

RECENT CASES.

CHECKS—PRESENTMENT.—In *Hannon v. Allegheny Bellevue Land Co.*, 44 Pa. Superior Ct. 266 (1910) a check was given in settlement of a transaction at 1.30 o'clock in the afternoon, but was not presented for payment until the third day afterwards, and one day after the bank on which it was drawn failed. All the parties interested in the check as well as the bank on which it was drawn, were located in the same city. The court *held*, that under Sec. 186 of the Negotiable Instruments Act which says that "a check must be presented for payment within reasonable time after its issue," the delay in this case was unreasonable, and a check must be presented for payment before the close of banking hours on the day after its delivery, or the drawer will be discharged from his liability thereon to the extent of the loss caused by the delay. This decision seems to be in accord with all the authorities on the subject. "Reasonable time" under the act must be taken in the light of decisions of the courts which have previously stated what constitutes reasonable time for the presentation of a check. *Gordon v. Levine*, 194 Mass. 418 (1907); *Matlock v. Scheurman*, 93 Pac. 823 (1908).

In *Rickford, et al., v. Ridge, 2 Campbell*, 537 (1810), Lord Ellenborough *held* it "to be convenient and reasonable that checks received in the course of one day should be presented the next." This rule has been universally adopted in cases where all the parties to the check and the bank on which it was drawn are located in the same city or town. *Bank v. Weil*, 141 Pa. 457 (1891); *Loux & Son v. Fox, et al.*, 171 Pa. 68 (1895); *Willis v. Finley*, 173 Pa. 28 (1896); *Industrial Trust, Title and Saving Co. v. Weakley*, 103 Ala. 458 (1893); *Simpson v. Pac. Ins.* 44 Cal. 139 (1872); *Bickford v. First National Bank of Chicago*, 42 Ill., 238 (1866); *Northwestern Coal Co. v. Bowman*, 69 Iowa 150 (1886); *Grange v. Reigh*, 93 Wis. 552 (1896); *Gregg v. Bean*, 69 Vt., 22 (1895); *Kirkpatrick v. Puryear*, 93 Tenn. 409 (1893); *Parker v. Reddick*, 65 Miss. 242 (1887); *Carroll v. Sweet*, 128 N. Y. 19 (1891); 2 *Daniel Neg. Inst.*, 5th Ed., p. 1590 and cases cited; *Bytes Bills* (Wood's Ed.) 212; *Story Prom. Notes*, p. 493; *Bigelow Bills and Notes* 78; *Cent. Dig. Vol. VII, Bills & Notes*, p. 1095.

CONTRACTS FOR PROFESSORSHIPS—TERMINATION.—Plaintiff entered into a contract with a medical school, whereby in consideration of a chair in the faculty, he executed to the school five promissory notes payable at intervals of a year. *Held*, that the contract was not terminable at will, but contemplated a permanent professorship, subject to be determined for cause. *Hospital College v. Davidson*, 131 S. W. Rep. 1004 (Ky. 1910).

In the law of England, college and university professors are regarded as public officers, removable only for cause. *Philips v. Bury*, 1 Ld. Ray. 5 (1694); *King v. Bishop of Ely*, 2 T. R. 290 (1788). This view is also taken in an early Massachusetts case. *Murdock's Appeal*, 24 Mass. 303 (1828). But it has since been held that not even in a State university, is a professor a public officer. *Butler v. The Regents of the University*, 32 Wis. 124 (1873). His relation to the institution which employs him is, therefore, necessarily contractual.

Where the contract between the college and the professor is silent as to its duration, there is no settled rule of law which governs its construction. In ordinary contracts of employment, the rule varies. In *Co. Lit.*, 42 b, it is said that if a man retain a servant generally, without expressing any time, the law shall construe it to be for one year. See also *Hobbs v. Davis*,

30 Ga. 423 (1860). Other courts hold that a contract for personal services, which does not purport to be binding for a definite period, is terminable at the will of either party. *Irish v. Dean*, 39 Wis. 562 (1876); *Davis v. Barr*, 12 N. Y. 111 (1887). The most equitable rule seems to be that the question of the duration of the contract is to be governed by the circumstances of each particular case. *Smith v. Theobald*, 86 Ky. 142 (1887). So it has even been held that where a statute authorized the removal of a professor whenever the interests of the college required, such provision became a condition of his employment for a definite time. *Ward v. Board of Regents*, 138 Fed. 372 (1905).

Governed by the rule that the peculiar circumstances of the case must determine the duration of the contract, the court, in the recent Kentucky case, decided that the large amount of the compensation paid for the seat in the faculty and the fact that the notes were to extend over a period of five years, indicated that the intention of the parties must have been to contract for a permanent professorship.

