NOTES AND COMMENTS ON RECENT DECISIONS.

IMPUTED NEGLIGENCE.

Persons riding in private vehicles, etc., at invitation of owner.

The Supreme Court of Montana in Whittaker *v.* City of Helena, 35 Pac. Rep. 904, has recently added itself to the few courts which uphold the erroneous doctrine that a person who is riding in a private vehicle at the invitation of the owner is chargeable with the contributory negligence of the latter. This decision is not supported by any independent reasoning, but rests wholly on the authority of Prideaux *v.* Mineral Point, 43 Wis. 513. That case argues the matter as follows:

"One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it."

This case, however, stands almost alone, and is opposed to an overwhelming weight of authority, as was clearly shown by an annotation on this very subject in Vol. 32 of this MAGAZINE, p. 763; and is moreover opposed to every principle of law and justice. One person cannot be held responsible for the acts of another unless there is some relation between them that will make those acts in legal effects the acts of the former. The only relations that have this effect are those of principal and agent, including master and servant, and that anonymous relation, akin to conspiracy in criminal law, which exists between those engaged in the prosecution of a joint enterprise, and by which each, though equally a principal with the others is also, to all intents and purposes, the agent of each of them.

It is manifest that this latter relation cannot exist between the driver of the vehicle and the one who rides in it at his invitation. That point has never been seriously urged, and could not well be, in face of the plain facts. Nor is it much more reasonable to hold that the driver is the agent of the one riding with him. In order to constitute the relation of principal and agent, there must be a right in the former to control the latter. A free agent has no principal, And in cases like the one in point it will hardly be contended that the passenger, as we may call him, has any right to control the motions of the driver. He may remonstrate, he may refuse to ride with him, he may, in short, use any and all means of persuasion at his command, or even use words of control, but the driver is under no obligation to obey him, and it is this obligation to obey that constitutes control in the legal sense.

There is no trust in the acceptance of an invitation to ride that will exonerate another whose negligence contributes to the injury. It is difficult to see what is meant by the word trust in such a connection. Neither does the rider accept the conveyance for the time being as his own, for this implies control, and there can be no control from the very nature of the case. It would be much more reasonable to hold that the hirer of a public hack or cab adopted that conveyance as his own, and in fact the hirer in such case does exercise some control, at least as to his destination. But in this latter case, the mere fact of hiring, by the almost unanimous assent of the authorities, does not make the driver the agent of the hirer; and this doctrine has been affirmed by the Supreme Court of the United States: Little *v.* Hackett, 116 U. S. 366.

A fortiori, then, one who rides in a private conveyance on invitation cannot in any sense of the word make the conveyance his own, or make the driver his agent. To quote the language of a well-considered case, one on all fours with the case under discussion, and in which the whole ground was carefully reviewed, "where, as in this case, the passenger has no control over the driver, and does not own the vehicle, and is without blame, and there is no ground in truth and reality for holding him to be the principal or master, there is neither

reason nor justice in holding him bound by the contributory negligence of the driver:" R. R. *v.* Hogeland, 66 Md. 149.

There is the additional consideration that there has never been an attempt to extend this doctrine to the case of direct negligence on the part of the driver. Yet a master is responsible for the negligence of the driver of his own carriage; and if the driver is the agent of the invited passenger for contributory negligence why not for all other purposes? "It is a poor rule that won't work both ways," as the author of the annotation heretofore alluded to very justly remarks; and that maxim applies with great force to the present case. Certainly, to hold that the driver is an agent for one purpose, and not for another, is inconsistent to a marked degree, and would seem to betray a consciousness of the inherent weakness of the former position.

The question, therefore, does not seem to have had full presentment or consideration in the Montana Case; and it is to be hoped that when it comes before the court again, if that should happen, that the present decision will be overruled, and a doctrine announced more consonant with authority, with reason and with justice.

The foregoing remarks apply only to the imputation of negligence as matter of law, resting on the relation between the parties. The passenger may be negligent on his own part, by riding with a driver known to be reckless or in a vehicle known to be unsafe, by not keeping a proper lookout for danger, or by encouraging the driver to expose them both to risk. But these are wholly different considerations, and do not apply to or affect the question of imputation.

ARDEMUS STEWART.

EQUITY CASES.

Trustee ex-malificio following trust funds.

An interesting opinion was handed down by the Supreme Court of the United States in January last in the case of Angle *v.* Chicago, St. Paul, etc., Ry. Co., reported in 151 U. S. 1.

