RECENT CASES.

BILLS AND NOTES—ALTERATION OF DATE—Ten persons made a joint and several note. Afterwards one of the makers without the consent of the others changed the date of the note. The indorsee of the payee brought suit. *Held:* He may recover only against the party that made the alteration. Barton Savings Bank and Trust Co. v. Stephenson, 89 Atl. Rep. 639 (Vt. 1914).

In this case, the Negotiable Instruments Act, Vt. Acts of 1912, No. 99, did not apply as the note was made before the act was passed. By the Law Merchant, the innocent purchaser of a note which has been altered materially gets no title as against those who sign before the alteration is made, as they are not parties to the instrument which the holder received. Master v. Miller, 4 T. R. 320 (Eng. 1791), Paine v. Edsell, 19 Pa. 178 (1852). It necessarily follows that the person making the change, or authorizing it, cannot complain that the paper has been altered. Schmelz v. Rix, 95 Va. 509 (1898). When the alteration is made by a stranger to the paper, the general attitude in the United States is that the holder may treat the alteration as a nullity, and sue on the paper as it was originally. Equitable Manufacturing Co. v. Allen, 76 Vt. 22 (1903). The alteration must be of a material part of the instrument; date or time of payment, Hartley v. Carboy, 150 Pa. 231 (1892); amount, Aetna Bank v. Winchester, 43 Conn. 391 (1876); rate of interest, Gettysburg Bank v. Chisholm, 169 Pa. 564 (1895); place of payment, Simpson v. Stackhouse, 9 Pa. 186 (1848); Neff v. Horner, 63 Pa. 327 (1869). But if the alteration, though material, can be shown to have been made to correct a mutual mistake, it does not affect the validity of the paper. Ames v. Colburn, 77 Mass. 390 (1858). An alteration of an immaterial part of the paper does not avoid the bill or note: noting residences of indorsers on bill, Struthers v. Kendall, 41 Pa. 214 (1861); changing the number of note, Comm. v. Emigrant Bank, 98 Mass. 12 (1876).

The Negotiable Instruments Act, Pa. Act of 1901, P. L. 194, Sec. 124, changes the earlier law and allows the innocent purchaser to recover from persons signing before the alteration according to the original tenor of the paper. In other respects, the Act on this subject does not change the Law Merchant.

BILLS AND NOTES—BONA-FIDE HOLDER—GAMBLING DEBT—The maker of a note executed in settlement of a gambling debt induced the plaintiff to become the holder by representing that the note was valid and would be paid. *Held:* Although the statute, §§ 1955, 1956, 1957, declare that any note given in consideration of a gambling debt shall be void, where the makers asserted the validity of such a note and thus induced the plaintiff to purchase it in good faith, they are estopped to deny its illegality. Holzbog v. Bakrow, 160 S. W. Rep. 792 (Ky. 1913).

This decision is in accord with the current of authority, similar statutes being in force in most jurisdictions. Finn v. Barclay, 15 Ala. 626 (1849); Blades v. Newman, 43 S. W. 176 (Ky. 1897); Dow v. Higgins, 72 Ill. App. 305 (1897); *contra*, Hurlburt v. Straub, 46 N. E. Rep. 163 (W. Va. 1903). But the estoppel cannot be invoked in favor of the original payee, or anyone who stands in his shoes, having had notice of the infirmity. Colby v. Title Ins. Co., 160 Cal. 632 (1911); Embery v. Jamison, 136 U. S. 336 (1890). And where the maker has not estopped himself, the infirmity of the note may be shown against a *bona-fide* holder. Bank v. Brown, 101 Ky. 356 (1897); New v. Walker, 108 Ind. 365 (1886); Western Nat. Bank v. State Bank, 70 Pac. Rep. 439 (Colo. 1902); Griffiths v. Sears, 112 Pa. 523 (0000).

Several jurisdictions, notably Pennsylvania, hold that a note given in a stock gambling transaction is not subject to this last rule, and that a *bona*

fide holder can recover against the maker. Northern National Bank v. Arnold, 187 Pa. 356 (1898); Myers v. Kessler, 142 Fed. Rep. 730 (1906); Long's Estate v. Jones, 69 Ill. App. 615 (1897); Higginbotham v. McGready, 81 S. W. Rep. 883 (Mo. 1904). The basis of these decisions is that notes given for this purpose do not come within the scope of the statutes making those given for the satisfaction of gambling debts void.

CIVIL PROCEDURE—WHO EXEMPT FROM SERVICE OF PROCESS—A non-resident under bail who enters a jurisdiction to answer to a criminal charge is not exempt from the service of process in a civil action, if the criminal action was *bona fide* and not a subterfuge to get the defendant within the jurisdiction of the court. *Ex parte* Hendersen, 145 N. W. Rep. 574 (N. D. 1914)

It is clear that a non-resident witness who has come into the jurisdiction to testify in any authorized legal proceeding is exempt from service of process in a civil action instituted against him personally or against any corporation or person of whom he may be the representative. Hardwood Mfg. Co. v. Kinsey, 94 N. Y. S. 455 (1905); Fidelity Co. v. Everett, 97 Ga. 787 (1896). It has been held that only such witnesses as are serving under subpoenas are granted the court's protection. Fertilizer Co. v. Kirsh, 24 Ky. L. R. 2471 (1903). But exemption has, almost universally, been granted to all witnesses. Jones v. Knauss, 31 N. J. Eq. 211 (1879). As to exemption of parties to an action from service of process, there has been a greater difference of opinion. The general rule is that parties to an action whether plaintiff or defendant are exempt. Cameron v. Roberts, 87 Wis. 291 (1894); Morrow v. Dudley & Co., 144 Fed. Rep. 441 (1906). Distinction has been made between a party plaintiff, who is submitting to the jurisdiction for his own advantage, and a defendant who is forced to attend to preserve his rights. Bishop v. Vose, 27 Conn. 1 (1858); Wilson Machine Co. v. Wilson, 51 Conn. 595 (1884). This distinction has been denied by the cases above where all parties are exempt and by another court which has held none exempt. Baldwin v. Emerson, 16 R. I. 304 (1888).

In accord with the proposition that the defendant in a criminal action is not exempt from service of process in a civil action while he is in the jurisdiction to face the criminal charge are Netograph Co. v. Scrugham, 197 N. Y. 377 (1910); Commonwealth v. Huntzinger, 2 Leg. Rec. Rep. 80 (Pa. 1881). The plaintiff in an attachment suit, who has entered the jurisdiction to avoid forfeiting his bond, given in that action is also liable to be served with process in a civil action. Mullen v. Sanborn, 79 Md. 364 (1894). But the defendant in a criminal action, entering the jurisdiction either to waive extradition or entering voluntarily or to avoid forfeiture of a bail bond, has often been held exempt from service of process. Murray v. Wilcox, 122 Ia. 188 (1904); Kaufman v. Garner, 173 Fed. Rep. 550 (1909). There is no doubt that if the criminal proceeding is a mere device to get the party within the jurisdiction, service then made upon him will be void. Commonwealth v. Daniel, 4 Clark 49 (Pa. 1847). But this is no more than the ordinary rule that if the service is obtained by fraud or by some trickery, it shall not be valid, no matter what form that fraud may take. Hill v. Goodrich, 32 Conn. 588 (1858); Dunlap v. Cody, 31 Ia. 260 (1871).

CONTEMPT—CRIMINAL AND CIVIL—FORM OF PROCEEDINGS—An injunction was issued against a labor union, restraining it from interference by intimidation with the complainant's business and workmen. Under the caption of the main cause, proceedings were issued as a "motion for attachment for contempt of court" against certain members of the union, only one of whom had been a party defendant in the main cause. *Held:* This is a proceeding for punishment of a criminal contempt and should properly be brought in the name of the United States or *"In re"* the defendant. This defect however is waived if the party goes to trial without objection [The motion was ultimately dismissed, however, on account of the insufficiency of the moving papers.] Phillips Co. v. Amalgamated Assn., 208 Fed. Rep. 335 (1913).

