RECENT CASES.

AGENCY—LIABILITY OF MEMBERS OF A TRADE UNION FOR THE ACTS OF THEIR OFFICERS.—The case of Lawlor v. Loewe, 187 Fed. Rep. 522 (1911), is interesting rather by reason of the facts of the case than because of any unique principle of law declared therein. The "Danbury Hatters," manufacturers, brought a suit under the Sherman Act, against the individual members of a large union known as the United Hatters of North America for damages caused by an unlawful boycott, effectuated through the efforts of the officers of the union. The court found that the boycott was a conspiracy in restraint of trade within the meaning of the Act; but that the evidence failed to establish any liability on the part of the defendants since it failed to show that the unlawful acts of the union's officers were authorized or acquiesced in by these individual members.

It is elementary law that a principal is liable only for such acts of his agent as he impliedly or expressly authorizes or ratifies. Huffcut on Agency, Chap. XIII. It is difficult to recover damages from the members of unincorporated associations for acts done by the officers thereof since it is practically impossible to prove actual knowltdge and authorization on the part of any single individual. In states where there is a statute permitting suits to be brought against unincorporated associations in their trade name or in the name of their officers, this difficulty has been in part avoided and damages have been recovered from the association where it has been shown that the officers acted unlawfully with the authority of the majority of the members. Schneider v. Local Union, 116 La. 270 (1906); Connell v. Stalker, 21 Misc. Rep. 609 (N. Y. 1897); Cotton J. & L. Asso. v. Taylor, 56 S. W. Rep. 553 (Tex. 1900). No such statute applies in the Federal courts, so this suit was properly brought against the individual members. Seattle Brewing & Malting Co. v. Hansen, 144 Fed. Rep. 1011 (1905).

CARRIERS—FORM OF ACTION FOR WRONGFUL EJECTION OF PASSENGERS.—In Baltimore & Ohio R. R. v. Thornton, 188 Fed. 868 (1911), the plaintiff purchased a ticket to a certain city but the ticket agent of the defendant failed to punch it to indicate the destination. The conductor refused to accept it and ejected the plaintiff who sued for damages. It was argued for the defendant that the ticket being invalid, the ejection was not wrongful. The court, in affirming judgment on a verdict for the plaintiff, declared that the ticket was valid upon its face and pointed out a distinction which previous decisions fully justify, and which serves to reconcile cases considered contrary. The distinction is this, that although as between the conductor and passenger, the ticket is conclusive evidence of the contract, yet if the ticket is invalid upon its face, the conductor is not bound to accept the explanation of the passenger where it is contradictory to the terms on the face of the ticket; and if the passenger is ejected (of course without more force than is necessary) he is precluded from any action of tort since the ejection was not wrongful, and his only remedy is on the contract. Railroad Co. v. Hill, 54 S. E. Rep. 872 (Va. 1906); McGhee v. Reynolds, 23 S. Rep. 68 (Ala. 1898); Brown v. Rapid Ry., 137 Mich. 591 (1903); Mosher v. Railway, 127 U. S. 390 (1887). But where the ticket shows that a mistake has been made by the ticket seller, and the passenger's explanation is not contradicted by the ticket, then the conductor is bound to accept the explanation, and if he ejects the passenger the latter has a right to recover in tort for the wrongful ejection. Frederick v. R. R., 37 Mich. 342 (1878); Murdock v. R. R., 137 Mass. 293 (1884); Erie R. R. v. Littell, 128 Fed. 546 (1904); Arnold v. Rhode Island Co., 66 Atl. Rep. 60 (R. I. 1907); and the principal case. See also 4 Elliott on Railroads, secs. 1594, 1594a; Moore, Carriers, page 742, sec. 8; Hutchinson, Carriers, 3rd edition, sec. 1403; sec. 1061, *et seq.*

CONTRACTS—AGREEMENT TO STOP TRAINS VOID AS AGAINST PUBLIC POLICY.—In Ford v. Oregon Electric Ry. Co., 117 Pac. Rep. 809 (Oregon 1911), the plaintiff brought a bill in equity to enforce the performance of a contract made between the defendant railway company and the devisor of the plaintiff. In the deed conveying the right of way the railway company covenanted to stop local trains for the accommodation of passengers at a certain crossing on the land of the plaintiff. The court held that the covenant was such as ran with the land and could ordinarily be enforced by the grantor's devisee; but that this covenant was void as being against public policy. Hence specific performance was refused. The action of the court in refusing specific performance is supported by the case of Conger v. N. Y. W. S. & B. R. Co., 120 N. Y. 29 (1890), where the court found that the contract would delay further traffic and not promote public convenience, and remitted the plaintiffs to their action at law for damages for breach of contract; but in declaring the contract void Ford v. Ry. Co. is *contra* to the weight of authority. A contract by a railroad company to locate a depot at a certain place, is not void as being against public policy, where there is no restriction or prohibition against any other locality. Lyman v. Suburban R. Co., 190 Ill. 320 (1901); Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 55 (1885); Missouri P. R. Co. v. Tygard, 84 Mo. 263 (1884); International & G. N. R. Co. v. Dawson, 62 Tex. 260 (1884). Such a contract is enforceable against the railroad company as long as it is possible for the company to discharge the duties owed by it to the public, and at the same time discharge the duties incumbent upon it by the contract. Atlantic, etc., R. R. Co. v. Camp, 130 Ga. 1 (1908).

A few jurisdictions hold that an agreement to establish a depot at a particular point, is illegal, since it is the duty of a *quasi* public agency, independent of any agreement, to establish its stations at points most convenient for the public interest; and any agreement which restricts the performance of such duty is against public policy. Burney v. Ludeling, 47 La. Ann. 73 (1895); Enid, etc., Co. v. Lile, 15 Okla. 317 (1905).

CONTRACTS—STATUTE OF FRAUDS—"AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR."—The defendant verbally engaged the plaintiff to work for a term of two years, either party having the right to terminate the engagement at any time, upon six months' notice. In a suit upon this contract, the defendant contended that it came within Section 4 of the Statute of Frauds (29 Car. II), "agreements not to be performed within one year from the making thereof." It was held that agreements for a defined term of more than a year are not taken outside the Statute by the existence of a power to terminate by notice before a year has passed. Hanau v. Ehrlich, 1911, 2 K. B. 1056.

If the time of completion of a contract depends on a contingency which may happen within a year, it is an agreement not within the Statute. Peter v. Compton, 1 Smith's Leading Cases (9th Ed.), 586; Warner v. Railway Co., 164 U. S. 430 (1896). But in England it has always been held that the existence of a power to determine by notice, even within a year, does not take the contract out of the operation of the Statute, on the theory that the exercise of such an option is a right or privilege, and not a "contingency." Dobson v. Collis, 1 Hurl. & N. 81 (1856); *Ex parte*, Acraman, 31 L. J. 741 (Chancery, 1862); Lavalette v. Riches, 24 Times L. R. 336 (1908).