Angle had contracted with what the opinion calls the Portgage Company to complete the construction of its road within a time specified by the Legislature of Wisconsin as a condition upon which a certain land grant to the company depended. He was pushing the work vigorously and apparently, would undoubtedly have finished it within the specified time. A rival company, called the Omaha Company (the defendant), was desirous of securing the grant for itself and by outrageous frauds compassed its designs by inducing the Legislature to pass an Act before the time allowed the Portgage Company had expired revoking the grant to that company and bestowing it upon the Omaha Company. The result of their efforts was that Angle's work was arrested, his material seized by the creditors who were supplying them, his laborers scattered and all profit which he would have received was lost to him. He thereupon sued the Portgage Company in an action at law and obtained judgment, and upon execution being returned *nulla bona*, he filed his bill in equity to reach the land in question in the Omaha Company's hands. The defendant filed a demurrer to the bill, the effect of which was to admit the fraud and conspiracy charged, *i. e.*, that the officers of the Portgage Company had been bribed by the Omaha Company to betray their trust by placing the entire outstanding stock of the former under the control of the latter, and that the Legislature had been induced by false allegations as to the progress of the work to revoke the grant to the Portgage Company and to bestow it upon the Omaha Company. The defendant relied upon the Act of the Legislature as a bar to subjecting this land which had been given to them to the debts of the company from which it had been taken away. The argument was that to allow the plaintiff to recover was to impeach the validity of the Act contrary to the established rule that whenever an Act of the Legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency or the motives of the legislators, or the reasons which were spread before them to induce the passage of the Act, a rule which rests upon the principle of the independence of the

Legislature as one of the co-ordinate departments of the government. (Fletcher *v.* Peck, 6 Cranch, 87.) The reply of the court to this was that the wrongdoing of the Omaha Company preceded the Act and that a remedy for that wrong once in existence could not be destroyed unless the Legislature had the power either to condone the wrongs or acting in a judicial capacity to decide that these wrongs gave no cause of action. Such power, of course, could not be claimed.

The defendant also raised the objection that in an action at law the defendant might obtain satisfaction for his injuries. To this the court answered that under the circumstances the remedy at law was not adequate, and they went even deeper into the principles involved. "Waiving the question as to the solvency of the Omaha Company and assuming that any judgment against it could be fully satisfied by legal process then remains a proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure by wrongful acts, and further, as these lands were given to aid in the construction of this road the defendant became a trustee *ex-malificio* in regard to them, and the plaintiff could pursue them into its hands since in good conscience he is entitled to them to the extent of the payment for his work of which the defendant unjustly deprived him by its method of obtaining the property.

Mr. Justice HARLAN dissented on the ground that Angle should have kept on with his work for it was not clear that his injury was the direct result of the defendant's acts, "the attempted revocation by the Legislature and the loss by the company of credit in financial circles do not in law hold the relation of cause and effect." Further, he agreed with the counsel for the defence that to allow the plaintiff to succeed was to impeach the Act of the Legislature, for upon the principle of the adjudged cases all intrinsic evidence in regard to statutes must be excluded and the court must presume that the Legislature was in possession of every fact affecting justice of such legislation.

It would seem, however, that the opinion of the majority is

sound and that, though affected indirectly, the Act of the Legislature was in fact independent of the case. The wrong was done, the right to have it remedied arose and the defendant ought not to be allowed to use the Legislature as a shield for his wrong nor to insist that it could take away the plaintiff's remedy here any more than it could deprive him of any of his other property without compensation. Moreover, there was nothing in the case to indicate that the Legislature had given the land to the Omaha Company other than freely and with no restrictions exempting it from the usual incidents of liability for its possessor's wrongdoing. On well defined equitable principles the defendant was plainly a trustee and answerable in a court of equity for the wrongs he had done.

R. P. BRADFORD.

CONSTITUTIONAL LAW.

The police power—Preservation of game and fish.

A Statute of New York (Laws of N. Y., 1880, Chap. 591, as amended by Laws of 1883, Chap. 317), prohibits the taking of fish in certain waters within the jurisdiction of that state otherwise than by "hook and line or rod held in hand," declares "any net, pound, etc.," a public nuisance, empowers any person, and imposes upon the game and fish wardens the duty to abate and summarily destroy such nefarious devices.

In Lawton et al. *v.* Steele (14 Sup. Ct. Rep. 499), the constitutionality of this Act has been contested before the Supreme Court, and Justice BROWN delivered its opinion upholding the Act, Chief Justice FULLER and Justices FIELD and BREWER dissenting.