The distinction between proceedings to punish civil contempt, which are remedial in nature, to protect the rights of the parties in interest, and proceedings to punish criminal contempt, which are punitive in nature, to preserve the power and dignity of the courts, is well established, although it is often difficult to place a given case within the proper class. Many contempts are both criminal and civil. Bessette v. Conkey Co. 194 U. S. 329 (1903); and in such a case though the proceeding is treated throughout as criminal, it is not improper for the court to make two awards, the one punitive, the other compensatory. Kreplik v. Couch Patents Co., 190 Fed. Rep. 565 (1911), The accused cannot be charged in proceedings for civil contempt unless he was a party defendant in the main cause, on the theory that civil contempt proceedings being compensatory and supplemental to the main cause, relief cannot be given against one not a party to that action. Garrigan v. U. S., 163 Fed. Rep. 16 (1908). But, aside from this one rule, the question of whether a proceeding to punish a contempt is civil or criminal is one which can only be determined by considering all the circumstances of the case, the caption of the papers, the prayer of the petition, etc. Gompers v. Buck's Stove & Range Co., 221 U. S. 418 (1911). Civil contempt proceedings should be brought by the party in interest in his own name, under the same caption as that of the main cause in which the order disobeyed was issued; criminal contempt proceedings should be brought by the party in interest as representative of the United States, and entitled "United States v. ———," or "*In re* ———." Gompers v. Buck's Stove Co., *supra*. By this the defendant will know that it is a charge against him and not a suit. But although this is the proper way to bring such a proceeding, yet it is held in the principal case that it is not the only or necessary way. If it be brought in the name of the plaintiff, this is a mere defect in form which the accused waives if he goes to trial without objection.

A criminal contempt proceeding arising out of an order in a purely civil case, though in the name of the United States, is brought by the party in interest and need not be by the United States attorney. *In re* Star Spring Bed Co., 203 Fed. Rep. 640 (1913). There appears to be no authority on the question of whether or not it is the duty of the United States attorney to bring criminal contempt proceedings whenever it becomes necessary to vindicate the authority of the court and the private parties are unwilling or unable to do so.

CRIMINAL LAW—MANSLAUGHTER—PHYSICAL CONDITION OF DECEASED—The defendant negligently drove his automobile into an embankment, and the deceased, a passenger, was thrown out on his head. As a result of the injury, the decedent, who had an alcoholic brain which rendered him susceptible to delirium tremens, suffered an attack of that disease and died thereof. *Held:* Although the fall would not have resulted fatally to a person in ordinary health, the defendant was guilty of manslaughter. State v. Block, 89 Atl. Rep. 167 (Conn. 1913).

It seems, as is indicated in the opinion, that no case with identical facts has previously been determined. However, it is well settled that a person whose act is the mediate, though not the immediate cause, of another's death, is liable for the homicide. Keely v. State, 53 Ind. 311 (1876); State v. Foote, 58 S. C. 218 (1900). Thus, it is no defence that if the injured person had subsequently been properly cared for, death would not have occurred. Bishop v. State, 123 Ala. 7 (1899).

As a general rule, evidence will not be admitted to show that death would not have resulted from the injury inflicted by the defendant, had it not been for the enfeebled physical condition of the deceased, whether or not the former had knowledge thereof. Cunningham v. People, 195 Ill. 550 (1902); State v. Costello, 62 Iowa 404 (1883); Commonwealth v. Fix, 7 Gray 585 (Mass. 1856)); Griffin v. State, 50 S. W. Rep. (Tex. 1899). The defendant will not be permitted to prove that the wounds given would not have been fatal in more than one case in a hundred. State v. Baruth, 47 Wash. 283 (1907).

Where a wound, not in itself mortal, accelerates the death of a person already mortally injured, the person inflicting it is nevertheless guilty of homicide. People v. Ah Fat, 48 Cal. 61 (1874). However, evidence of the deceased's prior state of health is admissible to ascertain whether death ensued from the harm done by the defendant. Phillips v. State, 68 Ala. 470 (1881).

DISORDERLY HOUSE—NATURE OF THE BUILDING—A hack driver habitually permitted his hack to be used for lewd purposes and solicited lewd patrons whom he took to secluded places. *Held:* A conviction for keeping a "house of ill fame" was proper. State v. Render, 144 N. W. Rep. 298 (Iowa, 1913).

The keeping of a disorderly house was an indictable offense at common law, Common. v. Kellar, 8 Ky. Law Rep. 537 (1886); Jennings v. Common., 34 Mass. 80 (1835); but is today generally provided for by statute or municipal ordinance. Although the statutes usually describe the offense as keeping a disorderly "house," the courts have not restricted this to the strict meaning of the word "house," but have held that it applies to any place where lewd and disorderly practices are permitted. So any building used as a shelter for disorderly persons, State v. Powers, 36 Conn. 77 (1869); a single room, People v. Buchanan, 1 Idaho, 681 (1878); a boat, State v. Mullen, 35 Iowa, 199 (1872); a tent, Killman v. State, 2 Tex. App. 222 (1877); a covered wagon, State v. Chauvret, 111 Iowa, 687 (1900); have all been held disorderly houses within the meaning of the statute. To authorize a conviction for keeping a disorderly house it is not necessary to show it was kept for gain, State v. Porter, 130 Iowa, 690 (1906); nor that the proprietor maintained it for the purposes of immoral practices, State v. Wilson, 124 Iowa, 264 (1904); it is sufficient that he knows of the fact, connives at it, or does not prevent it. De Forest v. U. S., 11 App. D. C. 458 (1897).

EMINENT DOMAIN—TAKING—The most suitable field of fire in times of peace for practice and other purposes of an adjacent coast defense battery was over the land in question. The guns, however, had been so fired on but two occasions, both shortly after installation, and not once within the last eight years. Since there is nothing to show any intention on the part of the government to repeat such firing, it was ruled such land cannot be said to have been appropriated so as to raise an implied agreement on the part of the government for compensation because of the impairment of the value of the same, due to the apprehension of a repetition of the firing over and across them. Peabody v. United States, 34 U. S. Sup. Ct. Rep. 159 (1913).

This decision recognizes the rule that there need not be a seizure, a direct appropriation and dispossession of the owners; but the facts were not sufficient to make it a "taking" within the principle of Pumpelly v. Green Bay Canal Co., 13 Wall. 166 (U. S. 1871). It was there laid down that where land is actually invaded by superinduced additions of water, earth, or other materials, so as effectually to impair its usefulness, it is taken. This rule represents the prevailing opinion. Hooker v. New Haven & N. Co., 14 Conn. 146 (1841); Heiss v. Milwaukee & L. W. R., 69 Wis. 555 (1887); Miles v. Worcester, 154 Mass. 511 (1891). In McIntyre v. U. S., 25 Ct. Cl. 200 (1890), the court of claims recognizes the rule in Pumpelly's Case, but found it inapplicable because the injury was temporary, and not the probable or necessary consequence of the work. *Accord,* Payne v. Kansas City R. Co., 112 Mo. 6 (1892); High Bridge Lumber Co. v. U. S., 69 Fed. 324 (1895); De Baker v. So. Cal. R. Co., 106 Cal. 257 (1895).

In some decisions a taking has been strictly limited to the acquisition of property for public use, and any damage, no matter how appreciable and permanent, inflicted upon other property, has been considered to be beyond the purview of the constitutional declaration. Livermore v. Jamaica, 23 Vt. 361 (1851); see also Penny v. S. E. R. Co., 7 El. & B. 660 (Eng. 1857). This strict construction is not, however, now generally sanctioned, and, while the decisions are by no means harmonious, the general rule deducible from

them seems to be that any destruction, restriction, or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking. Foster v. Scott, 136 N. Y. 577 (1893); Brinton v. Comm., 178 Mass. 199 (1901); U. S. v. Lynch, 188 U. S. 445 (1902).

To constitute an appropriation within the intent of the Fifth Amendment to the Federal Constitution, the taking must be of a kind from which some benefit is to be anticipated. McIntyre v. U. S., *supra.*

EVIDENCE—ACTION FOR WRONGFUL DEATH—In an action for wrongful death, it is not error to admit into evidence the number and ages of the children of the deceased, in order to show an incentive to thrift and an increased earning capacity, provided the court instructed the jury that there could be no greater damages due to the greater needs of a large family. Nicoll v. Sweet, 144 N. W. Rep. 615 (Ia. 1913).