In this country the jurisdictions are in conflict, although the precise point has come up only infrequently. The English rule, holding that contracts containing options to terminate at any time upon notice are nevertheless within the Statute, is followed in Harris v. Porter, 2 Harr. 27 (Del. 1841); Meyer v. Roberts, 46 Ark. 80 (1885); Biest v. Shoe Co., 97 Mo. App. 137 (1902), approved in Keller v. Fertilizer Co., 153 Mo. App. 126 (1910); and Wagniere v. Dunnell, 29 R. I. 580 (1909).

In New York and Massachusetts such options take the contract outside

the Statute. Blake v. Voigt, 134 N. Y. 69 (1892); Roberts v. Rockbottom, 7 Met. 46 (Mass. 1843).

On principle, the English rule seems the sounder, as it is just such contracts which provoke disputes, and should be reduced to writing.

CONTRACTS—STATUTE OF LIMITATIONS.—Two persons entered into a contract by the terms of which the plaintiff was to take care of the decedent for life, in return for which the decedent agreed to pay the plaintiff a sum of money by will. Shortly afterwards the decedent left the plaintiff and never returned. She left the plaintiff nothing in her will. Six years elapsed between the time when the decedent departed and her death. In an action for the sums of money, the judgment of the lower court in favor of the defendant was reversed. Ga Nun v. Palmer, 96 N. E. Rep. 99 (N. Y. 1911). The court assumed that the departure of the decedent amounted to notice to the plaintiff that the decedent would not fulfil her promise to leave the plaintiff the sum of money. The general rule is that the renunciation of a contract by one of the parties, before the time for performance has come, discharges the other, and entitles him to sue at once for a breach. Roehm v. Horst, 178 U. S. 1 (1899); Hocking v. Hamilton, 158 Pa. St. 107 (1893); Fox v. Kitton, 19 Ill. 519 (1857). *Contra:* Porter v. Supreme Council, 183 Mass. 326 (1903).

Assuming that the breach was of such a character as to permit the bringing of an action for damages, the question then arises as to whether the plaintiff was bound to treat the contract as broken and bring her action. Or might she, at her option, treat the contract as still in force, and wait until the sum specified became due under its terms? This question was answered in the affirmative, and therefore this action, brought within six years after the decedent's death, was not barred by the statute of limitations, though brought seven years after the technical breach.

The decision is sustained by the weight of authority. A person is not bound to regard the renunciation of a person under contract as final. He may elect to consider the contract as binding both on himself and on the other party until the date fixed for performance. Hochster v. Delatour, 2 E. & B. 678 (1851); Kadish v. Young, 108 Ill. 170 (1883); Roebling's Sons' Co. v. Fence Co., 130 Ill. 660 (1889).

COPYRIGHT—INFRINGEMENT OF RIGHTS IN A BOOK BY A MOVING PICTURE SHOW.—A moving picture exhibition was recently classified by the Supreme Court of the United States in Kalem Co. v. Harper Bros. *et al.*, 32 Sup. Ct. Rep. 20 (1911). The Kalem Co., engaged in the manufacture of moving picture films, employed a man to read "Ben Hur," a copyrighted book, and to write such a synopsis of it as could be acted in a short time. This was then performed, and negatives of the performance were taken from which films suitable for exhibition were produced. These films were advertised under the title of "Ben Hur," and were sold to jobbers. The owners of the copyright of the book claimed that this was an infringement of their copyright. By Rev. Stat. § 4952, as amended by the Act of March 3, 1891, U. S. Comp. Stat. 1901, p. 3406, "Authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." The question, therefore, as to whether this copyright was infringed depends upon whether this moving picture exhibition was a dramatization of "Ben Hur." The court took the position that the absence of spoken words is not fatal to the existence of a drama, but that action alone is sufficient.

What few decisions there are on the subject of the essentials of the drama support this view. Thus, in Daly v. Palmer, 6 Blatchf. 256 (1868), the court held that a written play, consisting of directions for its representation by actions without the use of spoken language by the characters, is a dramatic composition. In Jacks v. State, 22 Ala. 73 (1853), the following

language was used: "It may be conceded that its (the drama's) signification is broad enough to cover any representation, in which a story is told, a moral conveyed, or the passions portrayed, whether by words and actions combined, or by mere actions alone." In Bell v. Mahn, 121 Pa. 225 (1888), the court said that a drama "is a story represented by action"; adding that "it is ordinarily designed to be spoken, but it may be represented in pantomime." The court, in our principal case, went on to say that since a pantomime of "Ben Hur" would be a dramatization thereof, it would be none the less so because exhibited to the audience by means of a rapid succession of pictures rather than by living characters. The copyright was, therefore. held to have been infringed. On this last point there seem to be no decisions at all, owing, no doubt, to the novelty of this phase of the moving picture business.

To the argument that the manufacturing company did not produce these representations to the public, but merely sold the films to jobbers, the court replied that inasmuch as the company by its advertisement not only expected, but invoked the use of its films for exhibition purposes, it had contributed to the infringement. This is in accord with settled law. Harper v. Schoppell, 28 Fed. 613 (1886); Rupp Co. v. Elliott, 131 Fed. 730 (1904).

CORPORATIONS—NECESSITY FOR A VOTE OF THE STOCKHOLDERS TO AUTHORIZE GOING INTO BANKRUPTCY.—The directors of a company adopted a resolution authorizing the filing of a petition in bankruptcy. The objection was raised that a vote of the stockholders was necessary to authorize such action. *Held,* the board of directors have, at a duly called meeting, the power to put the corporation into bankruptcy. They have the care of its general business and know whether it is able to continue or not, and a vote of the stockholders is unnecessary. *In re* Kenwood Ice Co., 189 Fed. 525 (1911).

Until June 25, 1910, Act of Cong., 61st session, vol. 36, chap. 412, page 838, a corporation did not have a right to go into voluntary bankruptcy under the National Bankruptcy Act. Therefore, the only authority on the question in the principal case arises under the state laws and the cases under the involuntary section of the National Act.

The prevailing rule before the National Bankruptcy Act was, that in case of insolvency of a corporation, the board of directors, at a duly called meeting, might make an assignment for the benefit of their creditors without a vote of the stockholders. Tripp v. Northwestern National Bank, 41 Minn. 400 (1889); Ardesco Oil Co. v. N. A. Mining & Oil Co., 66 Pa. 375 (1870); Sargent v. Webster, 13 Met. 497 (Mass. 1847). Under the section of the National Bankruptcy Act which allows corporations to be put into involuntary bankruptcy. *In re* Bates Machine Co., 91 Fed. 625 (1899), held that a board of directors exceeded their authority in authorizing the treasurer of a corporation to make an admission of its willingness to be adjudged a bankrupt. One of the grounds for this decision was that it was merely avoiding the act, which did not allow voluntary bankruptcy. This objection has now been removed by the amendment of June 25, 1910.