CONTRACTS OF MARRIED WOMEN—MORAL OBLIGATION AS CONSIDERATION.—Prior to the passage of an act authorizing married women to contract as if unmarried, the plaintiff, a grocer, furnished supplies to the defendant, a married woman. After the enactment of the enabling statute, she expressly promised to pay for the supplies. *Held*: No liability attached to such a promise since it was supported by no legal consideration. *Lyell v. Walbach*, 77 Atl. Rep. 1111 (Md. 1910).

As to whether the moral obligation of a woman to pay for benefits received during coverture is sufficient consideration to give validity to a new promise made after the disability is removed, the doctrine of this case is in accord with the great weight of authority, numerically considered, at least. Since no liability can attach to the contract of a woman under coverture, such void contract can not be consideration for a new promise after discovery. *Eastwood v. Kenyon*, 11 Ad. & El. 438 (1840), overruling the doctrine of *Lee v. Muggeridge*, 5 Taunt. 36 (1813); *Gilbert v. Brown*, 29 Ky. 1248 (1906); *Warner v. Warner*, 235 Ill. 448 (1908).

If, however, the original promise or debt, though unenforceable at law, is binding in equity, upon the separate estate of the wife, a promise to perform the obligation, made after discovery, is valid. *Bibbs v. Davis*, 2 Hayw. & H. 364 (Fed. 1861); *Condon v. Barr*, 49 N. J. L. 53 (1886); *Sherwin v. Saunders*, 59 Vt. 499 (1887).

The leading case upholding the validity of the new promise, even though the original obligation is not binding at law or in equity, is *Goulding v. Davidson*, 26 N. Y. 604 (1864). It is followed in *Brownson v. Weeks*, 47 La. An. 1042 (1895); *Leonard v. Duffin*, 94 Pa. 218 (1880). This case excepts from the rule, cases where the original debt was entirely that of the husband. This distinction is recognized in *Stockton Bros. v. Reed*, 65 Mo. App. 604 (1896), and *Nesbit v. Turner*, 155 Pa. 429 (1893). The latter case is qualified by *Rathfon v. Locher*, 215 Pa. 571 (1906), in which the original promise was made by the wife as surety for the husband's debt and its renewal after discovery was held valid.

CRIMES—TAMPERING WITH PUBLIC RECORDS.—Under Sections 113 and 114, of the Penal Code of California providing for the punishment of any one who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying any record, map or book or any paper or proceeding of any court, a ledger containing accounts of receipts and disbursements of bail money was held to be a public record within the meaning of the statute. *People v. Tomalty*, 111 Pac. Rep. 513 (Cal. 1910).

A public record has been well defined in *Coleman v. Conn.*, 25 Gratt. (Va.) 865 (1874). The court says: "Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate way of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required to do so or not; and

when kept it becomes a public document, a public record belonging to the office, and not the officer; is the property of the State and not the citizen and is in no sense a private memorandum." In this case a warrant book of the sinking fund of the State was decided to be such a record.

Among the writings which Mr. Greenleaf classes as public writings and evidence *per se*, are "books kept by persons in public office in which they are required, whether by statute or by the nature of their office, to write down transactions occurring in the course of their public duties and under their personal observation." 1 Greenleaf Ev., 16th Ed., §483.

Under acts punishing the altering of a public record or document as forgery, the following have been held within the act: A writ of *feri facias* issued from the office of the prothonotary of the courts of common pleas, Com. v. Cullin, 13 Phila. 442 (Pa. 1879); a list of returns made by a deputy surveyor, Ream v. Com., 3 Sar. & Rawle 207 (Pa. 1817); the record of a deed though the deed was invalid, People v. O'Brien, 96 Cal. 171 (1892); a verified copy of a ship's manifest containing a list of alien immigrant passengers, delivered to the United States inspection officers, M'Inerney v. U. S., 143 Fed. 729 (1906); statistical information gathered by the commissioner of labor statistics under an act, People v. Peck, 138 U. G. 386 (1893).

The following were not classed as public records: a memorandum book kept by a judge of probate for his own convenience and not required by law, Downing v. Brown, 3 Colo. 571 (1877); a deposition to be used as evidence in an action, Atkinson v. Reding, 5 Blackf. (Ind.) 39 (1838); a jail warrant drawn by the clerk of the board of supervisors on the county treasurer, Harrington v. State, 54 Miss. 490 (1877); a tax duplicate, Smith v. State, 18 Ohio 420 (1868); a form of entry signed by a judge and intended for entry in the journal of the court, Whalley v. Tongue, 29 Or. 48 (1896).

DAMAGES—ELEMENTS OF MENTAL SUFFERING INCIDENT TO PERSONAL INJURIES FOR WHICH RECOVERY IS ALLOWABLE.—Where a plaintiff had a good cause of action for personal injuries due to the negligence of defendant's servants, it was held, that mental worry, distress, grief and mortification are proper elements of mental suffering for which a jury may award damages. Merrill v. Los Angeles Gas and Electric Co., 111 Pac. Rep. 534 (Cal. 1910).

