

RECENT CASES.

BANKS AND BANKING—CHECKS—PAYMENT AFTER NOTICE NOT TO PAY.—PEOPLE'S SAVINGS BANK & TRUST CO. v. LACEY, 40 So. 346 (ALA.)—*Held*, that it is no defense to an action by a depositor against a bank that it paid his check; payment having been after notice from him not to pay it.

The drawer of a bank check may, by notice to bank before its presentation for payment or acceptance, revoke the check. *Tramell v. Farmers' Nat'l Bank*, 11 Ky. Law Rep. 900. The check being considered merely an order on the bank for which the bank is not liable. *Schneider v. Irving Bank*, 30 How. Prac. (N. Y.) 190. But it is too late to revoke after bank has received the check, given credit to the holder, and charged up the check to the drawer, such acts being deemed payment. *Albers v. Com. Bank*, 85 Mo. 173. When a bank has paid a check after notice not to do so, it must refund the amount so paid. *Pub. Grain & Stock Exch. v. Kune*, 20 Ill. App. 137. But the bank is bound to pay to holder the amount of a check sent to it by him which it has in its possession when notified not to pay by the drawer. *Freund v. Imp. & Trad. Nat'l Bank*, 12 Hun. 537. Death of the drawer will act as a revocation of authority of bank to pay the amount of the check if death occurs prior to acceptance by the drawee. *Nat'l Com. Bank, v. Miller*, 77 Ala. 168; *Simmons v. Cin. Sav. Soc.*, 5 Ohio Dec. 527. But where a good consideration was given for a check, death does not relieve the drawee from an obligation to pay upon presentment. *Lewis v. Int. Bank*, 13 Mo. App. 202.

CARRIERS—INJURIES TO PASSENGERS—CARE REQUIRED, SPOONER v. OLD COLONY ST. RY. CO., 76 N. E. 660 (MASS.)—*Held*, that on becoming a passenger on a Street Railway, it became defendant company's duty to provide for his benefit proper facilities for transportation, including proper servants, and to carry him safely over his route to his destination.

Carriers of passengers are liable only for negligence, *McClenagan v. Brock*, 5 Rich Law 17 (So. Co.), and are liable for even the slightest negligence, *Baltimore & O. R. Co., v. Wightman*, 26 Am. Rep. 384. A carrier of passengers is not liable for casualties against which it was unable to guard by the utmost prudence and care, *Ken. Cent. R. Co., v. Thomas*, 79 Ky. 160. Street railways are bound to exercise extraordinary diligence. *Holly v. Atlanta Street R. R.*, 34 Am. Rep. 97. Carriers of passengers cannot relieve themselves from the obligation to observe ordinary care by any contract whatsoever. *Cooley on Torts* p. 826. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it. *Laing v. Colder*, 8 Penn. St. 479. Must supply safe vehicle, *Spear v. Philadelphia W. & B. R. Co.*, 5 Pa. co. ct. R. 393. The reasons for this line of decisions seems well summed up in the words of *Cooley on Torts*, p. 795: "Shall not he who has entrusted his person and life to the control of the company, to be carried by them in vehicles of their own selection and

management, rely upon the injury itself as entitling him to redress, and leave to the defense the task of exculpatory evidence?

CARRIERS—PASSENGER ELEVATORS—DEGREE OF CARE REQUIRED—EDWARDS v. MANUFACTURERS' BUILDING CO., 61 COL. 446 (R. I.). *Held*, that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers, is not a common carrier, nor bound to use the same degree of care as that imposed on a common carrier, but is bound to exercise only reasonable care for the safety of those who enter upon his premises and use the elevator.

In the above case the Supreme Court of Rhode Island rejects the rule adopted in the majority of the states and which imposes upon a landlord maintaining an elevator in his private building the same degree of care in running the same as that required of a common carrier of passengers, namely, the highest possible degree of care. The Court bases its opinion on the ground that a landlord does not occupy the same relation to the public as that occupied by a common carrier. The landlord is not the servant of the public. His duties are confined to tenants and their customers. The rule applied in the case of a common carrier is based on the relation of such carrier is based on the relation of such carrier to the public and not on the danger of the journey. Therefore, since the landlord does not stand in the same relation to the public the reason for the application of the rule fails. The Rhode Island Court follows the rule of New York laid down in *Griffen v. Manice*, 166 N. Y. 197.

