BILLS AND NOTES—PROVISIONS AFFECTING NEGOTIABILITY.—In an action based on a note promising to pay a certain amount "for value received in one machinery as per contract, November 23, 1899," and (further on) "in case it becomes necessary to employ an attorney to collect this note, a further sum, not exceeding 10 per cent., for fees," the case turned on whether the note was rendered non-negotiable by these provisions. *Held,* it was negotiable. First National Bank of Richmond v. Badham, 68 S. E. (S. C., 1910) 536.

As the Negotiable Instruments Law has not been adopted in South Carolina, it was necessary to decide the case without reference to that act. Further than this, there was no decision in that state which satisfactorily covered the points involved. The earlier cases showed quite clearly that the judges were not of a unit on either point, and it was felt important, therefore, that this case should settle the doubts on the subject. It can hardly be said to have done so, however. The judges were two against one in deciding that the provisions in question did not destroy the negotiability of the note; and only one of them thought so as to both propositions, having one of his associates with him on the first point and the other on the second. It will thus be seen that the case is not likely to be a strong one in guiding future decisions. However, it is submitted that the result is in accord with the weight of authority on both points.

Under the Negotiable Instruments Act it is pretty well settled that the provision as to attorney's fees does not render the amount of the note uncertain, the act providing that "the sum payable is a sum certain within the meaning of this act, although it is to be paid with costs of collection or an attorney's fee, in case payment shall not be made at maturity" (Title I, Art. I, sect. 2 and sub-sect. 5). This would seem to answer the charge that a stipulation for the payment of an attorney's fee for collection after maturity renders the amount of the note uncertain, and hence destroys its negotiability.

The second point—that "for value received in one machinery as per contract of November 23" was not a condition operating to make the note non-negotiable—is more difficult to determine, owing to the fact that it is largely a matter of interpretation of the words "as per contract." It was admitted by the judge, whose opinion was adopted, that, had the phrase been "subject to the contract," or one of similar meaning, the note would not have been negotiable; and this is undoubtedly true. But he contended, and, it seems, reasonably, that this was not the proper interpretation of the words used; but that the plain intent was an expression of the consideration, "the reference to the contract being manifestly for the purpose of indicating a sale by which the title to the machinery had to be reserved as a security for the debt," as provided for further on in the note. "Such a reference to the consideration and the security does not take away from the paper a single element of a promissory note," says the judge, and he cites numerous cases supporting his view, especially three: Markey v. Corey, 108 Mich. 184; Bank of Sherman v. Apperson (C. C.), 4 Fed. 25, and Taylor v. Curry, 109 Mass. 36, the last of which decides that a promissory note given to an insurance company is not rendered non-negotiable by bearing on its face the words "On policy No. 33,-386," although the policy contained a provision for the set-off of notes due the company, in case of a loss. The weight of authority is in accord with our principal case on this point also. See Daniel's Negotiable Instruments, § 51a, and cases there cited; also Bigelow's The Law of Bills, Notes and Cheques, p. 33. As to this question, the Negotiable Instruments Act says, "an unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with a statement of the transaction which gives rise to the

instrument" (Title I, Art. I, sect. 3 and sub-sect. 2). As the act has been adopted in some of those jurisdictions where there are not cases already covering the matter, there is little ground for supposing that the question would have been decided otherwise there; and there are thus only a few courts which would have probably held the other way, deciding rather on the construction of the words than the principle involved.

CONFLICT OF LAWS—MARRIAGE—VALID WHERE MADE, VALID EVERYWHERE.—The plaintiff in Garcia v. Garcia, 127 N. W. 586 (S. C., 1910), petitioned for the annullment of her marriage to the defendant, her first cousin. It appeared such a marriage was rendered void under S. C. Civil Code, and criminal under the Penal Code, but that it was legal under the laws of California, where it was contracted. The court refused to annul the marriage, holding that it was a universal principle of the law of nations that a marriage valid where contracted was thereafter valid everywhere.

With two possible exceptions, this proposition seems accepted law. Bishop on Marriage, Divorce and Separation, Sec. 843, Vol. I. "Should there be, as occasionally may happen, a country or state permitting marriages which by the common voice of civilized nations are vicious past toleration, such marriages, though solemnized under the protection of its laws, would not be within the protection of the law of nations, because lacking the general favor essential. Therefore they would be rejected by the tribunals of every other country in which they were not by its local laws approved." Do. Sec. 857. The court were of the opinion that for consanguinity to bring a case under this exception the parties would have to be in direct line, or brothers and sisters. With the growth of a higher standard of public morality we may look forward to a time when marriage between first cousins would come under this head. So in U. S. *ex rel.* Devine v. Rodgers, 107 Fed. 886, it was held that a marriage in Russia between Russian Jews who were uncle and niece, though lawful where celebrated, would not be recognized as valid in Pennsylvania. The court conceded the general rule that a marriage valid where celebrated is valid everywhere, but said the rule was subject to at least the following exception: "If the relation, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this state to recognize the foreign marriage as valid." The relation of uncle and niece is collateral and very little closer than that of cousins.

