RECENT CASES

CARRIERS—LOSS OF BAGGAGE—LIMITATION OF LIABILITY.—HARRIS v. SOUTHERN RY. Co., 85 S. E. (S. S.) 158.—The Interstate Commerce Commission requires notices of rates and charges filed with it by the railroads to be placed in the stations. *Held,* although no such notice was posted by the defendant, an interstate passenger checking a trunk without specifying its value can recover no more than the amount limited in the schedule in case of its destruction.

As early as 1838, it was held by the Supreme Court of New York that a common carrier could not excuse himself from liability by public notice. *Hollister v. Nowlen,* 19 Wend. (N. Y.) 234; *Cole v. Goodwin,* id. 251. But a common carrier could at common law limit his liability by express contract. *Swindler v. Hilliard,* 2 Rich. (S. C.) 286; *Bernard v. Adams Ex. Co.,* 205 Mass. 254. Acceptance of a ticket or bill of lading containing a limitation provision, has been held to constitute assent to the limitation by the passenger or shipper accepting the same. *Carr v. Tex. & Pac. Ry.,* 194 U. S. 427; *Schaller v. Chicago & N. W. Ry.,* 97 Wis. 31. Some states, however, require the actual consent of the shipper or passenger to the limitation. *Black v. Atlantic Coast Line,* 82 S. C. 478; *Plaff v. Pac. Express Co.,* 251 Ill. 243. The more recent decisions show that if a railroad has filed rates and charges with the Interstate Commerce Commission, there need be no actual knowledge or assent by the passenger to limit the carrier's liability. *L. & N. Ry. v. Miller,* 156 Ky. 677; *Barstow v. N. Y., N. H. & H.,* 143 N. Y. S. 983; *Boston & Maine v. Hooker,* 233 U. S. 97 (Pitney *dissenting*). The holding in the principal case goes further than the latter cases, in that it allows the limitation of liability even though the defendant had not posted schedules in its stations as required by the Interstate Commerce Commission.

S. H. S.

CONSTITUTIONAL LAW—14TH AMENDMENT—POLICE POWERS—SEGREGATION ORDINANCE.—HARRIS v. CITY OF LOUISVILLE, 177 S. W. (KY.) 472.—*Held,* an ordinance which provided for the segregation of races in the city of Louisville, and which contained a clause providing that nothing therein should affect present vested rights, was a valid exercise of the police powers, and not contrary to the 14th amendment of the Constitution of the United States.

The preservation of public health and safety is often made in express terms a matter of municipal duty. *1 Dillon, Municipal Corporations,* §144. The State may give to the municipal corporation the general power to pass ordinances in regard to public welfare. *Pool v. Trexler,* 76 N. C. 297. §2783 of the Ky. Statutes provides that "the General Council shall have power to pass, for the government of the city, any ordinance not in conflict with the constitution of the U. S., the constitution of Ky. and the statutes thereof." In *Munn v. Illinois,* 94 S. 113, Mr. Chief Justice Waite, in referring to police powers, said, "Under these powers the government regulates the conduct of its citizens, one toward another, and the manner in which each shall use his own property when such regulation becomes

necessary for the public good." Rights of property, like all other social and conventional rights, are subject to such reasonable limitations, restraints, and regulations, established by law, as the legislature may think necessary and expedient. *Commonwealth v. Alger,* 7 Cush. (Mass.) 53; *Deems v. Mayor,* 80 Md. 164; *Barbier v. Connolly,* 113 U. S. 27. Quarantine ordinances and ordinances for the segregation of prostitutes have been held constitutional. *Smith v. St. Louis & S. W. R. R. Co.,* 181 U. S. 248; *L'Hote v. New Orleans,* 177 U. S. 587. Legislation preventing intermarriage between the two races, and providing for separate compartments in railroad coaches, and establishing separate schools for whites and blacks, has been universally held valid. *State v. Gibson,* 36 Ind. 389; *Plessey v. Ferguson,* 163 U. S. 537; *Berea College v. Commonwealth,* 123 Ky. 209. An ordinance similar to the one in the principal case was held valid in the case of *Ashland v. Coleman* in the Circuit Court of Hanover County, Va. In the following cases segregation ordinances were declared unconstitutional, but the ordinances passed upon are distinguishable from the one in the principal case. *State v. Gurry,* 121 Md. 534; *State v. Darnell,* 166 N. C. 300; *Carey v. Atlanta,* 84 S. E. (Ga.) 456.