CONTRACTS—CONSTRUCTION.—ST. LOUIS DRESSED BEEF AND PROVISION CO. v. MARYLAND CASUALTY CO. 26 SP. CT. 400. This case came up before the Circuit Court of Appeals on Review and was referred by that court to the Supreme Court of the United States. Plaintiff was assured by defendant in a general accident policy against the claims of persons injured through the negligence of plaintiff's servants while engaged in its business. Paragraph 7 of the policy read:—"The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, *without the consent of the company previously given in writing* . . . And paragraph 8:—"No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment *after trial of the issue*." After the issuing of the policy one Mrs. H. was injured by a horse and vehicle driven by a servant of plaintiff. Damage suits were brought by the injured woman and also by her husband. Plaintiff notified defendant of the institution of the suits, but defendant, claiming that the driver was not a servant of the plaintiff, refused to defend and claimed the terms of the policy as a justification. As a matter of fact, the driver *was* a servant of plaintiff. Plaintiff at once employed counsel and investigated the injury done to the plaintiffs, Mr. and Mrs. H., and, concluding that they had a very good case, settled out of court for a sum found to be reasonable under the circumstances. Suit is now brought against defendant to recover the amount paid and counsel fees. Defendant rests on the terms of the policy denying liability and especially sets up the clause in paragraph 7 as to the consent of the as-

surer in writing, and that in paragraph 8 as to settlement "without a judgment after trial of the issue."

Held, that plaintiff may recover amount paid in settlement and also the attorney's fees which were found to be reasonable. The principle that one who has a claim against another is bound to use due care and not allow expense to pile up unnecessarily where it might be avoided by ordinary foresight does not seem to have been considered by the court in deciding the case.

CORPORATIONS—INDIVIDUAL LIABILITY OF STOCKHOLDERS—NATIONAL BANK—STATUTE OF LIMITATIONS. *RANKIN v. BARTON*, 26 SP. CT. 29.—*Held*, that a state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank, until the amount of such liability has been ascertained by the Comptroller of the Currency.

If the United States were compelled to pay the circulating notes of a national bank, on its contract of guarantee, it would have a paramount lien on the assets of the bank for reimbursement. Therefore, since the bank is an instrumentality of the United States, the duty of administering the assets of the bank is vested in an officer of the United States, namely, the Comptroller of the Currency. On his order only can the individual liability of a stockholder be enforced. It is, therefore, necessary for the Comptroller of the Currency to determine the amount of the liability of the stockholder before a right of action accrues and the statute of limitations begins to run.

CRIMINAL LAW—ARSON—EVIDENCE—PREVIOUS FIRES.—*PEOPLE v. BROWN*, 96 N. Y. SUPP. 957. *Held*, that in a prosecution for arson, alleged to have been committed with intent to secure insurance money, admissions made by defendant to an insurance adjuster that he had had fires in other buildings than the one in question were inadmissible. Spring, J., *dissenting*.

Upon the trial of a prisoner for setting fire to a building with intent to defraud the insurers, evidence showing that up to five years previously several buildings in which the prisoner was interested and which were insured, were burnt, is irrelevant. *State v. Raymond*, 53 N. J. L. 261. In a charge of bribery evidence of previous attempts on the part of the defendant to commit bribery is not admissible, though it might show, in a moral sense, that he would be likely to commit the crime with which he is charged. *People v. Sharp*, 107 N. Y. 427. The rule is that another act of fraud is admissible to prove fraud charged only where there is evidence that the two are parts of one scheme or plan of fraud, committed in pursuance of a common purpose. *Jordan v. Osgood*, 109 Mass. 457; *Commonwealth v. Bradford*, 126 Mass. 42. But an assured having lost several other vessels evidence of such loss was admissible, as on a question of intent, any other transactions from which any inference respecting the *quo animo* may be drawn are admissible, though it has sometimes been thought that such other transactions should be cotemporaneous, or nearly so, but that is not essential. *Howe v. Home Ins. Co.*, 32 Conn. 21. Where a defendant is charged with firing a house to defraud the insurers, it is admissible for the prosecution to prove that on prior occasions houses occupied by the defendant had been burned, though, as a general rule, evidence of distinct antecedent acts or transactions

is to be rejected as inadmissible against a person on trial for a particular offense. *Rafferty v. State*, 91 Tenn. 656.

CRIMINAL LAW—CONDUCT OF TRIAL—REMARKS OF JUDGE—O'SHEA V. PEOPLE, 75 N. E. 981 (ILL.). Held, in homicide, where the sole defense is insanity and the evidence is conflicting and the question close, the jury should be given no intimation by the trial judge as to the merits of the defense.

As a general rule, trial judges are inhibited by statute from discussing or commenting upon evidence. *Rodríguez v. State*, 5 S. W. 255; *Wessels v. Beeman*, 87 Mich. 481. Any remark tending to show the court's opinion has been held error, as a remark by trial judge "has it not already been shown that conspiracy existed to admit the evidence;" this being held to be a violation of a statute forbidding the judge making any remark calculated to convey to the jury his opinion of the case. *Crook v. State*, 11 S. W. 444; *Kirk v. State*, 32 S. W. 1045. It was held error for a court in the trial of a criminal case to make a remark to, or in the presence of, the jury, in reference to matter of fact, which might in any degree influence them in their verdict. *State v. Hurst*, 11 W. Va. 54; *State v. Swayze*, 30 La. Ann. 1323. But it is said that the expression of the opinion of the judge, on the weight of testimony, is not matter of error in law. *Gale v. Spooner*, 11 Vt. 152. If the case is in the least doubtful upon the evidence it might be error for the judge to express an opinion upon the evidence, but sometimes it might be the duty of the judge to express his opinion upon the evidence. *Johnston v. Commonwealth*, 85 Pa. St. 54. It seems that in the South and West a restriction is put upon the court by statutes, while in the East and Federal Courts the matter is one within the discretion of the court to a great extent.