There are cases which hold that mental suffering as a distinct element of damage in addition to bodily pain, is not a subject for compensation. Joch v. Dankwardt, 85 Ill. 331 (1877); Johnson v. Wells Fargo, 6 Nev. 224 (1870). But in most jurisdictions recovery is allowed for physical pain and mental suffering. Sedgwick on Damages, 8th Ed., §44, and authorities cited. And it has long been settled that an injury which operates primarily on the mind or nervous system may be considered by the jury in assessing damages. Watson on Personal Injuries, §390; Ballou v. Farnum, 11 Allen 73 (Mass. 1865); Railway v. Boddeley, 54 Ill. 19 (1870).

Mental suffering may, however, spring from very different sources. It may exist as a mere incident of physical pain; it may be due to shame, humiliation, annoyance, vexation, sorrow, grief, sentimental distress, fright or nervous apprehension; or it may be a consequence of disfigurement of the person. In many jurisdictions, damages are awarded only for such suffering as is incident to physical pain. Linn v. Duquesne Boro., 204 Pa. 551 (1903); So. Pac. Co. v. Hetzer, 135 Fed. 272 (1905); Railroad v. Chance, 57 Kas. 40 (1896). Mental distress springing from the other causes mentioned, is held intangible, incapable of test or trial, sentimental, too remote, too speculative, to constitute an element of actionable injury.

Other courts refuse to take this attitude and allow recovery for almost any form of mental suffering brought on by bodily injury. Gray v. Washington Power Co., 30 Wash. 665 (1903); Heddle v. R. R., 77 Wis. 228 (1890); R. R. v. Young, 81 Ga. 397 (1888); Power v. Harlow, 57 Mich. 119 (1885); R. R. v. Clark, 21 Tex. App. 167 (1899). Still other courts allow damages for mental suffering not incident to bodily pain only where

the personal injury was actuated by malice. *Railway v. Hines*, 45 Ill. App. 299 (1891); *Randolph v. R. R.*, 18 Mo. App. 609 (1885). To make this distinction is to regard damages of this kind as exemplary or punitive, in the face of the fact that the courts are almost unanimous in holding that they are of a compensatory character. *Watson on Personal Injuries*, §391.

In *Merrill v. Los Angeles, etc. Co.*, the California Supreme Court, deciding the question *de novo*, reaches the conclusion that unless grief, anxiety, worry, mortification and humiliation suffered by reason of physical injuries, are elements of the mental suffering for which damages may be awarded, "mental suffering" is a meaningless term; that physical pain is but one of many forms of mental suffering; that if the mental suffering must be that occasioned by physical pain, the latter phrase alone, would be sufficient to convey the full meaning of the law; and that mental suffering by reason of shame, humiliation or wrong is no more speculative, remote or intangible, than physical pain, or mental suffering arising from physical pain.

DAMAGES—MENTAL SHOCK INDUCED BY PHYSICAL INJURY.—In an action to recover for personal injuries, damages for mental shock were allowed under the following circumstances: Defendant discharged a blast which threw a rock into plaintiff's house. There was no evidence that she was hit by the rock, but she testified that a door hit her and she was thrown to the floor. There were no bruises on her body and her physician testified that she suffered simply from neurasthenia as a result of the shock. The court allowed the jury to find that the woman had either been struck in some way due to the blast, or had been violently thrown to the floor, and that her condition was therefore not entirely due to fright or distress of mind. *Driscoll v. Gaffey*, 92 N. E. Rep. 1010 (Mass. 1910).

It is a rule in many jurisdictions that damages for fright, anguish, remorse or any other abnormal mental condition, unaccompanied by an injury to the person, cannot be estimated, and are too remote to warrant a recovery. *Pollock on Torts*, 3d Ed., 54, and cases cited. However, the courts in which this rule prevails are so impressed with its injustice that they seize upon any pretext to allow a recovery—even the most frivolous legal wrong, and however slight the immediate harm may be. *Goode, J., Hickey v. Welch*, 91 Mo. App. 4 (1901). The recent Massachusetts case is a typical instance of this tendency of the courts. Other cases in which compensation has been permitted for mental pain although the physical injury was so slight as to be negligible, are: *Hess v. Pipe Company*, 221 Pa. 67 (1908); *Railroad v. McGinnis*, 46 Kas. 109 (1891); *Warren v. The Railroad*, 163 Mass. 484 (1895); *City Transfer Co. v. Robinson*, 12 Ky. Law Rep. 555 (1891); *Buchanan v. R. R.*, 52 N. J. L. 265 (1890); *Berard v. R. R.*, 177 Mass. 179 (1900).

DIVORCE—COLLUSION.—In a suit for divorce the evidence showed an agreement between the parties that the wife should proceed to procure a divorce, the husband furnishing her with the money. *Held*, that such agreement is collusive, and the petition for divorce must be dismissed. *Sheehan v. Sheehan*, 77 Atl. Rep. 1063 (N. J. 1910).

