

RECENT CASES.

ATTACHMENT—ALIAS WRIT.—DYE ET AL. V. CRARY ET AL., 78 PAC. 533 (N. M.).—*Held*, that, there being no statutory authority for the issuance of an *alias* writ of attachment, such a writ gives the court no jurisdiction over property levied on by virtue of it.

It is a well settled principle that, attachment being in derogation of common law, statutes in connection therewith must be strictly construed in favor of the one against whom the proceeding is employed. *Penoyer v. Kelsey*, 150 N. Y. 77; *Ritchie v. Sayers*, 100 Fed. 520. But it is also true that a court should not push the strict construction so far as to leave the creditor remediless. *Taylor v. Ricards*, 9 Ark. 378; *Rawles v. Hoare*, 61 Barb. 266. In a few jurisdictions even the general principle is denied. *Force v. Hubbard*, 26 Ga. 289; *Runyan v. Morgan*, 7 Humph. 210. It would seem that with this conflict, this particular point, which might well come in the exception above, ought to be decided more upon general justice than strictly under the broad rule. And it is so held in most jurisdictions. *Majarrietta v. Saenz*, 80 N. Y. 547; *Elliot v. Stevens*, 10 Iowa 418. But other jurisdictions cling to the other holding. *Pack v. American Trust, etc., Bank*, 172 Ill. 192; *Watson v. Noblett*, 65 N. J. L. 506.

BANKRUPTCY—DISCHARGE—EFFECT OF AMENDMENT OF 1903.—IN RE NEELEY, 12 AM. B. R. 407.—*Held*, that the amendment of 1903 to Sec. 14b, Bankruptcy Act of 1898, which forbids a discharge if the bankrupt has been granted a discharge in voluntary proceedings within six years, is not retroactive, but that a new condition of discharge was fixed, in case of a petition of bankruptcy filed after passage of the amendment.

There is no constitutional right to a discharge in bankruptcy, and regulations changing the conditions upon which discharge will be granted are not unconstitutional. *In re Peterson*, 10 Am. B. R. 355. A statute is not necessarily retroactive because its operation in a given case may depend upon an occurrence anterior to its passage. *Endlich Inter. Stat.*, Sec. 280. Under a state bankruptcy law a provision similar to the amendment here considered was held not to be retroactive. *Eastman et al v. Hillard*, 7 Metc. 420. To this effect have been the decisions occurring under the previous national bankruptcy acts. *In re Gifford*, 16 N. B. R. 135; *In re Griffiths*, 10 N. B. R. 456. *Contra, In re Sheldon*, 8 Ben. 67. In construing another section of the amendment of 1903, which forbids a discharge if the applicant has obtained property on credit from any person upon a materially false statement in writing, it was held that the statute was not retroactive, but that it merely set forth a condition precedent to discharge. *In re Scott*, 126 Fed. 981; *In re Peterson, supra*. The case of *In re Carleton*, 131 Fed. 146, is directly in point, and sustains the holding in the present case.

CARRIERS—PASSENGER TICKETS—STATUTE OF LIMITATIONS.—CASSIANO V GALVESTON, H. & S. A. R. Co., 82 S. W. 806 (TEX.).—Where a passenger presents a railroad ticket, unlimited as to time, but purchased fourteen years

before, *held*, that, as the statute of limitations ran from the date of issue, the person is a trespasser and can be ejected from the train.

Undoubtedly this is the first adjudication upon this question. The court reads into the contract an implied term that the ticket would be used within a reasonable time, and says that it occupied a position analogous to that of a demand note, upon which, in Texas, the statute runs from date of issue. *Kampman v. Williams*, 70 Tex. 568. The same court formerly held in *R. Co. v. Dennis*, 4 Tex. Civ. App. 90, that a passenger presenting a ticket limited as to time could not be lawfully expelled from the train, though the time limit had expired; but this decision is an anomaly. *McGhee v. Drisdale*, 111 Ala. 597; *Hill v. R. Co.*, 63 N. Y. 101; *Grogan v. R. Co.*, 39 W. Va. 415. Where, however, there are restrictions as to the use of a ticket which do not appear upon its face, and which are not communicated to the passenger, he cannot be expelled. *Maroney v. R. Co.*, 106 Mass. 153.