In re Burbank Co., 168 Fed. 719 (1909), followed the Bates case without discussion.

CRIMES—HOMICIDE—CONVICTION OF VOLUNTARY MANSLAUGHTER ON AN INDICTMENT FOR MURDER.—An indictment charged the accused with murder in the first degree. The court charged the jury upon every degree of homicide, including involuntary manslaughter, and the jury found the defendant guilty of the latter offence. He appealed on the ground that the indictment did not charge the crime found. *Held,* on an indictment for murder the jury may find a verdict of guilty of any of the lower degrees of homicide. State v. Averill, 81 Atl. 461 (Vt. 1911).

The question here, decided for the first time in Vermont, is in accord with almost universal authority. At common law on a charge of homicide

it was necessary to prove only the killing, of course under circumstances not involving *se defendendo* nor *per infortuniam*. If malice could be shown, the verdict would be murder; if not, manslaughter. Salisbury's Case, 1 Plow. 101 (1553); Mackalley's Case, 9 Coke, 65b (1611). This common law rule has been adopted in nearly every American jurisdiction, either judicially or by statute. People v. McDonald, 49 Hun, 67 (N. Y. 1888); Watson v. State, 5 Mo. 497 (1838); King v. State, 5 How. 730 (Miss. 1841).

But in order that there may be a conviction of a lower degree of any crime than that charged, the lesser offence must either necessarily be included in the general charge of the greater or else the averments of the indictment describing the manner in which the greater offence was committed must contain allegations essential to constitute a charge of the lesser. Watson v. State, 116 Ga. 607 (1902); People v. Adams, 52 Mich. 24 (1883).

An exception to the general rule exists in Pennsylvania. This state still clings to the old common law rule that where the indictment charges a felony, there cannot be a conviction of a misdemeanor even though all the essential elements of the latter are embraced in the former. Since, by statute, involuntary manslaughter has been reduced, in Pennsylvania, to a misdemeanor, it follows that there can be no conviction of involuntary manslaughter on an indictment for murder. Commonwealth v. Gable, 7 S. & R. 423 (Pa. 1821); Walters v. Com., 44 Pa. 135 (1862); Hilands v. Com., 114 Pa. 372 (1886).

In general, on an indictment for murder, it is proper for the court to refuse to charge the jury that if there is no proof of the material allegation of murder, the defendant should be acquitted. Smith v. State, 142 Ala. 14 (1905).

CRIMES—REQUISITES OF AN INDICTMENT FOR THE LARCENY OF MONEY.—In People v. Hunt, 96 N. E. Rep. 220 (Ill. 1911), the defendant was indicted for the larceny of "one pocketbook of the value of $1 and $55 of good and lawful money of the United States of America, a more particular description of said personal property and money being to these grand jurors unknown." The owner of the pocketbook and money testified that he had informed the grand jury that the money was in bills, five $10 bills and one $5 bill. The defendant was convicted in the lower court. On appeal the verdict was reversed on the ground that the description of the money in the indictment was insufficient.

In the absence of statute, it is not sufficient if money is described only by the aggregate amount, without any specification of the number, kind, or denomination of the pieces or bills. Whether the coins were of gold or silver should also be stated. Lord v. State, 20 N. H. 404 (1845); People v. Ball, 14 Cal. 101 (1859); 2 Bishop on Crim. Proc., sec. 703. The reason for this rule is that an accurate description of the property is essential to identify the particular transaction charged as criminal, so that the defendant may not be put on trial for an offense different from that for which the grand jury has found the bill.

Some courts have, however, followed a less strict rule, under which it is held unnecessary to describe each piece of coin alleged to have been stolen. Com. v. Grimes, 10 Gray, 470 (Mass. 1858); Chisholm v. State, 45 Ala. 66 (1871), holding that the number of pieces of coin, the denomination or the kind, whether gold, silver, copper, or other material, is not a necessary ingredient of an indictment for larceny of coin of the United States.

Under statutes in some states, viz., Kentucky, Indiana, Louisiana, Michigan, North Carolina, Ohio, Texas and Washington, (Encyclopedia of Pleading and Practice, Vol. 12, page 989, Notes 3 and 4), money may be sufficiently described in general terms, without specifying the coin, number, denomination or kind thereof, it being sufficient to describe it simply as money of a certain amount. Rains v. State, 137 Ind. 83 (1893); State v. Walker, 22 La. Ann. 425 (1870); Travis v. Com. 96 Ky. 77 (1894).

Where the description of the property is not known to the grand jury,

the property may be described as particularly as the testimony of the witnesses will permit, and there the indictment may allege that further particulars are unknown to the grand jurors; but this is only where the particulars could not have been ascertained by the exercise of ordinary diligence. 2 Bishop on Crim. Proc. § 705; 1 Bishop on Crim. Proc. § 549.

CRIMINAL PROCEDURE—POWER TO SUSPEND SENTENCE.—Upon conviction, the defendant was sentenced to a fine and imprisonment, but as an act of clemency the court suspended the execution of the sentence. Later the sentence was imposed and upon the defndant's writ of error it was held that the court had no power to suspend the execution of the sentence already pronounced for purpose of securing the good behavior of the convicted party; that the power existed only where the accused seeks an appeal or pardon. Spencer v. State, 140 S. W. Rep. 597 (Tenn. 1911).

At common law trial judges had power to suspend the imposition or execution of sentence whenever justice required it, for the reason that they could not grant new trials, nor was the verdict reviewable upon the facts by any higher court. 2 Hale P. C. 412.

There is an important distinction between suspending the imposition of sentence and suspending its execution; for the latter is an invasion of the right of the executive to pardon. State v. Voss, 80 Iowa, 467 (1890); *In re* Webb, 89 Wis. 354 (1895). The distinction, however, is technical, for if it be conceded that a judge can suspend the imposition of sentence, he may, if he chooses, very effectively deprive the executive of the right to pardon by simply never pronouncing sentence.

It is everywhere conceded that the trial judge has power to suspend imposing sentence for a limited time in order to decide upon the punishment, or to give the prisoner the opportunity to appeal or move for new trial, or because of the prisoner's insanity. People v. Barrett, 202 Ill. 287 (1903). Even the execution of sentence may be suspended for the latter reasons. *In re* Webb, *supra; In re* Williams, 150 Ala. 489 (1907).

As to the power of a court to indefinitely suspend sentence for the purpose of securing the good behavior of the prisoner after his release, the cases are in conflict. People v. Court of Sessions, 141 N. Y. 288 (1894), held that the power exists. *Contra:* U. S. v. Wilson, 46 Fed. 748 (1891); *In re* Flint, 25 Utah, 338 (1903); People v. Barrett, *supra,* even on motion for new trial.