The general rule is, that however just a cause may be, if the parties collude in its management so that in reality both are plaintiffs, while by the record the one appears as plaintiff and the other as defendant, it cannot go forward. *Gentry v. Gentry*, 67 Mo. App. 550 (1896). To the same effect are *Latshaw v. Latshaw*, 18 Pa. Super. Ct. 465 (1901) where the wife agreed with the husband that she would make no defense; and *Thompson v. Thompson*, 70 Mich. 62 (1888), where the wife agreed to make no claims for allowances or alimony in order to expedite and make more certain the decree.

But it is not collusion where the defendant, being also desirous of a divorce, of his own volition appears in court and makes no defense. *Pohlman v. Pohlman*, 60 N. J. Eq. 28 (1900); *Erwin v. Erwin*, 40 S. W. 53

(Tex. 1897); nor where a wife, having good grounds for divorce, in order to prevent unnecessary publicity and scandal makes an agreement with her husband as to the amount of alimony. *Ham v. Ham*, 181 Mass. 170 (1902); *Snow v. Gould*, 74 Me. 540 (1883).

EVIDENCE—CRIMINAL TRIALS—PRESUMPTION OF INNOCENCE AS EVIDENCE FOR ACCUSED.—Upon a trial for murder, where the plea was self defense, the court instructed the jury in substance, that the presumption of innocence remains with the prisoner until the killing is proved or admitted by the defendant; it then devolves upon him to show any circumstances of mitigation to excuse or justify the homicide, by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offence charged. *Held*, the instruction was not erroneous. *Culpepper v. State*, 111 Pac. 679 (Okla. 1910).

The contention of the defendant, that this presumption is evidence in favor of the accused, and that it remains with him throughout the whole trial under any and all circumstances, squarely raises the question: "Is the presumption of innocence evidence, having probative force, to be put into the scale and weighed along with the other evidence in the case?" This doctrine has the support of the Supreme Court of the United States in *Coffin v. U. S.*, 156 U. S. 433 (1895). But the opinion in that case has been severely criticised: 1 *Elliott on Evid.* §92, 4 *Wigmore on Evid.* §2511; and Professor Thayer has clearly demonstrated that the authorities cited in the opinion give very little support to the doctrine. *Prel. Treatise on Evid.* 551. This opinion received apparent sanction in *Allen v. U. S.*, 164 U. S. 492 (1896); but in *Agnew v. U. S.*, 165 U. S. 36 (1897) its particularly objectionable sentence declaring that "this presumption is to be treated as evidence" is referred to as "having a tendency to mislead." And in *U. S. v. Wilson*, 176 Fed. 806 (1910) the presumption is treated as in the principal case. Though followed in some jurisdictions, *People v. Milner*, 122 Cal. 171 (1898); *St. v. Clark*, 75 Atl. 534 (Vt. 1910), the weight of authority is certainly against *Coffin v. United States*, *Strickland v. St.*, 151 Ala. 31 (1907); *St. v. Fahey*, 54 Atl. 690 (Del. 1902); *Stevens v. Comm.*, 20 Ky. L. R. 48 (1898); *People v. Ostrander*, 110 Mich. 60 (1896). And it was expressly repudiated in *St. v. Linhoff*, 121 Iowa 632 (1903); *St. v. Maupin*, 196 Mo. 164 (1906). What appears to be true may be stated thus: the presumption of innocence, like any other presumption, relieves the party in whose favor it operates from going forward in argument or evidence. But it is not evidence; and involves no rule as to the weight of evidence necessary to overcome or destroy it.

EVIDENCE—PRIVILEGED COMMUNICATIONS—WHEN NOT BETWEEN PHYSICIAN AND PATIENT.—In the case of *People v. Austin*, 93 N. E. 57 (N. Y. 1910) the defendant, being indicted for murder, pleaded insanity and at the request of counsel a physician was appointed by the court to examine his mental condition. The examination was made but the physician was not called as a witness for the defense. He was however called in rebuttal by the district attorney. The objection that this testimony was privileged was sustained by the court. This ruling was reversed by the court of appeals, though of course it could not reverse the conviction, beneficial to the prisoner.

At common law communications to physicians were not privileged, *Greenleaf's Ev.* §248. In New York a statute provides "No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon." *Code Civ. Prac.* §834. Similar statutes have been passed in many of the other States: *Cal. Code Civ. Proc.* §1881; *Ind. Rev. St.* 1881 §497; *Iowa Code* §4608; *Mo. Rev. St.* 899, §4659; *Mich. Comp. laws*, 847, §10,181; *Utah Rev. St.* §3414.

