PROGRESS OF THE LAW.

As Marked by Decisions selected from the Advance Reports for July.

In *Hindson* v. *Ashly*, [1896] 2 Ch. 1, the Court of Appeal of England has practically reversed the decision of Romer, J. ([1896] 1 Ch. 78; see 35 Am. L. Reg. (N. S.) 88.) The facts, which were imperfectly set out in the former report, were as follows: The plaintiffs were entitled to a piece of land bounded on one side by the Thames, this land ending in an almost perpendicular bank from five to six feet high. The bed of the river reached to the foot of this bank, and the water often reached some height above the foot. The defendant owned a separate fishery in the river, and the bed of the river. Over fifty years before the action was brought, a row of willows was planted in the river at a short distance from the bank, which became large trees, and were always treated as his by the defendant. An accumulation of silt and mud gradually formed along the bank, and above and below the plaintiff's land, aided, no doubt, by the presence of the willows. Some twenty years after the trees were planted, as the mud had become tolerably firm, a small ditch was cut at the foot of the plaintiff's bank by the defendant or his father, which was thenceforth constantly cleared out by the defendant. The purpose of this was stated to be to mark the boundary of the plaintiff's land. In 1877, or thereabout, a weir further down the river was removed, which caused the water to sink about two feet, widening the distance between the bank and the water when the river was low, and facilitating the accumulation of mud at the foot of the bank. The strip thus formed is dry in summer, but still covered with water in winter. The defendant, in order to make a path to a small island claimed by him, filled up the ditch at the foot of the bank with concrete, and the plaintiffs brought this action to prevent him from trespassing, claiming the strip of mud as an accretion. Judge Romer held that it

Accretion, Rights of Riparian Owners and Owners of Bed of River

was to be so regarded; but the Court of Appeal ruled that it belonged to the defendant as part of the river-bed, and that the only right the plaintiffs had was that of free access to the river by passing over it.

The action on the case given by the Pub. Stat. R. I. c. 204, § 22, to recover damages for the larceny of personal property, making a person convicted thereof liable to the owner of the money or property for twice its value, unless it be restored, and then for the value thereof, is a remedial, and not a penal statute, since the damages are given to the person injured as compensation for the wrong, not for the punishment of the wrongdoer; and survives to the representatives of the plaintiff, under Pub. Stat. R. I. c. 204, § 8, which provides that actions "on the case for damages to . . . . personal estate" shall survive on the death of either party: *Aylsworth* v. *Curtis*, (Supreme Court of Rhode Island,) 34 Atl. Rep. 1109.

Actions, Penal and Remedial, Survival

An order on an employer to pay to a creditor of the employe money not yet due under the contract of employment operates as an equitable assignment of the fund as soon as it is earned, though the drawee did not accept the order: *Merchants' & Miners' Natl. Bank* v. *Barnes*, (Supreme Court of Montana,) 45 Pac. Rep. 218; but an assignment of unearned salary of a public official is against public policy, and void: *Stevenson* v. *Kyle*, (Supreme Court of Appeals of West Virginia,) 24 S. E. Rep. 886, even in the hands of an assignee; for he must be held to know that it is illegal: *Bangs* v. *Dunn*, 66 Cal. 72.

Assignment, Equitable

In a recent case in the Queen's Bench Division of England, before Justice Vaughan Williams, a surety had guaranteed a bank the payment of all sums of money which then were or might thereafter from time to time become due or owing to the bank from S., who was its customer, but the total amount recoverable from the surety was not to exceed £300. The guaranty was

Bankruptcy, Proof of Debt Guaranteed, Payment by Surety

to be a continuing security, and any dividend which the bank might receive in case of the bankruptcy of S. were not to prejudice their right to recover from the surety to the full extent of the guaranty any sums which might still remain owing to them by S. after the receipt of such dividend. S. became bankrupt, and the bank, after receiving the £300 from the surety, claimed to prove for the full amount due to them from S. The trustee in bankruptcy contended that the proof ought to be reduced by the amount the bank had received from the surety. The bank appealed, and the court ruled that it had a right to prove for the whole debt, without any deduction, unless the sum paid by the surety was twenty shillings in the pound: *In re Sass*, [1896] 2 Q. B. 12.