CONSTITUTIONAL LAW—EQUAL PROTECTION—FISH AND GAME LEGISLATION—NONRESIDENT LANDOWNERS.—*STATE V. MALLORY*, 83 S. W. 955 (ARK.).—*Held*, that an act declaring it unlawful for any non-resident to hunt or fish at any season of the year is unconstitutional as denying the equal protection of the law in so far as it prevents the same enjoyment of his property right by a non-resident landowner as is afforded a resident landowner. Hill, C. J., and Battle, J., *dissenting*.

The constitutionality of the statute turned upon the question of the ownership of game as between the state and the individual. That the state has the authority to control fishing in navigable waters is well settled. *Preble v. Brown*, 47 Me. 286; *Manchester v. Mass.* 139 U. S. 24. Furthermore, it has been held that an act prohibiting the shipment of game out of the state is constitutional. *State v. Express Co.*, 58 Minn. 403. *Magner v. People*, 97 Ill. 320, goes so far as to declare that ownership of wild animals is in the people of the state, and no one has a property right in them. *Sterling v. Jackson*, 69 Mich. 488, and *State v. Rodman*, 58 Minn. 393, sustain the same opinion. Cooley, on the contrary, states that the right to take fish in the fresh water streams of the country belongs to the owner of the soil under them, to the exclusion of the public. *Cooley on Torts*, 329. *Wickham v. Hawker*, 7 Mees. & W. 63, holds fish and game to be the property of the landowner. Likewise, in many of the states the right to fish and take fish is held to be a right of profit in lands. *Cobb v. Davenport*, 33 N. J. 223; *Adams v. Pease*, 2 Conn. 481.

CONSTITUTIONAL LAW—INFRINGEMENT ON JUDICIARY—REGULATIONS OF TRIAL.—*RIGLANDER V. STAR CO.*, 90 N. Y. SUPP. 772.—A statute provided that if a case was entitled to preference, in order of trial, the Court "must designate a day during the term" at which the application was made, "on which day the cause shall be heard, and, if there be two or more causes so designated for the same day, the said causes shall be heard in order of their date of issue." *Held*, that the statute was unconstitutional, as depriving the judiciary of the right to hear preferred cases according to the circumstances of each particular case. Laughlin, J., *dissenting*.

There is nothing in the Federal constitution which forbids a state legislature from interfering with state judiciary. *Satterlee v. Matthewson*, 27 U. S. 38; *Hartshorne v. Sleght*, 3 John. 554. The legislature, in undertaking to regulate rules of pleading, does not usurp judicial functions. *Whiting*

v. Townsend, 57 Cal. 515. The legislature may regulate procedure. *In re Probate Blanks*, 71 N. H. 621. A legislature may pass laws affecting powers lodged in the several justices of a supreme court, as distinguished from the court itself. *State v. Taylor*, 68 N. J. L. 276. A court may make reasonable rules in regard to fixing a time for a hearing before it, and such rules must prevail, even though in conflict with a statute. *Herndon v. Imperial Fire Ins. Co.*, 111 N. C. 384. A court may not make a rule which deprives one of a right secured by law. *Main v. Lynch*, 54 Md. 658. A court has power to change its own calendar and to fix dates of trials. *Merchants' Nat. Bank v. Greenwood*, 16 Mont. 395. As the statute in question would give the court no discretion in fixing a time for hearing of preferred causes, the decision would seem to be proper. *Jones v. Spear*, 21 Vt. 426.

CONSTITUTIONAL LAW—NOTICE OF TAX SALE—DENIAL OF DUE PROCESS.—*WILLIAMS v. PITLOCK*, 77 PAC. 385 (WASH.).—*Held*, that a statute which, without providing for notice, makes persons not known to have an interest in property assessed parties to proceedings to collect unpaid taxes by sale of the land, does not deprive a non-resident owner, whose land was assessed to one not an owner, of due process of law.

The name of the owner of real property, when known and entered on the assessment roll, is a material part of a notice of the sale thereof for taxes; *Marx v. Hanthorn*, 30 Fed. 579; and a statute making the tax deed conclusive evidence of notice is unconstitutional, as a denial of due process of law. *Kelly v. Herrall*, 20 Fed. 364; *McCready v. Sexton*, 29 Iowa 356. One who purchases land subject to a tax lien is entitled to notice of a tax sale of the same. *Quinlan v. Callahan*, 81 Ky. 618. A tax sale of land owned by several heirs upon notice to one is invalid; *Thurston v. Miller*, 10 R. I. 358; nor is notice to one of several co-tenants sufficient. *Howze v. Dew*, 90 Ala. 178. In *Lague v. Boagni*, 32 La. Ann. 912, it is held, contrary to the present case, that notice to the real owner is always essential. But the general rule seems to be otherwise. *Franklin Coal Co. v. Bertel*, 109 Pa. 550; *Sperry v. Goodwin*, 44 Minn. 207.