Of course, the validity of such a law as this rests upon that oftimes conveniently indefinite and elastic power of the state, the police power, applying as it has been held to do to circumstances so various that they include the compulsory vaccination of children and the suppression of obscene literature. It must be confessed that the application of the police power to some of the decided cases is of somewhat doubtful propriety.

The preservation of game and fish, however, seems and has

frequently been held, a distinctly proper subject for its exercise, especially when it is remembered that uniform national game laws are out of the question on account of the widely varying conditions in different parts of the country.

So much for the general classification of the legislation. The object of the law being of acknowledged wisdom and validity, are the means directed for enforcing it proper and constitutional?

The objection upon which the plaintiffs mainly relied was that the statute deprived them of their property without due process of law. They were fishermen whose nets had been found set (in violation of the Act) and promptly destroyed by the defendant, a game and fish protector. The court found that "the only real difficulty connected with the Act was the right it gave to *summarily destroy*" the confiscated nets, and met and overcame this difficulty by recognizing the eminently practical mode of preventing such a nefarious practice that such destruction presented, which, taken together with the fact that the articles destroyed were of comparatively slight value, distinguished the case from those which hold judicial proceedings necessary before condemnation.

Undoubtedly a rigid application to the facts of this case of the general principle that property cannot be taken and destroyed without due process of law, if by the latter is meant judicial proceedings, must result in the conclusion that the Act is unconstitutional. But where the general purpose sought to be accomplished by the law is one preeminently popular with all classes of law abiding citizens, and the only persons against whom its provisions operate are those who stand practically outlawed, it would be pointless and absurd to throw about the latter the protection afforded by a general principle. Of course, the comparatively slight value of the property taken, considered alone, should not exempt it from a rule which applies to property of greater value, but it is at least to be regarded as an element in forming a conclusion as to the best and most effective means of carrying the law into effect. The occupation of the poacher is one that is very difficult to put a stop to. The only thorough means of accomplishing this would seem to be to

destroy the means by which it is carried on. If it were necessary to go through a judicial process of condemnation, it is not likely that the purpose of the law would be very effectually accomplished.

The decision seems to us a fortunate departure from a general principle, and throws new light on the general subject of "due process." W. S. E.

The quo warranto proceeding in the New Jersey Senate contest.

The recent contest for the New Jersey Senate which culminated in an action of quo warranto to determine in whom vested the title to the presidency of that body is of general political rather than general legal interest. A large part of the case, also, depended upon the interpretation and construction of certain clauses of the State Constitution. The preliminary question of jurisdiction, however, interposed by counsel for Mr. Rogers, was considered at some length by the Chief Justice in his opinion. (Att'y-General ex rel. Werts *v.* Rogers et al., 28 Atlantic, 726.)

The state of facts presented to the court (without considering the political causes which produced them) was briefly, as follows: Twenty-one Senators of the State had divided themselves into two bodies. Nine of the old members, with one newly-elected member, who subsequently joined them, formed themselves into what was known as the "Adrain" Senate, while four of the old members, with seven newly-elected, comprised the "Rogers" Senate. The former had been recognized officially by the Governor, and at the time of the action remained in session. The "Rogers" Senate was recognized officially by the lower House, but not by the Executive, but it had passed various measures and had appointed certain State officers with the coöperation of the House of Assembly.

The applicants for the writ (the "Adrain" Senate) contended that the "Rogers" Senate had no legal existence inasmuch as it was organized in a manner contrary to the fundamental law of the State and the Constitution, "and, said the court, the proposition, therefore, would seem very evident that, as no

power is vested by the Constitution in this majority of Senators to construe such law in this respect, the power to expound and enforce it is lodged in the ordinary legal tribunals." (See Cooley, Constitutional Limitations, 46.) The counsel for the "Rogers" Senate, however, surprised the court by assuming the position that the interpretation of the Constitution "being a matter of purely legislative character," the court could not entertain jurisdiction of the case.

In reply to this the court said: "It is believed that no decision has been made for a century past that does not antagonize such a proposition."

The doubt expressed as to the court's jurisdiction certainly seems to have had no foundation whatever. The question was not whether the senatorial body had been organized in the accustomed mode or contrary to the custom prescribed by its own rules. Had that been the case it would have been proper for the settlement of the matter to have been arrived at by the senate itself without recourse to the courts. The court simply found itself called upon to determine whether or not the Constitution had been violated by the legislature and it has jurisdiction over such a question is clear.