Building Contract, Conditions, Performance, Alteration of Plans

According to a late decision of the Supreme Court of Pennsylvania, a contractor is not responsible for a delay caused by a change in the plans of a building, made at the oral request of the owner, though the building contract requires that a written order shall be given for any change which affects the cost of the building, or the time of its completion: *Focht* v. *Rosenbaum*, 34 Atl. Rep. 1001.

Carriers, Limiting Liability, Conflict of Laws

In another case before the court last named, *Burnett* v. *Penna. R. R. Co.*, 34 Atl. Rep. 972, the defendant company, a Pennsylvania corporation, issued and delivered to the plaintiff, in the State of New Jersey, a pass from Philadelphia to Elmira, N. Y., which provided that the plaintiff assumed all risks of accident. Such a limitation of liability is valid under the laws of New Jersey, but not under those of Pennsylvania. The plaintiff was injured, within the State of Pennsylvania, by the admitted negligence of defendant's employes. The limitation in the pass was alleged to defeat recovery, but the court held that since the contract of carriage was to be performed in Pennsylvania, it was governed by the laws of that State, and not by the laws of the place where it was made.

Street-Cars, Contributory Negligence

One who, without the knowledge of the conductor, rides upon the rear bumper of a street-car, which is full to overflowing, is guilty of contributory negligence as a matter of law, and cannot recover for injuries caused by another car coming up from behind and striking the car on which he is standing: *Bard* v. *Penna. Traction Co.*, (Supreme Court of Pennsylvania,) 34 Atl. Rep. 953.

Conflict of Laws, Death by Wrongful Act, Action by Wrong Plaintiff

In *Lower* v. *Segal*, 34 Atl. Rep. 945, Judge Garrison, of the Supreme Court of New Jersey has lately held, that though the courts of New Jersey will enforce the Pennsylvania Statute giving a right of action to the widow of one who dies of injuries inflicted by the wrongful act of another, since that statute is not repugnant to the policy of the former State, yet such an action cannot be brought in New Jersey by the personal representative of the deceased, as required by the laws of that state in similar cases, and a declaration in a suit by the personal representative, based on the Pennsylvania Statute, is bad on demurrer.

Corporation, By-law, Validity

A by-law of a stock corporation, which provides that if any stockholder shall desire to dispose of his stock he shall give written notice to the president of his intention to sell, which notice the president shall communicate to the other stockholders, that the stockholders shall then have the option to purchase the stock at the price named, and that the corporation shall have the option to purchase it if the stockholders do not exercise their option, is an invalid restraint on the power of alienation, and void: *Victor G. Bloede Co. of Baltimore City* v. *Bloede*, (Court of Appeals of Maryland,) 34 Atl. Rep. 1127.

Criminal Law, Fortune-telling, Evidence

In a prosecution under 3 How. Am. Stat., Mich., c. 51, § 1, for being a disorderly person, in that he "pretended to tell fortunes," advertisements inserted by him in the newspapers, in which he professed his ability to foretell future events, and offered his services to the public for that purpose, were admissible to

establish the offence charged: *Peo.* v. *Elmer*, (Supreme Court of Michigan,) 67 N. W. Rep. 550.

To the same effect is *Penny* v. *Hanson*, 16 Cox, C. C. 173.