As to the power to suspend the execution of sentence as an act of clemency, the weight of authority agrees with the principal case. Neal v. State, 104 Ga. 509 (1898); State v. Abbott, 87 S. C. 467 (1910); Tanner v. Wiggins, 54 Fla. 203 (1907). *Contra:* Weber v. State, 58 Ohio, 616 (1898); *Ex parte* Lee, 16 Ohio Dec. 259 (1906).

DECEDENTS' ESTATES—SURVIVAL OF ACTION UNDER PENNSYLVANIA STATUTE.—The Act of Feb. 24, 1834 (P. L. 77), excepts from actions which survive to the personal representatives of a decedent "actions * * * for wrongs done to the person." This clause has been construed in Smith v. L. V. R. R. Co., 81 Atl. Rep. 554 (Pa. 1911). There a wife recovered judgment for personal injuries to herself, and, as executrix of the estate of her husband, who died pending litigation, recovered judgment for his consequential losses. It was held that the words quoted do not refer to a right of action, but to actions for physical injuries done to the person of the plaintiff decedent. *Accord:* Moe v. Smiley, 125 Pa. 136 (1889).

Before the Act of 1834, actions for personal injuries survived in some cases. Penrod v. Morrison, 2 Pen. & W. 126 (Pa. 1830). Under that Act all actions a decedent had a right to bring in his lifetime, survived to his personal representatives, except actions for slander, libel and wrongs done to the person. Miller v. Wilson, 24 Pa. 114, 122 (1854). In Birch v. Pgh. Ry., 30 Atl. Rep. 826; 165 Pa. 339 (1895), the Acts of 1851 and 1855 were construed together as giving the right to bring suit after the death of

a testator, to the husband, widow, children or parents, and in the absence of any such, to the personal representatives, in whom also was vested the right to continue any suits commenced by the testator in his lifetime, even where the plaintiff's death was due to the injuries sued for. Maher v. P. T. Co., 37 Atl. 571; 181 Pa. 391 (1897). And the guardians of minor children are not entitled to any part of the proceeds, which become part of the estate to be accounted for on audit. Taylor's Est., 36 Atl. Rep. 230; 179 Pa. 254 (1897). Where one of the relatives named sues, the proceeds are to be divided among such relatives in the same proportion as is provided by law for the distribution of the personalty of an intestate. Since the Act of 1895, the death of the wrongdoer does not terminate the right. Rodenbaugh v. P. T. Co., 42 Atl. Rep. 190 Pa. 358 (1899).

DIVORCE—THE DOMICILE OF MATRIMONY AS DISTINGUISHED FROM THE DOMICILE OF THE PARTIES.—A man and woman were married in Mexico. The husband deserted his wife, who moved over into Texas, and after establishing a legal domicile there, sued for divorce. The husband could not be found, so service was had by publication, according to the laws of Texas, and the decree of divorce was granted. On appeal the husband contended that the decree of divorce was void, as the action was *in personam,* and jurisdiction could not be acquired by constructive service. *Held,* that the domicile of matrimony remains with the innocent party, and the other party is held constructively present within the jurisdiction. Actions of divorce in the court of the domicile of the innocent party are *in rem,* and the decrees are binding in every state, under the "full faith and credit" clause of the Fededal Constitution. A decree of the court of the guilty party is merely *in personam,* and binding only in the state where granted. Montmorency v. Montmorency, 139 S. W. Rep. 1168 (Tex. 1911).

In Haddock v. Haddock, 201 U. S. 562 (1905), a decree granted by the court of the domicile of the guilty party was held not binding upon the court of a different state. The two cases are complementary, and conform to the rule proposed in the principal case: that the innocent party can obtain a decree binding in every state, while the guilty party can obtain one binding only in the state where granted.

The Texas decision announces the curious proposition that some divorce actions are *in personam,* and some *in rem.* But this is due to the distinction between the marriage status and the persons married. If the domicile of matrimony remains with the innocent party, the court of that domicile has jurisdiction over the status, and can issue a decree *in rem,* binding in every court. Any other court, as for instance that of the domicile of the guilty party, can touch only the person married, not the status itself, so that its decree is merely *in personam.*

EVIDENCE—LIBEL—ADMISSIBILITY IN EVIDENCE OF A PLEA OF JUSTIFICATION AFTER ITS WITHDRAWAL, TO PROVE MALICE.—In an action of libel the defendant put in a plea that the statements were true. This plea was withdrawn at the opening of the trial. The court held that the plea of justification was evidence to be considered by the jury as a circumstance aggravating the damages. Ruskin v. Arnum, 81 Atl. Rep. 342 (N. J. 1911).

Under the old common law in actions of libel or slander, when truth was set forth as a plea, if it was not proved, it was a deliberate reiteration of the slanderous or libellous words and was conclusive evidence of malice. From this ruling the courts even went further and held that any evidence which in any way claimed the truth of the statements was unavailale in mitigation of damages. Fero v. Ruscoe, 4 N. Y. 162 (1850).

The harshness of the rule soon led to its abolishment. Either by statute or decisions the law has finally adopted the almost universal proposition that where truth of words spoken is pleaded in justification, in good faith, under an honest belief in their truth and with reasonable grounds for such belief,

the plaintiff is not, by reason of any such plea, on failure of the defendant's proof to sustain it, entitled to exemplary damages; nor should the damages be increased by this circumstance. Rayner v. Kinney, 14 Ohio St. 283 (1862); Lowe v. Herald, 6 Utah, 175 (1889); Pollet v. Sargent, 36 N. H. 496 (1858): Spooner v. Keeler, 51 N. Y. 527 (1873). Many jurisdictions go further and hold that the plea is no longer a part of the record, and cannot, therefore, be read as evidence. Gilmore v. Borders, 2 How. 824 (Miss. 1838); Shirley v. Keathy, 4 Caldwells, 29 (Tenn. 1867).

A recent decision in accord with the principal case is Fodor v. Fuchs, 79 N. J. L. 529 (1910).

MECHANICS' LIEN—CONSTITUTIONALITY OF PENNSYLVANIA STATUTE.—One more section of the Pennsylvania Mechanics' Lien Act of June 4, 1901 (P. L. 431), has been declared unconstitutional by the Supreme Court of the state in Page v. Carr, 81 Atl. 430, 1911. This latest section to come under the ban is section 13, giving to mechanics' liens priority over advance money mortgages. Prior sections declared unconstitutional are: Sec. 28, giving to a sub-contractor or materialman the right to issue an attachment execution against the owner or other party indebted to the contractor for labor or materials furnished, Vulcanite Cement Co. v. Allison, 220 Pa. 382 (1908); Section 36, providing for the enforcement of the judgment on the lien by a special *fi. fa.* under the Act of April 7, 1870, Vulcanite Paving Co. v. Transit Co., 220 Pa. 603 (1908); Section 38, permitting mechanics' liens to be filed against a building, without reference to the land, and providing for the sale and removal of the building for the benefit of lienholders, Lumber Co. v. Carnegie Institute, 225 Pa. 486 (1909); Section 35, giving the right to enter a personal judgment against a contractor who has been served with the original *scire facias,* or any *scire facias* to revive. Sterling Bronze Co. v. Improvement Ass'n, 226 Pa. 475 (1910).