There are two important elements in assessing damages in an action for wrongful death. One is the probable earning capacity of the deceased and the other the claimant's benefit from that earning capacity. Hence a widow can not recover probable earnings for a period longer than her own expectancy of life nor than that of her husband; that is, she can recover his earnings during their joint expectancy only. Redfield v. Oakland Ry. Co., 42 Pac. Rep. 1063 (Cal. 1896). The measure of damages is not the pecuniary value of the decedent's life, but the value of that life to the claimant. Houston Ry. Co. v. Johnson, 27 Tex. Civ. App. 420 (1901). Therefore the personal expenses of the victim should be deducted from his gross earning capacity. Savannah Ry. Co. v. Flannagan, 82 Ga. 579 (1889). The jury does not concern itself with what the claimant has customarily received from the decedent, but what he had a right to receive. In an action by a widow, it was held immaterial that the husband had not in fact contributed to the support of the family for a great time, so long as the widow had not, by her own wrong, forfeited her right to that support. B. & O. R. R. v. State, use of Chambers, 81 Md. 371 (1895). Nor can one recover on the ground of gratuities customarily received from the deceased. A mother must show beside contributions from decedent her dependence upon those contributions. Middle Georgia R. R. v. Barnett, 104 Ga. 582 (1898). The general rule of damages for wrongful death is the one stated above, that one can recover the value to himself of the life of the decedent. Rhoads v. Chicago & A. Ry. Co., 227 Ill. 328 (1907); Cleveland, C. C. & St. L. Ry. Co. v. Drumm, 32 Ind. App. 547 (1903). It has been held that the administrator may recover the present value of the probable accumulation of the deceased if he had lived to his expectancy, Carlson v. Oregon Short Line, 21 Ore. 450 (1892); Jacksonville Elec. Co. v. Bowden, 45 So. Rep. 755 (Fla. 1908).

EVIDENCE—PRESUMPTION—MAIL—The plaintiff mailed a letter inclosing a draft and bill of lading to the defendant bank. There was evidence that the bank did not receive the letter nor collect the draft, but the bill of lading to which the draft was attached was used by the consignee. *Held:* Proof that the letter was mailed raised a presumption of its receipt in due course. Model Mill Co. v. Webb, 80 S. E. Rep. 232 (N. C., 1913).

A letter sent by the post is *prima facie* proof, until the contrary be established, that the party to whom it is addressed received it in due course. Jensen v. McCorkell, 154 Pa. 323 (1893); Goodwin v. Assurance Co., 97 Ia. 226 (1896); Ashley Wire Co. v. Ill. Steel Co., 164 Ill. 149 (1896). Before the presumption arises it must appear that the letter was properly stamped, directed to a party at his post-office address and deposited in the regular receptacle for mail. Huntley v. Whittier, 105 Mass. 391 (1870); Kimberly v. Arms, 129 U. S. 512 (1889). But the presumption is rebutted by positive and direct evidence to the contrary. McDermott v. Jackson, 97 Wis. 64 (1897); Grade v. Mariposa County, 132 Cal. 75 (1901). The principle has been applied to an express carrier's delivery of packages. American Ex-

press Co. v. Haggard, 37 Ill. 465 (1865); Beiderbecka v. Transportation Co., 39 Ia. 500 (1874). And to a telegraph company's transmission of telegrams. Oregon Steamship Co. v. Otis, 100 N. Y. 446 (1885); Eppinger v. Scott, 112 Cal. 369 (1896). The same application of the principle would admit a private person's usual course of business to evidence any act of delivery or transmission. Beakes v. Da Crucha, 126 N. Y. 293 (1891); McKay v. Meyers, 168 Mass. 312 (1897).

The general rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed is *prima facie* sufficient evidence of the genuineness of the reply letter. Campbell v. Woodstock Iron Co., 83 Ala. 351 (1887); Norwegian Plow Co. v. Munger, 52 Kan. 371 (1893). The courts will not presume that a stranger surreptitiously or otherwise got possession of the original letter and answered it. Chicago R. R. Co. v. Roberts, 10 Colo. App. 87 (1897); Lancaster v. Ames, 103 Me. 87 (1907). But will presume that such answer is the letter of the one whose name is signed to it. Scofield v. Parlin Co., 61 Fed. Rep. 804 (1894); Ragan v. Smith, 103 Ga. 556 (1897). And will admit such reply letter in evidence without proof that it is in the handwriting of the party purporting to have sent it. Nat. Acc. Soc. v. Spiro, 78 Fed. Rep. 774 (1897); Grayville Waterworks v. Burdick, 109 Ill. App. 520 (1903).

EVIDENCE—SELF INCRIMINATION—In a civil action for damages for criminal conspiracy to libel, the defendant refused to answer several questions on the ground that the answers would tend to incriminate him. *Held:* A witness in a civil action is privileged from answering such questions under the constitutional provision that no person "shall be compelled in any criminal case to be a witness against himself." Karel v. Conlan, 144 N. W. Rep. 266 (Wis. 1913).

The law is well settled that a witness cannot invoke the privilege for the purpose of avoiding a purely civil liability. Bull v. Loveland, 10 Pick. 9 (Mass. 1830); Alexander v. Knox, 7 Ala. 503 (1845). Such as acknowledging a debt, or bringing some purely pecuniary disadvantage on himself. B. & M. R. R. Co. v. State, 75 N. H. 513 (1909). But the privilege extends to a witness in a civil proceeding, as well as a criminal, where the answer would subject the witness to a criminal prosecution. Gates v. Hardacre, 3 Taunton, 424 (Eng. 1811); Counselman v. Hitchcock, 142 U. S. 547 (1892); People *ex rel.* Lewisohn v. O'Brien, 176 N. Y. 253 (1903); Wilkins v. Malone, 14 Ind. 153 (1860).

There is no such privilege, however, where there has been a promise of exemption from prosecution coming from the proper authorities. *In re* Taylor, 8 Misc. Rep. 159 (N. Y. 1894); Muller v. State, 79 Tenn. 18 (1883). Or where a statute of immunity has removed the danger of prosecution. People v. Cahill, 126 App. Div. 391 (N. Y. 1908); U. S. v. McCarthy, 18 Fed. Rep. 87 (1883). These principles are clear since the object of the constitutional provision was to protect the witness and the privilege ceases with the necessity for protection.

The liability of prosecution must appear reasonable to the court or the witness will be compelled to answer. Real v. People, 42 N. Y. 270 (1870); Temple v. Com., 75 Va. 892 (1881); State v. Farmer, 46 N. H. 200 (1865).

JUDGMENT—PRESUMPTION OF PAYMENT—Suit was brought upon a judgment which had been recovered more than twenty years before. *Held:* The fact that during the time the creditor was a non-resident and had made diligent inquiry as to the financial status of the debtor without finding any property was enough to rebut the presumption of payment after twenty years. Judson v. Phelps, 89 Atl. Rep. 161 (Conn. 1913).

At the common law all judgments were, as a matter of public policy, presumed to be paid at the end of twenty years. This rule has been generally adopted in States where there is no statutory provision. Biddle v.

Girard National Bank, 109 Pa. 349 (1885); Janvier v. Culbreth, 5 Penne. 505 (Del. 1905); though some States have changed the period of time necessary to give rise to the presumption: fourteen years, Wittsbruck v. Temple, 58 Neb. 16 (1899); ten years. Moore v. Williams, 129 Ala. 329 (1901). This presumption of payment is in its nature essentially different from the bar imposed upon contract debts by the statute of limitations. The statute prohibits action upon the debt; the presumption *prima facie* obliterates the debt. Bank v. Thompson, 44 Pa. Super. Ct. 200 (1910). The creditor is bound conclusively by the statute, but only *prima facie* by the presumption. He may rebut the presumption by any evidence tending to show that the judgment has not been satisfied. Day v. Crosby, 173 Mass. 433 (1899). The evidence must be satisfactory and convincing, Trust Co. v. Chapman, 226 Pa. 312 (1910), and must be something more than the bare statement of the creditor that the debt was not paid. Hummel v. Lilly, 16 Pa. Super. Ct. 327 (1901). Whether the facts alleged are strong enough to rebut the presumption is a question of law for the court; whether they are true, a question for the jury. Gregory v. Commonwealth, 121 Pa. 611 (1888).

LIBEL—PRIVILEGE—MALICE—In an action for libel against the author and printer of a pamphlet the jury found that the author of the libel, who had set up privilege as a defence, was actuated by malice, but acquitted the printers of the charge of malice. *Held:* The publication was joint and since the defence of privilege failed in the case of the author, his liability attached to the printers in spite of the fact of the finding of the jury that there was no malice on their part. Smith v. Streatfield, 109 L. T. Rep. 173 (Eng. 1913).

The decision turns on the question of whether the defence of privilege in an action of libel attaches to the publication or to the person or persons making the publication. If it attaches to the publication, then malice on the part of any one of the publishers will overthrow the privilege and this defence will fail as to all. But if it attaches to the individual publishers, malice proved against one will not destroy the defence of privilege set up by the others. The court in the principal case assumes the most difficult points, *viz.*, that the author and printer are joint tort-feasors and that the privilege attaches to the publication, not to the individual, and no authorities are cited to support either proposition.

