RECENT CASES

BAILMENTS—WHEN IS A CARRIER A GRATUITOUS BAILEE—In the case of Hofford v. N. Y. C. I. H. R. R. Co., 43 Pa. Super Ct., 303 (1910). The plaintiff sent her trunk to the outward baggage-room intending later to purchase a ticket over the defendant's lines. She changed her mind and the next morning demanded her trunk, which in the meantime had disappeared. The defence was, first: that the Railroad was liable as a carrier under the New York Statute limiting their liability on goods of undeclared value to $150 or second that if a warehouseman, it was not liable, being a mere gratuitous bailee. The Court denied both these points and affirmed judgment for the plaintiff for the full amount demanded on the ground that the railroad was a warehouseman in the ordinary sense of the word and therefore liable as not having used ordinary and reasonable care.

All the Courts agree that in such a case the defendant company is not liable as a carrier because the duty of immediate transportation has not arisen. This applies to freight, London, etc. Ins. Co. v. Rome, etc. Ry., 144 N. Y. 200 (1894) as well as personal baggage. Murray v. International S. S. Co., 170 Mass. 166 (1898). It would seem that this is correct for if the company cannot carry the baggage because ignorant of the contemplated destination or because no destination has been decided upon by the owner, it would be a gross injustice to hold them subject to the extraordinary liabilities of common-carriers while thus awaiting the determination of the owners.

The trend of authority in these cases is to regard the company as an ordinary warehouseman or bailor for hire; Terry v. Southern Ry., 62 S. E. 249 (S. C. 1908), Ry. v. Zilly, 20 Ind. App. 569 (1897). Unless it appears that for some reason there can be no charge for the period of storage, when the liability becomes only that of a gratuitous bailee. Plow Co. v. Wabash Ry. Co., 61 Mo. App. 372 (1895), M. S. I. N. Q. Ry. v. Schurtz, 7 Mich. 515 (1854). Where, however, it does not appear that anything was charged for the storage, though for no apparent reason, there is some divergence of opinion. Some cases hold that the carrier is liable as a warehouseman the necessary compensation, being either included in the original charge or collectible at the carriers option. Bronson v. Atlantic Coast Line Ry., 56 S. E. 538 (S. C. 1907). Others hold under practically similar facts that the bailment is gratuitous, Van Gilder v. C. & N. Ry., 44 Iowa, 548 (1876), Clark v. Eastern Ry., 139 Mass. 423 (1885). The theory of these decisions seems to be that whether the carrier had a right to demand payment for storage, or not, he did not do so and therefore the bailment must be taken to be gratuitous.

In the case under discussion the exact situation upon which the courts have differed was presented. It appeared that it was customary for the company to charge storage where the trunk was called for without being checked. It did not, however, appear that the plaintiff had ever paid anything or that the railroad ever asked her to pay. The court entirely disregarded this phase of the case and based its decision upon a new and distinct ground, viz., that there is a mutual benefit in such a bailment. "We cannot agree that the acceptance by a railroad of the baggage of an intending passenger and depositing the same in a place provided by it for the purposes

of checking and safe keeping meantime, constitute a bailment for the sole benefit of the intending passenger." In support of this agreement, Hoy v. Clinton, 35 Pa. Super Ct., 297 (1908), a decision by the same court, is cited. The case was similar except that the trunk was in storage with a hotel. Under this theory it is of course impossible to regard the railroad as a gratuitous bailee.

The court seems to have solved the difficulty in a satisfactory manner. The storing of baggage prior to checking and subsequent to arrival is an essential feature of every large system. Without it there would be hopeless confusion and delay, innumerable losses in transitu and consequent litigation by patrons. It is therefore greatly beneficial to a carrier to have such facilities and use them. The benefit to the passenger is obvious. Having held out these places where baggage may be safely stored it is only fair to require of the company ordinary and reasonable care, instead of compelling the passenger to bear the burden of all but the grossest negligence. Under this decision the passenger's rights are fully protected and the carrier made to bear no greater burden than should with justice, be imposed upon it.

CONTRACTS—RESTRAINT OF TRADE IN LIMITING SALES-PRICE BY RETAILERS —The manufacturers, under a secret process, of a proprietary medicine, attempted to control the price of their product by making binding contracts with all retail druggists with whom they dealt, whereby the retailers agreed not to sell the medicine under a fixed price, and not to sell at all to wholesale or retail dealers who were not accredited agents of the manufacturer. Held, that the contracts were void as being in restraint of trade. W. H. Hill Co. v. Gray and Worcester, 127 N. W. Rep. 803 (Mich. 1910).

To the rule that contracts in general restraint of trade are void, there are several notable exceptions: Articles made under patents may be the subject of contracts by which their use and price in sub-sales may be controlled by the patentee. Bement and Sons v. National Harrow Co., 186 U. S. 70, (1902). This exception rests on the fact that the object of the patent laws is monopoly, and it would be a glaring absurdity to grant a monopoly by law, when the law prevented its enjoyment. Likewise the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made, outside of the rule as to restraints of trade. Murphy v. Christian Press Asso. Co., 38 App. Div. 426 (N. Y. 1899). Covenants restraining the use to be made of a trade secret do not contravene the common-law rule against monopoly and restraint, because so long as the owner of a secret can preserve its secrecy, there is necessarily a monopoly in its use; and there can be no restraint of trade in respect of a formula which is known only to those to whom the owner chooses to communicate it under restrictions. Harrison v. Glucose Co., 116 Fed. 304 (1902), 58 L. R. A. 915; Fowle v. Park, 131 U. S. 88 (1889). On the same basis rests the common-law protection of an author, (Werckmeister v. Am. Lithographic Co., 134 Fed. 321 [1904], 68 L. R. A. 591, and the cases relating to the distribution of news and information. Exchange Tel. Co. v. Gregory, 1 Q. B. 147 (1896); Bd. of Trade v. Grain and Stock Co., 198 U. S. 236 (1905).