DAMAGES—PERSONAL INJURIES—PLEADINGS.—HYNDS V. BROOKLYN HEIGHTS RY. CO., 97 N. Y. SUPP. 705. Held, that a complaint for personal injuries, alleging that plaintiff was struck in the abdomen and bruised, blackened, and injured there, and internally, authorizes evidence of eruptions that came out on the abdomen, though they were caused by the abdominal pains. *Hirschberg, P. J., and Hooker, J., dissenting.*

General advertisements of personal injury are sufficient in the absence of exception, *Graham v. J. H. Banland Co.*, 89 N. Y. SUPP. 595; *Fuchs v. St. Louis Trans. Co.*, 111 Mo. App. 324, and under an averment of a particular injury, all natural effects of that injury may be shown. *Comstock v. Georgetown Twp.* 100 N. W. 788 (Mich.); *Nichols v. Oregon Short Line Ry. Co.*, 28 Utah 319. But where particular injuries are described there can be no recovery for others not described. *Brown v. Manhattan Ry. Co.*, 94 N. Y. Supp. 190; *Union Pac. Ry. Co.*, 79 Pac. 152 (Kans.). Such injuries as do not necessarily result from the defendant's wrongful act, but flow from it as a natural and proximate consequence must be specially alleged in order that the defendant may have notice thereof and be prepared to meet the same upon the trial. 2 *Greenleaf on Evidence*, Sec. 254; *Treadwell v. Whittier*, 80 Cal. 574; *Gumb v. Railway Co.*, 114 N. Y. 411. Where the complaint alleges the nature and permanent character of the injuries, the permanent loss and damage to plaintiff by reason of his impaired capacity, because of the injuries, for attending to business, may be given in evidence and considered by the jury in fixing the amount of damages without being specially pleaded. *Wade v. Leroy*, 61 U. S. 44; *Tyson v. Booth*, 100 Mass 266.

DEATH—WRONGFUL ACT—RIGHT OF ACTION.—B. & O. R. R. Co., v. CHAMBERS, 76 N. E. 91, (OHIO). *Held*, that no action can be maintained in the courts of Ohio upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the State of Ohio.

This case lays down a comparatively new rule in this country. In general, whenever, by common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced and the right of action pursued in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy or the laws of the state where it is sought to be enforced, *Herrick v. Minneapolis & St. Louis R. R. Co.*, 31 Minn. 11; *Atchison, Topeka & Santa Fe R. R. Co. v. Keller*, 76 S. W. 801; *St. Louis & C. R. R. v. Brown*, 62 Ark. 254. Such action is on the same footing as to its transitory nature as an action of tort at common law, where statutes are substantially similar, and the exercise of comity between states is not prejudicial to the state's own citizens, *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48; *Chafec v. Fourth National Bank of New York*, 71 Me. 514. The courts of Maryland hold, however, that no action can be maintained upon a statute of this kind if the deceased person received the injury at a place not within the limits of the state. *Allen v. Pitts. & C. R. R. Co.*, 45 Md. 41. The courts of New York will not take jurisdiction of an action between non-residents for a tort committed in another state, unless special circumstances exist. *Collard v. Beach*, 81 N. Y. Supp. 619. The discrimination between residents and non-residents is probably based upon reason of public policy and the courts of New York should not be vexed with litigation between non-resident parties over causes of action which arose outside of its territorial limits. *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315. Affirmed in *Hoes v. N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435.

DEDICATION—LIMITED TO PUBLIC USE.—YOUNG v. LANDIS TP. ET AL., 62 ATL. REP. 1133. (N. J.). *Held*, that land may be dedicated to a restricted public use, and, if accepted, must be taken for the limited purpose only. Therefore the township had no authority to widen the driveway as proposed by an ordinance.