It is clear that when malice is sought to be proved, not as the basis of the plaintiff's right to recover, but in order to secure punitive damages, the malice of one party is no ground for aggravation of damage against another party who was free from malice. Clark v. Newsam, 1 Ex. 131, 139 (Eng. 1847); Robertson v. Wylde, 2 Moo. & Rob. 101 (Eng. 1838). It is submitted that the rule should be the same when, as in an action of libel when the defense is privilege, proof of malice is an essential prerequisite to the plaintiff's right to recover, and that in such a case malice by one defendant should not be imputed to another. The case of Hennessy v. Wright, 24 Q. B. D. 445 (Eng. 1888), was apparently overlooked by the court in the principal case. This was an action of libel, brought against a newspaper, which defended on the ground of fair comment, *i. e.*, privilege. An effort was made to introduce evidence of malice on the part of the correspondent who wrote the defamatory article, although this correspondent was not a party defendant to the action. *Held:* (Lord Esher, M. R.) "If the privilege is abused for the purpose of personal vengeance, . . . although the occasion may have been privileged, the defendant is not privileged, because he is not using his privilege but gratifying his malice. But to show that the persons who informed the defendant were malicious does not carry the case any further. What must be shown is, that the defendant was malicious, and to show that his informants were malicious is not evidence that he was malicious." The facts of the principal case and this case are identical, save only that in the latter the action was brought against the printer alone. It is submitted, however, that the words used by Lord Esher show clearly that he thought privilege

attached to the individual publishers of a libel and that malice must be proved against each one in order to destroy privilege as to him. See Carmichael v. Ry. Co., 13 Irish L. R. 313, 326 (1849).

LIMITATION OF ACTIONS—APPLICATION OF PROCEEDS OF SALE OF COLLATERALS AS PART PAYMENT—A debtor, to secure his note, pledged stock as collateral security with the payee bank and constituted its cashier his agent to sell and apply the proceeds in case of default. *Held:* A sale and application of the proceeds of the collaterals, after the statute of limitations had run against the note, acted as a part payment sufficient to revive the debt. First National Bank of Oxford v. King, 80 S. E. Rep. 251 (N. C. 1913).

The decision is in accord with the rule, followed in some jurisdictions, that where collaterals are sold within a reasonable time and their proceeds applied by the creditor in part payment of the principal debt, the statute of limitations will be interrupted. Taylor v. Foster, 132 Mass. 30 (1882); Haven v. Hathaway, 20 Me. 345 (1841); Sornberger v. Lee, 14 Neb. 193 (1883); N. Y. Insurance Co. v. Tooker, 4 N. J. L. J. 334 (1891). Where the debtor himself sells the collaterals and passes their proceeds to the creditor, there is sufficient acknowledgment of the debt and a new promise will be implied. Whipple v. Blackington, 97 Mass. 476 (1867). The same is of course true when a third person is authorized to act as the debtor's agent. Thompson v. Hurley, 1 Ir. Rep. 588 (1905). The difficulty arises where the creditor is acting as agent. In Wood's "Limitation of Actions" 101, it is contended, citing Brown v. Latham, 58 N. H. 30 (1876), that the doctrine of the principal case is fallacious, for the reason that the creditor cannot be made the agent of the debtor to such extent as to make an act done by him operate as a new promise.

As is indicated in the dissenting opinion of the principal case, there must be a voluntary affirmative act by the debtor, contemporaneous with payment, before the implication of a new promise will arise. U. S. v. Wilder, 13 Wall. 254 (U. S. 1871). The principle adopted by the majority opinion is based upon a *dictum* in Porter v. Flood, 5 Pick. 476 (Mass. 1827), and has been repudiated in many States for the above reasons. Lyon v. State Bank, 12 Ala. 508 (1847); Ferris v. Curtis, 53 Colo. 340 (1912); Wolford v. Cook, 71 Minn. 77 (1906); Brooklyn Bank v. Barnaby, 197 N. Y. 210 (1910); Wanamaker v. Plank, 117 Ill. App. 327 (1904); Good v. Ehrlich, 67 Kan. 94 (1903).

NEGLIGENCE—BREACH OF STATUTORY DUTY—When a statute is in force, establishing a statutory duty, the question arises whether the duty was imposed merely for the abstract public benefit, or for the benefit of the individuals affected as well. The statute may be remedial as well as penal, giving a right of action to individuals over and above the penalty inflicted by the State. The presence of a penal clause in such a statute does not necessarily preclude right of action by individuals for injury caused through breach of the statute. Strait v. Yazoo & M. V. R. R., 209 Fed. Rep. 157 (1914).

Statutes may be passed creating duties and the breach of that statute constitutes negligence. McRickard v. Flint, 114 N. Y. 222 (1889); Atlanta & W. P. R. R. v. Wyly, 65 Ga. 120 (1880). But there is no negligence where no duty and hence only those toward whom the duty was owed can recover; that is, those for whose protection the statute was enacted. O'Donnell v. Providence & W. R. R., 6 R. I. 211 (1859); Cleveland, A. & C. R. R. v. Workman, 66 Ohio, 509 (1902). On the other hand it has been held that anyone suffering from any breach of duty may recover. Atchison, T. & S. F. R. R. v. Reesman, 60 Fed. Rep. 370 (1894); Anderson v. Settergen, 111 N. W. Rep. 279 (Minn. 1907). In a statute creating a new duty, there need be no specific remedy mentioned, or that the statute is for the benefit of a particular class of persons. Wolf v. Smith, 42 So. Rep. 824 (Ala. 1906); Stearns v. Atlantic & St. L. Ry. Co., 46 Me. 95 (1858). Where, however, a

penalty is actually imposed by statute, liability has in many States been limited to the statutory penalty. Mack v. Wright, 180 Pa. 472 (1897); Grant v. Slater Mill & Power Co., 14 R. I. 380 (1884). This is only true, however, when a new duty has been created by the statute, and not when the statute gives a new penalty for breach of a pre-existing duty. Lang v. Scott, 1 Blackf. 405 (Ind. 1825). In accord with the principal case are Parker v. Barnard, 135 Mass. 116 (1883); N. Y. R. R. v. Lambright, 5 Ohio C. C. 433 (1891).

NEGLIGENCE—FELLOW SERVANT DOCTRINE—The deceased was employed as a stenographer on the fourth floor of the building of a publishing company. On her way to work she was killed by the negligence of the elevator operator. *Held:* The deceased was not a fellow servant with the operator and the company is liable. Putnam v. Pacific Monthly Co., 136 Pac. Rep. 835 (Ore. 1913).

This decision shows the increasing tendency of the courts to depart from the harsh fellow servant rule. Under the common employment rule in vogue in the eastern jurisdictions the employer in the principal case would not be liable. This rule is "where each servant is occupied in service of a kind that all the others, in the exercise of ordinary sagacity, ought to be able to see, when accepting their employment that another's negligence would probably expose them to the risk of injury, they are fellow servants." 1 Shearman & Redfield, Negligence 691 (6th Ed.); Baird v. Pettit, 70 Pa. 477 (1872); N. & W. R. R. Co. v. Mickol's Adm'r, 91 Va. 193 (1895); Fouquet v. N. Y. C. & H. R. R., 108 N. Y. S. 525 (1908).

The test in the West and South may be termed the "association" rule. "Fellow servants are not in the same common employment unless they are so engaged that their duties bring them into association with each other to such an extent that they can exercise some influence on each other in favor of care and caution for their mutual safety." 1 Shearman & Redfield, Negligence 694 (6th Ed.); C. & N. R. R. Co. v. Moranda, 93 Ill. 302 (1879); Dixon v. C. & A. R. R. Co., 109 Mo. 413 (1891); A. T. & S. F. R. R. Co. v. McKee, 37 Kan. 592 (1887); Kentucky C. R. R. Co. v. Ackley, 87 Ky. 278 (1888). The principal case was decided under this latter test with two judges dissenting on the ground that the deceased was thrown so constantly with the operator that all the requirements of the rule were fulfilled, and it is submitted that this is the correct deduction from the facts. However, the decision is consistent with the public sentiment of the age, which seems to be that the fellow servant rule has served its term of usefulness.

NEGLIGENCE—LANDLORD'S LIABILITY—The defendant erected a building which he demised to a tenant for a garage. The plaintiff placed his automobile in the garage to be cared for under a contract with the tenant. Due to a patent defect in the construction of the roof, it fell during a heavy rain injuring the plaintiff's automobile. *Held:* The plaintiff had no cause of action. Meade v. Montrose, 160 S. W. Rep. 11 (Mo. 1913).

