RECENT CASES.

BILLS AND NOTES.

In an action to recover money paid by mistake, it appeared that the defendant had for several months been accustomed to cash checks for one R. Four checks drawn on the plaintiff and apparently signed by R. were cashed by the defendant, who signed his name on the back without any qualification and presented them to the plaintiff for payment. The plaintiff paid the checks, but it was subsequently discovered that they were forgeries, and therefore the plaintiff brought suit to recover the amount paid. Judgment by the lower court for the defendant.

Forged Check Payable to Bearer: When Indorser Liable to Drawer

Held, error, as the defendant should be made to bear the loss.

Williamsburg Trust Co. v. *Tum Suder,* 120 N. Y. App. Div. 518.

See note appearing elsewhere in this issue.

CONSTITUTIONAL LAW.

The legislature of Michigan appropriated five hundred dollars a year to an association to aid it in prosecuting its work of creating a deeper interest in and a better knowledge of the culture and production of corn. The association was a voluntary, unincorporated body, the membership of which was limited to those residents of Michigan actively interested in the improvement of corn. The money was to be expended in such way as the directors deemed most effectual for attaining the object of the association.

Bounties: What Constitutes a Public Purpose

Held, the act was unconstitutional, for the purpose could not be considered a public one.

Michigan Corn Improvement Association v. *Auditor General,* 113 N. W. 582.

See note appearing elsewhere in this issue.

DIVORCE.

A wife sought a divorce on the ground of cruelty. The main acts of cruelty were proved by the direct testimony of complainant, corroborated only in collateral details by other witnesses. Court below granted divorce and husband appealed. *Held,* affirming the judgment, that there is no hard and fast rule preventing the granting of a divorce on complainant's testimony alone, though it is undoubtedly the correct rule that where a divorce is so granted the right thereto must be very clearly established. Supreme Court of Michigan in *Murphy* v. *Murphy,* 113 N. W. 583.

Evidence: Sufficiency

It is generally stated that a divorce will not be granted on the testimony of complainant alone. *Tate* v. *Tate,* 26 N. J. Eq. 55; *Reid* v. *Reid,* 112 Cal. 274.

Indeed, it has been held that where there is a conflict in the uncorroborated evidence of the parties, the testimony of defendant is deemed of greater weight; *Rie* v. *Rie,* 34 Ark. 37. On the other hand, a more liberal view is expressed in *Robins v. Robins,* 100 Mass. 150, where it is said that "the rule . . . . is merely a general rule of practice and not an inflexible rule of law."

EVIDENCE.

In a prosecution which resulted in defendant's conviction for manslaughter, the defendant offered evidence tending to show that his character as to peaceableness and quietness was good, this evidence to be based on the personal knowledge and observation of the witness. *Held,* that while the community reputation as to particular traits is admissible upon the question of character, the personal knowledge and belief of the witness must be excluded; *People* v. *Van Gaasbeek,* 189 N. Y. 408. Originally, the personal opinion of the witness was admitted; *Wigmore on Evidence,* Sec. 1981. In course of time the rule was conceived to be that evidence of general reputation only was admissible, and this has been generally followed; *Reg.* v. *Rowton,* Leigh and Cave 520. The original view is still adhered to in a few jurisdictions on the ground that there is no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition in question is from his own personal observation; *State* v. *Lee,* 22 Minn. 407. The evidence gained by experience is admittedly worth more than

Character: Whether Personal Opinion of the Witness is Admissible

EVIDENCE (Continued).

that from the reputation a man bears; *Wigmore on Evidence,* Sec. 1986. The New York court says if evidence of witness's personal opinion is admitted, then the incidents on which he bases his opinion must be admitted, and this would lead to collateral issues and admit evidence which is practically irrebuttable by the commonwealth. The reasoning of the court is answered by the practice in those states where the original doctrine is adhered to; but since what the witness does give is generally his personal view and it is not objected to, the question of the admissibility of this opinion evidence arises seldom and is practically unimportant. Note XXV to *Stephens' Digest of Evidence.*

MUNICIPAL CORPORATIONS.

Actions for Negligence: Notice of Injury

Action was brought for injuries sustained by falling into a hole in one of the city streets. A demurrer was sustained on the ground that no notice in writing within thirty days of the injury complained of was given as required by section 39, art. 3, c. 13, Comp. St. 1907. The plaintiff sought to avoid the effect of the statute by pleading that she was unconscious during the prescribed time and was therefore excused from giving the required notice. This plea was held insufficient; *Ellis* v. *City of Kearney,* 113 N. W. 803, Supreme Court of Nebraska. While this decision accords with the general line of cases, many states have avoided the evident injustice of the statute in such cases as this by providing that if any person receiving injuries from defects in a highway is unavoidably prevented from serving the required notice within the time prescribed by the statute, the supreme court may allow such claim to be filed if manifest injustice would otherwise be done; *Chadborne* v. *Town of Exeter,* 6u N. H. 190.