Dedication of land to the public may be so made as to indicate the specific public use which is intended, as for a footpath, etc., and acceptance of such a dedication would be limited to the use designed, *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Trustees of M. E. Church v. City of Hoboken*, 33 N. J. Law, 13; *City of Buffalo v. Delaware L. & W. R. R. Co.*, 39 N. Y. Supp. 4. The chief reason for these decisions is that the dedication is considered as being in the nature of a gratuity, therefore any limitation, condition, etc., attached to or imposed upon the grant will be upheld. Nothing passes to the public but the easement, the fee remains in the original owner. *Cincinnati v. White*, 6 Pet. 431. In the absence of expressed and formal dedication and acceptance, it may be effectuated by the acts, declarations and acquiescing conduct of the parties through such a period of time as will give rise to the conclusive interference of intent to dedicate and to accept. *Cook v. Harris*, 61 N. Y. 448. A use by the public at least for twenty years

has frequently been held to be evidence of the acceptance of a dedication, *Washburn on Easements*, p. 197; *Angell on Highways*, §162.

DIVORCE—SEPARATION FROM BED AND BOARD—EVIDENCE.—*HARRISON v. HARRISON*, 40 So. 232 (LA.).—In weighing the facts in a suit for separation from bed and board, *held*, that the court will be mindful that there may have been in the life of the parties a great deal which, owing to the mouth of the plaintiff being sealed, it may have been impossible to bring to the attention of the court.

The complainant in a divorce case is under the obligation to establish, by full, clear and adequate evidence, the charges made in his bill, and not merely to create inference, suspicion or doubt. *Hampton v. Hampton*, 87 Va. 148. Divorces ought never to be decreed without clear and satisfactory evidence of the wrong which the law treats as justifying cause for a divorce. *Edmond's Appeal*, 57 Pa. St. 232. And the complaining party must prove every element of the offense. *Bishop on Marriage and Divorce*, 6th Ed., Vol. II., §279. However it is not necessary to prove the allegations of the charge beyond a reasonable doubt, but it is sufficient if they be established by a preponderance of evidence. *Smith v. Smith*, 5 Or. 186. Yet the evidence must be "full and satisfactory" before the court can proceed to decree a divorce. *Moore v. Moore*, 22 Tex. 237. It is not sufficient for the court to have a moral conviction of the guilt of the party: it must be satisfied that such conviction is founded on legal evidence, applicable to legal charges. *Caton v. Caton*, 13 Jur. 431. So a party asking a court for a divorce must prove a full and complete case. Nothing is to be taken in favor of the applicant by presumption or intendment as to the facts. *Linden v. Linden*, 36 Barb. 61. The principal case is peculiar in that the court inferred that important testimony might have been tendered if it had not been excluded by a rule of evidence. And each inference was considered of weight.

EMINENT DOMAIN—PUBLIC USE—EFFECT OF LEGISLATIVE ACTION.—*TANNER v. TREASURY TUNNEL MINING AND REDUCTION Co.*, 83 PAC. 464 (COLO.). *Held*, that while the judgment of the legislature in conferring the power of eminent domain for certain purposes is not conclusive on the courts on the question of public use, it is entitled to great weight.

The determination of the legislature is not conclusive that a purpose for which it directs private property to be taken is a public use. *Talbot v. Hudson*, 82 Mass. 417; *Arsperger v. Crawford*, 61 Atl. 413. Whether a particular use for land is public or not is a question for the judiciary. *Call v. Town of Wilkesboro*, 115 N. C. 337. There seems to be some conflict as to who shall judge of the necessity. Whether a public highway, which is for public use, is a necessity or not is a question for the legislature to determine. *Call v. Town of Wilkesboro*, *Supra*. The legislature is the final judge as to the necessity of taking private property for public use. *Glover v. Lime Point*, 18 Cal. 229; *Concord Rv. v. Greely*, 17 N. H. 47. The right of determining the necessity may be delegated and courts and juries may be called upon to determine as to its necessity. *Water Works Co. of Indianapolis v. Burkhart*, 61 Ind. 364. Question of necessity may be vested in courts by statute. *Wheeling & L. E. R. R. Co., v. Toledo Ry. & Term. Co.*, 74 N. E. 209. *Paul v. Detroit*, 32 Mich. 108, is *contra* and holds that the necessity for such use is the subject of judicial inquiry only.

EVIDENCE—HOMICIDE—THREATS BY DECEASED.—STATE v. TOLLA, 62 ATL. 675 (N. J.). The defendant, a woman, had been previously assaulted several distinct times by the deceased. The defense tried to introduce evidence of the persistence of the debaucher, the constant repetition of the insult, and the wife's inability to put an end to the insult even in her husband's presence. *Held*, that in a homicide case, testimony of antecedent threats or acts of violence by the deceased against the defendant are not admissible, when it appears that at the time of the homicide there was no threat or act by the deceased, which, even in the light of any previous threats or acts could justify the homicidal act. Garrison, Dixon, Bogert, Vredenburg, and Vroom, JJ., *dissenting*.