S. H. S.

DAMAGES—PERMANENT OR TEMPORARY INJURIES—FLOODED LAND—MEASURE OF RECOVERY.—THOMPSON V. ILLINOIS CENTRAL R. Co., 153 N. W. (IOWA) 174.—In case of an overflow of land due to the faulty location of a railroad bridge, *held,* that damages should have been confined to the lowlands physically sustaining the injury and not extended to the depreciation in value of the farm as a whole.

It is well settled in the case of permanent structures that the measure of damages is the difference between the value of the land before and after the injury. *Sanitary Dist. of Chicago v. Herkert,* 108 Ill. App. 582. Whether a particular injury is permanent or temporary is a much controverted point. See *Flouring Mill Co. v. Lake Shore R. Co.,* 160 Mich. 330. Sometimes the question is made to depend upon the intention with which the structure was erected (*Strange v. Railroad,* 245 Ill. 246), or the right to be maintained. *Railroad v. Horan,* 131 Ill. 288; *Strout v. Railroad,* 157 Ky. 1. A permanent structure is defined sometimes as one of such a character that unless interfered with by the hand of man it will continue indefinitely. *Gartner v. Railroad,* 71 Neb. 444. Again, the question has been determined with reference to the ease or difficulty of removal. *Baker v. Allen,* 66 Ark. 271. Under any of these tests the structure in the principal case should be regarded as permanent. Where the convenience and salability of an entire farm are permanently affected by the flooding of a part, the damage to the entire farm should be recovered. *Hastings v. Railroad,* 148 Iowa 390; *Parrott v. Railroad,* 127 Iowa 424; *Reichert v. Bachenstross,* 71 Hun (N. Y.) 546; *Rourke v. Mass. Electric Co.,* 177 Mass. 46. On the other hand, the damage has been regarded as temporary owing to the temporary character of the immediate injury, notwithstanding the liability of indefinite recurrence thereof on account of the permanency of the structure. *Jones v. Sanitary Dist. of Chicago,* 252 Ill. 591; *Sloss-Sheffield Steel & Iron Co. v. Mitchell,* 61 So. (Ala.) 934. In viewing the authorities one is led to form the opinion that the courts in assessing damages consider the damage to the

whole tract rather than the damage to that part physically sustaining the injury alone. This is contrary to the holding of the majority of the judges in the principal case.

J. McD.

DAMAGES—PERSONAL INJURIES—LOSS OF PROFITS.—MAHONEY V. BOSTON ELEVATED RY., 108 N. E. (MASS.) 1033.—In an action for personal injuries, *held,* that one who is engaged in a commercial activity involving the employment of others, may not show in evidence a diminution of profits coincident with his inability to attend to his affairs.