Potent as are the reasons for making these exceptions to the general rule, they have no application where protection is sought for the establishment of a monopoly in the sale of an unpatented product of a secret formula, as distinguished from the formula itself. In finding that the contract in question was intended to further monopoly and stifle free competition, the court viewed it, not as a single contract, but as one of a system of contracts of which it was the main, and not merely the ancillary purpose, to consummate an unlimited restraint of trade.

Probably the most convincing authority in point, is the opinion of Mr. Justice Lurton, in Park and Sons Co. v. Hartman, 153 Fed. 24 (1907), 12 L. R. A. (N. S.) 135.

CONTRACTS—PARTIAL RESTRAINT OF TRADE VOID AS TO PUBLIC SERVICE CORPORATIONS.—In Central New York Telephone and Telegraph Co. v. Averill, 92 N. E. Rep. 206 (N. Y. 1910), the New York Court of Appeals held that a contract by the terms of which the owner of a hotel agreed to grant a telephone company the exclusive right to instal and operate telephone service in the hotel for nine years, was void as against public policy.

It is a perfectly well settled rule of law that contracts in general restraint of trade are void. It is equally well established that contracts in partial restraint of trade may be held valid if they are based on valuable considerations, and are reasonable. Horner v. Graves, 7 Bing. 744 (Eng. 1831); Keeler v. Taylor, 53 Pa. 467 (1866). The test of what is reasonable in the terms of such contracts is, according to Tindal, C. J., in Horner v. Graves, *supra:* "Whether the restraint is such as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

By this criterion the contract in the principal case would certainly seem valid; and it was so held by the decision of the Supreme Court of New York, which the Court of Appeals reversed. See 129 N. Y. App. Div. 752.

But there is a class of contracts in partial restraint of trade, which are void under any and all circumstances. To this class belong all contracts in restraint of trade to which a public service corporation is a party. So a contract whereby an oil transportation company was given the exclusive right to lay pipe lines over and under certain land, was declared invalid. Transportation Co. v. Pipe Line Co., 22 W. Va. 601 (1883). And it has been held unlawful for a railroad company to grant a telegraph company the exclusive right of erecting lines along its right of way. Western Union Co. v. American Union Co., 65 Ga. 160 (1880); R. R. Co. v. Postal Telegraph Co., 173 Ill. 508 (1898). These cases proceed on the proposition that inasmuch as the state has, by statute, given the public service corporations the right of eminent domain, it has declared its immediate interest in every parcel of land within its borders; that since the state has granted the public service companies the right to make use of any parcel of land it chooses to take, it is not for any individual to declare that on some particular parcel of land, the rights of all but one corporation serving the public in a given way, shall be restricted.

That this reasoning applies in the present case is obvious in view of the fact that the company concerned was organized under a franchise giving it the power of eminent domain. Moreover, as the court observes, "A contract between a telephone corporation and one of its subscribers whereby the latter excludes all other telephone service from his premises, deprives all the patrons of that other telephone service from telephonic communication with such subscribers and all the occupants of his premises. Though the number affected by one such exclusive contract may not be large, if exclusion may be exacted from one customer, it may be exacted from all, and so a corporation first in the field might establish a monopoly to the detriment of the community, and their deprivation of telephonic intercommunication."

CORPORATIONS—LIABILITY FOR ASSESSMENT AS BETWEEN VENDOR AND VENDEE OF STOCK.—The plaintiff, in Rogers v. Tolan, 43 Pa. Superior Ct. 248 (1910), prior to June 5, 1899 was the registered owner of one hundred shares of stock in the American Alkaline Company, a corporation of the state of New Jersey. On that day the plaintiff's brokers, sold these shares to the defendants, also brokers, for cash, and turned over the certificates transferred in blank by the plaintiff. On June 6, 1899, defendants sold to another broker, turning over the certificates as they had received them. The defendants at no time thereafter had any interest in the stock and what subsequent transfers were made the record does not disclose. The stock

was never transferred on the books of the company, always standing in the name of the plaintiff. On the insolvency of the corporation the receiver recovered from the plaintiff an assessment levied on each share to assist in the liquidation of the company's debts, and the plaintiff then brought an action against his immediate transferree for the money he was thus compelled to pay, contending that there was an implied contract on the part of purchaser of stock to indemnify the registered owner for any call or assessment he was forced to pay, not only as long as this buyer retained ownership and a right to immediate profits, but during the years after he was parted with the stock and every right and interest incident to its ownership. The Court held that no such agreement to indemnify can be implied on the part of a purchaser of stock; the only remedy for the registered owner who has been forced to pay an assessment being against the owner of the stock at the time such assessment is levied.