CONSTITUTIONAL LAW—POLICE POWER—POSSESSION OF IMPORTED GAME IN CLOSE SEASON.—*PEOPLE v. BOOTMAN ET AL.*, 72 N. E. 505 (N. Y.).—*Held*, that it is in the police power of a state to make the possession of imported game in the close season unlawful.

The original statutes of New York State, prohibiting the sale, possession, etc., of game in the close season, were not construed to include imported game because they did not expressly do so. Similar statutes have been so construed in other states. *Com. v. Hall*, 128 Mass. 410; *Com. v. Wilkenson*, 139 Pa. St. 298. Other courts hold the contrary. *State v. Randolph*, 1 Mo. App. 15; *Roth v. State*, 51 Ohio St. 209. In other states possession of game is *prima facie* evidence of its importation, subject to be rebutted. *People v. O'Neill*, 71 Mich. 325; *Com. v. Wilkenson, supra*. Though killed at a time and place lawful, it is a violation, if possessed in the close season. *State v. Rodman*, 58 Minn. 393; *State v. Judy*, 7 Mo. App. 524. The laws so interpreted are not unconstitutional and are not an interference with interstate commerce. *Fhelps v. Racey*, 5 Daley 235; *McReady v. Va.*, 94 U. S. 391. A state cannot prohibit the importation of lawful merchandise into its limits but after the act of transportation has terminated the possession

of the article may be declared unlawful. *Bowman v. Chi. etc., R. R. Co.*, 125 U. S. 465. This may discourage interstate commerce but it is not such regulation as is unconstitutional. *Magner v. People*, 97 Ill. 320.

CRIMINAL LAW—SUFFICIENCY OF INDICTMENT—REVIEW.—PEOPLE v. WIECHERS ET AL., 72 N. E. 501 (N. Y.).—*Held*, that an indictment, not objected to at the trial, nor demurred to before trial, nor objected to by motion in arrest of judgment, could not be attacked by appeal to the Court of Appeals, the offense not being a capital one, though it does not charge any criminal offense. Cullen, C. J., and O'Brien, J., *dissenting*.

Under the N. Y. Code of Criminal Procedure demurrer lies to an indictment when the facts do not constitute a crime. *People v. D'Argencour*, 32 Hun. 175; *People v. Kane*, 43 App. Div. 472. Objection may be taken at the trial under plea of not guilty or in arrest of judgment. *People v. Davis*, 56 N. Y. 95; *People v. Upton*, 38 Hun. 107. Plea of not guilty is a denial of every material allegation in the indictment. *People v. Benjamin*, 2 Park. Cr. 201. The fundamental defects appearing on the face of the record may be reviewed and corrected on appeal. The bill of exceptions enlarges the scope of review, but does not exclude other grounds. *People v. Thompson*, 41 N. Y. 1. The defect is not cured by the verdict. *People v. Davis*, 4 Park. Cr. 67. Appeal, like writ of error, brings up all questions of error in the indictment, verdict, or any part of the record. *State v. Dark*, 8 Blackf. 526; *Com. v. Thompson*, 13 B. Mon. 159. If there was no crime charged the verdict of guilty could not be broader than the charge, and consequently there is nothing to support the judgment. If the judgment is void a writ of *habeas corpus* would lie. *U. S. v. Patterson*, 29 Fed. 775; *In re Garvey*, 7 Colo. 384; *Ex parte Reynolds*, 35 Tex. Cr. R. 437.

EASEMENTS—DRAINAGE—SURFACE WATERS.—DAVIS v. FRY, 78 PAC. 180 (OKL.).—When surface waters by natural drainage collect in a natural basin or depression upon the premises of a dominant tenement, and escape therefrom only by percolation or evaporation, forming thereby a lake or pond, permanent in its character, *held*, that the waters so collected lose the character of surface water, and may not, by artificial means, other than those incident to the cultivation of the soil, be drained to the damage of a servient tenement without liability in damages for such act.