Where it appears, as it did not in this case, that the parties went to the foreign state for the express purpose of evading the *lex domicilii*, there is some authority that the marriage will be invalid in the home state.

While holding the marriage valid in South Carolina because valid in California where it was contracted, Whiting, P. J., was careful to express no opinion as to the criminal liabilities under the Penal Code. It would seem, however, that the state could not assume the anomalous position of declaring, through its courts, the marriage valid in a civil action, and then prosecuting criminally acts done under it which could be criminal, only when not done in lawful wedlock.

CONSTITUTIONAL LAW—RELIGIOUS LIBERTY.—The Constitution of Illinois guarantees the free exercise of religious profession and worship without discrimination and prohibits the appropriation of any public fund in aid of any sectarian purpose. In one of the school districts of that state a part of the regular school exercises consisted in the reading of the Bible, the repeating of the Lord's Prayer, and the singing of hymns. These were declared to be violative of the above constitutional provisions, and as such were ordered discontinued by the court. People v. Board of Education of District 24, 92 N. E. (Ill.) 251 (1910). The decision was based on the ground that these exercises constitute religious worship, and that the reading of the Bible is equivalent to sectarian instruction. Two of the judges dissented, claiming that the

Bible is not a sectarian book at all, that it is merely the interpretation of it that is sectarian, and that consequently the mere reading from it cannot amount to sectarian instruction.

The interpretation of similar constitutional provisions in other states has been conflicting. In Wisconsin it has been held that the mere reading of the Bible is in itself sectarian. State v. District Board of School District No. 8, 76 Wis. 177. In Nebraska the question as to whether or not such exercises amount to sectarian instruction is to be determined by the court from the facts of each particular case, in pursuance of the rule that the point where the courts may rightfully interfere to prevent the use of the Bible in a public school is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has become a sectarian propagandist. In every other state where constitutional enactments substantially those of Illinois have been interpreted by the Supreme Courts of the states, it has been held that the Bible is non-sectarian in its entirety, and may therefore be read without interference in the public schools. Moore v. Monroe, 64 Iowa, 367; Hackett v. Brooksville School District, 120 Ky. 608; Billard v. Board of Education, 69 Kan. 53; Church v. Bullock, 109 S. W. (Tex.) 115. The question has not come up before the Supreme Court in Pennsylvania, but a lower court has decided that the reading from the King James' Version of the Bible and the singing of Protestant hymns, where a room was provided in which Catholic children might remain during such exercises, was not illegal under a constitutional enactment similar to that in the Illinois case. Hart v. Sharpsville Borough School District, 2 Chest. Co. 521.

The dissenting opinion in the principal case seems better grounded in reason than the majority decision.

CONTRACTS—ACCORD AND SATISFACTION—CERTIFICATION OF CHECK OPERATING IN ACCORD AND SATISFACTION.—The case of Scheffenacker v. Hoopes, 77 Atl. 130 (Md., 1910), is valuable as a decision of practical business importance. In a dispute over the amount due for certain printing the defendant sent the plaintiff a check for half the amount claimed by the latter, stipulating that it was payment in full and that the plaintiff must return it if he chose not to use it. Plaintiff never cashed the check, but had it certified at the bank upon which it was drawn. In an action to recover the balance of the claim, *held,* this was such use of the check as to constitute an acceptance of it in full accord and satisfaction.

It is generally settled law that the certification of a check is an acceptance of it and operates as payment by the drawer on the theory that upon certification the bank becomes the holder's debtor and acknowledges that funds have been placed to the credit of the holder. First Nat'l Bank v. Leach, 52 N. Y. 350; Girard Bank v. Bank of Penn Township, 39 Pa. St. 92. Where the drawer himself causes the check to be certified this does not operate as payment, but merely shifts the immediate liability to pay cash. The debtor would still be liable if the bank failed before payment. Born v. First Nat'l Bank, 123 Ind. 78. Nor does the creditor, in the absence of an express stipulation to the contrary, lose his right to demand payment of his claim in money. Hancock v. Yaden, 121 Ind. 366. These cases merely limit the general doctrine and are not in conflict with it, for it can well be argued that where the holder has the check certified he thereby accepts an implied condition to waive an actual present cash payment. In view of this state of the law the decision under discussion would seem in accord with the general trend of authority. It is but a step farther to hold certification a good use of a check operating as accord and satisfaction, and the conclusion is reached by applying the principles mentioned to a new situation. It is therefore on its practical, not its legal side, that the case attracts attention. The cases bearing directly on the question under discussion are few, but note in accord St. Regis Paper Co. v. Tonawanda Paper Co., 107 App. Div. 90 (N. Y., 1905).

CORPORATIONS—INCORPORATION FOR PURPOSE OF PRACTISING LAW.—The Co-Operative Law Company was formed "to furnish its subscribers with legal advice and service, to operate in connection with the above a department of law and collections for the use and benefit of the subscribers of the company only—and to accomplish these objects said company proposes to employ and maintain a staff of competent attorneys and counsellors-at-law to give such advice." A certificate of approval was given this company by the Appellate Division Supreme Court in June, 1910, which was ordered vacated by that body four months later. On appeal the Supreme Court affirmed the vacation order. *In re* Co-Operative Law Co., 92 N. E. 15 (N. Y., 1910). Cited with approval, *In re* Bensel, 124 N. Y. S. 726.