For this decision the Court had no Pennsylvania cases as a precedent on the facts and very few in other jurisdictions, not determined under statute. Kellock v. Beethoven, L. R. 92 B. 241 (1873) the leading English case on the subject, makes a purchaser of stock, who in his turn has sold, indemnify his vendor for assessments levied and collected from this vendor, after the passage of the stock to third parties. Brinkler v. Hamilton, 67 Md. 169 (1887) the American authority, decides that this obligation to indemnify is co-extensive with the ownership of the stock, and no liability is imposed on unregistered transferees except that created by statute. Each one of these cases was decided under a statute making every assignor and assignee of shares of stock liable, under certain conditions, to the company for calls and assessments. They both take the common law to be, that in those cases where there has been an assignment of stock, but from neglect or omission from any cause to have the actual transfer made on the books of the company to the assignee, and the assignor remains the nominal owner merely and because of that fact is required to pay calls on the stock, there is an obligation on the part of the assignee to indemnify such nominal owner of the shares, against calls made during the time the former remains virtually and potentially the owner though not registered as such, citing Walker v. Bartlett, 18 C. B. 845 and Johnson v. Underhill, 52 N. Y. 203.

These cases, however, did not declare so broad a doctrine. The defendant in each case was both unregistered transferee and holder of the stock. That a vendor may recover money he has had to pay on account of the failure of his vendee to register the transfer seems undoubted where the vendee holds the stock when the call is made, Lichten v. Verner, 8 Pa. Dist. Rep. 218. Such case falls directly under the fundamental principle that "where a person has been compelled by legal process to pay, or being so compellable has paid, money which another person was ultimately liable to pay at law or in equity so that the latter has obtained the benefit of the payment by the discharge of his liability, the person having so paid may charge the person so discharged with a debt for the money paid for his use." Leake Contracts, 5th Ed. 43. But the defendant in the principle case was not ultimately liable to pay this assessment and had obtained no benefit from the payment by the discharge of a liability. The case seems analogous to, and indeed the Court compares it with, cases of sale and purchase of land subject to payment of mortgages, taxes or other incumbrances where the principle has been declared and followed that, although each succeeding tenant is liable for the discharge of rent, taxes, etc., during his ownership, that liability is rooted in the fact of ownership and ceases with it, Walker v. Plysick, 5 Pa. 193. Business expediency certainly justifies the court in adopting this principle in the case of sale and purchase of stock, following the dicta of Prinkley v. Hamilton.

EVIDENCE—USE OF MEMORANDA BY WITNESSES.—Under a statute making it a penal offense to unite in marriage a female under fifteen a conviction was secured on the testimony of a witness who, relying upon a church

record, but neither knowing the girl nor recalling her birth or christening, testified that he christened her on such a date as would make her age under fifteen. Upon appeal the Supreme Court granted a new trial on the technical ground that the witness failed to aver that the record was correct. Territory v. Hardwood, 110 Pac. Rep. 556 (New Mexico, 1910).

The general rule is, that a witness may use written memoranda to refresh his memory (1) where the writing revives his memory and brings to his mind a recollection of the facts so that he can testify to them as of his own recollection; (2) where, although it brings to him neither any recollection of the facts mentioned in it nor any recollection of the writing itself, it nevertheless enables him to swear to the facts because of the correctness of the memoranda, in which cases the memoranda may be read. Acklen's Ex. v. Hickhan, 63 Ala. 494. Costello v. Crowell, 133 Mass. 352. Downer v. Romel, 24 Vt. 343. 1 Greenleaf Sec. 437; 1 Wigmore Sec. 747. Our principal case falls under this second class which, although generally adopted, differs in various jurisdictions as to the manner of proving the correctness of the memoranda. Some courts require that he must have known it to be correct when made. Acklen's Ex. v. Hickman, *supra*; Davis v. Field, 56 Vt. 428. "It is sufficient if he knew he could not have made the entry unless the fact was true." Costello v. Crowell, *supra*. "It is not necessary that he should be able to state that it was correctly made; it is necessary only that its correctness is in some way verified." Eder v. Reilly, 48 Minn. 437.

In Massachusetts, only regular entries, not mere casual memoranda can be used, apparently on the ground that their regularity is the only satisfactory guarantee of their correctness. Perkins v. Ins. Co., 10 Gray 323. But this is an exception to the general rule.

A testimonial guarantee of accuracy being all that is required, it is generally immaterial whether the witness was or was not the person who actually made the memorandum. Green v. Caulk, 16 Md. 573; Clark v. Bank, 164 N. Y. 498. The requirement that the memorandum shall be made by the witness himself is usually a loose *obiter dictum*. Morrison v. Chapin, 97 Mass. 82; Howard v. McDonough, 77 N. Y. 592.

EVIDENCE—SPECIFIC ACTS OF PRIOR NEGLIGENCE.—The plaintiff, a motorman, was injured in a collision caused by the reckless and negligent operation of a special car under the control of a crew alleged to be incompetent. *Held*. Evidence of specific acts of prior negligence on the part of such crew tending to prove their incompetency was admissible when the master had, or by the exercise of due care should have had, knowledge of such acts. Robbins v. Lewiston, A. & W. St. Ry., 77 Atl. 537 (Me. 1910).