In *State* v. *Nelson*, 34 Atl. Rep. 990, the Supreme Court of Rhode Island, laying down the broad doctrine that all the constitutional provisions in regard to former jeopardy are intended to secure the same a right to absolute immunity from a charge after an acquittal, and the right to have a trial go on after it has begun, ruled that under the Constitution of that State, (Art. 1, § 7,) which provides that "no person shall, after an acquittal, be tried for the same offence," a plea filed by a defendant, setting out that on a former trial for the same offence the jury were discharged by the court against the defendant's objection, upon a report of the illness of a juror, made to an officer of the court by telephone, states a sufficient ground for the discharge of the defendant; for such a discharge of the jury, based on a mere report, is not within any of the well-recognized exceptions to the general rule, and is not a valid exercise of judicial discretion.

Former Jeopardy, Discharge of Jury

The Supreme Court of Florida, following the invariable rule that no legal sentence can be pronounced in a felony case upon a verdict rendered and received by the court during the absence of the defendant, has lately held that when the defendant in such a case voluntarily absconds while the jury are out considering their verdict, the proper practice is for the judge to declare a mistrial and discharge the jury, without receiving any verdict, after he becomes satisfied that the defendant cannot be produced within a reasonable time; and that if, after the defendant in a felony case has absconded, a verdict of guilty is received and the jury discharged during his absence, and sentence pronounced thereon by the court at a subsequent term, the verdict and sentence are mere nullities: *Summeralls* v. *State*, 20 So. Rep. 242.

Verdict, Absence of Defendant

The Supreme Court of Nebraska has recently decided, following *State* v. *Allen*, 43 Neb. 651, (1895), that the ques-

Elections, Nominations, Rival Conventions, Duties of Secretary of State

tions as to which of two factions in a political party is the true representative of that party is a political, rather than a judicial question, which the Secretary of State, in certifying nominations, has no power to decide; and therefore, when two factions of a political party nominate candidates and certify their nominations to the Secretary of State in due form, the latter should not inquire into the regularity of the convention held by either faction, but should certify to the county officers the names of the candidates nominated by each: *Phelps* v. *Piper*, 67 N. W. Rep. 755.

To the same effect are *Peo* v. *District Court*, 18 Colo. 26, 1892, and *Shields* v. *Jacobs*, 88 Mich. 164, 1891. See 34 AM. L. REG. (N. S.) 219.

In *In re East York Election*, 32 Con. L. J. 481, Mc Dougall, Co. J., held, that all ballots on which the elector has made a cross in the division containing the name of the candidates he votes for are valid, though the cross is not placed in the space (a circular disk) provided for it at the right of the name; and also that ballots marked by a cross-mark with lines drawn over and under it, by a cross-mark in ink instead of pencil, by a cross in the shape of a figure 2, with the lines intersecting at the bottom, and by a proper cross-mark and also an erazure of the addition under the name of the other candidate, were good. He disallowed two where the cross was made on the back of the ballot opposite to the circle.

Ballots, Marking

The language in which the learned judge disposes of the contention that the statutory requirement as to position of the cross is mandatory, is worth quoting. "Lord Mansfield's rule as to whether a statute is mandatory or not, as stated in Potter's Dwarrison on Statutes, (p. 224,) depends upon whether the thing directed to be done is of the essence of the thing required. Now here the essence of the thing required is the marking of the ballot secretly with a cross so as to indicate with clearness which candidate the elector votes for. The position of the cross as indicating the elector's choice of a candidate is to my mind not of the essence of the thing required to be done."

Under the Canada Election Act of 1874, which required the cross to be placed at the right of the candidate's name, the Ontario court pronounced two opposite judgments, one holding that a cross at the left would be good, as the statute was only directory: *North Victoria Case*, *Hodgins' El. Cas.*, 680; the other that the statute was mandatory, and that a cross placed any where but at the right of the name, would vitiate the ballot: *Monk's Case*, *Hodgins El. Cas.*, 730. The American Cases on this subject will be found in 33 AM. L. REG. (N. S.) 748; 34 AM. L. REG. (N. S.) 85, 155, 222 359, 430, 491, 556, 638, 719, 780.