When the situation of two adjoining fields is such that the water falling, or collected by melting snow, and the like, upon one, naturally descends upon the other, the owner of the lower must suffer that it be so discharged if desired by the upper owner, but the latter cannot by artificial trenches cause the natural mode of its being discharged to be changed to the injury of the lower field. *Washburn, Easements*, 353. Most of the decisions in various states are unanimous in the opinion that the owner of the upper heritage may improve his lands by mining or agricultural operations, although thereby the volume of water discharged upon the inferior land is increased, but that he is liable for damage caused by his digging ditches for purposes of draining. *Kauffman v. Griesemer*, 26 Pa. St. 407; *Hogenson v. Railway Co.*, 31 Minn. 224. In *Hughes v. Anderson*, 68 Ala. 280, it was held that the extent to which a proprietor may go in this way must be determined by the degree of comparative injury it may produce and relieve. A still more liberal decision was rendered in *Sheehan v. Flynn*, 59 Minn. 436, making simple drainage the

lawful right of a person, if such drainage does not unnecessarily or unreasonably injure his neighbor. See also *O'Brien v. City of St. Paul*, 25 Minn. 355.

EQUITY—SPECIFIC PERFORMANCE—CONTRACT TO MAKE A WILL.—LAIRD ET AL. V. VILA ET AL., 100 N. W. 656 (MINN.).—*Held*, that when a party has legally bound himself to will his property to minor relatives in consideration that the beneficiaries shall assume a peculiar and domestic relation to the promisor, and render him services of a character to make it impossible to estimate their value by any pecuniary standard, and the agreement is executed on behalf of the promisee and beneficiaries, a specific performance of the contract will be decreed.

A person may make a valid contract to devise his lands in a particular way. *Parsell v. Stryker*, 41 N. Y. 480; *East v. Solihite*, 72 N. C. 562. And specific performance on such contracts may be had. *Burns v. Smith*, 21 Mont. 251; *Johnson v. Hubbell*, 10 N. J. Eq. 332. Especially is this so where through trust in the agreement improvements have been put upon the land. *Harman v. Harman*, 70 Fed. 894; *Erwin v. Erwin*, 139 N. Y. 616. And it may be the same even though the contract be parol. *Brown v. Sutton*, 129 U. S. 238; *Walters v. Walters*, 132 Ill. 467; *contra*, *Morgan v. Tillet*, 55 N. C. 39. There are cases almost identical with the one under discussion. *Sharkey v. McDermott*, 91 Mo. 647; *Godine v. Kidd*, 64 Hun 585. A few jurisdictions do not follow the general rule. *Stafford v. Bartholomew*, 2 Ind. 153; *Hazelton v. Reed*, 46 Kan. 73. And even Illinois has held that such an agreement cannot be specifically enforced on account of injustice to the heirs. *Woods v. Evans*, 113 Ill. 186.

FIXTURES—OIL LEASE—REMOVAL ON DEFAULT.—GARTLAN ET AL. V. HICKMAN, 49 S. E. 14 (W. VA.).—Engines, oil-well rig, tanks, pipes, etc., were placed on land under a lease, in which it was agreed that lessees should have the privilege of removing them at any time. The lease was forfeited and terminated for non-payment of rental. *Held*, that the machinery did not become part of the realty.

There is a difference of opinion as to cases parallel to the above where there was no agreement for removal. *Roseville A. Min. Co. et. al. v. Iowa Gulch Min. Co.*, 15 Colo. 29; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249; *Heffner v. Lewis*, 73 Pa. St. 302. The agreement between the parties to consider what might be realty as personalty will be enforced. *Fratl v. Whittier*, 58 Cal. 126; *Hunt v. Bay State Iron Co.*, 97 Mass. 279. Agreements could not effect the rights of bona fide purchasers. *Roswand v. Anderson*, 33 Kan. 264; *Bartholomew v. Hamilton*, 105 Mass. 239. Nor is an agreement conclusive if serious damage would result to the freehold by their removal. *Ford v. Cobb*, 20 N. Y. 344; *Sword v. Low*, 122 Ill. 487. Abandonment of the premises before the expiration of the lease is not waiver of the right to remove fixtures where they were placed on the land with the intention of removing. *Conde v. Lee*, 171 N. Y. 662. Chattels placed on agricultural lands, to become fixtures, must be germane to farming purposes. *Perkins v. Swank*, 43 Mass. 349; *McJunkin v. Dupree*, 44 Tex. 500.