This case, the first to be decided in Maine upon the precise point, is supported by the weight of authority. Where the liability of an employer depends upon the incompetency of an employe such incompetency may be proved by the general reputation of the employe; B. & O. Ry. Co. v. Henthorne, 73 Fed. 634 (1896); Cooney v. Commonwealth Av. St. Ry., 196 Mass. 13 (1907); Park v. R. R. Co., 155 N. Y. 215 (1898); or by evidence of particular acts of prior misconduct on part of the employe. First Nat. Bank v. Chandler, 144 Ala. 286 (1905); Banlec v. N. Y. & H. Ry. Co., 59 N. Y. 356 (1874); Southern Pac. R. R. Co. v. Hetzer, 135 Fed. 272 (1905); *contra*, Frazier v. Pa. R. R., 38 Pa. 104 (1860); Hatt v. Nay, 144 Mass. 186 (1887).

The Massachusetts and Pennsylvania Courts which alone hold *contra* to the doctrine of the principal case base their rule of exclusion upon the doctrine of unfair surprise to the defendant whose liability is thus made to depend on facts of which he has no prior notice and so cannot fairly try and of multiplicity of issues tending to confuse the jury. Huntington, etc., Ry. Co. v. Decker, 82 Pa. 119 (1876) modifying Frazier v. R. R., *supra;* Connors v. Norton, 160 Mass. 333 (1894).

It is submitted that evidence of particular acts of prior negligence has a logically probative force upon the issue of incompetency which outweighs any reasons of policy given for its exclusion. The master whose liability

now depends upon his failure to discharge an incompetent employe would not discharge a servant merely because he had gained a general reputation for incompetency. He would require information of particular acts of misconduct. It follows that the jury should be permitted to judge of the incompetency of the servant from the same facts on which the master ought to have acted. Metropolitan, etc., Ry. v. Fortin, 203 Ill. 454 (1903); Pittsburgh, Ft. W. & C. Ry. Co. v. Ruby, 38 Ind. 294 (1871).

The general reputation of a servant for incompetency is of value in proving the master's knowledge thereof. When the employe's acts of misconduct are so gross as to be generally known throughout the community, the master necessarily knew or should have known of them. O'Donnell v. American Sugar Refining Co., 58 N. Y. S. 640 (1899); Gulf C. & S. F. Ry. v. Hays, 89 S. W. 29 (Tex. 1905).

HUSBAND AND WIFE—ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTION.—In an action by one married woman, living apart from her husband, against another, similarly situated, for enticing away plaintiff's husband and alienating his affections, neither husband being joined in the suit, it was decided that plaintiff could recover under certain statutes for the benefit of married women, upon which she based her case. Eliason v. Draper, 77 Atl. Rep. 572 (Del. 1910).

The first statute, enacted in 1871 and amended in 1893, provides that a "married woman living separate from, and not supported by, her husband, . . . may sue in her own name, and for her own use, for . . . the redress of her personal wrongs, torts, or private injuries." The second, enacted in 1873, provides "That any married woman may prosecute and defend suits at law or in equity for the preservation or protection of her property, as if unmarried. . . ." The court, after stating that plaintiff could have recovered under the Act of 1871, having placed herself in the position therein contemplated, go on to say that she could also have recovered under the Act of 1873 by itself, as it had been interpreted in a previous case in that state. Hatton v. Wilmington City Railway Company, 3 Pennewill, 159, 50 Atl. 663 (1901), which decided that the wife's right to the consortium of her husband was a property right. Their view is that such remedial legislation removes from a wife, in the positions contemplated, those disabilities imposed on her by coverture, and that she is thus free to maintain an action for the preservation of a right which has always been hers. Woolley, J., who delivered the opinion of the court, divides the cases on this subject into four classes; but it has seemed best to consider them as only forming three groups, inasmuch as all but one of the cases cited in the second class belong to the third or fourth: (1) those holding that under such remedial statutes the wife is permitted to sue alone only where she could have sued before with her husband—on the theory that the non-existence of a remedy indicates the absence of the right—in which class there are now only two states, Maine and Wisconsin, New Jersey having recently reversed its previous attitude and joined the second class in this present classification. Libby v. Berry, 74 Me. 286 (1883), 43 Amer. Rep. 589, and Duffies v. Duffies, 76 Wis. 374 (1890), 45 N. W. 522; (2) those holding that the wife can sue in a case like the present under such statutes as the first one above cited—on the broader ground of having had the right without the remedy, which the statutes supply, Bennett v. Bennett, 116 N. Y. 584 (1889), 23 N. E. 17; Nolin v. Pearson, 191 Mass. 283 (1906), 77 N. E. 890; Sims v. Sims, 76 Atl. 1063 (N. J. 1910), and Gernerd v. Gernerd, 185 Pa. 233 (1898); (3) those holding that the wife's right to the consortium of her husband is a property right, which may be protected under such statutes as the second one above cited—on the narrower ground of the right to the husband's consortium being a property right, Westlake v. Westlake, 34 Ohio St. 621 (1878) 32 Am. Rep. 397; Warren v. Warren, 89 Mich. 123 (1891), 50 N. W. 842. The one jurisdiction which holds that the wife has had the right of action all along, regardless of enabling statutes, is Connecticut.

Foot v. Card, 58 Conn., 1 (1889), 18 Atl. 1027, and is clearly an anomaly in the law. The second class, as given above, rests on the true foundation. and comprises a majority of the states, though there are quite a number in the third. It is difficult to place the present case, because, under the statute of 1871, it belongs in the second group above, while under that of 1873 it belongs in the third. However, it would be on a stronger basis, if classed with the second group.