There is a strong tendency in two cases to restrict the operations of the rule. This is due, probably, to the attempts of the courts to avoid unjust

decisions, for there are many occasions when the case of one side depends wholly upon the testimony sought to be excluded. Thus the courts have held that the burden is upon the party seeking to exclude the evidence by showing that it is within the statute. *People v. Schuyler*, 106 N. Y. 298 (1887). The information must be acquired to enable the physician to prescribe for his patient. *Carrigan v. North*, 39 Mich. 606 (1878). In California by statute the rule is limited to civil action. *People v. Lane*, 30 Pac. 16 (1894).

While the exact facts of the present case have not often come before the courts, the few decisions are all in accord. *Nesbit v. People*, 19 Col. 441 (1894), and *People v. Glover*, 38 N. W. 874 (Mich. 1888) both present exactly the same facts and decisions as the case under discussion. It seems that this exception to the general rule is well taken and that the voluntary subjection of the prisoner while in jail to medical examination should not become the subject of privilege. This case seems to differ greatly from the ordinary case of physician and patient where often the very reason for employing a medical man is the trust that may be placed in his discretion. In such a case as the present the examination is not secured for the sole benefit of the accused. It is agreed to by the prosecution for the express purpose of enabling a physician to testify as to the prisoner's mental condition. It would seem impossible and unjust to allow the prisoner, with the consent of the prosecution, the privilege of introducing the testimony if the result should be favorable to him and yet reserving to himself the power of excluding the testimony if it should prove unfavorable.

EVIDENCE—CONFESSION—VOLUNTARY—BURDEN OF PROOF.—In *Berry v. State*, 111 Pac. 676 (Nov. 22, 1910, Okl.), objection was made to the admission of a confession of the prisoner because it was not voluntary but was extorted by fear of punishment and prompted by hope of leniency. *Held: Prima facie* any confession is admissible in evidence, and where its admissibility is challenged by the defendant, the burden is on him to show that it was procured by such means or under such circumstances as to render it involuntary.

The weight of authority seems to be that the prosecution has the burden of proving the voluntary character of the confession before it is admissible. *Regina v. Thompson*, 1895 L. R. 2 Q. B. 12; *Hopt v. Utah*, 110 U. S. 574 (1883); *Thompson v. Commonwealth*, 20 Gratt. 724 (1870); *State v. Smith*, 72 Miss. 420 (1894); *Campbell v. State*, 150 Ala. 70 (1907); *Watts v. State*, 99 Md. 30 (1904); *State v. Johnson*, 30 La. Ann. 881 (1878); *People v. Soto*, 49 Cal. 67 (1874); *State v. Moorman*, 27 S. C. 22 (1887); *Smith v. State*, 74 Ark. 397 (1905); *Mitchell v. State*, 79 Ga. 730 (1887); *State v. Hernia*, 68 N. J. L. 299 (1902).

The more recent view, that adopted by our principal case, is favorably commented upon by text writers: 1 *Wigmore Evidence*, §860; *Elliott Evidence*, §274, and seems to be well recognized, although still in the minority. See the cases cited as authority in the opinion and the following: *Williams v. State*, 19 Tex. App. 276 (1885); *Thurman v. State*, 169 Ind. 240 (1907); *State v. Armstrong*, 203 Mo. 554 (1907); *State v. Sanders*, 84 N. C. 728 (1881); *Dixon v. State*, 13 Fla. 636 (1870); *People v. White*, 121 N. Y. 449 (1890).

The Pennsylvania rule is seen in *Epps v. Commonwealth*, 193 Pa. 512 (1899). Upon the introduction of evidence of confession by the State, the prisoner is allowed the privilege of cross-examination but may not offer rebutting testimony until the issue is before the jury, who are to decide as to the value of the evidence. If subsequent testimony has shown the confession to have been involuntary, the court may instruct the jury to disregard it.

The reason for the majority rule seems to be in the principle that every possible advantage must be indulged in favor of the prisoner. The minority rule is certainly more logical, as shown by the text writers. The latter is receiving more general recognition.

NUISANCE—ERECTION OF HOSPITAL FOR CONTAGIOUS DISEASES IN RESIDENCE SECTION OF A CITY.—It has been recently decided in Washington that the maintenance of a tuberculosis hospital in the residential section of a city, where its location depreciates the value of contiguous property from 33 to 50 per cent., and causes such continued apprehension in the minds of the occupants of such property as to prevent their comfortable enjoyment thereof, constitutes a nuisance, although such hospital is carried on with due regard to the welfare of the inmates and the public, is a great benefit to the community, and could not be carried on so well elsewhere, because of the inconvenience to attending physicians. *Everett, et ux., v. Paschall*, 111 Pac. Rep. 879 (Wash. 1910).