GUARANTY—CONSTRUCTION.—MCAFEE V. WYCKOFF, 89 N. Y. SUPP. 996.—*Held*, that a guaranty of payment by a vendee for goods to be manufactured by the vendor "as per contract," extended only to the price of goods actually delivered and was not a guaranty for breach of contract.

The present case is an excellent illustration of the doctrine that a guarantor is not to be held liable beyond the exact stipulations of his contract. This rule seems firmly established in New York. *N. Y. Ins. Co. v. Lowenburg*, 120 N. Y. 44; *Smith v. Mollensen*, 148 N. Y. 241. On the other hand, in Tennessee the contract is construed most strongly against the guarantor. *Bright v. McKnight*, 1 Sneed 168. And Missouri seems to hold a similar view. *Hurly v. Fidelity & Deposit Co.*, 95 Mo. App. 88. But in many jurisdictions neither of these rules of construction meets with approval and the tendency is to construe as an ordinary contract. *Davis v. Wells*, 104 U. S. 159; *Wills v. Ross*, 77 Ind. 1; *Matthews v. Phelps*, 61 Mich. 327; and the construction should be as favorable to the creditor as in case of any other contract. *Swisher v. Deering*, 204 Ill. 203. While it is impossible to reconcile these conflicting constructions the weight of authority seems to be against the strict rule adopted in the present case.

INSURANCE—LIFE—AGENT—RELATION TO INSURED.—REILLY v. EMPIRE LIFE INS. CO., 90 N. Y. SUPP. 866. *Held*, that an insurance solicitor who takes an application is the agent of the insurer, notwithstanding a clause in the contract of insurance providing that the solicitor shall be the agent of the insured as to all statements and answers made in the application; and that it is therefore competent, in an action on the policy, to show that the insured gave truthful answers to the agent, who wrote false answers in the application. Woodward and Jenks, JJ., *dissenting*.

The decision in question is in decided opposition to the holdings of the Federal courts, which maintain that there is no reason that insurance policies should be considered differently from other contracts. *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519. This view was sustained in *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168, where it was held that errors made by the agent invalidate the contract, because the insured is inexcusably negligent in not reading the application. *Lewis v. Ins. Co.*, 39 Conn. 100; *Richardson v. Maine Ins. Co.*, 46 Me. 394. An early New York decision, *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, was in harmony with the decisions just mentioned, but later decisions in that state are in support of the present holding. *O'Farrell v. Met. Life Ins. Co.*, 168 N. Y. 592; *Grattan v. Met. Life Ins. Co.*, 92 N. Y. 274. Now nearly all of the state courts have adopted the rule that agents of insurance companies must be regarded as agents of the insurers, not of the insured, on considerations of public policy, and have considered any stipulation to avoid their responsibility as void. *Ins. Co. v. Olmstead*, 21 Mich. 246; *Brandup v. St. Paul Ins. Co.*, 27 Minn. 393.

INSURANCE—LIFE—LIMITATION OF ACTION—VALIDITY.—UNION CENT. LIFE INS. CO. v. SPINKS, 83 S. W. 615 (Ky.).—*Held*, that a provision in a life policy to the effect that no suit shall be maintained thereon, unless begun within one year from the death of the insured, is void, as in contravention of public policy, the statute prescribing a period of fifteen years for actions on such contracts. Paynter, J., *dissenting*.

This unusual ruling is sustained by like decisions in only two of our states, Nebraska and Indiana. *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443, declares void a stipulation in a fire insurance policy requiring suit to be brought within six months after loss, as against public policy. In a like manner the Nebraska court holds that it is the policy of the law to have but

one law of limitations, and that to establish a limitation by contract there must be a sufficient consideration. *Barnes v. McMurry*, 29 Neb. 184. The rest of the state courts and the Federal courts agree that a condition that suit must be brought within a certain time is valid, unless unreasonable. *Thompson v. Phoenix Ins. Co.*, 25 Fed. 296; *Ins. Co. v. West*, 6 Ohio St. 602.

MASTER AND SERVANT—INJURIES TO SERVANT—BREACH OF FACTORY ACT—ASSUMPTION OF RISK.—*ESPENLAUB ET AL. v. ELLIS*, 72 N. E. 527 (IND.).—*Held*, in an action by a servant for injury received from a saw left unguarded, contrary to the provisions of the Factory Act, that he was entitled to recover against the master, there being no such assumption of risk as would defeat recovery.