MASTER AND SERVANT—RECOVERY FOR NERVOUS SHOCK UNDER WORKMEN'S COMPENSATION ACT.—In Yates v. South Kirby, etc., Colleries, Ltd., L. R. 2 K. B. 538, July 5, 1910, the plaintiff, a collier, claimed damages for injuries received, under the Workmen's Compensation Act, 1906, 6 Edw. VII, C. 58, Sec. 1. While at work, the plaintiff heard a shout for help, and, upon search, discovered a fellow-collier who had been knocked down by a fallen timber prop and some coal. The plaintiff, having assisted in the carrying away of the injured man, who died shortly afterward, received such a nervous shock that he was incapacitated from work, although he made distinct efforts to resume his duties on various occasions. *Held:* "Nervous shock, due to accident, which causes personal incapacity to work, is as much personal injury by accident as a broken leg," etc.

The case is interesting, in that the sole issue presented is the proximity of the physical injury resulting from the nervous shock, there being no question of the employer's negligence or violation of duty under the Workmen's Compensation Act, *supra*. The violation of a duty having been established, whether or not nervous shock resulting from such violation is the proximate result is a much mooted question. This question was considered in Victorian Rwy. Comm. v. Soulas, 13 L. R. App. Cas. 222, 1888, and the damage was held as too remote. Since that time the English courts have been inclined to reject the doctrine there laid down, and have allowed recovery. In Julien v. White, 70 L. J. R. K. B. 837, 1901, it was *held:* "If the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been that actual impact?" "Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental makes no difference." See also Bell v. Gt. Northern Rwy., 26 Ir. L. R. 428, 1889; Braddon v. Caledonian Rwy., 4 Fraser, 880, 1902; Pugh v. London, etc., Rwy. 1896, L. R. 2, Q. B. 248.

The question is most frequently raised in cases of negligence by a common carrier in the transportation of a passenger, where recovery is generally allowed. Fitzpatrick v. Gt. Western Rwy., 12 U. C. Q. B. 645 (1855); G. C. & S. T. R R. v. Hayter, 93 Tex. 239 (1900); Stewart v. Ark. R. R., 112 La. 763 (1904); Simone v. R. I. Co., 28 R. I. 186 (1907); Oliliger v. Toledo Trac. Co., 23 Ohio Circ. 265 (?). In Sloane v. S. Cal. Rwy., 111 Cal. 668. (1896), the distinction between nervous shock and mere fright is carefully drawn, concluding, * * * "If these nerves or the entire nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind." The person injured must not be one of peculiar sensitiveness. Spade v. L. & B. R. R., 168 Mass. 285 (1897). For cases where the negligence is by a person or body other than a common carrier in the transportation of a passenger, see Hickey v. Welsh, 91 Mo. App. 4 (1901); Watkins v. Kaolin Mfg. Co., 131 N. C. 536 (1901); Oliver v. La Valle, 36 Wis. 592 (1875); Chic. & N. W. Rwy. v. Hunerberg, 16 Ill. App. 387 (1885); Armour v. Kollmeyer, 161 Fed. 78 (1908).

Many courts, however, refuse to depart from the doctrine of Victorian Rwy. Comm. v. Soulas, *supra*, and require proof of physical impact before a verdict for resultant nervous shock will be supported. Mitchell v. Rochester Rwy., 151 N. Y. 107 (1896); Mack v. South Bound R. R., 52 S. C. 323 (1897).

The rule in Pennsylvania is clearly established that the injury in such cases is too remote. Ewing v. Pitts., Chic. & St. L. Ry., 147 Pa. 41 (1892); Chitlick v. P. R. T. Co., 224 Pa. 13 (1909); Morris v. L. & Wyo. Val. R. R., 228 Pa. 198 (1910).

The extension of liability to cases of nervous shock corresponds to the economic necessities of the times, and, in view of the fact that those courts which have adopted the rule have limited the operation of it within a reasonable compass, it would seem that such adoption is wise and expedient.

NEGLIGENCE—SUBSEQUENT NEGLIGENCE OF PLAINTIFF'S AGENT.—The case of Grant v. Owners of S. S. Egyptian (1910) Appeal Cases, 400, is interesting mainly on its facts. A watchman employed by the plaintiffs to take charge of their trawler in dock, agreed with the defendants' manager to take the defendants' trawler into the same dock. By pure negligence the watchman so navigated the defendants' trawler as to cause a collision with the plantiffs' trawler. The injury was slight in itself and reasonable care would have prevented further harm, but the watchman, on returning to the plaintiffs' ship entirely neglected his duty to examine the injury and use reasonable care in the prevention of further harm, and in consequence the plaintiffs' trawler sank. *Held:* The defendants were liable for the damage, which was the natural and direct consequence of their wrongful act, *i. e.,* the injury due directly to the collision, but were not liable for any further damage which could have been avoided or minimized by the exercise of reasonable care on the part of the plaintiffs, that is, the sinking of the vessel.

As a proposition of the law of tort the decision is sound. The doctrine that the plaintiffs' negligence subsequent to the accident may operate as an intervening cause exempting the defendant from liability for resulting damage due to that negligence is generally accepted, and the plaintiff, under such circumstances, "is bound to use reasonable skill and diligence to save his property from suffering further injury." Chase v. N. Y. Central, 24 Barb. 274 (1857); 13 Cyc. 75, N. 54. The English courts have applied the doctrine to admiralty cases. So in the case of H. M. S. Flying Fish, 2 Moore P. C. (N. S.) 77, where there was a collision between two vessels due to negligence of the defendant's crew, the defendant was held liable for the injury caused by the collision, but not for the total loss of the ship, due to the subsequent negligence of plaintiff's crew.