As a general rule the evidence of threats is admissible only where there is some other evidence of an overt act or hostile demonstration on the part of the deceased. *Wigmore on Evidence*, Sec. 110; *State v. Harrison*, 35 So. 560 (La.); *Gilmore v. People*, 124 Ill. 380. The dissenting judges based their opinion on the fact that the evidence ought to have been admitted, not as tending to justify the homicidal act, but because of the obvious bearing of such testimony upon the degree of the defendant's crime. Their opinion is supported by *Monroe v. State*, 5 Ga. 138, which holds that evidence of threats unaccompanied by any acts of aggression is admissible to show the state of feelings of the parties toward each other at the time of the killing. Evidence of this kind has also been admitted as furnishing a reasonable inference that the deceased sought the defendant for the purpose of executing those threats. *Liebert v. People*, 143 Ill. 571.

GAME—FEDERAL STATUTES—CONSTRUCTION.—PEOPLE EX REL., SILZ v. HESTERBERG, SHERIFF.—96 NEW YORK SUPPL., 286. *Held*, that U. S. Stat., providing that all dead bodies of foreign game animals, the importation of which is prohibited, or the dead bodies of wild game animals transported into any state or territory, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, relates to the transportation of game from one state to another, and has no application to the importation of game, which is not prohibited and which constitutes a conceded article of commerce, from a foreign country. Miller and Jenks, JJ., *dissenting*.

There seems to be no decisions, since this law was enacted, upon foreign importation, but it is generally held that an act prohibiting the having in possession of game birds, though brought from another state where the killing is not prohibited, is constitutional, and within the power of the legislature to pass, as it does not conflict with any law which Congress has enacted and is a power, which lying dormant, may be exercised by the state, *Phelps v. Racey*, 60 N. Y. 10; *State v. Farrell*, 23 Mo. App. 176; *Roth v. State*, 51 Ohio St. 209; *Magner v. The People*, 97 Ill. 320; *Commonwealth v. Hall*, 128 Mass. 410; *People v. O'Neil*, 71 Mich. 325, while upholding the constitutionality of such a statute, deny that the *prima facie* having in possession is sufficient to convict, holding that defendant may show that birds were killed in another state and not in violation of the law of such state. These decisions were rendered before the passage of the U. S. Statute, as above, and this act would seem to remove any doubt as to the constitutionality.

HIGHWAYS—USE OF AUTOMOBILES—NEGLIGENCE IN OPERATING AUTOMOBILE.—*MCINTYRE v. ORNER*, 76 N. E. 750 (IND.). *Held*, it was negligence for an autoist to drive his automobile at the rate of more than 15 miles an hour toward a team of horses which were frightened at the machine, where the autoist saw or could have seen, when 300 feet away, that the horses were frightened.

The case above is a very interesting one from many standpoints, the chief of which is from that of its being seasonable. Questions are bound to arise in great numbers due to the increasing use of this method of locomotion, totally unknown a short time ago. So that any well decided point cannot fail to be of use as a precedent and aid in settling these questions in the future. At present it is difficult to find many cases of this kind reported. There being no question of the right of an automobile to the use of the highway, it becomes a question of what kind of a use. It is obvious that it must as in all other cases be a proper use. As to use of vehicles in general see *Payne v. Smith*, 4 Dana 497; *Angell on Highways* p. 441 *et post*. The law of the road will not tolerate any inconsiderate and reckless disregard of the rights of other travelers on the highway. *Railway v. Long*, 112 Ind. 166; *Benjamin v. Holyoke R. Co.*, 160 Mass. 3. Parties owe to each other the duty of reasonable care. *Baker v. Fehr*, 97 Pa. 70. In the case of the auto it does not seem that the defendant used this care. It was not prudent driving. In the case of *Mason et al. v. West*, 70 N. Y. (Sup.) 478, it was held that a verdict for damages to the Plaintiff was justified from the evidence. The evidence was that the auto gave out a loud puffing sound and was running at the speed of 10 or 12 miles an hour and did not slacken until the horses became frightened.

MARRIAGE—VALIDITY.—*CHAMBERLAIN v. CHAMBERLAIN*, 62 ATL. 680. (N. J.). *Held*, that when a man and woman marry but the marriage is subsequently shown to be illegal by the existence of the wife's former husband, when she subsequently obtains a decree of divorce from the former husband and it is shown that they still believe themselves married, their relations are lawful.

Where one of the parties to a valid marriage contracts a second marriage, the second and bigamous marriage is not rendered valid by a subsequent decree of divorce dissolving the prior marriage. *Teter v. Teter*, 101 Ind. 129; *Hunts' Appeal*, 86 Pa. St. 294, as the decree becomes operative only when rendered. *Estate of Cook*, 77 Cal. 220; *Alt v. Banholzer*, 39 Minn. 511. But where the relation was begun under a contract of marriage supposed to be legal, though in fact void, in consequence of the disability of one of the parties, yet after removal of the disability a subsequent marriage may be presumed from acts of recognition of each other as husband and wife, and from continued matrimonial cohabitation and general reputation. *Collins v. Collins*, 80 N. Y. 9; *Blanchard v. Lambert*, 43 Iowa 228. Without the proof of the subsequent actual marriage such marriage will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin. *App. of Reading Ins. Co.*, 113 Pa. St. 204.