NEGLIGENCE.

Liability of Charity for Acts of Servants

The plaintiff, an inmate of a workhouse and recipient of poor law relief, was directed to assist the resident electrician in the installation of electric lights. Refusal to obey would, under the English law, have rendered the plaintiff liable to imprisonment. A scaffolding on which the plaintiff had mounted collapsed, thereby injuring the plaintiff. The accident being due to the negligence

NEGLIGENCE (Continued).

of the electrician in not having the scaffolding securely constructed, the plaintiff brought suit against the Guardians of the Poor, whose servant the electrician was.

Held, there could be no recovery.

Tozeland v. *Guardians of the Poor,* L. R. (1907) 1 K. B. 920.

See note appearing elsewhere in this issue.

Duty to Trespasser: Opening near Highway: Province of Court and Jury

The defendant maintained a cellarway to his store at the corner of two streets. On one side this was unguarded. The distance from the sidewalk to this unguarded side was two feet, the intervening space being level with the sidewalk. The plaintiff hurrying to the railroad station on a dark evening turned the corner sharply and fell into the cellarway. The lower court left the case to the jury, which found a verdict for the plaintiff. *Held,* error; *Collins* v. *Decker,* 120 N. Y. App. Div. 645.

The attitude of the court is shown by the following extracts from the opinion: "There is no difference in principle whether the stairway be two or twenty feet from the sidewalk. The act of the plaintiff in leaving the sidewalk may have been natural and excusable. But he did not take the time or trouble to properly inform himself of the exact boundaries of the streets as indicated by the sidewalk." P. 648. "I am convinced that the test of liability is whether the excavation adjoins the highway or is in such close proximity thereto that a person *while* on the highway stepping or stumbling, or making a misstep falls into the excavation, but that such liability does not exist where the traveller deviates for ever so short a distance and becomes a trespasser before he falls."

There seems a tendency in some courts to punish even innocent though technical trespassers by debarring them from recovering for negligence. In a Pennsylvania decision, Strong, *J.,* used the following expression: "There is as perfect a duty to guard against accidental injury to a night intruder into one's bed chamber as there is to look out for trespassers upon a railroad;" *Railroad* v. *Hummel,* 44 Pa. 375. It is hard to find a reasonable ground for such a view. The preferable rule would seem to make liability depend upon the probability of trespassers coming upon the property and receiving injuries; Am. and Eng. Encyc., Vol. 21, p. 472; Shearman and Redfield, Negligence, 5th Ed., Vol. 1, § 97; *Sanders* v. *Riester,* 1 Dak. 151. A man will not ordinarily be bound to anticipate wilful tres-

NEGLIGENCE (Continued).

passers. Sometimes he ought and is held to be bound to anticipate innocent trespassers. The liability imposed on one who causes injury to trespassing infants by allowing attractive dangers to be within their reach, though on his own property, is an instance of this. If this be the correct view a court should not take a case from the jury unless no reasonable differences of opinion could be entertained as to the probability of trespass and injury.

PRINCIPAL AND AGENT.

Unauthorized Sale by Stockholder: Measure of Damages

When, after notice of an unauthorized sale of a contract for the future delivery of cotton by his broker, the customer determines upon his line of conduct by immediately notifying his broker that he will hold him legally responsible, he canont measure his damages by the highest market price obtained by similar contracts within a period of two weeks after the unauthorized sale; this because he cannot speculate at the expense of his broker, but is only entitled to the highest market price attained within the reasonable time necessary to enable him to determine upon his line of action; *Hurt* v. *Miller,* 120 N. Y. App. Div. 833, McLaughlin and Clarke, *JJ.,* dissenting in part.

In actions for the conversion of stocks, etc., the weight of authority seems to support the rule allowing the recovery of the highest value of such stock from the time of the conversion up to a reasonable time after knowledge of such conversion. Cases are not lacking, however, which hold the measure of damages to be the value of the stock at the time of the conversion; *Freeman* v. *Harwood,* 49 Me. 195. Some of the states, on the other hand, have adhered to the original rule of highest intermediate value between the conversion and the trial; *Learoch* v. *Paxson,* 208 Pa. 602 (1904), Thompson, *J.* "While it is true that in the conversion of ordinary chattels the measure of damages is the value at the time of the conversion, yet, in view of the shifting character of the price of stock in our stock exchanges such a rule would be manifestly inadequate. It has, therefore, been held that stocks are an exception to the rule in question and the highest price in the market is consequently made the measure of damages." Some states have enacted statutes allowing the recovery of the highest market value of the property at any time between the conversion and the trial; Cal. Civil Code, par. 3336. But under all such statutes the action must be prosecuted with reasonable diligence.

SALES.