The facts of the case give a very interesting example of the law of agency. The servant whose negligence makes the defendants liable for one injury, and the servant whose negligence bars the plaintiffs' recovery for the other injury, is one and the same man. If, however, we apply the test used in Laugher v. Pointer, 2 B. & C. Rep. 547; Jones v. Scullard, L. R. 2, Q. B. Div. 565, and following cases, we must agree that the House of Lords was right in holding the watchman the servant of the defendants while navigating their vessel into the dock, and the servant of the plaintiffs as soon as he returned to their vessel as watchman

NUISANCE—LEGISLATIVE AUTHORITY.—In Adler v. Pruitt, 53 So. 315, Ala., July 6, 1910, the legislature had created a commission, with authority to construct a sewer. Upon its completion, this proved to be a nuisance to the plaintiff, a neighboring landowner, who recovered from the individual to whom the system had been leased, Sayer, J., holding: "In the absence of express statutory provision to that effect, it cannot be assumed that it was intended to legalize an act which would necessarily result in a nuisance." The reason for the decision is to be found in the constitutional principle involved.

The leading case is in accord with the American rule of legislative authority as to the erection of a nuisance. Sadlier v. N. Y., 40 N. Y. Misc. 79 (1903); Gaynor, J.: "The full extent of legislative power to legalize and shield a nuisance is to exempt it from public prosecution." "The more plain

and explicit the legislature might be in authorizing the taking of private property or a direct injury thereto by a nuisance *per se* * * * the more plain it would make manifest that it had exceeded its constitutional powers."

The principal stated seems to have been recognized from the time of the establishment of our government. Nichols v. Pixly, 1 Root, (Conn.) 129, (1789). "The license, however it may estop the town from proceeding against the dam as a common nuisance, it can be no excuse or justification for an injury done to private property." See also Eastman v. Amoskeag Mfg. Co., 44 N. H. 143 (1862), accord on analogous facts; Blane v. Murray, 36 La. 162 (1884). "The legislature of a State * * * cannot authorize a use (of property) that will create a private nuisance;" Churchill v. Burlington Water Co., 94 IA. 89 (1895): "Nor can we presume from a mere grant of power to erect, maintain and operate water works, that either the legislature or city councils intended to legalize the erection and maintenance of a nuisance;" Townsend v. Norfolk Rwy. & Light Co., 105 Va. 22 (1906): "Immunity is not to be presumed from a general grant of authority."

In England a somewhat different rule would seem to prevail. British Cast Plate Mfrs. v. Meredith, 4 T. R. 794 (1792); Sutton v. Clarke, 6 Taunt 29 (1815); Bidulph v. Vestry of Parish of St. George, 3 De G. J. & S. 492 (1863). As stated in Sadlier v. N. Y., *supra*, the reason for the conflict of authority is that in England, Parliament is under no limitation or restraint, and the question becomes merely an interpretation of the intention of the legislators. Plowden, 467. Wherever possible, the English courts will construe the statute narrowly. Atty. Gen. v. Asylum, 38 L. J. Ch. 265 (1869); Vernon v. Vestry of St. James, 50 L. J. Ch. 81 (1880); Sellors v. Board of Health, 14 Q. B. D. 928 (1885), and the result attained is practically the same in both countries. Where, however, Parliament sees fit to legalize a nuisance in express terms, there is no remedy for the individual injured, while in this country, such exercise of authority is unconstitutional, and the statute legalizing the nuisance merely nugatory.

Some of the English cases, apparently following the American rule, may be distinguished. In Price Patent Candle Co. v. London County Council, 78 L. J. Ch. (1909), the statute under which the defendants were acting expressly forbade the creation of a nuisance. In Lea Conservancy Board v. Mayor of Hertford, 1 Cab. & El. 299 (1884), there was no real injury, and in Harrison v. S. & V. Water Co., 2 L. R. Ch. (1891) 409, and National Telephone Co. v. Baker, 2 L. R. Ch. 93 (1893), the user was held reasonable.

There remain to be considered the cases in which railroads in a reasonable user have caused injury to neighboring proprietors. In these cases the English and American courts seem to be at one in holding that there is no liability on the principle *Salus populi suprema lex*, Bac. Max. reg. 12; King v. Pease, 4 B. & Ad. 30 (1832); Vaughan v. Taff Vale Rwy. Co., 5 Hurlst & Nonn, 678 (1860); Hammersmith, etc., Rwy. Co. v. Brand, 4 L. R. E. & I. App. 171 (1869); Taylor v. Seaboard & Aair Line Rwy., 59 S. L. 129, U. C. (1907), and Balto. & Potomac R. R. v. Fifth Baptist Church, 108 U. S. 317, per Field, J.: "If a railway, authorized by Congress, when used with reasonable care produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience * * * must be for the public accommodation." This principle is followed in Pennsylvania, P. R. R. v. Marchant, 119 Pa. 541 (1888); Wunderlich v. P. R. R. 223 Pa. 114 (1909), unless, of course, the injury is done in the construction of the work. P. R. R. v. Duncan, 111 Pa. 352 (1886); Pa., L. V. R. Co. v. Walsh, 124 Pa. 544 (1889).

Unless expressly authorized by Parliament, it would seem that the erection or creation of any work but railroads under legislative authority, resulting in a nuisance to a neighboring landowner, is actionable.