The point of conflict between the Act and the Constitution of 1874, is Art. 3, § 7 of the latter, providing that "the General Assembly shall not pass any general or special law * * * providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate." Inasmuch as mechanics' liens had no preference over advance money mortgages prior to the Constitution, this section of the Act of 1901 does, of course, accomplish the result forbidden in the Constitution.

Incidentally, the court overruled the additional objection to the Act, entertained by the Common Pleas Court, that the subject of the statute was not clearly expressed in the title, following what was said by Elkins, J., in Gilbert's Estate, 227 Pa. 648 (1910): "It has been decided, over and over again, that the title need not be a general index to the contents of an Act, but that it is sufficient if it relates to one general subject, no matter how the details may be multiplied, provided they are subordinate to the general purpose of the Act and germane to its provisions."

MECHANICS' LIENS—EXTENT TO WHICH THEY APPLY TO THE PROPERTY OF CHARITABLE INSTITUTIONS.—A bishop of the Catholic Church contracted for the construction of an orphanage. He acquired the property individually, but under the laws of the church he was morally and ecclesiastically bound to use it only for charitable and religious purposes. *Held,* in a *per curiam* opinion reversing a previous decision, that the property was not exempt from statutory mechanics' liens on the ground that it was a public charity. Morris v. Nowlin Lumber Co., 140 S. W. Rep. 1 (Ark. 1911).

In the light of previous Arkansas decisions on this subject it is rather difficult to understand exactly how this determination was reached, although a review of the cases in other jurisdictions indicates that it is generally considered sound. Under the mechanics' lien statute in practically all the states, had the bishop held this property absolutely in his own right there

could have been no question as to the enforcibility of the lien. Upon their first consideration of the case, the court held that equity would imply a trust in the bishop for the use of the church. In this holding they are supported by abundant authority. Mannix v. Purcell, 46 Ohio St. 102 (1888); McDonald v. Tyner, 84 Ark. 189 (1907); Condit v. Maxwell, 142 Mo. 274 (1897); Pomeroy's Eq. Jur. Sec. 155. Then, following the decision of Eureka Stone Co. v. First Christian Church, 86 Ark. 213 (1908), which expressly holds that a church is a charitable institution, and as such, exempt from statutory liens, the court held, and it would seem correctly, that the orphanage which had been shown to be open to the public, was as much a public charity as a church, and therefore exempt from statutory liens. The exact reason for receding from this position is not stated in the *per curiam* opinion.

Why a church should be considered a public charity is not made clear in any of the opinions holding it to be such. In the great majority of jurisdictions churches are as much the subject of mechanics' liens as any other buildings. Jones v. Mt. Zion Congregation, 30 La. Ann. 711 (1878); Lumber Co. v. Washburn, 29 Ore. 150 (1896); Presbyterian Church v. Allison, 10 Pa. 413 (1849). For an oft-quoted discussion of what constitutes a charitable institution, see opinion by Paxson, J., in Fire Insurance Patrol v. Boyd, 120 Pa. 624 (1888).

NUISANCE—JOINDER OF DEFENDANTS.—Eighteen defendants acting individually, by building bridges and constructing banks obstructed the flow of water in a creek and backed it up on the plaintiff's property. He sued at law for damages, making the eighteen tort-feasors joint defendants. It was held that where the wrongs of several parties contribute to the plaintiff's harm, they are liable jointly only if they have acted in concert. If they have acted independently, each is liable only to the extent of the injury caused by his own individual act, and the fact that it is difficult to determine the proportion of the aggregate harm caused by his separate act, does not affect the rule or make one defendant liable for the acts of others. Tackaberry Co. v. Sioux City Co., 132 N. W. Rep. 945 (Iowa, 1911).

Persons who act in concert in causing or continuing a nuisance may be sued jointly at law. Simmons v. Everson, 26 N. E. Rep. 911 (N. Y. 1891). But where the defendants are joined, the action will fail unless the wrong complained of is joint. Keyes v. Gold Co., 58 Cal. 724 (1879). If it is several, each defendant is liable only to the extent of the wrong committed by him. Chipman v. Palmer, 77 N. Y. 51 (1879). In Sadler v. Great Western Ry. Co., 2 Q. B. 688 (1895), and Lull v. Fox, 19 Wis. 100 (1865), this rule was applied to cases where the wrong complained of was the maintenance of a nuisance on a stream, as in the principal case.

In equity, it is possible to join as defendants several tort-feasors whose independent acts have contributed to the same injury. Thorpe v. Brumfitt, 8 L. R. Ch. App. 654 (1871). It has been suggested that the proper course would seem to be to bring separate equity actions and apply to have them tried together. Garrett, Law of Nuisances, 3rd Ed. 254.

In Pennsylvania, when suit is brought against two defendants for joint negligence, there can be no recovery where there is no community of fault. Sturzebecker v. The Inland Co., 211 Pa. 156 (1905); and see, further, P. & L. Dig. Dec. Vol. 16, Col. 27798.

PARTNERSHIP—LIABILITY OF A PARTNER TO ACCOUNT FOR THE PROFITS OF AN ILLEGAL CONTRACT.—Two persons entered into a partnership agreement for the purchase and sale of coal lands. The acquisition of part of these lands was illegal. On a bill for an accounting by one partner, it was held that to decree division of the profits would be in substance to enforce an illegal contract. Kennedy v. Lonabaugh, 117 Pac. Rep. 1079 (Wyoming, 1911).

The proposition that a court of law will not enforce the performance of an illegal contract is practically universal. Miller v. Larsen, 19 Wis. 463 (1865); Alford v. Burke, 21 Ga. 46 (1857); Low v. Hutchison, 37 Me. 196 (1853). When it comes to determining, however, what constitutes an enforcement of an illegal contract the courts differ. A number of jurisdictions have held that where the subject matter of the illegal contract has been completed and the profits arising therefrom have been acquired, a court of equity will compel a division of the profits between the parties. Crescent Insurance Co. v. Bear, 23 Fla. 50 (1887); Wilson v. Owen, 30 Mich. 474 (1874); Gilliam v. Brown, 43 Miss. 641 (1871). These courts hold that this is not an enforcement of an illegal contract but that a new contract arises. One partner when he receives the money does so on an implied promise of division. But the weight of authority seems to hold that it is not the duty of the court to divide the spoils of illegal contracts between the wrongdoers. Spies v. Rosenstock, 87 Md. 14 (1898); Central Trust and Safe Deposit Co. v. Respass, 112 Ky. 606 (1902); Dunham v. Presby, 120 Mass. 285 (1876). A number of the cases which refuse to allow an accounting discuss and repudiate the theory of presumed promise.