MUNICIPAL ORDINANCES—WAGES OF LABORERS—CONSTITUTIONALITY.—*GIES v. BROAD*, 83 PAC. 1025 (WASH.). *Held*, that a municipal ordinance

providing that the rate of wages for laborers on work done by contract for the city in the improvement of the streets shall not be less than a certain sum for a calendar day's work of eight hours, is constitutional and valid.

The state may within its police power look after the health, safety and comfort of its citizens. *Holden v. Hardy*, 169 U. S. 366; *State v. Buchanan*, 29 Wash. 603. And the only state, perhaps, that holds the eight hour law, as applied to miners, invalid is Colorado. *In re Morgan*, 28 Colo. 415. It is clearly within the power of the state to limit the number of hours a laborer may be permitted to work in one day on any public work undertaken by it. *In re Dalton*, 61 Kan. 257; *People v. Beck*, 30 N. Y. Supp. 473. The power to do this rests upon the principle that it belongs to the state to prescribe the conditions upon which it will permit public work to be done on its behalf. *Atkin v. Kansas*, 191 U. S. 207. A contractor or laborer cannot object upon constitutional grounds to a liability which he has voluntarily assumed, in consideration of a benefit conferred. *Bertholf v. O'Reilly*, 74 N. Y. 517.

NUISANCE—ACTION FOR DAMAGES—LEASED PREMISES.—MILLER ET AL., v. ELECTRIC ILLUMINATING CO. OF N. Y., 76 N. E. 734 (N. Y.) Held, that plaintiff could not recover for any depreciation in the rental value pending the lease as the tenant was alone entitled to recover for any such injury. Gray, Bartlett and Haight, JJ., *dissenting*.

The settled rule of law seems to be that the owner of the reversion may sue in an action on the case when an injury to his reversionary interest is committed, 4 *Ken's Com.* 119; 8 *Pick.* 235; 31 *Iowa* 138; *Tiffany on Real Property* Vol. 1 p. 93. The judges of the majority opinion in the case *supra* admit this but hold that the injury necessarily must be of a permanent character, 29 *N. Y. Sup.* 1000. It is also admitted that the defendant, having separate assets, may sue for the diminution of his enjoyment of the premises. But when the question of which shall sue for the depreciation of rental value comes up the authorities are in conflict. The case of *City of Eufaula v. Simmons*, 86 *Ala.* 515, holds that the damage suffered was properly measured by the diminished rental value of the premises for the year during which the nuisance continued if he elected to claim only for that period, waiving the question of permanent injury. *The Tallman case*, 121 *N. Y.* 118; *Lawrence case*, 126 *N. Y.* 483; *Whitmark v. N. Y. Elev. R. R.*, 76 *Hun.* 302; *Diermger v. Wehrman*, (*Dist. Ct.*) 12 *Wkly Law Bul.* 222, substantially hold to the same view. But the majority opinion in the case reported hold that these cases or the Elevated R. R. cases are *sui generis* and are governed by principles which apply to no other class of cases. They are supported in this view by, *Stowers v. Gilbert*, 156 *N. Y.* 604; *Ottentot v. N. Y. L. & W. R. Co.*, 119 *N. Y.* 603; *Uline v. N. Y. C. & H. R. R. Co.*, 101 *N. Y.* 98.

PATENTS—CONTRACTS—ROYALTIES.—BENNETT v. IRON CLAD MFG. CO., 96 *N. Y. SUP.* 968. Defendant acquired the right to manufacture and sell plaintiff's patented article during the life of the patent, and agreed to pay plaintiff a royalty on each article manufactured. On defendant's failure to pay the royalties, plaintiff recovered judgment for the royalties and for the cancellation of the contract. The judgment was affirmed on defendant's

appeal. Pending the appeal it continued to make and sell the article. *Held*, that plaintiff was entitled to recover the royalties specified in the contract on the articles made pending the appeal; his failure to procure an injunction restraining the manufacture and sale pending the appeal not procluding a recovery on the contract. *Spring and Hiscock, J.J., dissenting.*

A license does not become *ipso facto* void on a failure to pay royalties even if it contain an express stipulation to that effect. *Standard Dental Mfg. Co. v. Nat. Tooth Co.*, 75 Fed. 291. There must be some proper proceeding and a rescission in equity. *Hanifen v. Lupton*, 95 Fed. 465. The question in this case is obviously the effect of the judgment of the lower court pending appeal. When the case is to be tried anew upon appeal as upon original process, the effect of the appeal is to vacate and render null the judgment. *Powell on Appellate Proceedings*, c. 9. It is very clear that if the judgment remained good, the original cause of action would be merged in it, and might even be pleaded as a bar to it. *Curtiss v. Beardsley*, 15 Conn. 518. So, in an early case, it was held that the judgment of the common pleas, when regularly appealed from, becomes wholly inoperative. *Campbell v. Howard*, 5 Mass. 376. These cases must be distinguished from those where the appeal is in the nature of a writ of error or for review of errors only. In the latter class, the appeal does not vacate the judgment but merely suspends its execution. *Curtiss v. Root*, 28 Ill. 367. Some cases have held, however, that in either case the appeal does not suspend or supercede the force of the judgment. *St. v. Chase*, 41 Ind. 356; *Walls v. Palmer*, 64 Ind. 493.