A statute has recently been enacted in New York making it a misdemeanor for any corporation "to practise law, render or furnish legal services or advice, furnish attorneys or counsellors for that purpose, or advertise for or solicit legal business." Penal Laws, § 280, c. 483 Laws of 1909. This statute would, of course, effectually prevent any further attempt at incorporation, but as the application was made prior to this statute the company's counsel (it did not plead its own cause) claimed the right to incorporate under the clause allowing this privilege for "any lawful purpose." As no state except New York expressly forbids a corporation practising law, and as nearly all the states have the above act as to lawful business, the remarks of the court on this subject are particularly interesting.

"Business," says the court, "in its ordinary sense is what is meant by these provisions—not the calling of members of the great professions which have always been subject to peculiar difficulties and responsibilities. Requisites for admission to the bar, such as study, examinations, registration, etc., are peculiarly personal and cannot be fulfilled by a corporation. The relation of attorney and client, moreover, is a very close and private one involving the highest trust and confidence, nor could it but tend to degrade the bar to make some of its members subject to a money-making corporation, acting not for the advancement of justice, but for its own sordid interests."

We have, therefore, in this case authority for denying the right of incorporation to a body intending to practise law and wishing to incorporate under the usual statutes. While this is the first decision on the subject, there are cases analogous in doctrine forbidding the practise of medicine or dentistry by a corporation. People v. Woodbury Dermatological Inst., 192 N. Y. 454; Hannon v. Siegal-Cooper Co., 167 N. Y. 244. In accord see language of Weiss, P. J., in a Pennsylvania case: "The right to practice dentistry could not be declared from the language 'to engage in any other lawful business of any kind or character.'" Comm. v. Alba Dentist Co., 13 Pa. Dist. Rep. 432. Whether the object be medicine or law the same reasoning applies, and the result is and should be the same under the well-known principle that no corporation will be incorporated where its purpose is uncertain or doubtful, or where it may be perverted to improper or unworthy purposes, injurious to morals and the public welfare. *In re* Chinese Club, 1 Pa. Dist. Rep. 84. The New York Supreme Court is to be congratulated on its decision, which cannot but commend itself to all truly interested in the advancement of the bar.

CRIMES—SUSPENSION OF CIVIL REMEDY.—The Mayor and City Council of Baltimore brought action against a former clerk in the office of the register of the Mayor and City Council for some $24,000, alleged to have been stolen by the defendant while in this office. At the same time prosecution for the identical larceny, was instituted in the Criminal Court of the City of Baltimore. The civil suit came into the Court of Appeals of Maryland on an appeal from a judgment overruling the defendant's motion to quash an attachment on original process while the criminal prosecution was still pending. In this situation the appellant contended that under Section 261, Article 27 of the Code of Public General Laws of Maryland, which provides that "every person convicted of larceny of the value of $5 or upwards shall restore the

money, goods or thing taken to the original owner, or pay the full value thereof and be sentenced to the penitentiary," etc., a special jurisdiction is conferred upon the criminal courts of the state in all matters of restitution in larceny, "the restoration of the goods or their value being predicated on conviction and being part of the punishment prescribed, and the said courts having exclusive jurisdiction of all felonies committed within the bounds of their authority." But the court did not adopt this view, holding that the restoration of the property was a part of the judgment to be entered, but not punishment prescribed, and was designed to effect an immediate restoration of any of the stolen property in the custody of the court or state's officer, without necessity of recourse to a civil suit for its recovery. A contrary rule would withhold from the real owner until the conviction of the thief, the civil remedy to recover the property stolen or its value, and it could not be supposed that this was the design of the Legislature. Downs v. Mayor, etc., of City of Baltimore, 76 Atlantic, 861.

In thus deciding, the court has followed the rule almost universally adopted in the United States. In England the doctrine of the suspension of civil remedy in the case of felony seems to have been favored in some of the earlier cases, but there is little of decisive authority to support it and in a comparatively recent case the court remarked that it was exploded, though the decision did not turn directly on that point. Midland Ins. Co. v. Smith, L. R. 6, Q. B. D. 561. However, it is easy to account for the origin of such a doctrine in that country. In feudal times and even later, when all felonies were punished by death and the property of the felon was forfeited to the crown, a civil action would be of no avail. Where proceedings were instituted by the voluntary action of the party injured by the crime, the "policy of the law required that before the party injured by any felonious act could seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal in order that the justice of the country may be first satisfied in respect to the public offence." Lord Ellenborough in Crosby v. Leng, 12 East. 409.

It was inevitable that some of the early decisions on this point in the United States should be contradictory. But the institution of public prosecutors and the much greater leniency in the punishment of felons seemed to furnish the court good reasons for discarding the old doctrine. Boston & Worcester R. R. Co. v. Dana, 1 Gray, 83, repudiated the early rule in Massachusetts. Pettingill v. Rideout, 6 N. H. 454, overthrowing Grafton Bank v. Flanders, 4 N. H. 239, did the same thing in New Hampshire. Ballew v. Alexander, 6 Humph. Tenn. 433, follows Massachusetts, as does Hyatt v. Adams, 16 Mich. 180. Plummer v. Webb, *et al.*, 1 Ware, 69, calls the rule "a relic of feudal times."