REPLEVIN—DUTY OF DEFENDANT TO ACCEPT TENDER OF PART OF GOODS.—The case of Leeper, Graves & Co. v. First Nat. Bank, 110 Pac. 655 (Okla. 1910), presents the question of the extent of the duty of the successful defendant in a replevin suit to accept a partial tender of the goods and recoup on the bond given by the plaintiff. In this case the bank was a pledgee in possession of eight steel bridges which were replevied by the plaintiffs and bond executed. Upon judgment for the defendant and tender made, it appeared that certain essential parts of the bridges were missing. The defendant refused to accept, and claimed full indemnity on the bond. A judgment below to this effect was reversed, the higher court holding that it was the duty of defendant to accept tender and recoup on the bond.

Upon this question there appears to be some conflict of opinion, in spite of the fact that it has not come before the courts as often as might be expected. The trend of authority is strongly in favor of our principal case, and the cases in conflict seem to be ignored as of no importance. Cobbey on Replevin, 2nd Ed., § 1389. It would seem worth while, however, to mention Whetmore v. Rupe, 65 Cal. 237 (1884), and Pauls v. Mundine, 37 Tex. App. 60 (1905), as presenting the best authority for the opposite point of view. There is a lower court case in New York to the same effect, Kingsley v. Sauer, 41 N. Y. S. 248 (1896), and the rule was recognized, though not applied in Stevens v. Tuite, 104 Mass. 328 (1870). The cases mentioned proceed upon the ground of a strict interpretation of the judgment obtained, and regard the alternatives of indemnity or return of the specific goods as whole and indivisible rights. The mass of authority allowing a return of goods in part, imposes certain definite restrictions upon the application of the rule. For example, it can only apply where the goods returned are separable from the others, so as not to be dependent upon them for use and value, Edwin v. Cox, 61 Ill. App. 567 (1895), and do not constitute a whole and entire claim, Stevens v. Tuite, *supra*. Some courts assert that the property when returned must be in as good condition as when taken, Harts v. Wendell, 26 Ill. App. 274 (1887), but others allow the diminution in value to be recovered by a suit on the bond. Yelton v. Sinclair, 85 Ind. 190 (1882). The latter view seems correct here for all the reasoning that can apply to a partial return of the goods applies to a return of goods partially damaged. In the case under discussion it was said that the missing parts of the bridge were such as could easily be procured in the market, so that the structures could, without hardship, be put in their original condition. In spite of the various limitations imposed by different courts, the main reason for all the decisions is a simple, yet fundamental one. In the action of replevin it is primarily the specific property that is sought, and the original theory of alternative damages was to cover cases where, for some reason, the identical property could not be returned. "At the termination of the suit, it is not optional with him, the successful party, to take the property or its value. If the other has the property and will permit him to take it, he is obliged to do so." Allen v. Fox, 51 N. Y. 562 (1873). In short, in replevin it is the *status ante quo* that is sought to be established. When, therefore, part of the property can be returned without working injustice, it is but fair to make the party take back his own goods—the very object he had in mind in bringing the suit.

A comparison with the action of traver shows that ancient technicalities are being disregarded, and that the growing tendency is to allow a return of the goods in mitigation of damages. Such has been the law of England since 1762, when it was laid down by Lord Mansfield, C. J., by way of *dicta* in the case of Fisher v. Prince, 3 Burr, 1364. His reasons are concise and convincing. "It ought to be done to prevent vexatious litigation, which a plaintiff may be tempted to pursue when, in all events, he is sure of costs. It ought to be done, because it is the specific relief. An estimated value is a precarious measure of justice, compared with the specific thing." In accord, see Earle v. Holderners, 4 Bing. 462 (1833). In this country the English rule has been recognized and applied. Churchill v. Welsh, 47 Wis. 39 (1879); R. R. v. Bank of Middlebury, 32 Vt. 639 (1860); Ward v. Moffett, 38 Mo.

App. 395 (1889). For other jurisdictions, where the rule has been recognized, if not applied, see cases cited, Sutherland on Damages, 3d Ed., Vol. 3, § 1140. These cases are in direct conflict with the general law that an offer to return only operates in mitigation when accepted. It must be noted, however, that the above doctrine has only been applied to cases free from complications, where the conversion is really technical, where special damages are not claimed and the value of the goods does not fluctuate. It would seem, therefore, that the tendency in both replevin and trover is to make the complainant receive back his goods where just and possible, and upon this theory the case under discussion seems in line with modern development.

STATUTES—INQUIRY INTO VALIDITY OF ENROLLED ACTS.—In the recent case of Rash v. Allen, 76 Atl. 370, (1910), the Superior Court of Delaware held an act void which had been signed by the presiding officers of both houses of the legislature, passed by the Governor, and duly enrolled, because the names of the members voting for and against the measure did not appear on the journals, as required by the constitution.