RAILROADS — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — INFIRM PERSONS. — *TOLEDO P. & W. Co., v. HAMMETT*, 77 N. E. (ILL.) 72. *Held*, that a deaf person on approaching a railroad crossing is required to be more careful in order to avoid contributory negligence than a person not so afflicted.

Highway travelers approaching a railroad crossing are charged with diligence to ascertain if a train is about to pass by; and their diligence must be greater accordingly as the particular locality and the circumstances of the case seem to require greater caution. *Morris v. Chic. M. & St. P. R. Co.*, 26 Fed. 22. The care and caution required of a person in crossing a railroad track is such reasonable care and caution as a man of ordinary prudence would exercise in similar circumstances. *Wichita & W. R. Co. v. Davis*, 37 Kan. 743. This usually requiring the traveler to "look and listen." *Easley v. Mo. Pac. R. Co.*, 113 Mo. 236. So it is gross negligence for a blind person to attempt to cross a network of tracks unattended, where he knows that trains are passing. *Fla. Cent. & P. R. Co. v. Williams*, 37 Fla. 406. A greater degree of care is imposed upon an infirm person to avoid danger in crossing the tracks, but the responsibility of the railroad is not increased by the fact of plaintiff's deafness. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570; nor by the fact that plaintiff was blind in one eye, *Marks' Adm'r v. Petersburg R. Co.*, 88 Va. 1; unless the employees in charge of the train know of the infirmity. *C. C. & C. R. Co. v. Terry, supra*. Generally speaking an engineer is bound to use ordinary care but not the highest degree of care when approaching a crossing. *C. R. L. & P. R. Co. v. Caulfield*, 27 U. S. App. 358. And to protect a person in a helpless condition. *Yoakum v. Mettasch*, 26 S. W. 129. But not to stop a train, even when possible, because an idiot is on the

track, the fact of idiocy being unknown to him. *Daily v. R. & D. R. Co.*, 106 N. C. 301.

STATES—TORTS—PERSONAL INJURIES—NEGLIGENCE OF VOLUNTEER.—*SPENCER v. STATE*, 97 N. Y. SUPP. 154. *Held*, that where the foreman of a repair gang in the employ of the state and engaged in replacing the old flooring of a bridge silently acquiesced in the act of a stranger, who desired to remove boards for his own use, the state was liable for injury to a third person, resulting from the negligent performance of such act by the stranger. Parker and Chester JJ., *dissenting*.

In the absence of statute a state is not liable for the negligence of its officers in the discharge of their ordinary duties, *Chapman v. State*, 104 Cal. 690. But the maxim, "the king can do no wrong," does not imply that the state cannot do an act for which the citizen is not entitled to redress. Its real meaning is that the right to sue must be voluntarily given by the state not coerced, *Metz v. Soule*, 40 Iowa 236; 2 *Blackstone* 255. If there be a statute allowing the state to be sued then we are to treat the state as an individual and the question arises, would an individual be liable in the case cited *supra*. *Halutzok v. Gt. Northern Ry.*, 55 Minn. 446; *Booth v. Mister*, 7 Car. & P 66, hold that where a servant in the employ of the master hires another to assist him in performing acts for the master, the master is liable for the sub-servant's acts. The reasons given are diverse. It may rest upon the idea of implied authority, or of ratification, or of the negligence of the servant in directing or controlling the work, or of the duty of the occupier of premises not to permit his property to become a nuisance. The case of a volunteer is decided for nearly the same reasons, chief of which is the doctrine of implied assent, *Hill v. Morey*, 26 Vt. 78.

TELEPHONES AND TELEGRAPHS—PLACING OF WIRES—REGULATION BY VILLAGE.—*VILLAGE OF CARTHAGE v. CEN. N. Y. T. & T. Co.*, 96 N. Y. SUP. 919. *Held*, that where a telephone company extends its lines in a village without permission of the trustees, the trustees can require such extension to be taken down and placed underground, without requiring a rival company to place its wires underground; there being no such requirement as to wires previously erected, and the rival company not appearing to have made extensions at or after the same time. McLennan, P. J., and Nash J., *dissenting*.