The consideration of profits lost as an element of damage resolves itself into a question of certainty of proof. *Griffin v. Colver,* 16 N. Y. 489. First, the fact of loss may be purely conjectural. *Martin v. Deetz,* 102 Cal. 55 (new business—frustrated attempt at incorporation). Second, data may be insufficient to warrant the inference of a causal connection between the injury and the loss. *Bierbach v. Goodyear Rubber Co.,* 54 Wis. 208 (nothing to prevent the employment of a substitute during the disability); *Wallace v. Penn. Ry. Co.,* 195 Pa. 127 (injury to boarding-house keeper, loss of custom). Third, the extent of the loss may be uncertain. Uncertainty of either of the first two species is decisive against the admissibility of proffered evidence. Cases *supra.* It is sufficient, however, to have a substantial basis for a probable opinion. *Hetzel v. Ry.,* 169 U. S. 26 (prospective profits from use of land injured); *Hanover Ry. Co. v. Coyle,* 53 Pa. 396 (injury to peddler, purely personal activity); *Walter v. Post,* 4 Abb. Pr. (N. Y.) 382 (injury to place of business). In general, ordinary profits incident to a regular established business are not too speculative. *Goebel v. Hough,* 26 Minn. 252. By the better view, in actions of tort at least, mere uncertainty as to the quantum of damage will not exclude an item from consideration. *Allison v. Chandler,* 11 Mich. 542; *Gildersleeve v. Overstolz,* 90 Mo. App. 518. *Contra, Coyle v. Ry. Co.,* 18 Pa. Super. Ct. 235. Courts have accordingly sometimes admitted the evidence, even in the case of a personal injury to one engaged in a commercial occupation. *Terre Haute v. Hudmut,* 112 Ind. 542; *Ry. Co. v. Scheinkoenig,* 62 Kan. 57. The great weight of authority, however, supports the principal case in rigidly drawing the line between pursuits consisting solely or substantially of personal activity, and commercial occupations involving the employment of labor and capital. *Lombardi v. St. Ry. Co.,* 124 Cal. 311; *Masterton v. Mt. Vernon,* 58 N. Y. 391; *Cincinnati v. Evans,* 5 Ohio St. 594. The infinite variations of fact intermediate between the position of the mere investor of capital and that of one engaged in a purely personal activity demand a more elastic and open-minded treatment, under the liberal doctrine of *Allison v. Chandler, supra.*

C. R. W.

EVIDENCE—RELEVANCY—VALUE OF PROPERTY.—JONESBORO L. C. AND E. RY. CO. V. ASHABRANNER, 174 S. W. (ARK.) 548.—*Held,* that a statement of an owner of land that she had been offered a specified sum per acre for it was not competent as evidence of value.

According to the weight of authority, testimony of an offer to purchase land is inadmissible to show its value. *Minn. Ry. Transfer Co. v. Gluek,*

45 Minn. 463; *Atkinson v. Chicago Ry. Co.*, 93 Wis. 362; *Fowler v. Middlesex*, 88 Mass. 92. The rule is the contrary, however, where the witness testifies as to the price at which he offered the property for sale. *City of Findlay v. Pertz*, 74 Fed. 681; *Grand Rapids v. Widdicomb*, 92 Mich. 92. The same result is reached where there is evidence of the price put on a commodity by an agent appointed to sell it. *Banks v. Gidrot*, 19 Ga. 421. Many cases, however, are opposed to the ruling of the principal case. *Curran v. McGrath*, 67 Ill. App. 566; *Faust v. Hosford*, 119 Ia. 97. The theory on which the evidence is excluded is that it is so open to suspicion and inviting to fraud, that it is inadmissible. *Perkins v. People*, 27 Mich. 386. Undoubtedly such defects could be brought out on cross examination and on principle it would seem as though the testimony should be admitted, particularly since the market price of land may be proved by the opinions, based in part on hearsay, of witnesses.

J. C.

LANDLORD AND TENANT—INJURY TO TENANT—DUTY OF LANDLORD.—SHEA V. MCEVOY, 107 N. E. (MASS.) 945.—*Held*, where a landlord furnishes a dumb-waiter for the use of tenants in common, he is bound to keep it in as good repair for the benefit of the tenants as it was when their tenancy began.

There is no duty upon a landlord to make repairs on the leased premises, in the absence of a covenant to do so. *Logan v. Langan*, 145 Ky. 599; *Soucy v. Louis Obert Brewing Co.*, 180 Ill. App. 69. But this general rule is modified in most jurisdictions so that where, as in the principal case, the premises are rented to a number of tenants, the landlord is bound to keep in repair that portion of the premises which is used by all the tenants, such as stairs, hallway, elevators, etc., and which he is said to have kept under his control. *Trego v. Rubovits*, 178 Ill. App. 127; *Wilcox v. Zane*, 167 Mass. 302; *Dollard v. Roberts*, 130 N. Y. 269; *McGinley v. Alliance Trust Co.*, 168 Mo. 257. But the landlord must have actual or constructive notice of the defect. *Brooks v. Schlernitzauer*, 113 N. Y. Supp. 484. In Minnesota the landlord was held not bound to repair a common roof except to prevent its becoming a nuisance. *Kruger v. Ferrant*, 29 Minn. 385. Where a stairway in a tenement house, occupied by several tenants, is rendered unsafe by merely temporary causes such as snow and ice, in some states the landlord is not liable to a tenant using it with knowledge of the defect. *Purcell v. English*, 86 Ind. 34. A landlord is not liable for an injury from a defect in premises in common use of tenants, and under his control, where the defect existed and was patent at the time of letting. *Dowling v. Nuebling*, 97 Wis. 350; *Freeman v. Hunnewell*, 163 Mass. 210. But he is liable even though the defect was not obvious, if it existed at the time of letting. *Andrews v. Williamson*, 193 Mass. 92. The principal case seems correct.