Where a contract consists of two distinct facts readily severable and not in any material sense depending on each other, one part being legal and the other illegal the rule is to enforce that part which is valid. Gelpeck v. City of Dubuque, 68 U. S. 221 (1863); Leavit v. Blatchford, 5 Barb. 9 (N. Y. 1848); Treadwell v. Davis, 34 Cal. 601 (1868).

It is not necessary in most jurisdictions for the question of illegality to appear in the pleadings. The court's duty in most jurisdictions is to refuse its aid to enforce a contract which is in violation of law or against public policy. Oscanyan v. Winchester Repeating Arms, 103 U. S. 261 (1880); Prost v. More, 40 Cal. 346 (1870); Sheldon v. Pruesner, 52 Kan. 579 (1894).

POSTAL LAWS—NEGOTIABILITY OF MONEY ORDER.—A postal clerk fraudulently issued postal money orders, and cashed them at the bank of the defendant. Defendant, without knowledge of the fraud, in turn received their vale from the Post Office. Upon discovery of the clerk's fraud, the Government sued the banker, under Rev. St., Sec. 4057, for the difference between the amount of the clerk's bond and the amount of the fraudulent orders. The bank defended on the ground that it was an innocent holder for value of commercial paper. *Held,* that postal money orders were not intended to be and are not negotiable instruments, and are not subject to the defenses permitted by the law merchant to innocent holders for value Bolognesi, *et al.,* v. U. S., 189 Fed. 335 (1911).

This decision is sustained by the Postal Regulations covering the postal money order system, as they impose restrictions which are inconsistent with negotiability. Sections 1002-1009. For instance, no more than one endorsement is permitted. See also U. S. v. Stockgrowers' National Bank, 30 Fed. 912 (1887).

The American postal money order system is modeled after the English system; and in England too, in Fine Art Society v. Union Bank, 17 L. R. Q. B. 705 (1886) it has been decided that postal money orders are not negotiable instruments.

PROPERTY—CONTINGENT REMAINDERS.—Certain realty was devised to A and his wife for life; and at their death to the children of A "who shall be living at that time," and the issue of any child of A who may have then deceased. *Held,* that the interests of the children of A, living at testator's death, were at that time contingent, not vested, remainders. Birdsall v. Birdsall, 132 N. W. Rep. 809 (Iowa, 1911).

The result of this case depended on whether the clause "who shall be living at the time," was meant to create a condition precedent or subsequent. Ducker v. Burnham, 146 Ill. 9 (1893). It was conceded, on argu-

ment, and seems quite clear, that the testator meant to give to those children who should be living at the death of A or his wife, whoever should servive; but that still leaves the question undecided as to the nature of the interests which such children took, as were living, at the time the testator died. The general test to be applied has been stated by Gray, Rule Against Perpetuities, Sec. 108, as follows: "If the conditional element has been incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested." There is also to be considered the well-settled policy of the courts to construe a remainder as vested rather than contingent, if there is doubt in the matter. Blanchard v. Blanchard, 1 Allen (Mass.) 223 (1861). The decision in the principal case is based on the conclusion that the condition was precedent and the persons who were to take were unascertained at the time the testator died. This brings the case within Fearne's fourth class of contingent remainders, which are described as those "where the person to whom the remainder is limited is not yet ascertained, or not yet in being." Fearne, Contingent Remainders, p. 4. The construction here adopted is very generally supported, though the question may be a close one in some cases. Ducker v. Burnham, 146 Ill. 9 (1893); *dicta* in Smaw v. Young, 109 Ala. 528 (1895); Price v. Hall, L. R. 5 Eq. 399 (1868); Delbert's Appeal, 83 Pa. 462 (1877); Thomson v. Ludington, 104 Mass. 193 (1870); Gray, Rule Against Perpetuities, Sec. 108; *In re* Moran's Will, 118 Wis. 177 (1903). The subject is discussed at length in a note to Robertson v. Guenther, 25 L. R. A. (N. S.) 888.

PROPERTY—COVENANTS RUNNING WITH THE LAND.—The owners of adjoining properties indirectly derived title from a common grantor who had owned considerable land in the vicinity, but had never resided there. The defendant's predecessor in title covenanted with the grantor to build a hotel but not closer than a certain distance from the boundaries of the premises. The plaintiff's deed had a similar restriction, but no obligation to build. The plaintiff sought to enjoin the defendant from extending the hotel up to the boundary line, as this would shut up the windows in the wall of the plaintiff's house. *Held,* a restrictive covenant in a deed in which it does not appear that it was made for the benefit of the land to which the plaintiff has title, cannot be enforced in equity at his instance. Berryman v. Hotel Savoy, 117 Pac. 677 (Cal. 1911).

At law, all covenants are binding, at least upon the parties to them, but those covenants which run with the land are also binding upon subsequent transferees of the land. In order that a covenant shall run with the land, it must in its nature "touch or concern the land," Spencer's Case, 5 Co., 16a (1583), and privity of estate must have existed between the original parties. Gilmer v. Mobile Ry., 79 Ala. 569 (1885); Hurd v. Curtis, 19 Pick. 459 (Mass. 1837). Privity of estate is unnecessary in only one class of case—where the burden, corresponding to the benefit of the covenant, attaches to a person and not to another piece of land. National Bank v. Segur, 39 N. J. L. 173 (1877); Shaber v. St. Paul Water Co., 30 Minn. 179 (1883). A covenant relating to a thing *in esse* binds transferees, but if the thing is not *in esse* they are not bound unless it is so stipulated. Spencer's Case, *supra;* Minshull v. Oakes, 2 H. & N. 793 (Eng. 1858).

In equity, building restrictions will be enforced against one who purchases or occupies the land with notice of the restrictions and in such cases, the agreement need not be under seal, nor run with the land, nor is privity of estate necessary. Tulk v. Moxhay, 2 Phil. 714 (Eng. 1848). But it is essential for the plaintiff, in order to enforce such restrictions, to prove that they were to enure to the benefit of the land which he owns. Sharp v. Ropes, 110 Mass. 381 (1872); Hutchinson v. Thomas, 190 Pa. 242 (1899).

TAXATION—JURISDICTION TO TAX A VESSEL.—In Southern Pacific Company v. Kentucky, 32 Sup. Ct. Rep. 13 (1911), it was held that a ship is subject to taxation in the state where the owner is domiciled provided it has not acquired an actual situs in some other state; and the enrollment of the ship at a port in that other state does not give it a situs there.