On Approval or Trial: Acts Constituting Election

Defendant sold a traction engine to the plaintiff in consideration of $400 and an old horse power. Ten days' trial was allowed. After testing the engine on six or seven different days the plaintiff sent word to the defendant of his absolute determination not to accept. During the rest of that day and half the next he used the engine in order to finish a job of threshing on which he was then engaged. When he demanded from the defendant the old horse power of which the defendant had obtained possession, the latter, denying the plaintiff's right to rescind, refused to return it. In an action of replevin to recover the old horse power the jury found for the plaintiff, but in answer to two questions from the court, found: (1) That plaintiff had absolutely determined to reject the machine; (2) that after so determining he proceeded to use it for the purpose of finishing the threshing job on which he was engaged. The court entered judgment for the defendant. *Held,* judgment affirmed, for the use of the machine after determination to reject constituted acceptance; *Fox* v. *Wilkinson,* 113 *No. West,* 669 (Wis.).

Acceptance, since it depends on intention, is a question of fact for the jury unless the evidence is such that reasonable men could not differ as to the conclusion to be drawn therefrom. Where goods are delivered on trial use of them in excess of what is necessary for trial, either with respect to time or amount, will usually be held conclusive evidence of exceptance in the absence of evidence to the contrary; Benjamin on Sales, 5th Ed., p. 1013; *Palmer* v. *Baufield,* 86 Wis. 441. But it is not necessarily so. The use of a horse beyond the time agreed on for trial was held not to be conclusive so as to take the case from the jury; *Kahn* v. *Klabund,* 50 Wis. 235. Where there is a question whether the use was necessary for trial or not, the case should go to the jury; *Okell* v. *Smith,* 2 E. C. L. 49. The right of the buyer to use the goods after showing a determination to reject is clearly a distinct question from the effect of such unnecessary use in evidence of intent to accept. If there is evidence clearly negativing such intent, then in spite of such unnecessary use the question should be submitted to the jury; *Schwarz* v. *Church,* 60 Minn. 183. The principal case therefore seems extreme.

SALES (Continued).

Vendor's Mistake Known to Vendee

Purchaser agreed to take certain "Bassein Rice" according to sample, and sold the invoice at an advance. After the purchaser found that the sample was not "Bassein" rice, but "Java" rice, a much more valuable kind, he ordered more, leaving the vendor under the impression that his sample was of "Bassein" rice. *Held,* in a suit by purchaser against the vendor for non-delivery, that the purchaser might recover for the failure to deliver the rice sold under mutual mistake, but no recovery could be had for that sold where the mistake was that of the vendor alone, and known only to the purchaser; *Davis* v. *Reisinger,* 12 N. Y. App. Div. 767. Where one accepts an offer in which he knows the offerer errs as to the nature or extent of his promise, equity will compel him to elect to cancel the contract, or perform it rectified to suit the offerer's real intention; *Gerrard* v. *Frankel,* 30 Beav. 445. There need not be any misleading by express words, Blackburn, *J.,* in *Lee* v. *Jones,* 17 C. B. N. S. 482; but at what point communication of the fact known to one party only is required, and what may be concealed is the question on which the authorities differ. Bramwell, B. in *Lee* v. *Jones,* 17 C. B. N. S. 482. Here, however, as the purchaser knew not only the fact concealed to the vendor, but also that the vendor was contracting on the supposition of the non-existence of that fact, the case was correctly decided; *Smith* v. *Hughes,* L. R. 6 Q. B. 597.

TORTS.

Mental Suffering as a Cause of Action: Telegraph Co.: Insult

A entered a railroad station to send a telegram from the telegraph company's office in the station. The agent in charge of the office ordered A to leave, insulted her and humiliated her by abusive language. *Held,* that since the telegraph company is a public service corporation, it has a duty to afford decent treatment to persons wishing to employ the company. That there had been a breach of this duty, and as a result A had suffered the injury of humiliation and wounded feelings and had a cause of action against the company. Court of Appeal, of Georgia, in *Dunn* v. *Western Union Tel. Co.,* 59 S. E. 189.

There is one class of cases in which mental suffering without any other injury has given rise to an action, namely, those cases

TORTS (Continued).

where mental anguish has resulted from the negligence of telegraph companies in misstating messages announcing sickness or death of a near relative; *Chapman* v. *Western Union Tel. Co.*, 90 Ky. 265; *Mentzer* v. *Tel. Co.*, 93 Iowa, 752.

But this rule is against the great weight of authority (Cooley Torts, 3d Ed., p. 92, and cases cited), and is rejected in Georgia in *Chapman* v. *Tel. Co.*, 88 Ga. 763.

It has been pointed out (*Tel. Co.* v. *Ferguson*, 157 Ind. 64) that the law takes cognizance of mental suffering in two classes of cases: (1) Where it is the result of some physical injury; (2) in such cases as malicious prosecution and libel. In both these classes of cases there is, however, a cause of action aside from the mental suffering. Here there is no injury aside from the mental suffering.

It seems, therefore, that the decision must rest on the ground that a telegraph company as a public service corporation owes extraordinary duties to the public in the course of its business.