A lessor is ordinarily under no duty to see that the premises are, at the time of the demise, fit for the use to which the lessee may propose to put them. McKenzie v. Cheetham, 83 Me. 543 (1891); Dyer v. Robinson, 110 Fed. Rep. 99 (1899); Phelan v. Fitzpatrick, 188 Mass. 237 (1905). And, therefore, the lessee cannot assert a claim for damages against the lessor on account of the condition of the premises at the time of the demise. McKeon v. Cutter, 156 Mass. 291 (1892); Wilcox v. Hate, 65 Vt. 478 (1893). The rule, however, is subject to the exception that, if there is some hidden defect known to the lessor, at the time of making the lease, he is bound to inform the lessee. Whitehead v. Comstock Co., 25 R. I. 423 (1903); Whiteley v. McLaughlin, 183 Mo. 160 (1904); Rhodes v. Seidel, 139 Mich. 608 (1905). And his liability extends not only to dangerous conditions which he actually knows, but also to those the existence of which he has reasonable ground to suspect. Albert v. State, 66 Md. 325 (1886); Lindsey v. Leighton, 150

Mass. 285 (1889). But if the defects are such as would be apparent to the lessee on a reasonably careful inspection, there is no obligation upon the lessor to notify him of their existence, Booth v. Merriam, 155 Mass. 521 (1892); Shackford v. Coffin, 95 Me. 69 (1901); Borggard v. Gale, 205 Ill. 510 (1903).

The same rules apply to persons other than the tenant rightfully on the premises by the tenants' request or permission. Cohe v. Gutkese, 80 Ky. 598 (1883); Whitmore v. Orono Paper Co., 91 Me. 297 (1898); Shute v. Bills, 191 Mass, 433 (1906). But a guest or servant of a tenant can have no greater claim against the landlord than the tenant himself would have under like circumstances. Deller v. Hofferberth, 127 Ind. 414 (1890); Hilsenbeck v. Guhring, 131 N. Y. 674 (1892).

The lessor of premises used for a public or *quasi* public purpose, such as a wharf or pier, or a public hall, has been held liable to persons rightfully there for defects existing at the time of the demise. Albert v. State, 66 Md. 325 (1886); Eckman v. Atlantic Lodge, 68 N. J. L. 10 (1902). The courts hold there is a duty upon the lessor of such premises, which does not exist in the case of other premises, to see that they are, when demised, safe for use by the public. Fox v. Buffalo Park, 47 N. Y. Supp. 788 (1897); Smith v. State, 92 Md. 518 (1901). The view, however, that a distinction exists between a building devoted to public purposes and one devoted to private purposes has been expressly repudiated. Wilcox v. Hines, 100 Tenn. 538 (1898).

NEGLIGENCE—LIABILITY OF INNKEEPER FOR ASSAULT BY SERVANT—A guest in a restaurant was assaulted by a waiter. The proprietor knew that this waiter had a violent temper and that he had assaulted other guests on previous occasions. *Held:* The proprietor is liable for injuries inflicted by his servant on the guest. Duckworth v. Appostalis, 208 Fed. Rep. 936 (1913).

The basis of the landlord's liability in this case is his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. Rahmel v. Lehndorff, 142 Cal. 681 (1904). And he is liable for injuries to guests caused by the acts of other disorderly guests as well as for those of his employees. Rommel v. Schambacher, 120 Pa. 579 (1889). This liability is analogous to that of the master for the acts of a servant known by him to be incompetent where a fellow servant is injured. Siveat v. B. & A. R. R. Co., 156 Mass. 284 (1892); Mann v. D. & H. Canal Co., 91N. Y. 495 (1883).

A much more doubtful point presents itself when the innkeeper did not know of the dangerous character of his employee. The weight of authority holds that the innkeeper's obligation is limited to the exercise of reasonable care for the safety and comfort of his guests, and that he is not liable for assaults committed by an employee on the ground that this is entirely outside the scope of the latter's authority. Weeks v. McNulty, 101 Tenn. 499 (1898). However, some courts have held the innkeeper liable on the implied contract that his guests shall be free from harm when enjoying his hospitality. Clancy v. Barker, 131 Fed. Rep. 161 (1904); Rommel v. Schambacher, 120 Pa. 579 (1889). This liability is considered by the latter decisions coincident with that of the common carrier. Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 122 (1890); P. Ft. W. & C. R. R. Co. v. Hinds, 53 Pa. 515 (1866); Bryant v. Rich, 106 Mass. 188 (1890).

NEW TRIAL—JOINT TORT FEASORS—Suit was brought against three joint tort feasors. The evidence established the liability of two but not of the third. The jury returned a general verdict against all three. *Held:* The court on motion for a new trial, might let the judgment stand as against the first two and order a new trial as to the third. Pence v. Bryant, 80 S. E. Rep. 137 (W. Va. 1913).

This case shows the general law today. The early law did not allow a new trial to be granted as to one tort feasor and the judgment to stand as

to the others because the award of the *venire de novo* extinguished the whole prior *venire* and thus when a new trial was awarded to one there was nothing to bind the others. A few States still follow this rule. Findlay v. Ry., 5 Ga. App. 722 (1909). However the majority of the States regard this objection as technical and allow a new trial to be granted as to one and the judgment to stand as to the others. Ry. v. Foulks, 191 Ill. 57 (1901); Gross v. Scheel, 67 Neb. 223 (1903). The cases base their decision on the ground that the liability in tort is joint and several and therefore the judgment is severable. Albright v. McTighe, 49 Fed. Rep. 817 (1892); Kansas City v. File, 60 Kan. 157 (1899); Sparrow v. Bromage, 83 Conn. 27 (1910). When it is a question of reversing the judgment as to one and letting it stand as to the others, the cases are more in conflict. The common law rule did not allow reversal as to one and affirmance as to the others because the judgment was looked on as an entirety. Massey v. Oates, 143 Ala. 248 (1904); Henning v. Sampsell, 236 Ill. 375 (1908). But most States have changed from this rule, some by statute. Ry. v. Treadway, 142 Ind. 475 (1895); Westervelt v. St. Louis Transit Co., 222 Mo. 325 (1909): others by decision, Ry. v. Tucker, 105 Ky. 492 (1895); Sutherland v. Ingalls, 63 Mich. (1886). Thus the general rule is to look into the nature of the case and to allow the judgment to be severed when the interests of the parties may rightfully be severed. Stotler v. Chicago Co., 200 Mo. 107 (1906).

PARTNERSHIP—INSOLVENCY—RIGHTS OF FIRM AND INDIVIDUAL CREDITORS—A partnership and the individual partners were insolvent and in bankruptcy, and there were no partnership assets available for distribution among the partnership creditors. *Held:* That such creditors had the right to share *pari passu* with the separate creditors of one partner in the net proceeds of his separate property. *In re* Gray, 208 Fed. Rep. 959 (1913).

The rule in this case was early adopted in England, *Ex parte* Hayden, 1 Bro. Ch. 454 (1785), and has been generally followed there for more than a century. *In re* Budgett, 2 Ch. 557 (1894). The same result was attained in the cases in the United States at common law and under the Bankruptcy Acts of 1841 and 1867. *In re* Jewett, Fed. Cas. No. 7,304 (1868); *In re* Knight, Fed. Cas. No. 7880 (1871). The decisions under the Act of 1898 are in conflict, that of the principal case being based upon Conrader v. Cohen, 121 Fed. Rep. 801 (1903). An exhaustive opinion by Mr. Justice Lowell in the case of *In re* Wilcox, 94 Fed. Rep. 84 (1899), reviews all of the leading English and American cases and denies the conclusion which they have reached. *In re* Janes, 133 Fed. Rep. 912 (1904) in accord.

The Act of 1898 §5, cl. f, under which these latter cases are decided, provides that the net proceeds of the individual estate of each partner shall be appropriated to the payment of his individual debts and the net proceeds of the partnership property to the payment of the partnership debts. Any surplus of property of any partner remaining after his individual debts are paid, is to be applied to the payment of partnership debts. But nothing further is said concerning the rights of firm creditors against the individual property of the partners. It is submitted that the decision of the principal case, and those in accord with it, are clearly in violation of these provisions. It has been said that the statute merely expresses the general rule governing the equitable distribution of such funds, and that this should only apply where both partnership and individual estates are before the court for distribution. *In re* Conrader, 118 Fed. Rep. 676 (1902). As nothing to this effect is stipulated, however, it appears to be an attempt to make a distinction in order to avoid the application of the rule.