The other points of the case fall, as we have said, within the particular provision of the New Jersey Constitution, and, although interesting in their bearing on the general subject present no doctrine of importance.

To readers of the daily newspapers the events which finally led to the application to the court are still fresh. The general concurrence and approval of the judgment that have been expressed form another instance of the willingness of the people of all parties to accept cheerfully a judicial decision, no matter how bitter may have been the contest.

THE CONSTITUTIONAL ASPECT OF THE HOUSE RULES.

There has been introduced into the House of Representatives at Washington a resolution amending Clause 1 of Rule VIII, of the Rules of the House. It has for its object the securing of a quorum on a yea and nay vote of the House when there is a quorum present. As is well known, for a

long time it has been the custom of the members of the minority desiring to block legislation, to refuse to vote on a call of the House, and thereby prevent the quorum of the members which is necessary to pass any measure. Mr. Reed, when he was Speaker, nullified this filibustering proceeding by counting as present, to aid in making the quorum not only those members who voted, but those who were present and refused to vote. The constitutionality of this proceeding was doubted, but all doubts relative thereto were set aside by the decision of the Supreme Court in the case of the United States *v.* Ballin, 144 U. S. 1. Mr. Justice BREWER, in his opinion in that case, said (p. 6): "The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers and their count as the sole test, or the count of the Speaker or the Clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the House may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question, and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the House is in a condition to transact business."

"As appears from the journal, at the time this bill passed the House there was present a majority, a quorum, and the House was authorized to transact any and all business. It was in a condition to act on the bill if it desired. The other branch of the question is, whether, a quorum being present, the bill received a sufficient number of votes, and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of

the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. As, for instance, in those states where the Constitution provides that a majority of all the members elected to either House shall be necessary for the passage of any bill. No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains."

The principle on which this decision rests is that the Constitution requires, and only requires the presence in the House of a majority of the members legally elected thereto in order that the House may transact business.

Any rule for ascertaining this fact—the presence of a majority of elected members—which is reasonably sure in practice of coming to a correct conclusion is constitutional. Once the fact of a quorum being present is ascertained, then anything which the majority of these members there present determine to do, the body, as an organization, does. The theory that, in order to pass a bill or do any other act as a representative body, a majority of the whole number of elected persons must unite in actively desiring the thing to be done; the theory, in other words, which required the majority party, which is responsible for legislation, to constantly keep a quorum of its own members in the House, however, it may be defended in the realm of politics or statesmanship, is entirely untenable in the realm of constitutional law.

The difficulty of obtaining a quorum in the present House of Representatives (without counting the quorum) after the manner of the last Congress above described, has been, we understand, very great. This, we presume, is the reason of the introduction into the House and the probable passage of the resolution above referred to, which, besides from its political aspect, raises a very nice question of constitutional law. The first and second sections of the resolution are as follows:

"1. Every member shall be present within the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put unless he has a direct personal or pecuniary interest in the event of such question.

Whenever in pursuance of § 5, Art. 1 of the Constitution of the United States, the House of Representatives at the request of one-fifth of the members present shall order the yeas and nays of its members on any question to be entered on its journal, and upon a call of the roll of its members for that purpose a quorum thereof shall fail to vote, each member within the hall of the House who shall fail to vote when his name is called, unless he has a direct personal or pecuniary interest in the event of such question, and each member who shall be absent from the hall of the House when his name is called, unless he has been excused, or is necessarily prevented from being present, shall be fined the sum of $10, and the Speaker shall cause an entry of such fine to be made against such member on the journal of the House, and the same shall be collected and paid into the Treasury of the United States."

Now, there can be no doubt that the House can provide rules for its own guidance and for the regulation of the conduct of its members. So far then, as the intended rule fines a member for being absent, there can be no constitutional objection to it; but, on the other hand, it is equally certain that each member of the House has a constitutional right to his vote on every question before the House, and that a resolution prohibiting any member from voting, or force any member to vote in a way different from that which they desired would violate, not only their own constitutional rights as representatives, but the constitutional rights of their constituency.