In stating that the taxable situs must be that of the domicile of the owner unless an actual situs has been acquired elsewhere, the principal case is entirely in accord with the authorities. Hays v. Pacific Mail Co., 17 How. 596 (1854); Ayer v. Kentucky, 202 U. S. 409 (1905); People v. Commissioners, 58 N. Y. 242 (1874); Olson v. San Francisco, 148 Cal. 80 (1905). Cases holding that the ship could not be taxed by the state where the owner was domiciled on the ground that the ship had acquired an actual *situs* elsewhere, are Old Dominion v. Virginia, 198 U. S. 299 (1904); North American Dredging Co. v. Taylor, 56 Wash. 565 (1910); National Dredging Co. v. State, 99 Ala. 462 (1892).

The principal case seems to hold that if a ship has not acquired an actual situs, the state of the domicile of the owner may tax it even if the ship has never entered or could not possibly enter that state. In Union Transit Co. v. Kentucky, 199 U. S. 194 (1905), it was held that a state could not tax such property, although there is no indication that an actual situs had been acquired elsewhere. The court in the principal case tried to show that its decision was in accord with the case mentioned, but the latter would seem to be *contra*. At any rate in American Mail Co. v. Crowell, 76 N. J. L. 54 (1908), the court held that a state could not impose a tax upon a ship which had never been in the state and cited Union Transit Co. v. Kentucky, *supra*, saying that they were bound by that decision.

On principle these cases are hard to justify for if the state of the domicile of the owner cannot tax a ship which has not elsewhere acquired an actual situs, it will entirely escape taxation. Furthermore such a test would excuse from taxation large steamships, and render smaller craft liable.

TORTS—CONTRIBUTORY NEGLIGENCE AS AFFECTING DAMAGES IN ADMIRALTY LAW.—A gasoline launch, after reaching the middle of a river, became disabled and drifted with the current. When it was opposite a wharf, a large river steamer backed out into the launch and sunk it. It appeared that each boat was negligent, the launch in not having and blowing certain required whistles, and the steamer in not maintaing a proper lookout. In an action by the owner to recover the value of his launch it was held that the admiralty rule applies: if both of the colliding vessels are negligent, each must pay one-half the resulting loss. St. Louis Packet Co. v. Murray, 139 S. W. Rep. 1078 (Ky. 1911).

The rule, as set forth in this decision, is the general rule of admiralty where damage is caused by the negligence of one vessel, but the injured ship contributed to it. The Catharine v. Dickinson, 58 U. S. 170 (1854); The Ant, 10 Fed. 294 (1882); The Albert Dumvis, 177 U. S. 240 (1900).

The same rule as to the division of damages does not apply, where there is a reasonable doubt as to which vessel was in fault, but the loss must remain where it has fallen. Pettitt v. Kallisto, 2 Hughes, 128 (U. S. C. C. 1877). And where a collision occurs by the wilful fault or intentional wrong of both parties, the damages will not be apportioned, but the libel will be dismissed. The R. L. Maybey, 4 Blatchf. 88 (U. S. C C. 1857).

If a third party is damaged by a collision between two vessels, where there is negligence in both, he may recover the full amount of his damage from either vessel, but that vessel may recover half of what it is compelled to pay from the owners of the other ship. The Job T. Wilson, 84 Fed. 204 (1897); The Atlas, 93 U. S. 302 (1876).

TORTS—LIBEL—PRIVILEGED COMMUNICATION.—The defendant wrote a letter to the plaintiff's superior in the municipal government, in which the

plaintiff was charged with scoundrelism, incompetency, corruption, buffoonery, despotism, lawlessness, and in being possessed with the most dangerous and destructive delusion that an official can entertain in a free government. The communication was sent for publication to the newspapers before its receipt by the plaintiff's superior. The defendant in his answer alleged that the matters of fact referred to were true, and that the opinion expressed, was fair comment on the acts of the plaintiff. The court held this a plea of privilege rather than justification and sustained the plaintiff's demurrer. Bingham v. Gaynor, 96 N. E. Rep. 84 (N. Y., 1911).

It is universally held that a plea in justification to a vague general charge, libellous *per se*, must be as broad as the charge and must set forth the specific facts which the defendant means to prove in order to substantiate his charge. Zerenberg v. Labouchere, 2 Q. B. 183 (1893); Odgers on Libel and Slander, 4th Edit., p. 173; 13 Ency. of Plead. & Pract. 82. Under the common law, privilege may be pleaded under the general issue, Bradley v. Heath, 12 Pick (Mass) 163 (1831); but under the codes, privilege must be pleaded specially. Hess v. Sparks, 44 Kan. 470 (1890); 13 Ency. of Plead. & Pract., page 88.

The important part of the opinion in Bingham v. Gaynor, *supra*, is the discussion of what constitutes fair comment on the acts of public officials. In line with the general authority the court held that a person having an interest, as a citizen, in a public official, may make a statement to the superior of the person to whom the communication refers, and will not be liable even for untrue statements, if they are made in good faith. Coogler v. Rhoads, 38 Fla. 240 (1897); Dennehy v. O'Connell, 66 Conn. 175 (1895). Publication in a newspaper before receipt by the superior, however, destroys the privilege. Odgers on Libel & Slander, 263 and cases cited. Fair and honest criticism of a public officer is privileged; but such privilege will not protect the writer if he makes false statements. Neither does it extend to attacks upon private character Clifton v. Lange, 79 N. W. Rep. 276 (Iowa, 1899); Wood v. Boyle, 177 Pa. 620 (1896). See Woodward v. Lander, 6 Car. & P. 548 (1834) for the effect of violent language used in the complaint.

TORTS—MEASURE OF DAMAGES FOR CONVERSION BY INNOCENT TRESPASSER.—A third party innocently went upon the plaintiff's land, cut down the latter's trees and, after transporting them to a market, sold them at a greatly enhanced value to the defendant. In an action to recover for this conversion, the measure of damage is the value of the logs at the place of severance, with interest from the date of cutting, unaffected by any enhancement of value through transportation or by labor, etc., bestowed upon them by the innocent trespasser. Wall v. Holloman, 72 S. E. Rep. 369 (N. Car., 1911).

The disputed point in cases of this nature is whether the plaintiff's proprietary rights in his goods should be compensated for at their value when taken, or at their value when sold by the innocent trespasser, who has expended labor and time thereon, and paid the cost of transportation, as a result of which their marketable value has been greatly enhanced.

The decisions upon this question are greatly at variance. The decision in the principal case that the innocent purchaser for value should be protected as far as possible and the plaintiff compensated only for what he has actually lost is supported by the cases in Maine, Pennsylvania, Maryland and Wisconsin. The leading case taking this view is Weymouth v. Railroad, 17 Wis. 580 (1863).