S. H. S.

NEGLIGENCE—INJURIES TO CHILDREN—DANGEROUS PREMISES.—CHESKO ET AL. V. DELAWARE & HUDSON CO., 218 Fed. 804.—*Held*, that where a boy six years old wandered from the street into the defendant's machine shop through an open, unguarded gateway he was too young to be a trespasser and the defendant owed him a duty of care.

It is a rule of the common law that the owner of property is liable for the negligent use of it as to all who are lawfully on the premises but not as to those who are there without right or without permission. The rule is usually expressed by saying that there is no affirmative duty to exercise care toward a trespasser—the owner of the property must only refrain from wilful injury. *Baker v. Byrne,* 58 Barb. 438; *Elliott v. Carlson,* 54 Ill. App. 470; *Rooney v. Woolworth,* 74 Conn. 720. But there are decisions which except from the general rule all cases where children are injured by reason of the maintenance on private property of "an attractive nuisance"—that is, one which from its nature, location, and inherent dangerous character is likely to attract and injure irresponsible children. It started and has had its most frequent application in the case of railroad turntables. *Sioux City and P. R. Co. v. Stout,* 17 Wall, 657; *Chicago etc. R. Co. v. Fox,* 38 Ind. App. 268; *Barrett v. So. Pacific Co.,* 91 Cal. 296. These cases proceed on one of three theories:—that a child of tender years can not be a trespasser, that the attraction amounts to an invitation, or that as to such a child the attraction is a wilfully concealed danger. All of these grounds have been entirely repudiated in some jurisdictions. *Delaware, L. & W. R. Co. v. Reich,* 61 N. J. L. 635; *Frost v. Eastern R. Co.,* 64 N. H. 220; *Daniels v. N. Y. & N. E. R. Co.,* 154 Mass. 349; *Wilmot v. McPadden,* 79 Conn. 367. These cases hold that temptation is not such invitation as will excuse a trespass and that the duty of protecting children is on their parents and not on the owners of property. The majority rule would seem to favor the attractive nuisance doctrine in all cases of machinery or devices which would tend to attract children, though generally restricted to cases of ponds, holes, cisterns or structures like barns or railroad stations. The doctrine never applies where the owner of the property could not carry on his lawful business in the necessary and ordinary manner and at the same time take precautions against trespassing children. *Chicago etc. R. Co. v. Fox, supra.* In the principal case the age of the child, the dangerous character of the machinery, and its location only a few feet from a much-traveled street bring it well within a conservative application of the attractive nuisance doctrine.

V. L. K.

NEGLIGENCE—LEGAL CAUSE—SPREADING FIRES.—DAVIES ET AL. V. DEL. L. & W. RY. CO., 109 N. E. (N. Y.) 95.—*Held,* that although a railroad can not be held for a loss caused to one proprietor communicated by way of the premises of another, it is liable in the case of a fire spreading from one building to another on the premises of a single proprietor.