In Pennsylvania, by Act of March 31, 1860, P. L. 445, civil actions may be maintained against felons in like manner as if offence "had not been feloniously done," and New York has a similar statute. Allison v. Farmers' Bank, 6. Rand, Va. 223, disapproves the rule. Some states have not been so positive. In Georgia if the injury amounted to a felony as described by the code, there must be a simultaneous, previous or concurrent prosecution for the crime. Sawtell v. Western & Atlantic R. R. Co., 61 Ga. 567; but by the Act of August 27, 1879, no prosecution for the tort as a felony need be shown in order to recover for it as a civil injury. New Jersey allows the party to institute proceedings in damages, but not "bring on the trial in advance of public duty." McBlain v. Edgar, 48 Atlantic, 600. Thus some courts merely modify the rule which others do not countenance, and the latter seem to be supported by reason and the great weight of authority.

CRIMES—SUICIDE.—In McMahan v. St., 53 So. Rep. 89 (1910 Ala.) defendant was convicted of murder and appealed. The deceased was shot and the prosecution contended that the defendant purposely shot him. The defendant testified that he and the deceased, had agreed that they should both kill them-

selves, and it was in the execution of this agreement that deceased met death. Upon this part of the evidence the court instructed the jury that if the death of the deceased was self inflicted, and was the result of a compact between him and the defendant that each take his own life, the defendant as survivor was guilty of murder. The Supreme Court affirmed the judgment of the trial court and held that the defendant was a principal in the second degree to murder.

The defendant's guilt was made to depend upon the fact that he was a principal in the second degree to a felony, and the interesting question is, if suicide is a felony what felony is it? If suicide is murder, then of course, the defendant is a principal in the second degree of murder. It was looked upon as murder at the common law as far back as Bracton and carried with a punishment for its commission, viz. forfeiture of estate. But, since with us forfeiture of estate does not penalize the felon, and since the dead cannot be punished, the law is confronted with a felony for the commission of which it has ascribed no corresponding punishment. This should, however, make it none the less criminal, because guilt is the ground of punishment and not punishment of guilt. 2 Pol. & Mait. Hist. Eng. Law. 475 n. It most nearly resembles murder, for it has all the elements of murder—the killing of a reasonable creature, the malice, and the forethought.

In Com. v. Bowen, 13 Mass. 356 (1816), the court holds self destruction murder, and therefore one who aids or abets in the commission of the act is guilty of murder, and in the State v. Lavelle, 34 S. C. 120 (1890), practically the same thing is held. In Com. v. Mink, 123 Mass. 422 (1878), it is held that one who in attempting suicide, accidentally kills another, is guilty of manslaughter and possibly murder yet they add that since the statute makes felonies only those crimes which are punishable by imprisonment in the state prison, and by death, it might not be a felony in that state. It is difficult to see the court's reasoning, because in Massachusetts, murder is punishable by death, and if suicide is murder, then it must be a felony. In Grace v. St., 69 S. W. (Tex.) 529 (1902), under a statute similar to the one in Massachusetts the courts hold that since suicide is not a penal offence, aiding and abetting in its commission is not an unlawful act. In some states such as New York, and some others their penal codes made it a felony to attempt or aid an attempt to commit suicide, yet they have not provided for the successful attempt. It must, therefore, be conceded that the courts that have held suicide to be murder have been the most logical, and have kept closer to the English common law.

EQUITY—RIGHT OF PRIVACY.—James J. Jeffries, having written an autobiography, sought to enjoin the defendant from using the name, portrait or picture of the plaintiff in or in connection with a so-called biography or life history of the plaintiff. He attempted to bring the case within the Civil Rights Law (N. Y. Cons. Laws I 308). Art. V, Sec. 51, which allows an injunction and damages to "any person whose name, portrait or picture is used for advertising purposes or for the purposes of trade without the written consent" of such person, by alleging that his picture gave defendant's newspaper "an increased circulation" and thereby "increased value as an advertising medium." Whitney, J., *held* "* * * a picture is not used for advertising purposes * * * unless it is part of an advertisement, while "trade" refers to "commerce or traffic" not to the dissemination of information." Injunction denied. Jeffries v. New York Evening Journal, 124 N. Y. Supp. 780.

The question of the existence of a right of privacy in this connection is a comparatively recent one in the law, due largely to the late development of instantaneous photography. Probably the most important decision on the subject is that by Judge Parker in Roberson v. Rochester Folding Box Co., 171 N. Y. 538. In this case the plaintiff, an infant, by her mother, sought to restrain the unauthorized publication and distribution of lithographic copies of her photograph in an advertisement for flour. In denying the injunction Judge Parker said: "There is no precedent for such an action to be found in the

decisions of this court." "Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law." "If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be combined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits." Judge Parker, however, recommended in this opinion the passage of the statute upon which the leading case is based.