A dissenting opinion in Wall v. Holloman, *supra*, adopts the other point of view, which would extend all the reimbursement possible to the plaintiff. It is supported by decisions in Florida, Minnesota, Michigan, and by *dicta* in Wooden Ware Co. v. United States, 106 U. S. 432 (1882). The reasons adduced for the superior merit of this rule are, perhaps, not as powerful on analysis as they appear at first sight. In the first place, great stress is laid

upon the fact that the defendant, after paying the value of the property to the true owner, can recover from the trespasser or intermediate vendor upon an implied warranty of title. But under the first rule, which the court followed in our principal case, the defendant will have an action also against the trespasser; and, in the event of insolvency on the part of the latter, the innocent purchaser would lose far less than under the second rule.

The other objection to the rule advanced by the dissenting opinion lies in the unnecessary hardship it inflicts upon the innocent trespasser. Under this doctrine the unconscious and unintentional converter of the property of another can obtain no benefit whatever from the labor and expense he has bestowed in good faith upon what he honestly believed to be his own property.

Under the rule of the majority of the court the plaintiff is reimbursed for his lost goods at their precise value when taken and therefore sustains no loss; the innocent trespasser, after answering to the defendant in a suit for the actual cost of the goods—their original value when taken—is not deprived of the fruits of his labor expended in good faith upon property he considered his own; and the defendant, after recovery from the trespasser, has sustained no loss whatever.

For a complete discussion of the whole subject see Coal Co. v. Cox, 39 Md. 1 (1873) and Mining Co. v. Heston, 26 Am. Rep. 521 (1877), and cases reviewed therein.

TORTS—NEGLIGENCE—DOCTRINE OF "LAST CLEAR CHANCE."—A railroad company negligently backed a train through a city without providing any signal of warning or look-out on the cars. The plaintiff negligently ran over a crossing just in front of the train and, managing to grasp an iron bar on one of the cars, was carried along for some distance without being seen by the train crew. He finally fell off and was badly injured. In a suit against the railroad the court, two judges dissenting, held that the doctrine of the "last clear chance" did not apply and that the company was not liable. Bourrett v. Chicago & N. W. Ry. Co., 132 N. W. Rep. 973 (Ia. 1911).

The majority opinion takes the view that the doctrine of the "last clear chance" is founded on actual knowledge of the plaintiff's danger, irrespective of whether or not it was the defendant's duty to have provided means of knowledge. This interpretation is followed in New York, N. H. & H. R. Co. v. Kelley, 93 Fed. 745 (1899); Sweeney v. N. Y. Steam. Co., 117 N. Y. 642 (1890); Milwaukee Electric R. & Light Co., 108 Wis. 593 (1901), and in cases in Arkansas, Colorado and Montana. Some states declare that under this doctrine the defendant is liable only if chargeable with wantonness or recklessness. Frazer v. South & North Ala. R. C., 80 Ala. 105 (1886); Mulherin v. Delaware, L. & W. R. Co., 81 Pa. 366 (1877); and cases in Indiana, Louisiana and Oregon.

The dissenting opinion, however, seems to be in accord with the weight of authority. The judges considered the defendant liable because the injury resulted from the omission of an act which constituted a breach of duty owed to the plaintiff, namely, to have a look-out and to give warning at crossings. Without this breach of duty the plaintiff would not have been injured, and when there is a duty to investigate, reasonable means of knowledge should be regarded as equivalent to actual knowledge. In accordance with this view are Smith v. Norfolk & Southern R. Co., 114 N. C. 728 (1894); Richmond v. Sacramento Valley R. Co., 18 Cal. 351 (1861); Battisbull v. Humphreys, 64 Mich. 514 (1889); Edgerley v. Union Street R. Co., 67 N. H. 312 (1894); Virginia Midland R. Co. v. White, 84 Va. 498 (1889); the decisions in Kansas, Kentucky, Maryland, Mississippi, Nevada, Utah and West Virginia; and England in Davies v. Mann, 6 M. & W. 545 (1855), where the doctrine originated. The better rule, it is submitted, is followed in these decisions, which hold the defendant liable for any omission of duty, whether

before or after the discovery of the peril in which the plaintiff had placed himself by his antecedent negligence, if that breach of duty intervened or continued after the negligence of the other party had ceased. Beach on Contrib. Negligence, sec. 28; Shearman v. Redfield on Negligence, sec. 99; Davies v. Mann, *supra*. For an exhaustive review of the entire subject see the note under Bogan v. Carolina Central R. R. Co., 55 L. R. A. 418 (N. C. 1901).

TORTS—NEGLIGENCE—LIABILITY OF SERVANTS TO THIRD PERSONS FOR NON-FEASANCE.—Although the point was not directly raised, the Kentucky Court of Appeals in a recent case discussed the liability of a servant or agent to third parties for injuries sustained by reason of his non-feasance of his duties, and, affirming previous decisions, took the position that such a liability existed. Cincinnati, N. O. & T. P. R. Co., 140 S. W. Rep. 176 (1911).

There are three distinct lines of decisions on this question, in each of which the liability or non-liability is based upon a different ground. The first group of cases holds that non-feasance by a servant or agent is merely negligence in the performance of a duty arising from some implied or express contract with his principal or employer. Accordingly the agent or servant is responsible to him only and not to any third person. Such is the view in the leading case of Delaney v. Rochereau, 34 La. Ann. 1123 (1882), and in Colvin v. Holbrook, 2 N. Y. 126 (1863); Brown v. Lent, 20 Vt. 529 (1849); Henshaw v. Noble, 7 Ohio St. 231 (1858); and Lane v. Cotton, 12 Mod. 488 (Eng. 1796). See also Mechem on Agency, sec. 539, and Story on Agency, sec. 309.

Cases taking the intermediate ground declare that, while for absolute non-feasance there is no liability, nevertheless if the agent or servant once undertakes a duty, he must use reasonable care in carrying it out so as not to injure third parties; and if, by reason of his improper execution, neglect or abandonment of the undertaking after having entered upon it, outside persons are injured, he will be liable. Osborne v. Morgan, 130 Mass. 102 (1880). The distinction, it is submitted, is extremely fine, and courts which follow this view have become deeply involved in the endeavor to distinguish such cases from those of simple non-feasance or misfeasance. See Ellis v. McNaughton, 76 Mich. 237 (1890); Campbell v. Portland Sugar Co., 62 Me. 552 (1875); Lottman v. Barnett, 62 Mo. 159 (1876).

The third class of cases bases the liability of the servant for non-feasance upon the same grounds as his liability for misfeasance. That is, the liability is not regarded as being in any way connected with his contract, but as resting solely upon the common law obligation devolving upon every responsi- the present estate (see Stimson Amer. St. Law, sec. 1403), no exactly similar he operates his own property as principal or that of another as agent or servant. Such is the rule in Baird v. Shipman, 132 Ill. 16 (1891); Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611 (1894); Ellis v. Southern Ry. Co., 72 S. C. 465 (1905). For a brief general review of the entire subject see Lough v. John Davis Co., 30 Wash. 204, 59 L. R. A. 802 (1902).