PARTNERSHIP—TORT LIABILITY—The owner of property employed a partnership to dig a well. The well-digging machine was operated by one partner alone, and owing to his negligence an adjoining barn caught fire from the sparks emitted from the machine, which was proved to have been negligently operated by the one partner. *Held:* An action is not maintainable

against the partnership, because a partnership is not liable for the torts of one of the partners. Battle v. Pennington, 80 S. E. Rep. 247 (Ga. 1913).

At common law and in almost all States in this country today a partnership is held liable for any torts committed by a partner within the scope of the partnership business. Miller v. Phenix Ins. Co., 109 Ill. App. 624 (1903); Guarantee Trust Co. v. Drew Co., 107 La. 251 (1902); Grissom v. Hofius, 39 Wash. 51 (1905); Nisbet v. Patton, 4 Rawle 120 (Pa. 1833); Lothrop v. Adams, 133 Mass. 471 (1882). But the principal case is decided under a statute in Georgia which provides: "Partners are not responsible for torts committed by a copartner. For the negligence or torts of their agents or servants they are responsible under the like rules with individuals." Ga. Code 1910 §3187. It might be thought that the intention of the legislature in passing this statute was to relieve a partner only from liability for such direct acts of his co-partner as trespass, libel, *etc.*, and was not intended to apply to an action for negligence. This distinction, however, the court refused to draw in Corbett v. Connor, 11 Ga. App. 385 (1912). It might also well be argued that, since each partner is in law the agent of the others, one partner could make the partnership liable for his torts as its agent if not as partner. But this proposition was also denied in Ozborn v. Woolworth, 106 Ga. 459 (1899), the court holding that the provision that partners should be liable for the torts of their agents was manifestly not intended to apply to those agents who were members of the partnership. The decision in the principal case, therefore, though hardly supportable on principle, and, it is submitted, not a necessary decision under this anomalous act, is well sanctioned by the weight of authority in that State. *Cf.* the decision in Hobbs v. Packing Co., 98 Ga. 576, 581 (1896) which, apparently oblivious to the statute, holds that a partner may render his firm liable for his torts.

PHYSICIANS AND SURGEONS—LIABILITY OF OPERATING SURGEON FOR NEGLIGENCE OF HOSPITAL AUTHORITIES—After a surgeon had carefully performed an operation on a patient, the nurses and internes of the hospital in sewing up and dressing the wound, negligently left in the body several feet of gauze and a drain of rubberized silk. *Held:* The surgeon cannot be held for this negligence. Hunner v. Stevenson, 89 Atl. Rep. 418 (Md. 1913).

The principle that a man exercising a trade is liable to a person injured by his negligence in that trade is fundamental in the common law. Year Book, 46 Ed. III, 19 pl. 19 (1491); Fitz-Herbert, Nat. Brev. 94 D. There is thus no doubt that the surgeon in the principal case would have been liable had he himself done the act of sewing up, or had it been his duty to inspect it. Akridge v. Noble, 114 Ga. 949 (1901); Reynolds v. Smith, 148 Iowa 264. (1910). But in determining the extent of a surgeon's liability for materials left in the body after an operation, the extent of the duty of the surgeon must be considered. Harris v. Fall, 177 Fed. Rep. 79 (1910). The recognized custom in hospitals is that a surgeon is engaged to perform the actual operation, and that nurses and internes are supplied to attend to the ordinary work of dressing and treating the wound after the operation. Perionowsky v. Freeman, 4 Foster & F., 977, 981 (Eng. 1866). The duty of a surgeon then extends only to the actual operation performed, and not to the treatment subsequently given. The distinction drawn in the principal case between articles left in the wound at the time of the operation and while the surgeon is in charge, and those left in during subsequent treatment, is sound in principle and well supported by authority. Reynolds v. Smith, *supra;* Harris v. Fall, *supra;* Baker v. Wentworth, 155 Mass. 338 (1892); Wharton v. Warner, 135 Pac. Rep. 235 (Wash. 1913).

PROCEDURE—MOTION IN ARREST OF JUDGMENT—After verdict, the defendant undertook by motion in arrest of judgment to raise the same legal questions respecting the sufficiency of the declaration as were presented on a demurrer. *Held:* The rule is, that after judgment on demurrer by solemn de-

termination, there can be no motion in arrest of judgment for any exceptions that might have been taken on arguing the demurrer. White v. Central Vermont Ry. Co., 89 Atl. Rep. 618 (Vt. 1914).

The majority of jurisdictions uphold this view and will not entertain such a motion after the overruling of a demurrer to the declaration either for any exceptions which *might* have been considered on the demurrer. Shreffler v. Nadelhoffer, 133 Ill. 536 (1890); Mayer v. Lawrence, 58 Ill. App. 194 (1895); Davis v. Carrol, 71 Md. 568 (1889); Edwards v. Blunt, 1 Str. 425 (Eng. 1883). But there are cases *contra*, Newman v. Perrill, 73 Ind. 153 (1880); Hydes Ferry Turnpike Co., 108 Tenn. 428 (1902); McCall v. Sullivan, 1 Tex. App. Civ. Case 1 (1892); or for any exceptions that *were* considered on the demurrer. Price v. Art Printing Co., 112 Ill. App. 1 (1904); Chicago, *etc.* R. Co. v. Clauson, 173 Ill. 100 (1898); Davis v. Carroll, *supra;* Freeman v. Camden, 7 Mo. 298 (1842); Rose v. Burlington, 1 Aik. 43 (Vt. 1825); but see Decatur v. Simpson, 115 Iowa 348 (1902); Stewart v. Terre Haute *etc.* R. Co., 103 Ind. 44 (1885).

In analogy to the leading case the same difference of views is borne out by the different jurisdictions where a subsequent demurrer is taken so as to take effect upon matter previously demurred to, which demurrer was overruled. In Cummins v. Gray, 4 S. & P. 397 (Ala. 1833); Johnson v. Pensacola Co., 16 Fla. 623 (1878); Pittsburgh Co. v. Hixon, 79 Ind. 111 (1881), and Perrin v. Thurman, 4 T. B. Monroe 176 (Ky. 1843), it was ruled that the second demurrer does open the whole record even beyond where the former demurrer was overruled. People v. Opera House Co., 249 Ill. 106 (1911); Fish v. Tarwell, 160 Ill. 236 (1896); Ricknor v. Clabber, 76 S. W. R. 271 (Ind. Ter. 1903) *contra.*

The overruling of a demurrer to a declaration does not preclude the defendant from objecting at the trial that the declaration shows no cause of action. Perry v. Baker, 61 Neb. 841 (1901); Tiernan v. Miller, 96 N. W. R. 661 (Neb. 1903).

SALES—CHATTEL MORTGAGES—A chattel mortgage was issued upon certain property upon condition that the mortgagor should remain in possession until there was default in payment. Before the condition was broken, the mortgagor sold the property as his own to an innocent purchaser. *Held:* The mortgagee could recover the property from the purchaser. Shorter v. Dale, 89 Atl. Rep. 329 (Md. 1913).

In ordinary chattel mortgages, a stipulation that the mortgagor is to have possession until breach of condition bars any action by the mortgagee before such breach. Calkins v. Clement, 54 Vt. 635 (1881); Madison Bank v. Farmer, 5 Dak. 282 (1888). The authorities are not in accord as to the nature of the right in the mortgagor in possession. Some States consider that it is a personal right and allow recovery by the mortgagee if the goods are found in the possession of one other than the mortgagor. Levi v. Legg, 23 S. C. 282 (1885). The better rule, however, is that the mortgagor has a substantial and valuable interest in the property and that this interest is assignable, Heflin and Phillips v. Slay, 78 Ala. 180 (1884); and subject to levy, Simmons v. Jenkins, 76 Ill. 479 (1875). This interest may be sold only subject to the mortgage; if it is sold in antagonism to the mortgage, it is tortious. Lafayette Bank v. Metcalf, 40 Mo. App. 494 (1890). Thus the mortgagor may not assume to dispose of the property as his own; a sale of the entire property is in exclusion of the mortgagee's rights and is a conversion on the part of the mortgagor. Dean v. Cushman, 95 Me. 454 (1901). The more general rule holds that the purchaser though innocent is also guilty of conversion and that the mortgagee may recover from him without making any demand. Lafayette Bank v. Metcalf, 40 Mo. App. 494 (1890); Carey v. Bright, 58 Pa. 70 (1868). But some States hold that the innocent purchaser is entitled to a demand before he is guilty of conversion. Dean v. Cushman, 95 Me. 454 (1901); Gillett v. Roberts, 57 N. Y. 28 (1874). The

act of conversion as it is contrary to the agreement for the mortgagor to remain in possession, gives the mortgagee the immediate right to possession, though the condition is technically not broken. Lafayette Bank v. Metcalf, 40 Mo. App. 494 (1890). In the principal case, it is not clear whether the court regards the interest of the mortgagor as a personal or an assignable right; under the circumstances of the case, the decision is correct, no matter which way the mortgagor's interest is regarded.