The Roberson case may be taken as generally accepted, if not universal law to-day. Probably the strangest case *contra* is that of Pavesich v. New England Life Ins. Co., 122 Ga. 191, Cobb, J.: "So thoroughly satisfied are we that the law recognizes within proper limits as a legal right and that the publication of one's picture without his consent by another as an advertisement * * * is an invasion of this right that we venture to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability." However it will be noticed that in this case the photograph in question was obtained without the plaintiff's consent from a photographer. The decision therefore is in reality based on a property right and the statements as to the right of privacy are mere *dicta*.

In Corliss v. Walker, 57 Fed. 434, 64 Fed. 280, the court seems to recognize a right of privacy in private individuals (for criticism see Judge Parker in Roberson v. Rochester Box Co., *supra*) but as the person in question had impliedly consented to the use of his photograph during his lifetime, it was *held* that his relatives could not secure an injunction against its use after his death.

The Jeffries decision may be said to be thoroughly in accord with the authorities in that it refuses to recognize the right of privacy beyond the narrow scope of the statute. The property right involved in this case (the fact that the plaintiff has written an autobiography, the sale of which he alleged would be injured by the publication of his photograph) was certainly too remote to warrant the intervention of the court.

For an interesting discussion of the right of privacy see Harv. Law Review IV. 193. For cases in accord with leading case see Henry v. Cherry & Webb, 73 Atl. 97 (R. I.); Von Thodorovich v. Franz Josef Beneficial Ass., 154 Fed. 911; Moser v. Press Pub. Co., 110 N. Y. Supp. 963.

EVIDENCE—CROSS-EXAMINATION OF ACCUSED IN CRIMINAL CASES.—The accused in a murder case in his testimony in chief having neither directly nor indirectly denied, nor in any way negatived his connection with the beating of the deceased, but left the subject untouched, it was held error to require him on cross-examination to answer questions relating to conversations and statements respecting the beating, and deceased's condition attributable thereto, State v. Vance, 110 Pac. 434 (Utah, 1910).

Although there is some conflict of opinion as to the scope of the cross-examination of the defendant, the weight of authority and better opinion favors a broader scope than allowed in this case. Com. v. Mullen, 97 Mass. 545; Guy v. State, 44 Atl. (Md.) 977. It is often stated that the accused by taking the stand places himself in the position of any other witness in respect to the right of cross-examination. But where an ordinary witness may refuse any testimony tending to incriminate, the defendant is generally compelled to testify to any facts relevant and material to the issue. Evans v. O'Connor, 174 Mass. 287; Disque v. State, 49 N. J. L. 249. As the defendant's permission to testify may properly be granted only on condition that he clear up the whole matter, and not prejudice the jury in his behalf by testifying on certain facts only, this broad waiver is justified. However, concerning questions merely touching his credibility, his privilege, ought still to exist. No concealment of pertinent facts would thereby result, and otherwise the jury might be unfairly prejudiced by the defendant's commission of entirely distinct crimes.

This distinction between questions relevant to the issue and those affecting credibility is not recognized in the principal case, though accepted by most of the authorities. Holder v. State, 58 Ark. 473; Saylor v. Com., 97 Ky. 184.

The case is further interesting for its reply to an attack by Prof. Wigmore on the reversal in St. v. Shockley, 29 Utah, 25. In his criticism of this case the eminent writer on evidence does not show his usual discriminating judgment. In the Shockley case it was held reversible error to permit the state, over defendant's objections, to question him on cross-examination respecting the commission by him of other crimes in no wise connected with the crime for which he was on trial. It is apparent the evidence sought to be elicited by these questions was for the sole purpose of prejudicing defendant before the jury; and that they could not have been other than prejudicial to defendant's case. Yet Prof. Wigmore says the court "gave not even one word's consideration to the question whether the alleged errors should have affected the verdict." The criticism in fact does not fairly reflect the decision.

LIBEL—INNUENDO.—For several years the plaintiff had been a subscriber to Dun's Commercial Agency, of which the defendant was the Baltimore agent, and during this time he had enjoyed a financial standing of from ten to twenty thousand dollars in their publication. Upon his refusal to continue the subscription, he was given a blank rating, due as he alleged, to the malice of the defendant. A blank rating in the key was as follows: "The absence of rating whether of capital or credit indicates those whose business and investments render it difficult to rate satisfactorily. We therefore prefer in justice to these to give the detail reports on record at our offices." It was generally accepted in trade and among subscribers that the person so rated blank was worthless as to financial condition, untrustworthy as to character and utterly unworthy of credit in any commercial transaction. The plaintiff's business had been seriously injured as a result of this blank rating. A demurrer was filed. Thomas, J., *held:* "If the blank rating and accompanying explanation have acquired the meaning and significance stated among those to whom the lists or books are sent and the defendants, knowing that they were so understood, caused the name of the plaintiff to be published with a blank rating for the purpose of injuring him, the words must be taken in the sense in which they were used and in which those to whom they were published must have understood them. Judged in that sense, giving them that meaning, the publication if without justification was clearly libelous, *per se.*" DeWitt v. Scarlett, 77 Atl. 271 (Md.). The accuracy of the decision seems indisputable.