Electric Railways, Snow on Track, Vis Major, Control of Car

In *Danville Street Car Co.* v. *Payne*, 24 S. E. Rep. 904, the Supreme Court of Appeals of Virginia has lately held, that a fall of snow in January cannot be considered as an "Act of God" which will relieve the defendant from liability for injuries occasioned thereby; that when there's such a fall of snow, the employes of an electric street railway are bound to know the difficulty of managing the car, and must approach grades at a rate of speed which will allow them to keep the car under control; and that if, when there's snow on the track, they approach a heavy grade at such speed that the car slides down it in spite of the brakes, which work properly, the company will be liable for injuries caused to a passenger thereby.

Electric Wires, Negligence, Contributory Negligence

The Court of Errors and Appeals of New Jersey, in *Suburban Electric Co.* v. *Nugent*, 34 Atl. Rep. 1069, has decided some very interesting questions in reference to accidents from electric wires. The plaintiff's intestate was found dead about three feet from the base of an electric light pole. There was no direct evidence of the cause of death. On this pole was fastened a reel, at about the level of a man's head, around which was wound a wire rope used to raise and lower the lamp on the pole, and this wire was practically uninsulated and heavily charged with electricity. A post-mortem examination showed all of deceased's organs to have been in a normal condition, and

that his death was not caused by disease of any kind; but on his left hand, running all the way across it, was a freshly made burn, about one-sixth of an inch in width; and his blood was in an abnormal state, such as is found in persons who have died from electric shock. Upon these facts the court held that it was only reasonable to suppose that the decedent came to his death through touching the uninsulated wire on the reel; that in so maintaining this wire, within reach of passers-by, the defendant company was guilty of negligence; and that as there was nothing to show how the plaintiff's intestate received the shock that killed him, there was nothing upon which his negligence could be predicated.

Eminent Domain, Construction of Sewer, Injury to Land, Loss of Lateral Support

The Supreme Judicial Court of Massachusetts has recently had before it a very peculiar case. A city built a sewer in a public street, the soil of which opposite the plaintiff's premises consisted of about three feet of gravel filling, upon about ten feet of peat and silt, below which was very fine sand and silt on quicksand. The soil of the plaintiff's premises was of the same nature, and part of the same strata. The underlying sand contained a great deal of water, and while the sewer trench, which was twenty-six feet deep, was being dug, it was kept free from water by buckets and pumps. A great deal of the substratum of water-logged sand ran into the trench, from the plaintiff's premises, and the surface, being deprived of its subjacent and lateral support, cracked and settled, and his buildings were injured. Upon these facts it was held that the city was liable to him for damages: *Cabot* v. *Kingman*, 44 N. E. Rep. 344.

Justices Holmes, Knowlton and Lathrop dissented, on the authority of *Popplewell* v. *Hodkinson*, 4 L. R. Exch. 248, 1869, where it was decided that the owner of land, had no right to the support of subterranean waters, and could not recover damages from one who, by draining his own land, withdrew such support from another, and caused his land to subside, and on the ground that a quicksand which flowed so freely as to be raised by a pump ought to follow that analogy.

Insurance, Several Underwriters, Stipulation for Separate Suits

According to a recent decision of the Supreme Court of New York, Appellate Division, First Department, a stipulation in a policy on which one hundred underwriters are severally liable for the one-hundredth part of the insurance, that the assured shall not sue more than one of the underwriters at one time, and that a final decision in any action thus brought shall be decisive of the claim of the assured against each of the underwriters who agree to abide the event of the suit, is not void as against public policy, but valid on the ground that it tends to prevent a multiplicity of suits; and in an action to which all of the underwriters are made parties defendant, a plea that it was brought in violation of the agreement should be sustained: *New Jersey and Penna. Concentrating Works* v. *Ackerman*, 39 N. Y. Suppl. 585.