The right to construct a telegraph or telephone line along and upon a street or highway must be derived from an express grant of authority. *N. Y. & N. J. Tel. Co. v. East Orange, N. J.*, 42 N. J. Eq. 490. But a municipality has no right to nullify a franchise granted to a telephone company to erect poles and wires in the streets in the absence of any provision therein reserving the right. *Old Colony Trust Co. v. Wichita*, 123 Fed. 762. Where, however, the use of the streets of a city by a telegraph and telephone company is without authority, either because of the particular mode of use or because of the utter lack of authority to occupy the streets, an injunction by the city will be to restrain such future use. *St. v. Met. T. and T. Co.*, 31 Hun. 596. *Utica v. Utica Tel. Co.*, 24 N. Y. App. Div. 361. And, notwithstanding telegraph lines are instruments of commerce, a city has the right to determine how, in what manner, and upon what condi-

tions a telegraph company shall enter the city and pass through it. *Mutual Un. Tel. Co. v. City of Chicago*, 16 Fed. 309. And, while there is no power in a municipality arbitrarily to declare a forfeiture of the company's right to occupy its streets, *Abbott v. Duluth*, 104 Fed. 833, nevertheless a city cannot, by a contract which permits a telephone company to construct and maintain its line upon a certain street, deprive itself of the power to enact such legislation as is necessary for the public safety, general welfare, and Convenience. *Mich. Tel. Co. v. City of Charlotte*, 93 Fed. 11.

TELEPHONES — POLES AND WIRES IN STREETS — ADDITIONAL BURDEN. — FRAZIER v. EAST TENNESSEE TELEPHONE COMPANY, 90 S. W., 620. (TENN.). *Held*, that telephone poles and wires erected in the street do not constitute an additional burden upon the fee of abutting owners, for which they are entitled to compensation. Shields, J., *dissenting*.

Cases on this point are in irreconcilable conflict, the weight of authority being to the effect that such wires and poles are an additional burden. It is said that the erection and use of telephone wires and poles is one of the new uses over which the power of the city extends as it springs up, as well as to uses common and known at the grant of the power to the city. *City of St. Louis v. Bell Telephone Company*, 96 Mo. 623. And it is held in Missouri that telephone companies organized under the laws of the state may set their poles and wires along the public street, without compensation to owners of abutting fees, subject to regulation by the city. *The State ex rel v. Flad*, 23 Mo. App. 185. Statute giving right to erect poles and wires is constitutional though it makes no provision for compensation to the owners of the fee. *Pierce v. Drew*, 136 Mass. 75. On the other hand it is said that a telephone system not being a use to facilitate travel is an added servitude to the fee. *Union Elec. Tel. & Telg. Co., v. Applequist*, 104 Ill. Appl. 517. *Ches. & Pot. Tel. Co. v. Mackenzie*, 28 Am. St. Rpts. 219. The public easement includes the grading, paving, cleaning and lighting of the highway, the apparatus of street railways and apparatus for the protection and convenience of travelers using the way, but the right to construct a telephone line for public use is not within this easement and can be acquired upon the fee of abutting owners, against the consent of such owners, only through the power of eminent domain. *Nicoll v. Tel. Co.*, 62 N. J. L. 733; *Hodger v. Tel. Co.*, 133 N. C. 235.

TRIAL — ARGUMENT OF COUNSEL — APPEAL TO SYMPATHY. — DALLAS CONSOLIDATED ELECTRIC ST. RY. CO. v. BLACK, 89 S. W. (TEX.) 1087. *Held*, that where in an action against a corporation for injuries, the evidence was conflicting, it was prejudicial error for counsel for plaintiff to argue that plaintiff was a poor girl and defendant a rich corporation, though such facts were in evidence.

Where counsel uses language calculated to arouse prejudice in the jury, an adverse party may interpose, and if the court fails or refuses to check the abuse an exception lies. *Abbott's Brief on Civil Jury Trials*, 2nd Ed. 399. It is not within the privilege of counsel in argument to jury to use language calculated to humiliate or degrade the opposite party in the eyes of the jury. *Coble v. Coble*, 79 N. C. 589. And he may not avert the consequences of his remark by taking it back. *Wolfe v. Minnis*, 74 Ala. 386. It is the duty of the court to stop him under these circum-

stances, *Magoon v. B. & M. R. Co.*, 67 Vt. 177. And if such remarks are expressly discountenanced by the judge there is no ground for error. *Dugan v. Chic. St. P. M. & O. Ry. Co.*, 85 Wisc. 609. Where there was conflict in evidence the verdict for plaintiff was not set aside for the mere fact that counsel said he was poor. *City of Chic. v. Todd*, 50 Ill. App. 609. But to say "Because he (defendant) has his thousands, because the rich opposes the poor, shall the plaintiff be deprived of his rights," was reversible error. *Bitterman v. Hearn*, 32 S. W. 341.