It is interesting to note that in this case, the malice destroys all question of privilege, Minter v. Bradstreet Co., 174 Mo. 444, on which the authorities are somewhat at variance. (See 57 Am. Law Reg. 178.) Of the recent cases, Mower-Hobart Co. v. R. G. Dun & Co., 131 Fed. 812, *held:* "communications made by such an agency will be privileged when furnished to those having an interest on the matter but * * * the communication will lose its privileged character when furnished to their subscribers generally and to those having no interest in the standing of the person as to whom the report is made." But see Denney v. Northwestern Credit Association, 104 Pac. 769 (Wash.): "We do not want to be understood as holding that an association of this character can claim a report of this or any other kind to be privileged. Mercantile agencies are not above the law and must answer for their conduct," etc.

The latter case, Denney v. N. W. Ass'n, *supra,* is practically analogous to the leading case and in accord with it, the demurrer being sustained because of insufficiency in the pleadings. Where the rating is not given in good faith, the liability seems unquestioned.

In an action of libel for a newspaper publication, which stated that the complainant had been arrested for reckless automobiling, accompanied by a female companion described in the newspaper as his affinity, the plaintiff set forth the article and alleged that it meant to charge him with being guilty of

adultery. The trial judge had permitted him to offer in evidence several articles from previous issues of the same paper, to prove that the newspaper had educated its reading public into understanding the word affinity as conveying such a meaning but on appeal, the court declared the admission of this evidence as error, because the complainant had not alleged the word affinity had acquired such a new and odious meaning and was published with such meaning. Clark, J., laid down the following rule of law: "Where a word alleged to be libellous has two meanings, one bad and the other good, the latter will be taken unless by way of innuendo the bad is brought before the attention of the court. Grant v. N. Y. Herald Co., 123 N. Y. Supp. 447.

This rule is established both in this country and in England. See in accord, decided on similar facts Stone v. Cooper, 2 Denis N. Y. 293; Rawley v. Morbury, 1 F. & F. Eng. 341; Stone v. Erison, 206 Pa. 600 (1903); Krone v. Block, 129 S. W. (Miss. 1910) 43.

The particular vice in our principal case as pointed out by Clark, J., is the attempt to apply an innuendo alleging adultery to a statement which may be perfectly innocent, were it not for the possible meaning which could be attached to the word affinity. The plaintiff failed to bring the invidious meaning of the word squarely in issue. Had he averred such meaning in regard to the word affinity and then alleged the defendant's intention to convey that meaning, the defendant would have had an opportunity to traverse this intention, whereupon the plaintiff could have properly introduced the aforementioned newspaper articles to support his position. It is well established that an innuendo is not a statement of fact but an inference. The statement of fact necessary in this case was that the word affinity had acquired an invidious meaning and the inference or innuendo, that the defendant intended to use that meaning. Here the plaintiff omitted the averment and as a result could not prove the evil meaning of the word affinity as was laid down in McGregor v. Gregory, 2 Dowl. N. S. 769, "Where particular English words have acquired some sense different from their natural one, an averment, in an action for libel by way of inducement, of that acquired sense is necessary and an innuendo without such averment is sufficient.

MARRIAGE—PRESUMPTION OF MARRIAGE, AFTER REMOVAL, UNKNOWN TO THE PARTIES CONCERNED, OF AN IMPEDIMENT THERETO.—Deceased married A and lived with her for a number of years. Subsequently he left her, moved to another state, and married B, with whom he lived for the rest of his life. He had one child by B. Twelve years after deceased married B, A died. Neither decedent nor B had any knowledge of the death. On the contrary, deceased sent money to a third party for A's support, after her death. Shortly after A's death, decedent died. B at all times in good faith believed herself to be the lawful wife of deceased, who had always treated her as such. The lower court held that these facts were sufficient to raise a presumption of marriage as between deceased and B after A's death. On appeal the Supreme Court was evenly divided, and the decision of the lower court was therefore sustained. *In re* Fitzgibbons' Estate, 127 N. W. 313 (Mich., 1910).

Marriage may be presumed from cohabitation and reputation. Inhabitants of Newburyport v. Inhabitants of Boothbay, 9 Mass. 414: Myatt v. Myatt, 44 Ill. 473. Moreover, a ceremonial marriage is not necessary to establish a valid contract of marriage after the removal of an impediment thereto, although the intercourse was meretricious in its inception. A lawful marriage may be presumed from the circumstances, where the parties are living together as man and wife and holding themselves out as such to their acquaintances. Fenton v. Reed, 4 Johns. 52; Hyde v. Hyde, 3 Bradf. 509.

The so-called presumption of marriage is, however, really an inference of fact, to be found, if at all, by the jury. State v. Worthington, 23 Minn. 528;

Northfield v. Plymouth, 20 Vt. 582; Fordham v. Gouverneur Village, 5 N. Y. App. 565; Lorimer v. Lorimer, 124 Mich. 631. It is, therefore, a rebuttable presumption, depending for its origin on the probative force of the evidence.