The lower court found that "there exists a general public dread of tuberculosis, and the maintenance of a tubercular hospital in the vicinity of residences detracts from the comfortable use of such residential property, on account of the dread of contagion therefrom in the minds of persons ignorant of the true nature of the disease and the harmlessness of such sanitarium"; that "the fear or dread of the disease is, in the light of scientific investigation, unfounded, imaginary and fanciful"; that plaintiffs' property had been lessened in value from 33 to 50 per cent., because of being contiguous to that on which the hospital was located; but that, nevertheless, the injury, if any, which the plaintiff's would suffer from the continuance of the hospital would be *damnum absque injuria*, and that, therefore, no injunction should be granted. As already indicated, this decision was reversed on appeal, the main ground for reversal being that the lower court erred in deciding that the fear which prevented the comfortable enjoyment of plaintiffs' property was unreasonable. The opinion states that when the fear is shared by the whole community to such an extent that property values are diminished, it is not for the court to say that such fear is unfounded or unreasonable, especially where there is danger of contagion, if there should be any carelessness on the part of the nurses of the hospital. The interesting point in the case is the fact that the decision is based on the prevention of the comfortable enjoyment of their property by the plaintiffs, through the fear of contracting the disease, although it was not probable that such would be the case. There are not many cases which rest their decision on this element, as there is always the additional one of lessening the value of contiguous property; but the case of *Stotler v. Rochelle, et al.*, 109 Pac. Rep. 788 (Kan. 1910) seems to do so. In that case the hospital was for the treatment of persons afflicted with cancer, and was to be located in the residence section of the city, and the court affirmed the judgment of the lower court in granting a permanent injunction to restrain the erection of such a hospital, the bill being brought by one who owned property adjoining that on which it was proposed to build the hospital. There seems to be no reason why the interference with the comfortable enjoyment of one's property should not take the form of fear as well as annoyance by offensive odors, or otherwise, where no actual harm is done to plaintiff's health; and when such interference with the comfortable enjoyment of property is coupled with a material diminution in its value, and the thing complained of is not in what might be called its proper locality, it is submitted that it is entirely reasonable for a court to find that a nuisance exists and to grant an injunction restraining the same. "The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings." Wood, *The Law of Nuisances*, 3d Ed. Vol. I, §9.

PARTNERSHIP—LIABILITY OF REPRESENTATIVE OF DECEASED PARTNER.—In an action against the executor of the estate of a deceased partner for a partnership debt, it was held, that the Partnership Act of 1897 did not alter the common law rule as to the joint liability of partners. *Seligman v. Friedlander*, 92 N. E. Rep. 1047 (N. Y. 1910).

At common law the sole right of action of the joint creditors of a partnership was against the survivors, and they originally had no claim in equity against the estate of the deceased partner unless the survivors were

insolvent, or some other reason of an equitable nature existed. *Lane v. Williams*, 2 Vern. 292 (Eng. 1693). New York, Pennsylvania, and some other jurisdictions adopted this rule. *Voorhis v. Child's Exr.* 17 N. Y. 354 (1898); *Lang v. Kepple*, 1 Binney 123 (Pa. 1804); *Caldwell v. Stileman*, 1 Rawle 212 (Pa. 1829).

Subsequently, however, the English courts decided that in equity all partnership debts are joint and several; and that, consequently, joint creditors have a right, in the first instance, to proceed at law against the survivors, or to proceed against the estate of the deceased partner. *Devaynes v. Noble (Sleech's Case)* 1 Mer. 540 (1816). However, New York and some other jurisdictions adhered to the early common law doctrine. *Leggatt v. Leggatt*, 79 N. Y. App. 141 (1903). But the weight of authority is now in favor of the modern English rule. *Nelson v. Hill*, 46 U. S. 127 (1847). *Doggett v. Hill*, 108 Ill. 560 (1884). And a large number of States, notably Pennsylvania, have by statute adopted this view. Pa. Act of Apr. 11, 1848 P. L. 536. *Brewster's Admx. v. Sterrett*, 32 Pa. 115 (1858).

TORTS—ACTIONS FOR MALICIOUS PROCUREMENT OF AN INJUNCTION.—In *Kryszke v. Kamin*, 128 N. W. 190 (Mich. 1910), the defendant by the wrongful and malicious procurement of an injunction without reasonable cause, prevented a certain sale of the plaintiff's goods. In an action for malicious prosecution, recovery was allowed.

The decision is consistent with the general law and is sustained by the cases cited in the opinion and the following authorities: *Newark Coal Co. v. Upton*, 40 Ohio St. 17 (1883); *Burt v. Smith*, 84 N. Y. App. 47 (1903); *Meyers v. Block*, 120 U. S. 206, 211 (1886).

An action for the malicious prosecution of a civil suit is governed by the same principles as one for the malicious prosecution of a criminal action. There must be malice and want of probable cause and the malicious suit must be terminated in favor of the plaintiff.

