support the issue, and not whether the evidence is sufficient to support these points. *Bridger v. Ashville & Spartanburg Ry. Co.,* 25 S. C., 24; *Munroe v. Williams,* 35 S. C., 572. The question raised by a demurrer to evidence is whether or not the facts of the evidence, granting them to be true, support the issue. *United States v. Smith,* 24 U. S. (11 Wheat), 171; *Gates v. Nobles,* 1 Root (Conn.), 344; *Humphrey's Admr. v. West's Admrs.,* 3 Rand (Va.), 516. Hence one raises the question of the competency of facts if established, the other the sufficiency of the facts though competent.

It is well settled that a motion for non-suit can not be sustained if there is a conflict of evidence or a question of fact to be determined. *Chi. & N. W. Ry. Co. v. Olney,* 71 Fed., 95; *Wheaton v. Newcombe,* 48 N. Y. Super. (16 J. & S.), 215. It is equally well settled that the legal sufficiency of evidence is a question of law exclusively for the court. *Cuikshank v. Fourth Nat. Bank,* 26 Fed., 584; *Belt v. Marriott,* 9 Gill (Md.), 331; *Thalheimer v. Lamont,* 9 N. Y. St. Rep., 439. In the end, a demurrer to evidence admits the truth of all the plaintiff's evidence—which would eliminate the conflict—and considers it in the most favorable light possible for the plaintiff. *Thornton v. Bank of Washington,* 28 U. S. (3 Pet.), 36; *Dormandy v. State Bank,* 3 Ill. (2 Scram.), 236; *Patrick v. Hallet,* 1 Johns (N. Y.), 241.

WITNESSES—CREDIBILITY—EVIDENCE.—CITY OF MONTGOMERY v. WYCHE, 53 So., 786 (ALA.).—*Held,* that where a plaintiff sueing for a personal injury testified that he believed in the existence of physical pain, evidence that he was a Christian Scientist, and as such, denied in his religious belief the existence of pain, was properly excluded, if introduced to impeach his credibility.

The general American rule agrees with the case under discussion, and holds that laws providing that no person shall be incompetent to testify on account of his religious belief, have been interpreted to prevent any inquiry into that belief for the purpose of affecting credibility. *State v. Scheleusky,* 128 Ill. App., 1; *People v. Copsey,* 71 Cal., 548. Such laws as referred to have generally been passed throughout the country. *State Const. of Cal.,* Preamble, Art 1, 3; *N. H. Const.,* Bill of Rights, Art. 5; *Alabama Const.,* Sec. 3, and so it has been held that it could not be shown, for the purpose of discrediting a witness' testimony, that he did not believe in God. *Dickinson v. Beal,* 10 Kan. App., 233. Nor can the testimony of a child, otherwise competent, be impeached because it could know

nothing of God. *White v. Conron,* 96 Ky. 180. And it has been held that a witness who has made former statements of his belief, can not be impeached for retraction. *People v. Jenness,* 5 Mich., 305. The leading case in opposition to the case under consideration holds that a witness may be interrogated as to the existence of a God, and that it may thus be shown that he does not realize the importance of false swearing, making a distinction between his competency and his credibility. *Staubro v. Hopkins,* 28 Barb. N. Y. 265. The English rule is in accord with this. *King v. Taylor,* Peake's Cases II. In one American state it is held that it is a question of fact for the judge whether a person who does not believe in a deity is competent to testify. *Free v. Buckingham,* 59 N. H., 219.