In view of the nature of the presumption of marriage as it exists in the law, the decision in the case under review, seems an unwarranted extension of the rule of public policy which requires that, wherever possible, marriages be declared valid; and children legitimate. The jury were advised to infer from the conduct of decedent towards B, and B's belief in the legality of her marriage, that a marriage had, in fact, been entered into, as soon as deceased was, by reason of his first wife's death, free to enter into another marriage contract. In the face of the facts of the case, such inference was rather violent. The deceased did not know of the removal of the impediment to his marriage to B. Therefore he could have had no other intent than to continue to live, as he had for years been living, in what he well knew to be an unlawful relationship with B. On the other hand, B never knew of the illegality of her supposed marriage, and could not therefore have given her consent to make that which had been illegal and void, legal and valid. Hence the inference that deceased and B entered into a legal marriage relationship after the death of A, can be supported only by a blind disregard of the facts of the case.

Further, as the dissenting opinion points out, to base the presumption of marriage in such case entirely on the good faith of the party deceived, creates the absurd possibility of having one man become, on the death of his first wife, the lawful husband of two or more women.

Sympathy for the unfortunate position of B and her child, is really the only merit in the prevailing view of the court. But, as was said in Howd. v. Breckenridge, 97 Mich. 70, it is not within the court's province to make a contract of marriage, on account of commiseration for one or contempt of the other party, where the evidence does not show one to exist.

On the question involved in *In re* Fitzgibbons' Estate, the authorities are divided. The most notable case sustaining the court's position is *In re* Well's Estate, 123 N. Y. App. 79. Cases *contra* are Randlett v. Rice, 141 Mass. 385; Cartwright *et al.* v. McGown, 121 Ill. 389; Inhabitants of Howland v. Inhabitants of Burlington, 53 Me. 54; Barnes v. Barnes, 90 Iowa, 282.

The law of Pennsylvania is, that proof of a subsequent actual marriage is necessary in such a case. Hunt's Appeal, 86 Pa. 294.

MARRIED WOMEN—CONVEYANCE FROM WIFE TO HUSBAND.—In Pennsylvania by Act of June 8, 1893, P. L. 344 a married woman is given the same right and power to acquire and dispose of property, real, personal or mixed, and to exercise that power in the same manner and extent as an unmarried person. The statute requires, however, that the husband shall join in the deed of the wife.

Under this act Alexander v. Shalala, 228 Pa. 297 (1910), holds that a direct conveyance from the wife to the husband is void even though joined in by him. The suit was an action of ejectment. It appeared at the trial that a woman, one time owner of the land in question, conveyed it to her husband, he joining in the deed as grantor and the defendants claimed under conveyance from him. In holding the deed invalid the court says: "The common law considered the husband and wife so nearly one that the husband could neither directly convey to his wife, nor be a direct grantee from her. To render such a conveyance from the wife to the husband valid, the statute must not only expressly confer the power upon her, but it must thereby remove his common law disability," citing Rice v. Brandenstein, 98 Cal. 465; Johnson v. Jouchert, 124 Ind. 105; Riley v. Wilson, 86 Tex. 240 and other cases decided under statutes requiring the joinder of the husband in the deed. And indeed this construction seems quite universal. In McCord v. Bright, 87 N. E. 654, a recent Indiana case, it was not doubted that under such statute no direct conveyance could be made from wife to husband.

In some jurisdictions, where the joinder of the husband in a deed is not required, the opposite rule has been adopted. Savage v. Savage, 80 Me. 472;

Wells v. Caywood, 3 Colo. 487; Robertson v. Robertson, 25 Iowa 350, but the statutes in these states are absolutely silent as to the husband's disability to take as grantee from his wife. There is nothing in them that can be taken to expressly remove that disability and in the light of these decisions the argument of the court in the principal case does not seem to rest on the right ground. It can hardly be doubted that were not joinder of the husband in a wife's deed required, a direct conveyance could be made from wife to husband in Pennsylvania. It is true that one, as grantor, cannot convey to himself as grantee, but the court in enforcing this principle invokes to its aid the old common law fiction of the identity of husband and wife, which the legislature had almost completely overthrown. The rule which it has preserved seems to be one of technicality rather than substance as a valid conveyance from wife to husband can be made indirectly through the medium of a third person.

NEGLIGENCE.—The plaintiff, riding on the front seat of an automobile with and by invitation of the driver, permitting the driver negligently to drive upon a railroad crossing immediately in front of an approaching train without stopping to look or listen, and exercising no care on his part to ascertain whether the crossing is safe, is guilty of negligence contributing to his own injury caused by the striking of the car by the train and cannot recover therefor from the railroad. Brommer v. P. R. R., 179 Fed. 577 (Sept., 1910). This appears to be the first reported case where this principle, established by a long list of cases, has been applied to those riding in automobiles. The negligence of the driver is not imputed to the plaintiff; but the plaintiff is held answerable for his own negligence. "A person about to cross a railroad track is under a legal duty to stop, look and listen for approaching trains, and, failing to perform this duty, he is guilty of such contributory negligence as will prevent his recovery for an injury by a collision with a train at a crossing. Under this rule, one who, riding by invitation in a vehicle in charge of another, remains in it with knowledge that it is approaching * * * a crossing * * * without keeping any lookout himself, and without any request to the driver to stop, is guilty of contributory negligence." Dean v. P. R. R., 129 Pa. 514. "It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and to avoid it if practicable." 3 Pennewill Del. 581. "He was certainly responsible for his own negligence. * * * He said nothing by way of warning to the driver nor did he ask him to stop, to look and listen; and the danger was as obvious to him as it was to the driver." Dean v. P. R. R., *supra*. "It was as much his duty as that of the driver to observe the dangers, and to avoid them, if practicable, by suggestion and protest." Davis v. Rwy., 159 Fed. 10. "It was an act of mutual negligence, for the plaintiff could have given warning of the train and avoided it, if he had acted with the ordinary prudence to be expected from a man in a wagon which was about to cross a railroad." Bronk v. R. R., 5 Daly N. Y. 454.