The right to recover for the malicious prosecution of civil suits presents an interesting historical development. Prior to the Statute of Marlbridge, 52 Hen. III, 1267, where one sued another maliciously and without probable cause, he was liable in an action on the case but after the passage of that statute, which gave costs to the defendant *per falsum clamorem*, the action could not be maintained unless the person of the defendant were arrested, his property attached or some special damage was done to him such as the institution of bankruptcy proceedings or proceedings to have the plaintiff declared insane. The English courts have rigorously followed this rule and it is law today. *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, L. R. 11 Q. B. 675 (1883).

For many years the American courts followed the English principle, *Mitchell v. S. W. R. R.* 75 Ga. 398 (1885), but comparatively recently, despite the weight of authority and the animadversion of the text-writers, the courts began to adopt the contrary view and it is now quite generally recognized. *Cooley Torts*, 3d Ed., 349 and cases there cited. For an interesting discussion of the inapplicability of the English rule to our conditions, see article by John D. Lawson, 21 Am. Law Reg. N. S. 281, 353 (1882). See also 18 Cent. L. J. 242 (1884).

In some jurisdictions where the filing of an injunction bond is necessary, it has been held, that the remedy of the plaintiff is confined to the bond. *Lawton v. Green*, 5 Hun, 157 (1875), but the weight of authority seems to establish the contrary proposition. *Lawson Rights, Remedies and Practice* 5791, *Robinson v. Kellum*, 6 Cal. 309 (1856); *Hayden v. Keith*, 32 Minn. 277 (1884); *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505 (1877); *Crate v. Kohlsaatt*, 44 Ill. App. 460 (1892); *G. J. L. L. & D. R. R. Co. v. K. G. J., & E. R. R. Co.*, 47 W. Va. 725 (1900).

TORTS—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR IN WORK NOT INHERENTLY DANGEROUS.—In *Lafferty v. United States Gypsum Co.*, 111 Pac. 498 (Kan. 1910), the plaintiff's husband, a laborer employed by an

independent contractor, was killed by a rock which fell from the roof of a mine owned by the defendant company. A judgment for the plaintiff was reversed on the ground that it cannot be held as matter of law that mining is so intrinsically or inherently dangerous as to make the owner of a mine liable for the negligence of an independent contractor resulting in injuries to a servant of such contractor.

To the general rule, that an employer is not liable for the negligence or improper execution of work by an independent contractor, there are many limitations; one of which is that the contractor is responsible where the work is inherently dangerous. *Bower v. Peate*, L. R. 1 Q. B. D. 321 (1876); *Hotel Co. v. Gallagher*, 129 Ill. App. 557 (1906); *Wetherbee v. Partridge*, 175 Mass. 185 (1900). Of course the danger must be inherent in the work to be done, and not result from the collateral negligence of the contractor. *Bonapart v. Wiseman*, 89 Md. 12 (1899); *Cuff v. Railroad Co.*, 35 N. J. L. 17 (1870); *Water Co. v. Ware*, 83 U. S. 566 (1872). But jurisdictions differ as to the inherent danger of some operations, as blasting. See *Edmundson v. Railroad Co.*, 111 Pa. 316 (1885); *McCafferty v. Railroad Co.*, 61 N. Y. 178 (1874) expressly disapproved in *Wetherbee v. Partridge*, *supra*; *Joliet v. Harwood*, 86 Ill. 110 (1877); *Railroad Co. v. Finley*, 117 S. W. 413 (Ky. 1909). In recent cases cutting down trees in a forest, *Young v. Lumber Co.*, 60 S. E. 655 (N. C. 1908); raising the roof of a brick building, *Smith v. Humphreyville*, 104 S. W. 495 (Tex. 1907); sinking of a caisson and the construction of bridge piers for a railroad, *Bridge Co. v. Ballard*, 116 S. W. 93 (Tex. 1909) were held, not intrinsically dangerous. Courts have hitherto held that mining generally is not so dangerous as to come within the rule, where it was not shown that the mine was unsafe when the contract was made, or that the owner reserved control of its operation. *Shaw v. Oil Co.*, 9 Scottish L. R. 254 (1872); *Martin v. Gold Mining Co.*, 17 N. S. Wales L. R. 364 (1896); *Smith v. Belshaw*, 89 Cal. 427 (1891); *Iron Co. v. Erickson*, 39 Mich. 492 (1878); *Samuelson v. Mining Co.*, 49 Mich. 164 (1882); *Kelley v. Howell*, 41 Ohio St. 438 (1884); *Welsh v. Parrish*, 148 Pa. 599 (1892). It would seem the principal case would have been differently decided in Ohio and possibly Massachusetts. *Jacobs v. Fuller Co.*, 67 Ohio St. 70 (1902); *Mulchey v. Religious Society*, 125 Mass. 487 (1878).