SALES—FRAUDULENT CONVEYANCES—POSSESSION—A bank advanced money upon a note with the collateral security of twenty-five barrels of whiskey in the pledgor's bonded warehouse. The pledgee indorsed and delivered the warehouse receipt to the bank. When the pledgor became bankrupt, the bank claimed the whiskey as against the trustee in bankruptcy. *Held:* The pledge to the bank was good; the transfer of the warehouse rereipts was enough to prevent the conveyance from being fraudulent. Taney v. Penn National Bank, 34 Supreme Ct. Rep. 289 (U. S. 1914).

The law upon the question of the effect of retention of possession of the goods by the vendor after the sale is made is in great confusion and each jurisdiction has its own line of decisions upon the matter. The law, as originally developed in England, was that retention of possession by the vendor after sale was fraudulent *per se*, and thus the sale was avoided. Edwards v. Harben, 2 T. R. 587 (Eng. 1788). This case was soon overruled and the modern law is that retention of possession by the vendor is only evidence of fraud. Martindale v. Booth, 3 Barn. & Ad. 498 (Eng. 1832). In this country some of the States follow the modern English rule: Miller v. Shreve, 29 N. J. L. 250 (1861); Ingalls v. Herrick, 108 Mass. 357 (1871). Pennsylvania, on the other hand, follows the earlier English rule as laid down in Edwards v. Harben, *supra*. Retention of possession by the vendee is conclusive evidence of fraud. Clow v. Woods, 5 S. & R. 275 (1819). To validate the sale as to third persons, "there must be such delivery and change of possession attending the transfer as the nature of the property is capable of." Haynes v. Hunsicker, 26 Pa. 58 (1856); actual if the goods are capable of physical delivery, constructive if they are not. McKibben v. Martin, 64 Pa. 352 (1870). Constructive delivery takes various forms. Assumption of ownership has been frequently held a sufficient change of possession; of pile of lumber, Haynes v. Hunsicker, *supra;* of portable sawmill, Pressel v. Bice, 142 Pa. 263 (1891); of brick yard, White v. Gunn, 205 Pa. 229 (1903). But the ownership must be exclusive; ownership concurrent with the vendor is not enough: McKibben v. Martin, *supra*. In other cases, marking the goods with the vendee's name has been considered a constructive delivery: raft, Smith v. Crisman, 91 Pa. 428 (1879); machinery, McCullough v. Willey, 200 Pa. 168 (1901); bags of coffee set aside in warehouse, Riggs v. Bair, 213 Pa. 402 (1906). Symbolical delivery also has been held good: delivery of key of house in which the goods were stored, Barr v. Reitz, 53 Pa. 256 (1866); Goddard v. Weil, 165 Pa. 419 (1895); delivery of keys of safe and of room in which it was stored for delivery of the safe, Benford v. Schell, 55 Pa. 393 (1861). The principal case, as the transaction took place in Pennsylvania, is governed by local law, and the decision appears correct; the transfer of the warehouse receipt was a valid constructive delivery, especially as it was the established custom of the trade to treat the warehouse receipts of whiskey as the whiskey itself. The opinion of the Circuit Court of Appeals on the former trial of this case contains a very clear summary of the law in Pennsylvania upon this question. Taney v. Penn National Bank, 187 Fed. Rep. 689, 696 (1911).

SPECIFIC PERFORMANCE—PERSONALTY—SAUERKRAUT—In a suit to compel specific performance of a contract for the sale of a quantity of sauerkraut equal to that produced by the seller and sold to the buyer in 1911, which was only a fair quality, the bill was dismissed. *Held:* Sauerkraut is a staple, com-

mercial commodity whose market value can be easily and accurately ascertained and which the plaintiff could have easily procured, and a court of equity will not compel the specific performance of a contract for the sale of personal property unless special circumstances and conditions exist which render inadequate a suit at law to recover damages for its breach. Lehman Co. v. Island City Pickle Co., 208 Fed. Rep. 000 (Mich. 1913).

It is a matter of course for courts of equity to decree specific performance of a contract for the conveyance of real estate and it does not depend upon the inadequacy of the legal remedy in the particular case. Cumberledge v. Brooks, 235 Ill. 249 (1908); Peer v. Wadsworth, 67 N. J. Eq. 191 (1904); Lighton v. Syracuse, 96 N. Y. S. 692 (1905); Hammond v. Foreman, 26 S. E. Rep. 212 (1897). Pennsylvania is *contra* because of the possibility to obtain the same results at law. Smaltz's App. 99 Pa. 310 (1882); 50 U. OF PA. L. R. 65 (1902).

On the other hand as a general rule specific performance is not decreed where the subject matter of the contract is personal property, because in the case of ordinary chattels, the recovery of damages at law enables the plaintiff to purchase the same quantity of like goods. Block v. Shaw, 78 Ark. 511 (1906); Dorman v. McDonald, 47 Fla. 252 (1904). In accordance with the principal case the following articles have been held ordinary articles of commerce: Cotton, Block v. Shaw, *supra;* cattle, Lumley v. Miller, 119 N. W. Rep. 1014 (S. D. 1909); logs or lumber, Neal v. Parker, 98 Md. 254 (1904); whiskey, Langford v. Taylor, 99 Va. 577 (1901); bar-room fixtures, Meehan v. Owens, 196 Pa. 69 (1900); stocks of groceries, Mesandona v. Burg, 49 La. Ann. 656 (1897), or fruit, Carolee v. Handelis, 103 Ga. 299 (1898); pianos, Gillett v. Warren, 10 N. M. 523 (1900); stock in corporation, Ryan v. McLane, 91 Md. 175 (1900); Butler v. Wright, 186 N. Y. 259 (1906).

But even contracts for such articles may be enforced where peculiar circumstances make it difficult for the vendee to obtain similar goods. Eichbaum v. Sample, 213 Pa. 216 (1906); Curtice Bros. v. Catts, 72 N. J. Eq. 831 (1907). And contracts will be enforced for unique or rare chattels such as valuable jars, Falcke v. Gray, 29 L. J. Ch. 28 (Eng. 1860): an old altar-piece, Somerset v. Cookson, 3 P. Wms. 390 (Eng. 1735); a painting, Lowther v. Lowther, 13 Ves. Jr. 95 (Eng. 1806); annuities, Prichard v. Overy, 1 Jac & W. 396 (Eng. 1820); Harris v. Parry, 215 Pa. 174 (1907); stock having no market value and not readily procurable, Fleishman v. Woods, 135 Cal. 256 (1901); Eichbaum v. Sample, 213 Pa. 216 (1906); ships, Hurd v. Groch, 51 Atl. 278 (N. J. Ch. 1898); documents, such as deeds, title-papers, private letters, Fred v. Fred. 50 Atl. 776 (N. C. Ch. 1901); Dock v. Dock, 180 Pa. 14 (1896); patent rights and copyrights, Young v. Gilmour, 69 N. Y. S. 191 (1901); Corbin v. Tracey, 34 Conn. 325 (1867); Cogent v. Gibson, 33 Beav. 557, (Eng. 1864), and patented articles, Adams v. Messinger, 147 Mass. 185 (1888).

SPECIFIC PERFORMANCE—RIGHTS OF ONE NOT A PARTY TO THE CONTRACT—The injured judgment creditor cannot compel specific performance of a contract of insurance whereby the judgment debtor was insured against loss through liability to others. Van Reen v. Aetna Life Insurance Co., 209 Fed. Rep. 691 (1913).

The terms of the policy were such that it was held that the insurer incurred no liability until the insured suffered damage, that is, until he satisfied the judgment. Of course, if there is no liability on the part of the insurer, no one can compel performance of the contract. Under this interpretation of such contracts, all efforts to get hold of the insurance money have proved futile. Garnishment has failed, for there is no debt owing the assured, since he has incurred no loss. Allen v. Aetna Insurance Co., 145 Fed. Rep. 881 (1906). Assignment is no more effective, for the assignee can have no better claim than the assured assignor, and he has no right of action until he has satisfied the judgment. Thompson v. Allen, 12 Ind. 539 (1859). The insurer is not trustee of a fund for the injured party, and may settle with the as-

sured without incurring any liability to any third parties. Bains v. Atkins, 181 Mass. 240 (1902). Action at law by the injured party as one for whose benefit a contract was entered into has failed, because the contract is for the protection of the assured when he has incurred loss and not for the benefit of the injured party, and because, until the judgment is satisfied, there is, at all events, no liability on the part of the insurer. Beyer v. International Aluminum Co., 101 N. Y. S. 83 (1906). Directly in accord with the principal case is Frye v. Bath Gas Co., 97 Me. 241 (1903).