Accident Insurance, Construction of Policy

One who carelessly slips on a railroad track, without noticing an approaching train, is not guilty of voluntary exposure to danger within the clause of an accident insurance policy providing that "this insurance does not cover . . . voluntary exposure to unnecessary danger:" *Lehman* v. *Great Eastern Casualty and Indemnity Co. of N. Y.*, (Supreme Court of New York, Appellate Division, Fourth Department,) 39 N. Y. Suppl. 912.

Insurance, Fire, Insurable Interest, Mortgagor who has conveyed his Equity

One who has no title, legal or equitable, in property, and no present possession or right of possession therein, has nevertheless an insurable interest in the property, if he will derive a benefit from its continued existence, or suffer loss by its destruction; and therefore a mortgagor of real estate, who conveys the title of the property mortgaged to another, subject to the mortgage, has an insurable interest in that real estate, since he remains liable to the mortgagee for any deficiency: *Hanover Fire Ins. Co.* v. *Bohn*, (Supreme Court of Nebraska,) 67 N. W. Rep. 774.

Vice-Chancellor Pitney, of the Court of Chancery of New

Landlord and Tenant, When Relation Arises, Possession by Mortgagee of Goods

Jersey, has lately decided, that if mortgagees of a stock of goods in a leased store building take possession of the goods therein, by permission of the mortgagors, and use the building to display and sell the goods, and keep the usual accounts of a retail store, they take possession of and occupy the building as tenants of its owner, and not as licensees of the mortgagors: *Hatch* v. *Van Dervoort*, 34 Atl. Rep. 938.

Libel, "Slippery"

It is libelous to use the word "slippery" in reference to a person; *e. g.*, by addressing him in a telegram as "Slippery Sam." "This word, when used as descriptive of a person, has a well-understood meaning. It means, when so used, that the person to whom it is applied cannot be depended on or trusted; that he is dishonest, and apt to play one false. If such is the meaning of this word as used in this message—and of this the jury were the judges—it was clearly libelous, because, if a man is dishonest, and apt to play one false, he merits the scorn and contempt of all honorable men. To falsely publish of a man that he is slippery, tends to render him odious and contemptible. Such a publication is a libel:" *Peterson* v. *Western Union Tel. Co.*, (Supreme Court of Minnesota,) 67 N. W. Rep. 646.

It is libelous to publish of one that he is "a dangerous, able, and seditious agitator:" *Wilkes* v. *Shields*, (Minn.,) 64 N. W. Rep. 921 (1895).

Negligence, Imputed, Parent and Child

The Supreme Court of New York has made another effort to escape from the bondage of *Hartfield* v. *Roper*, 21 Wend. 615, 1839, that absurd case in which it was held that the parent is to be regarded as the agent of a child *non sui juris*, so as to prevent its recovery for injuries due to his contributory negligence. Now, though still recognizing that rule, it holds that the negligence of the father will not be imputed to an infant about twenty-one months old, which is injured while in its mother's arms in a

carriage driven by the father, since in such a case the child is in the immediate custody of the mother, and not of the father: *Hennessy* v. *Brooklyn City R. R. Co.*, (Supreme Court of New York, Appellate Division, Second Department,) 39 N. Y. Suppl. 805.

The court was simply forced to this decision by the circumstances. The mother who was injured at the same time as the infant, recovered for that injury on the ground that her husband's negligence could not be imputed to her; *Hennessy* v. *Brooklyn City R. R. Co.*, 73 Hun., (N. Y.) 569, 1894, affirmed, 147 N. Y. 721, 1895; and it would have been the grossest injustice to refuse the like privilege to the infant. But the expedient resorted to was unworthy of the court, and constitutes no valid reason for its decision, if its premises are true. If the doctrine of *Hartfield* v. *Roper* is correct, then the father in this case was the agent of the child, although he did not have manual possession of it. He had the charge of the team, and all those who were in it; and his negligence in driving the team, which contributed to the injury, was to be imputed to the child, as much as if he held it in his arms. It would have been much more in accordance with legal principles and sound common-sense to have repudiated *Hartfield* v. *Roper*, and decided the case on the broad ground that the negligence of a parent cannot be imputed to a child, because it has no control over him. It would have been the easier to do this, because the authority, *Hartfield* v. *Roper*, is rejected in every other State, and has been refuted with unnecessary particularity again and again, and is only adhered to in the state of its origin on account of its venerable antiquity.