The question which is presented by the rule is this: has a member the constitutional right, being present, to abstain from voting? It might be argued that he has, for the reason that the passive act of abstaining from voting may more nearly obtain the desire of the representative in relation to the matter in dispute before the house. It may be, for instance, a perfectly logical position for one who desires the ultimate success of a measure, but thinks its consideration should be postponed until other and more pressing business was disposed of, to take this position: "If I vote against the measure, or for its postponement, I shall have, by increasing the majority for its postpone-

ment or rejection, a tendency to defeat the ultimate passage of this measure in which I am really interested. If I vote for either measure, on the other hand, I accomplish its immediate passage or consideration which will postpone other and more pressing business." In other words, it might be that, in relation to a question before a legislative body, a member thereof was not placed between the alternative of voting for or against the measure, but that he had three choices: to vote for it, to vote against it, or not to vote at all. If we are right in this, the curtailment and practical prohibition against exercising one of these choices, is unconstitutional.

Since writing the above, we understand that the proposed rule, whose constitutionality is here involved in a certain amount of doubt, has been withdrawn, and the Reed Rule substituted in its place. There seems to us to be no reason to doubt the wisdom of this course. As a political question, it may be proper that the majority should be required to keep a quorum present, they being responsible for legislation, but this principle is abandoned, as well by fining a person present ten dollars for not voting as by "counting the quorum." Around the latter method there can gather no constitutional doubts. The case we have here set out in full sets them at rest forever. But the constitutionality of the rule proposed is involved in a great deal of doubt. To fine a man ten dollars for not voting when he is present is practically to force him to vote "Yea" or "Nay" on the call of the House.

PROPERTY.

Eminent domain—Consequential damages.

The case of Butchers' Ice and Coal Co. *v.* Philadelphia, 156 Pa. 54, contains an important statement of the liability of a municipality for consequential damages to property under Art. XVI, § 8, of the Constitution of Pennsylvania. The plaintiff owned a wharf extending into the river, and the adjoining wharf owned by the city extended over one hundred feet farther into the stream than that of the plaintiff, between was a dock sixty feet wide into which the city opened

a sewer at a point on the inner side of the dock forty-seven feet from the plaintiff's wharf. It was in evidence that deposits from the sewer obstructed the dock, and that injury could have been avoided by the extension of the sewer to the end of the city's wharf. It was held that the city was liable for consequential damages and the liability was not affected the fact the sewer was on the city's land nor was essential that the land on which the sewer was constructed should have been taken by the city by right of eminent domain. The decision therefore did not turn upon the rule that the public right of navigation is paramount to the right of sewerage (Franklin Wharf Co. *v.* Portland, 67 Me. 46; S. C., 24 Amer. Rep. 1 and note), but simply upon the application of the familiar words, "taken, injured or destroyed," and therefore the case of Malone *v.* The City, 2 Pennypacker, 370, prior to the Constitution of 1874, could be distinguished. Another difference pointed out was that in Malone *v.* The City, "the sewer was built in obedience to a legislative mandate," while in the case in question the sewer was constructed by authority of an ordinance of councils under the Act of April 8, 1864. Aside, however, from these distinctions the decision indicates an intention to take a broader view of the clause of the Constitution in question and will no doubt lead to efforts to extend its reasoning to other and different kinds of damage resulting from municipal improvements.

Covenants running with land.

City real property owners in general and those engaged in the undertaking business in particular will be interested in the decision in Rowland *v.* Miller, in the New York Court of Appeals, 34 N. E. 765, affirming 18 N. Y. Supp. 793. The owner of lots in the residence part of the City of New York sold some of them under a covenant running with the land prohibiting their use for several purposes and concluding "nor shall any other buildings be erected, or trade, or business carried on upon said lots which shall be injurious or offensive to the neighboring inhabitants." Both parties occupied houses built on these lots, and an injunction was sought by the com-

plainant to restrain the defendant lessee of the house next door from carrying on the business of an undertaker upon the premises. "The parties," said the court, "had in mind ordinary normal people and meant to prohibit trades and business which would be offensive to people generally and would thus render the neighborhood to such people undesirable as a place of residence." It could not be doubted that the business of undertaking was within this definition. "Judges," said the court, "must be supposed to be acquainted with the ordinary sentiments, feelings and sensibilities of the people among whom they live," and hence, after the character of the business had been proved, the court "could have found as a matter of law that it was in violation of the restriction agreement." The contention, therefore, that the general clause in the covenant extended only to trades and kinds of business which are nuisances *per se*, could not be sustained. In view of the decision the decree is also interesting. It was ordered that the premises should not be used for holding autopsies, receiving, storing bodies, or holding funerals, but could be used to solicit orders and sell coffins by sample and the room called a "chapel" for a place of worship.