TORTS—INDEMNITY BETWEEN TRESPASSERS.—In the case of Hoek v. Allendale Tp. *et al.*, 126 N. W. 987 (Mich. 1910), the plaintiff was directed by the highway commissioner to work out his road tax by plowing up certain land, which a third party had planted. The commissioner agreed to "stand back" of the plaintiff if the third party made any trouble, and the plaintiff, acting in good faith, did as directed. He thereby unwittingly committed a trespass, for which the third party recovered of him. It was held that the plaintiff had a right of action against the commissioner on the contract of indemnity.

It was early laid down in the law that there could be no contribution claimed as between joint wrong doers. Merryweather v. Nixan, 8 T. R. 186. This

principle is limited, however, by the rule pronounced by Best, C. J., in Adamson v. Jarvis, 4 Bing. 72, that every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful, if the employer had the authority he pretends to have.

Under this limitation of the general rule, the decision of the Michigan court seems perfectly sound. The plaintiff's case was not only based on the implied contract of indemnity to which, according to Best, C. J., the employer became a party when he gave the plaintiff directions to do the work; but it was re-enforced by the actual words of indemnity which the commissioner spoke.

There cannot, however, be a recovery on an actual contract of indemnity where the plaintiff was employed or directed to do what he knew to be a crime, misdemeanor, trespass or wrong; and by the doing thereof was subjected to indictment or suit. To allow a right of action in such case would be "against the peace and policy of the law." Holman v. Johnson, 1 Cowp. 341: Story on Agency, Sec. 339.

Decisions in line with the judgment of the court in Hoek v. Allendale are: Coventry v. Barton, 17 Johns. (N. Y.) 54; Howe v. Buffalo, etc., R. R., 37 N. Y. 299.

TRADE AND LABOR DISPUTES—MALICIOUS MOTIVE AFFECTING CIVIL LIABILITY.—In Rhodes v. Granby Cotton Mills, 68 S. E. 824 (S. C. 1910) the plaintiff was on the black list of the defendant's strikers, which, through "mill courtesy" was accessible to other mills. The plaintiff was prevented from obtaining employment at other mills because of his being on this list, but was told that he would be employed if his name was released from the list. The plaintiff was not a striker and was wrongly on the list but the defendant refused to remove his name. The plaintiff recovered in the court below and in overuling the defendant's objections the Supreme Court said:

"The jury might well have found a verdict for the plaintiff upon reaching he conclusion that there was no conspiracy with other mills, but a lawful combination perverted by the defendant to the injury of the plaintiff." The court *held* that the working of this lawful arrangement was in this case made unlawful as to the plaintiff through the presence of malice shown by the defendant's refusal to withdraw the plaintiff's name from the list in which he was wrongly included. "As a matter of law the right of employers to combine for blacklisting purposes, or of an employer to circulate a blacklist among its various employing agents, seems to be, in the absence of malice, undoubted. But the presence of that element (malice) according to the trend of decisions gives the injured employee a right of action."

The decision in the case is doubtless correct, but the proposition of law on which it is based may profitably be discussed. The proposition briefly is that a purely malicious motive will make an act, otherwise legal, illegal. It is supported by a few well known English cases *e. g.* Quinn v. Leatham, A. C. 495 and has found even greater favor with American courts. *In re* Phelan, 62 Fed. Rep. 803; Plant v. Woods, 176 Mass. 492; Davis Watch Co. v. Robinson, 84 N. Y. Suppl. 837. The Minnesota case of Tuttle v. Buck, 170 Minn. 145 (1909) applies this doctrine to facts of a truly dramatic nature. The defendant, a banker of means, set up a barber shop for the purely malicious purpose of enticing away the plaintiff's trade and forcing him to leave town. Recovery was allowed.

The general trend of authority is that this proposition is sound but it is to be regretted that the courts have framed it in such a way as to make motive the determining question of defendant's liability. It undoubtedly derived its origin from the well known decision of Walker v. Cronin, 107 Mass. 555, which is

accepted law, and unconfused by an over-theoretical presentation. "Any act the natural result of which is an injury to a particular person, knowingly done by one person, and resulting in injury to the other, renders the actor liable to the injured person, unless the actor has a just cause and excuse." This proposition would have disposed of all the cases in which the other has been invoked, and it is to be regretted that the courts have seen fit further to refine so clear and comprehensive a statement of the law. Yet if malice be taken in the every day sense and defined as "want of just cause and excuse," the propositions are essentially the same.