When two mechanics are riding in a wagon in which they are transporting their tools, the one who is driving is to be regarded as the agent of the latter, so as to prevent him from recovering for injuries received through the contributory negligence of the driver: *Omaha & R. V. Ry. Co.* v. *Talbot*, (Supreme Court of Nebraska,) 67 N. W. Rep. 599.

Common Enterprise

This depends upon the principle that they are to be regarded as engaged in a common enterprise.

A very practical application of the rule that one who suffers special damage from a public nuisance may maintain a private action therefor has been lately made by the Supreme Court of Pennsylvania. The plaintiff had contracted to haul a large quantity of dirt from one place to another at a specified price per load. The defendant company, in the progress of certain changes it was making in its roadbed, fenced off a highway which was the direct and natural route from the place where the dirt was loaded to the place where it was delivered, and the plaintiff, in consequence, was compelled to haul the dirt by a circuitous route, which enabled him to haul but one load in the time in which he might have hauled three loads by the obstructed route, thus very largely increasing the cost of the hauling to him. This was held to be sufficient special damage to entitle him to recover: *Knowles* v. *Penna. R. R. Co.*, 34 Atl. Rep. 974.

Nuisance, Public, Special Damages, Right of Action

Following the general rules, when a subordinate officer takes the place of his superior, on the death or disability of the latter, he stands in the latter's shoes to all intents and purposes, and is entitled to the same salary, the Supreme Court of Nevada has held, that under the constitutional provision that, on the death of the governor, the powers and duties of the office shall devolve on the lieutenant-governor, the latter, in case the duties of the governor's office thus devolve upon him, is entitled to receive the salary attached to the governor's office: *State* v. *La Grave*, 45 Pac. Rep. 243.

Officers, Lieutenant-Governor, Acting as Governor, Salary

A railroad company is not entitled to the use of an invention patented by its master mechanic, when none of the company's material or labor entered into the discovery or perfection of the invention, and nothing belonging to the company was devoted to the construction of the appliances until after the invention had been put into definite form, and the patent issued: *Ft. Wayne, C. & L. R. R. Co.* v. *Haberkorn*, (Appellate Court of Indiana,) 33 N. E. Rep. 322.

Patents, Taken Out by Employes, Rights of Employer

It has been recently held by the Supreme Court of Michigan, that the authority of the superintendent and general manager of an electric light corporation, who is also a director, to bind the corporation by employing a nurse for a person injured in its service, is a question for the jury: *Hodges* v. *Detroit El. Light & Power Co.*, 67 N. W. Rep. 564. The superintendent or general manager of a railroad company has the authority to employ a physician to attend an injured passenger or employe: *Walker* v. *Great Western Ry. Co.*, 2 L. R. Exch. 228, 1867; *Cincinnati, Indianapolis, St. L. & C. Ry. Co.* v. *Davis*, 126 Ind. 99, 1890; *Atchison & Neb. R. R. Co.* v. *Reecher*, 24 Kans. 228, 1880; *Marquette & Ontarigan R. R. Co.* v. *Taft*, 28 Mich. 289, 1873;