A servant does not impliedly assume risks of service which are violations of law by the master. *Narramore v. Cleveland, C. C. & St. L. R. Co.*, 96 Fed. 295; *Durant v. Lex. Coal Min. Co.*, 97 Mo. 62. It is also held in the cases cited that knowledge by the servant of the master's violation of the statute requiring the saw or other machinery to be guarded is not a bar to recovery. See also *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130. Acts made for the protection of servants should be construed to effect their purpose. *Groves v. Wimborne*, (1898), 2 Q. B. 402. The courts of New York and Massachusetts place an opposite interpretation upon similar statutes. The servant cannot recover for an injury resulting from an open and obvious defect caused by the master's failure to perform a statutory duty. *Knisley v. Pratt*, 148 N. Y. 372; *O'Maley v. S. Boston Gaslight Co.*, 158 Mass. 135; *Powell v. Ashland Iron & Steel Co.*, 98 Wis. 35. The statute does not abrogate the common law rule that if the servant knows of the unguarded condition and appreciates the risk he cannot call upon his employer for indemnity. *McRickard v. Flint*, 114 N. Y. 222; *Goodridge v. Washington Mills Co.*, 160 Mass. 234.

NEGLIGENCE—IMPUTABILITY—DRIVER OF VEHICLE AND GUEST.—*EVENSON v. L. & B. Ry. Co.*, 72 N. E. 355 (MASS.).—*Held*, that the right of one riding with another to recover for injuries caused by the negligence of a street car company is dependent upon the exercise of due care by his companion who was driving.

The present case can only be reconciled with the previous decisions of the same court upon the ground that the plaintiff himself failed to exercise ordinary prudence. *Allyn v. B. & A. R. R. Co.*, 105 Mass. 77; *Randolph v. O'Riordan*, 155 Mass. 331. In most jurisdictions it is now firmly established that the negligence of a driver is not to be imputed to a guest who exercises no control over him. *Little v. Hackett*, 116 U. S. 336; *Masterson v. N. Y. C. R. R. Co.*, 84 N. Y. 247; *Cahill v. C. N. O. & T. P. Ry. Co.*, 92 Ky. 345. The same rule applies to passengers in public hacks. *East Tenn., Va. & Ga. Ry. Co. v. Markens*, 88 Ga. 60; *Becke v. So. Pac. Ry. Co.*, 102 Mo. 544. But recovery will be barred if the guest failed to use reasonable prudence. *Flanagan v. N. Y. C. & H. R. R. Co.*, 70 App. Div. (N. Y.) 505; *Holden v. Missouri Ry. Co.*, 177 Mo. 456. The doctrine of imputed negligence is, however, still favored to a limited extent in a few jurisdictions. *Ritger v. City of Milwaukee*, 99 Wis. 190; *Nesbit v. Garner*, 75 Iowa 314; *Omaha & R. V. R. R. Co. v. Talbot*, 48 Neb. 627. But the general tendency, as above indicated, is toward the entire abandonment of the theory.

NEGLIGENCE—INJURY TO CHILD—TRESPASSERS.—*POWERS v. OWEGO BRIDGE Co.*, 89 N. Y. SUPP. 1030.—Plaintiff, a child, was injured while playing about a pile of lumber belonging to the defendant. The lumber was not near any public place and children had been repeatedly warned away from it. *Held*, that the defendant owed no duty to the plaintiff beyond that which it owed to other trespassers.

The doctrine here laid down finds much support among the latest decisions. *Paolino v. McKendall*, 24 R. I. 432; *O'Connor v. Brucker*, 117 Ga. 451; *Ann Arbor R. Co. v. Kinz*, 68 O. St. 210. The owner of attractive machinery or other property is not an insurer of infant trespassers. *Frost v. Eastern R. Co.*, 64 N. H. 220; nor does the fact that the trespasser is an infant raise a duty where none otherwise exists. *Nolan v. N. Y., N. H. & H. R. R. Co.*, 53 Conn. 461. A trespass by an infant is not excused because there is a temptation to commit it. *Holbrook v. Aldrich*, 168 Mass. 15. The exceptional rule of liability for injury to child trespassers imposed by the so-called "turn table" cases, *Railroad Co. v. Stout*, 17 Wall. 657, and *U. P. R. Co. v. McDonald*, 152 U. S. 252, has been often rejected. *Walsh v. Filchburg R. R. Co.*, 145 N. Y. 301; *Delaware, Etc. R. R. Co. v. Reich*, 61 N. J. L. 635; *Ritz v. City of Wheeling*, 45 W. Va. 262. The present case seems fairly to express the general trend of the courts toward placing infant trespassers upon the same basis as adults. 11 *Harvard Law Review*, 349, 434.