By the established rule of New York, recovery for loss from the spread of fire is limited to the premises adjacent to those of the defendant. *Ryan v. Ry. Co.,* 35 N. Y. 210; *Van Inwegen v. Ry. Co.,* 165 N. Y. 625. Accord, *Ry. Co. v. Kerr,* 62 Pa. 353. Other authorities are agreed only to the extent of repudiating this arbitrary limitation. *Ry. Co. v. Barker,* 94 Ky. 71; *Ry. Co. v. Gantt,* 39 Md. 115; *Johnson v. Ry. Co.,* 31 Minn. 57. The judicial language in some instances points to an unlimited liability, whatever the duration and extent of the conflagration, in the absence of an extraordinary, active, intervening agency. See *Ry. Co. v. Stamford,* 12 Kan. 354; *Ry. Co. v. Wilbach,* 113 S. W. (Tex. Civ. App. 1908) 318. According to other opinions, however, the intervening cause may be merely negative, such as an extraordinary failure, whether culpable

or otherwise, of a counteracting agency, such as in the natural and probable course of events would have been evoked to meet the situation. *Doggett v. Ry. Co.*, 78 N. C. 305 (ample opportunity to check conflagration; extraordinary failure to do so). See *Phillips v. Ry. Co.*, 138 N. C. 12, 20. Cf. *Ry. Co. v. Barrett*, 78 Miss. 432 (time and distance proper elements to be considered in determining proximateness or remoteness); *Henry v. Ry. Co.*, 50 Cal. 176 (distinguishing cases of city block and of open field); *Ry. Co. v. Westover*, 4 Neb. 268 (emphasizing rapidity of conflagration); *Hoffman v. King*, 160 N. Y. 618 (emphasizing length of time between negligence and loss). The majority of cases intimate nothing as to the possibility of negative as well as positive intervening causes. *Ry. Co. v. Salmon*, 39 N. J. L. 299; *Ry. Co. v. Hope*, 80 Pa. St. 373. The North Carolina doctrine of negative intervening cause is in harmony with either the "foreseeable" test, or the test of "natural and proximate sequence," as a criterion of legal causal relation. By removing the possibility of unlimited liability, it would destroy the main argument for the illogical rule obliquely recognized in the principal case.

C. R. W.

WAR—EFFECT ON EXISTING CONTRACTS AND REMEDIES—CONTRACT RIGHTS AND REMEDIES OF ALIEN ENEMIES—BILL FOR SPECIFIC PERFORMANCE IN A NEUTRAL FORUM.—COMPAGNIE UNIVERSELLE DE TELEGRAPHIC ET DE TELEPHONIC SANS FIL V. UNITED STATES SERVICE CORPORATION, 95 ATL. (N. J.) 187.—*Held*, on a bill for specific performance by a company of one belligerent nation against a company of another belligerent, that statutes of the respective nations prohibiting such performance did not forbid institution of suit or its defense, that the ground of aid to an alien enemy failed, that comity required that a neutral court be open to the litigants, and that chancery would grant the degree. Where one nation is at war with another, all subjects or citizens of one are deemed in hostility to citizens of the other and they have no capacity to contract between each other. *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586; *White v. Burnley*, 61 U. S. (20 How.) 235. And property engaged in trade with the enemy is subject to confiscation. *The Rapid*, Fed. Cas. No. 11576, 12 U. S. (8 Cranch) 155. But a joint owner of personalty in an enemy's country during a war may use part of his property to bribe enemy officers to save the remainder from destruction. *Coogan v. U. S.*, 7 Ct. Cl. 510. As to a contract made previous to a declaration of war, judicial enforcement in the countries at war is suspended, if the nature of the contract permits; but its obligation does not cease, and the remedy revives with the restoration of peace. *Semmes v. Fire Ins. Co.*, 80 U. S. (13 Wall.) 158; *Watts, Watts & Co. v. Unione Austriaca de Navigazione*, 224 Fed. 188. *Contra; Isaacs v. McGrath*, 2 McCord (S. C.) 26 (holding that war ends all executory contracts between citizens of belligerent nations). The interesting feature of the principal case is that it apparently is without direct precedent in considering the enforcement in a neutral forum of a contract between belligerents made previous to the war. The reason which moves a belligerent court to prohibit performance—that the enemy may not be benefited—does not apply to a neutral court, and consideration for the patriotic motives of the contestants must not be allowed to stand in the way of the execution of justice.

S. B.