Principal and Agent, Powers of Agent

The same rule holds good as to the employment of a physician by any superior officer of a railroad company, in case there is no higher on the ground; *e. g.*, by a division superintendent: *Union Pac. Ry. Co.* v. *Winterbotham*, 52 Kans. 433; by a master mechanic: *Pac. R. R. Co.* v. *Thomas*, 19 Kans. 256, 1877; or by a conductor: *Terre Haute & Indianapolis R. R. Co.* v. *McMurray*, 98 Ind. 358, 1884; *Terre Haute & Indianapolis R. R. Co.* v. *Brown*, 107 Ind. 336, 1886; *Terre Haute & Indianapolis R. R. Co.* v. *Stockwell*, 118 Ind. 98, 1888; *Louisville, New Albany & Chicago Ry. Co.* v. *Smith*, 121 Ind. 353, 1889; *Evansville & Richmond R. R. Co.* v. *Freeland*, 4 Ind. App. 287; *Contra*, *Peninsular R. R. Co.* v. *Gary*, 22 Fla. 356, 1886; but not when he is employed by a road-master: *Peninsular R. R. Co.* v. *Gary*, 22 Fla. 356, 1886; *Louisville, Evansville & St. L. Ry. Co.* v. *McVay*, 98 Ind. 391, 1884; a yard master: *Marquette & Ontarigan R. R. Co.* v. *Taft*, 28 Mich. 289; or a station agent: *Cox* v. *Midland Counties Ry. Co.*, 3 Exch. 268, 1849; though in any case the employment will be binding, if ratified by the superintendent: *Louisville, Evansville & St. L. Ry. Co.* v. *McVay*, 98 Ind. 391, 1884; *Pacific R. R. Co.* v. *Thomas*, 19 Kans. 256, 1877; The general manager of a trading or manufacturing corporation, however, has no such inherent power; but whether or not he possesses delegated authority for that purpose is a

question for the jury: *Swazey* v. *Union Mfg. Co.* 42 Conn. 556, 1875; *Chaften* v. *Freeland*, 7 Ind. App. 676; *Musenbach* v. *Southern Cooperage Co.*, 45 Mo. App. 232.

Principal and Surety, Release of Surety, Extension of Time

When a purchaser of real estate, holding a bond for title, transfers it to a third person, and thus becomes a surety for the payment of notes given for purchase-money, he will not be released from liability thereon by a new contract between the vendor and the transferee extending the time of payment, if that contract expressly provides that it shall not affect the original notes, nor operate to extend them, except at the election of the maker: *Hodges* v. *Elytar Land Co.*, (Supreme Court of Alabama,) 20 So. Rep. 23.

Railroads, Prohibition of Running Freight Trains on Sunday, Interstate Commerce

In *Norfolk & W. R. R. Co.* v. *Commonwealth*, 24 S. E. Rep. 837, the Supreme Court of Appeals of Virginia reached independently the same conclusion as the Supreme Court of the United States in *Henning-ton* v. *Georgia*, 16 Sup. Ct. Rep. 1086, (see 35 AM. L. REG. (N. S.) 390,) that a statute forbidding the running of freight trains on Sunday does not conflict with the interstate commerce clauses of the federal constitution, though it may operate to prevent through freight trains from passing through that State from one State to another. This overrules *Norfolk & W. R. R. Co.* v. *Commonwealth*, 88 Va. 95.

Street Railroads, Crossings, Negligence, Stop and Look Rule

In *Consolidated Traction Co.* v. *Scott*, 34 Atl. Rep. 1094, the Court of Errors and Appeals of New Jersey has very justly decided, that when a street car, propelled by electricity, is stopping at a crossing to receive and discharge passengers, it is not the duty of one who wishes to cross the street to look for cars approaching on the other track, the rule as to steam railroads not applying to a street car track in a city street, where the rights of the company and of the public are equal; and that therefore when a boy, nearly eight years old, walked across a street behind a standing car, without looking for cars on the other track, and was struck and killed by a car

approaching without warning on the other track in the opposite direction, his view of it being obstructed by the standing car, the questions of negligence and contributory negligence were for the jury.