NUISANCE—CEMETERY—INJUNCTION.—*ELLIOTT v. FERGUSON*, 83 S. W. 56 (Tex.).—*Held*, that a petition to enjoin the location of a public cemetery adjacent to one's land must show clearly and with reasonable certainty that a danger to health would ensue.

A cemetery is not a nuisance *per se*. On the contrary, under our modern civilization, cemeteries are often richly adorned and made attractive. *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 192. Yet a cemetery may become a nuisance, where it endangers health by corrupting the surrounding atmosphere, *Monk v. Packard*, 71 Me. 309; or, possibly, by polluting drinking water, *Upjohn v. Board of Health*, 46 Mich. 542; *Greencastle v. Hazelett*, 23 Ind. 186. Where it is clearly proved that there will be such a danger to health, equity will intervene. *Clark v. Lawrence*, 6 Jones Eq. 83. But where the danger apprehended is doubtful or contingent, the complainant will be left to his remedy at law. *Ellison v. Commissioners*, 5 Jones Eq. 57. The few decisions upon the subject are in accord with the ruling of the present case. *Musgrove v. Church of St. Louis*, 10 La. Ann. 431; *Begein v. City of Anderson*, 28 Ind. 79; with the possible exception of *Jung v. Neraz*, 71 Tex. 396.

SALES—BREACH OF WARRANTY—ACCEPTANCE OF GOODS.—*ALABAMA STEEL AND WIRE Co. v. SYMONS*, 83 S. W. 78 (Mo.).—*Held*, that upon receipt of nails ordered by sample, acceptance of part of them, with knowledge that they are defective, does not waive one's right to offset damages in an action upon the price.

An acceptance of goods sold under an implied warranty, without objection, raises a presumption of a waiver of one's right to damages for their defective condition. *Babcock v. Trice*, 18 Ill. 420. This is strengthened by continued silence, *Lewis v. Rountree*. 78 N. C. 323; still more so by knowledge of the defects, *Morse v. Moore*, 83 Me. 473; and by the use of the goods, *Dayton v.*

Hoogland, 39 Ohio St. 671; without explanation, it might then be conclusive. But it is one of evidence only and is not a rule of law. *English v. Commission Co.*, 48 Fed. 196; except where the deficiency is merely formal, as of time, place, etc. *Morse v. Moore*, *supra*. This is the prevailing view in England and in most of our jurisdictions. *Chandelor v. Lopus*, 1 *Smith Lead Cas.* (8th Ed.), pt. 1, 299, 360. Though some jurisdictions, notably New York, hold that there is a waiver by knowledge, where the warranty sprang from an essential term of the contract. *Burdick on Sales*, 135, where the two views are discussed.

SPECIFIC PERFORMANCE—DECREE AS TO PART INTEREST—INTENTION OF PARTIES.—*TILLERY v. LAND*, 48 S. E. 824 (N. C.).—Where one of several owners of land contracts to sell the entire property and a conveyance from the other proprietors cannot be obtained, *held*, that, since the vendor's intention was not to dispose of his own interest separately, in the absence of bad faith, specific performance as to his share will not be decreed. Clark, C. J., and Montgomery, J., *dissenting*.

In general inability to completely perform is no defense to a bill for partial performance. *Bell v. Thompson*, 34 Ala. 633; *Swepton v. Johnson*, 84 N. C. 449. This rule applies to a tenant in common who without authority agrees to sell the entire property. *Keaton v. Brown*, 57 N. J. Eq. 600. It seems, however, that the contrary would be the rule in the absence of bad faith. *Lumsley v. Ravenscroft*, 1 Q. B. 683; *Cochran v. Blout*, 161 U. S. 350. In *Jackson v. Torrance*, 83 Cal. 521, it was held that when a husband and wife agree to sell property and the wife refuses to convey, specific performance as to the husband's share will not be decreed, as such a contract was never contemplated by the parties; and, analogously, an agreement for the sale of property, including a homestead, which is void as to the homestead, cannot be specifically enforced as to the remainder. *Hall v. Loomis*, 63 Mich. 709.