The question how far courts shall treat an enrolled bill as conclusive of the existence of the law, including the regularity and validity of its passage through all necessary stages, is one of some difficulty, and on which American jurisdictions are irreconcilably divided. In 1450, in Pylkington's Case, Y. B. 33 Hen. 6. f. 17, pl. 8, the court referred the matter to the next Parliament; but the later cases, Rex v. Blundell, Hob. 110 (1619), and Ry. Co. v. Wauchope, 8 Ch. & Fin. 710 (1842), and English text-writers state that with irregularities or departures from the usage of Parliament the courts have nothing to do. Hardcastle on Statutory Law, p. 40. In America the well recognized doctrine that courts will declare an unconstitutional act void, and the requirements of the constitutions as to the manner of enacting laws have caused a conflict of authority. Where a court declares a statute void as not having been passed in accordance with constitutional requirements, it must go back of the enrolled act, to discover the manner of its enactment. Many jurisdictions hold the courts have a right to look at something besides the enrolled act, adopting the "journal entry doctrine." The leading case and the basis for this line of decision is Spangler v. Jacoby, 14 Ill. 297 (1853). The reasons given are principally two: 1. Since the courts have power to decide whether or not a law constitutionally passed is valid, they have power to decide that an act was not constitutionally passed; and the journals of the legislative body are the best evidence on this subject; 2. The sovereign power—the people—can by their organic law impose limitations upon legislative power in the passage of an act, and these provisions, being mandatory, should be enforced by the courts. These courts have assumed that to determine whether constitutional rules of legislative procedure have been complied with is a judicial question. Other jurisdictions have adopted the English "enrolled act doctrine" on the grounds of: 1. Public policy, which demands that vested interests shall not be endangered by allowing old statutes to be overthrown upon a discovery that the clerk was careless, Panghorn v. Young, 32 N. J. L. 29 (1866); 2. The unreliability of legislative journals. Weeks v. Smith, 81 Me. 538 (1889). The unsatisfactory nature of this evidence is frequently pointed out, not only by the courts which refuse to resort to it, but also by the courts which do. Field v. Clark, 143 U. S. 649 (1891). In many instances decisions from the same State appear on both sides of the question. Carr v. Coke, 116 N. C. 223 (1895); Bank v. Commissioners, 119 N. C. 214 (1896); St. v. Hagood, 13 S. C. 46 (1880), directly overruled by St. v. Chester, 39 S. C. 307 (1893); and some jurisdictions have changed their rule several times, St. v. McBride, 4 Mo. 303 (1836); R. R. v. Governor, 23 Mo. 353 (1856); St. v. Mead, 71 Mo. 266 (1879). In several cases where the courts felt constrained to follow their former rulings, holding the journals competent, regret is expressed that a different rule had not prevailed, St. v. Moore, 37 Neb. 13 (1893). Others express a doubt whether the journal is the better rule. People v. Starne, 35 Ill. 121 (1864).

It is submitted that this is largely a question of governmental policy—someone must be trusted. Since the vital function of the legislature is to enact laws, it is wholly inconsistent with the fundamental principle that the departments of government are equal and independent in their respective spheres, that the judiciary should be supervisors of the legislature's performance of its peculiar duty. The current of judicial decision in the last fifteen years has been strongly against the right of the court to go back of the enrolled act, Sutherland Statutory Construction, 2d Ed., Vol. I, p. 72; so the decision in the principal case is against the weight of recent opinion.

TORTS—LIABILITY OF MUNICIPAL OFFICERS.—In the case of Wallenberg v. City of Minneapolis, 127 N. W. 422 (Minn. 1910), a property owner brought suit against the city to recover damages for injury to his property caused by lowering the grade of the street on which it bordered. The city engineer, his assistant, and the street commissioner were joined with the municipality as defendants. It appeared that while it was within the authority of the governing body of the city to fix the grade of the streets, in the present instance the necessary forms had not been complied with. It was a case of a public improvement made by a municipality, but in an irregular and unauthorized manner. A Minnesota statute provides that: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured." The verdict in the trial court was for the defendants. The Supreme Court, after showing the undoubted liability of the municipality, ordered a new trial as to it, but refused to disturb the verdict in favor of the personal defendants joined. *Held:* "Such officers and employers should not be required to determine at their own risk the legality of the proceedings pursuant to which they performed the acts complained of."

It seems exceedingly doubtful that the case is good law. The general rule is that if the agent's acts are a tort he is liable regardless of his authority from his principal or his principal's liability. In the case of certain public officers, however, there is an exception. Purely ministerial officers, acting under authority from judicial or quasi-judicial bodies, are protected, if their authority appears on its face regular and the subject matter is within the jurisdiction of the body in question. Thus a constable is not liable in trespass for seizing chattels under a writ of replevin which appears on its face to have been issued from competent authority and with legal regularity. Watson v. Watson, 9 Conn. 140 (1832). In the same way an officer is protected in making an arrest on a writ which appears on its face valid. Underwood v. Robinson, 106 Mass. 296 (1871). So a warrant issued by a receiver of taxes, or board having in charge the levy of the tax in question, when apparently regular, protects the officer acting under it. Cunningham v. Mitchell, 67 Pa. St. 78 (1870).

These exceptions seem to be founded on public expediency. The collection of taxes and the administration of justice are vital to the existence of any government, and the ministerial officer should not be deterred by fear of a personal liability he cannot guard against. But it is carrying this principle beyond a point where it can soundly apply, when it is made to include cases of municipal public service not vital to the existence of government. It would be going little further to hold that the executor of any work public in its nature is exempt from personal liability by an authority apparently regular, whether granted by the municipality or by the contractor to whom work of that class has been let. It would seem sounder policy to confine these exceptions strictly to the administration of governmental acts. Where cases have arisen on all fours with the principal case, the officers making the excavation have been held liable in trespass. Larned v. Briscoe, 62 Mich. 393 (1886); Bliss v. Sears, 24 Pa. 111 (1854).