It is conceivable that the insurer and insured might enter into such a contract that the insurer agrees to insure against liability, and not only for damages incurred through liability. Gilbert v. Wiman, 1 N. Y. 550 (1848). Under such circumstances, as soon as final judgment has been rendered against the assured, there is a debt due him from the insurer and this debt may be garnisheed by the judgment creditor. Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286 (1895); Fritchie v. Miller's Extract Co., 197 Pa. 401 (1900). A contract of insurance substantially identical with the one in the principal case has been construed to be one of insurance against liability and the judgment creditor has been given all rights which he would have under a policy clearly one insuring against liability. Sanders v. Frankfort Insurance Co., 72 N. H. 485 (1904). This case, however seems against the great weight of authority. Under all these cases it appears that the judgment creditor could garnishee the insurance company for as great a sum as the judgment debtor has paid, until the judgment is satisfied.

TORTS—INDEMNITY—RECOVERY FROM PARTY PRIMARILY LIABLE—A railroad company was granted a right of way over a certain city street. While constructing its line of railway, the street was left in a dangerous condition and a pedestrian received therefrom a severe personal injury for which he recovered against the city. Suit was instituted by the city to recover over against the company. *Held:* The efficient and primary cause of the accident was the negligence of the defendant for which it is answerable over to the city. City of Astoria v. Astoria & C. R. R. Co., 136 Pac. Rep. 645 (Ore. 1913).

As a general rule, one wrongdoer who has been forced to pay damages has no right of contribution from another. This principle is well shown in a recent case where an injury was received from a defective street, judgment recovered against the municipality and the right to recover over was denied as against one under contract to keep the street in repair. It was here said that the city should have repaired the defect and then called upon the contractor for reimbursement. City of Des Moines v. Barber Asphalt Co., 208 Fed. Rep. 828 (1913).

The rule as stated above applies only when the wrongdoers are *in pari delicto*. If it is shown that one is at fault to a greater extent than the other or that one is guilty of mere passive negligence, while the direct cause of the injury is the active negligence of the other, recovery over against the principal wrongdoer will be allowed. Lowell v. Boston & Lowell R. R. Co., 40 Mass. 24 (1839). This case is the leading authority upon the subject and has been cited with approval in all of the later decisions.

Municipalities against which judgments have been rendered in favor of parties injured on account of defects in streets, may always recover over against the party whose negligence was the principal and direct cause of the accident. Waterbury v. Traction Co., 47 Conn. 152 (1901); Brooklyn v. Brooklyn City R. Co., 57 Barb. 497 (N. Y. 1870). Judgment rendered against the defendant in the first suit is conclusive upon the person liable over, provided notice be given to the latter and full opportunity be afforded him to defend the action. Washington Gas Co. v. Dist. of Columbia, 161 U. S. 316 (1895). Not only the amount of the judgment may be recovered, but also all legitimate costs incurred in defending the prior action, including attorney's fees. Westfield v. Mayo, 122 Mass. 100 (1877).

TRADEMARKS—TERRITORIAL EXTENT OF PROTECTION—The complainant corporation adopted in 1872 the words "Tea Rose" to designate a make of flour which it had been selling since that time, the sales, however, being confined to the territory north of the Ohio River. The defendant corporation has been selling flour as "Tea Rose" flour since 1904 in the southeastern States in ignorance of the trade conducted by the complainant under the same name. A bill was brought to restrain the defendant from using the name "Tea Rose" throughout this southeastern district. *Held:* The decree will be refused, because complainant is only entitled to protection for his trademark in those districts in which his goods are actually sold. Hanover Star Milling Co. v. Allen & Wheeler Co., 208 Fed. Rep. 513 (1913).

The court cites no authorities for this geographical limitation of protection of a trademark, but considers that the right in a trademark and the right to be free from unfair competition as so similar that since there is a geographical limit to the protection granted against unfair competition there should be the same limitation to trademark protection. The court shows that in both "trademark" and "unfair competition" cases the injury by infringement is an injury to trade and maintains that where complainant has no trade in a particular district he cannot be injured by an infringement of his trademark.

It is submitted that this case cannot be supported either on principle or by authority. The distinction between the basis of protection of a trademark and against unfair competition is today clearly established, 62 U. OF P. LAW REV. 458. The holder of a valid trademark has property rights in the mark, and the mere proof of infringement will give him a right to relief, whereas the protection against unfair competition is predicated on the actual competition of the trade of the two parties. Thus it is obvious that there can never be protection from unfair competition unless there exists actual competition. A trademark, however, which is a property right, even though a right inseparably connected with trade, is of little value unless unlimited in territorial extent. It is an exclusive right, Bissell v. Bissell, 121 Fed. Rep. 357, 364 (1903), and amounts to a monopoly of the name or mark appropriated. The basis for protection from unfair competition is for these reasons not analogous to the protection of a trademark and the rules adopted in the one case should have no application in the other.

The only "trademark cases" cited by the court in the principal case are in opposition to the decision there reached. Derringer v. Plate, 29 Cal. 292 (1866); Kidd v. Johnson, 100 U. S. 617 (1879); Hygeia Water Co. v. Ice Co., 144 Fed. 139 (1906); Hopkins on Trademarks, §13. An effort is made to distinguish them on the ground that they merely support the proposition that a trademark has no territorial limitation provided the trade with which it is connected has no such limitation. It is submitted that the language used in this case does not warrant this conclusion.

TRUSTS—CREATION—VOLUNTARY—WITHOUT KNOWLEDGE OF BENEFICIARY—The owner of a note deposited it at a bank assigning it to her son by writing on the back of it "I hereby assign this note to my son, to be given him at my death, reserving ownership and control of same, to myself, until that time"—to which she attached her signature. She died and a dispute arose over the possession of the note. *Held:* A trust was created with the bank as trustee in favor of the son even though he never knew of it. Marshall v. Marshall, 160 S. W. Rep. 775 (Ky. 1913).

This is in accord with the general rules of trusts: First, that where a donor intends to make a gift by a conveyance to uses or by declaring himself trustee for the donee, equity will enforce such gift only in the manner in which it was intended, and if it fails in that manner as a gift in that it was incomplete, it will not be enforced in any other manner. Grover v. Grover, 24 Pick. 261 (Mass. 1835); Notes in Ames Cases on Trusts, pages 155, 162; Richards v. Delbridge, L. R. 18 Eq. 11 (Eng. 1874); Lawrence v. Lawrence, 181 Ill. 248 (1899). Second, a voluntary trust can be enforced

by the *cestui que trust* when it is an "executed" voluntary trust, where the power of revocation which was included was not exercised. Hammerstein v. Equitable Trust Co., 103 N. E. 706 (N. Y. 1913). Third, the fact that the donee had no notice or knowledge of the trust during the life of the settler will not affect the trust. Merigan v. McGonigle, 205 Pa. 321 (1903); Conn. Savings Bank v. Albee, 33 Am. St. Rep. 944 (Vt. 1892); Marquette v. Wilkinson, 119 Mich. 414 (1899); Taylor v. Watkins, 13 So. Rep. 811 (Miss. 1893); Totten v. Satten, 179 N. Y. 112 (1904), except in Massachusetts if the trust is voluntary and donor has not parted with possession. Boynton v. Gale, 194 Mass. 320 (1907).

TRUSTS—STATUTE OF FRAUDS—PROOF OF PAROL TRUSTS IN LAND—An owner of property by deed of bargain and sale, reciting a valuable consideration paid, conveyed to his daughter a tract of land. At the time of conveyance no consideration was paid, and the daughter took and held the land with the understanding and agreement that she would hold it in trust for the grantor's children. This trust was proved by parol. *Held:* There was no error for that section of the Statute of Frauds, which requires contracts concerning land to be in writing does not affect the value of trusts or the evidence by which they are established. Jones v. Jones, 80 S. E. Rep. 430 (N. C. 1913).

This is in accord with the general rule that a trust arising on transmutation of possession, orally declared by the grantor, may be proved by parol where section seven of English Statute of Frauds, 29 Car. II, c. 3, is not in force. 61 U. OF P. LAW REV. 687. For the States which have adopted this section of the Statute of Frauds forbidding the proof of parol trusts of realty, see Ames Cases on Trusts, Vol. I, 176.