This rule coincides with that adopted in *Driscoll* v. *Market St. Cable Ry. Co.*, 97 Cal. 553, 1893, but is in direct opposition to that laid down in *Scott* v. *Third Ave. R. R. Co.*, 16 N. Y. Suppl. 350, 1891, reversing 13 N. Y. Suppl. 344, 1890. It is well settled, however, that one who crosses a street behind a moving car at a place not a regular crossing is guilty of contributory negligence if he does not look out for cars on the other track: *Baker* v. *Eighth Ave. R. R. Co.*, 62 Hun, (N. Y.) 39, 1891; *Reich* v. *Union Ry. Co.*, 78 Hun, (N. Y.) 417, 1894; *Thompson* v. *Buffalo Ry. Co.* 145 N. Y. 196, 1895.

When the person who attempts to cross behind a standing car has just alighted from it, one would naturally suppose that the rule in regard to steam railroads would be applied, *i. e.*, that an alighting passenger or an intending passenger going to take a train, has a right to presume that the track will be kept clear in order to enable him to reach the station or the train: *B. & O. R. R. Co.* v. *State*, 60 Md. 449, 1883; *Gaynor* v. *Old Colony & Newport Ry Co.*, 100 Mass. 208, 1868; *Klein* v. *Jewett*, 26 N. J. Eq. 474, 1875; *Armstrong* v. *N. Y. Cent. & H. R. R. R. Co.*, 64 N. Y. 635, 1876, affirming 66 Barb. (N. Y.) 437; *Brassell* v. *N. Y. Cent. & H. R. R. R. Co.*, 84 N. Y. 241, 1881; *Terry* v. *Jewett*, 17 Hun, (N. Y.) 395, 1879.

In Illinois and Ohio it has accordingly been held that such a passenger is not guilty of contributory negligence in failing to look before crossing the other track: *Chicago City Ry. Co.* v. *Robinson*, 127 Ill. 1, 1888; *Cincinnati St. Ry. Co.* v. *Snell*, (Ohio) 43 N. E. Rep. 207, 1896; the New York cases are inconsistent, *Dobert* v. *Troy City Ry. Co.*, 36 N. Y. Suppl. 105, 1895, following the Illinois rule, and *Doyle* v. *Albany Ry. Co.*, 39 N. Y. Suppl. 440, 1896, adopting the Pennsylvania doctrine mentioned below; and the Supreme Court of Pennsylvania, in *Buzby* v. *Phila. Traction Co.*, 126 Pa. 559, 1889, while acknowledging that the stop, look and listen rule did not apply,

holds, that such a case must be tested "upon the universal rule which requires due and ordinary care in crossing public streets, as in all the other transactions of life."

The Supreme Court of Indiana, in a recent case before it, admitted the existence of the general rule in the case of a passenger alighting from a street car at the usual stopping-place, but held that when he alighted on the other side of the street, before it stopped, and while he had plenty of time to cross in safety, (the car that struck him being then two hundred feet away,) it must be presumed that he was guilty of contributory negligence: *Evansville St. R. R. Co.* v. *Gentry*, 44 N. E. Rep. 311.

Trial, Remarks of Judge on Failure of Jury to Agree

Remarks of the trial judge to the jury, to the effect that unless they agree he will keep them to the end of the term, as the county cannot afford to try the case over again, are ground for reversal: *North Dallas Circuit Ry. Co.* v. *McCue*, (Court of Civil Appeals of Texas,) 35 S. W. Rep. 1080.

Writs, Service, Exemption,

It has been recently held, that Art. 2, § 22, of the constitution of Kansas, exempting members of the legislature from the service of civil process "during the session," must be construed to mean any session of either branch of the legislature which the provisions of the constitution require to be held, and applies to a session of the senate held for the purpose of trying an impeachment: *Cook* v. *Senior*, (Court of Appeals of Kansas, Southern Dept., E. D.,) 45 Pac. Rep. 126.