TORTS—LIABILITY OF CONTRACTOR TO A THIRD PERSON FOR DEFECTIVE CONSTRUCTION.—Well settled principles govern the decision in *Thornton v. Dow*, 111 Pac. 899 (Wash. 1910). Upon the facts the case is extreme; it appearing that one detail of the building of an armory was the erection of a balcony in the drill hall. This balcony had a railing built according to specifications and accepted by the State upon completion of the whole building. While an athletic meet was in progress the spectators crowded to the edge of the balcony. The railing gave way and precipitated the plaintiff, among others, to the floor below. The plaintiff, alleging negligence, sued the contractors for personal injuries. *Held*: He could not recover.

The principle governing this class of cases is that in the sale of an article not in its nature dangerous there is no general or public duty but only a duty arising out of the contract which does not extend to strangers thereto. This rule is of a very general application. The differing results attained from it, depend upon varying interpretations of facts. One of the first, and perhaps the leading decision on this point is *Winterbottom v. Wright*, 10 M. & W. 109 (1855), a case that has been many times cited with approval in both countries. From the host of American authorities, *Albany v. Cunliff*, 2 N. Y. 165 (1849), and *Marvin Safe Co. v. Ward*, 46 N. J. L. 19 (1884), are especially applicable, on their facts, to the present case. A full list of authorities may be found in the note to *Smith v. 1st Presby. Church*, 26 L. R. A. 504 (Pa. 1894) and in the opinion of *Jaggard, J.*, in *O'Brien v. Am. Bridge Co.*, 110 Minn. 364 (1910).

There are several reasons advanced by the various cases in support of the above-mentioned rule. One often cited is that of legal policy—there would

be no bounds to actions and litigious intricacies if the ill effects of the negligence could be followed down the chain of results to the final effect. Another is that of business policy—if the contractor who constructs a boiler, steam-engine or bridge owes a duty to the whole world that his work shall contain no hidden defect it is difficult to measure his responsibility and no prudent man would engage in such occupation upon such conditions, *Curtin v. Somerset*, 140 Pa. 70 (1891). Nor does it seem proper to hold the contractor for a situation which although he may have been the cause of it, is beyond his power to rectify. The person injured was not on the premises by the contractor's invitation or consent nor could the latter remedy the defective article or control any arrangement of details which might have prevented the accident.

In the case under discussion it will be noted that in no possible way could the plaintiff escape the consequences of the rule mentioned and recover. The contractors were found to have carried into effect without change two specifications furnished, under the personal supervision of the architect in charge. The actual breaking of the rail was caused by the unusually violent rush of the crowd to the edge of the balcony. Either of these facts would be sufficient to remove all shadow of doubt as to the proper application of the above rule to this case.

WASTE—MORTGAGEE'S RIGHT TO BRING SUIT FOR WASTE.—A mortgagor in possession of the mortgaged premises leased them for use as a pest house. A junior mortgagee brought an action of tort in the nature of waste against the lessee. *Held*, that he could recover an amount equal to the diminution in market value of the premises caused by such use. *Delano v. Smith*, 92 N. E. Rep. 500 (Mass. 1910).

The courts in Massachusetts and some other States consider the mortgagee as having the legal title and therefore award him full damages for injury done to his estate by acts of waste by the mortgagor. *Prudential Ins. Co. v. Guild*, 64 Atl. Rep. 694 (N. J. 1906); or by a person who acts under the mortgagor, *Webber v. Ramsey*, 100 Mich. 58 (1894); *Atkinson v. Hewitt*, 63 Wis. 396 (1885). A junior mortgagee has the same rights as a first mortgagee, *Gooding v. Shea*, 103 Mass. 36 (1869), especially if the first mortgagee waives his right of action, *Sanders v. Reed*, 12 N. H. 558 (1842).

Where by statute or otherwise, the mortgagee has a mere lien, he cannot have an action on the case in the nature of waste because his interest is contingent and may be defeated by payment of the debt secured by the mortgage. *Peterson v. Clark*, 15 Johns. 205 (N. Y. 1818); *Vanderslice v. Knapp*, 20 Kan. 647 (1878). He has, however, an action for acts of waste which impair his security and he may recover the damage done to his mortgage as distinguished from injury to the land itself. *Lumber Co. v. Busse*, 86 N. Y. Supp. 1098 (1904); *Smith v. Frio Co.*, 50 S. W. (Tex. 1899). After foreclosure, or entry for condition broken, the mortgagee may everywhere recover full damages for all injury done subsequently. *Ocean A. & G. Corp. v. Ilford Gas Co.*, 2 K. B. 493 (1905).

As a general rule equity, disregarding the person in whom the legal estate may be considered as vesting, will not interfere to restrain acts of waste on the part of the mortgagor unless it is alleged and proved that the acts complained of are such as may render the security of doubtful sufficiency for satisfaction of the debt. *King v. Smith*, 2 Hare 239 (Eng. 1843); *Martin's Appeal*, 9 Atl. Rep. 490 (Pa. 1887); *Williams v. Chicago Exhibition Co.*, 188 Ill. 19 (1900).