RECENT CASES.

BILLS AND NOTES—BONA FIDE HOLDER UNDER NEGOTIABLE INSTRUMENTS LAW.—The plaintiff in an action to recover on two promissory notes proved himself to be a purchaser for value before maturity. The defendant offered evidence of notice in order to prove bad faith, and the case was tried on the theory that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence is deemed to have "constructive notice" of the fact itself, as provided by Sections 6702 and 6703 of the Revised Codes of North Dakota, 1905. The trial resulted in a verdict and judgment for the defendant. On appeal the Court *held*, that the above-mentioned sections of the Codes, since the enactment of the Negotiable Instruments Law, have no application to actions upon negotiable instruments in the hands of indorsees before maturity, being superseded by Section 6358 (N. I. L., Section 56), defining notice in such case as "actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." American Nat. Bank v. Lundy, 129 N. W. 99 (N. D.), 1910.

This decision is in accord with the weight of authority as to what constitutes bad faith in one taking a negotiable instrument before maturity. The rule of "constructive notice" prevalent in other branches of the law, was in England, *held*, applicable to commercial paper in Gill v. Cubitt, 3 Barn & C. 466 (1824). This doctrine was overthrown several years later by Goodman v. Harvey, 4 Ad. & El. 870 (1836), Lord Denman, C. J., saying: "Gross negligence may be evidence of *mala fides*, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." This rule has not been shaken in England and has long prevailed in this country, though some few jurisdictions have followed Gill v. Cubitt (*supra*), 1 Daniel Neg. Inst., 4th Ed., 770. It is incorporated in the Negotiable Instruments Law, Section 56. (For cases decided under this section see Brauman, "The Negotiable Instruments Law," 2d Ed., 62.) "The rights of the holder are to be determined by the simple test of honesty and good faith, and not by the speculative issue as to his diligence or negligence." O'Brien, J., in Cheever v. Pittsburgh R. Co., 150 N. Y. 65 (1896).

The Court in the principal case, however, was justified in holding Section 6703 inapplicable. It is found in Chapter 101 of the Revised Codes, 1905, entitled, "Definitions and General Provisions." This chapter is general in its scope, as the title would indicate, defining, *inter alia*, "constructive notice" as a legal phrase. The "Uniform Negotiable Instruments Law" was originally enacted in North Dakota, Revised Codes, 1899, Chapter 100, and "governs as to all negotiable instruments executed on and after July 1, 1899." This latter phrase would seem to except the subject matter of the chapter from the operation of the more general sections of the Code.

CRIMES—FALSE PRETENCE—STATE OF MIND AS AN EXISTING FACT.—On appeal assigning for error a charge that "if A buys property intending not to pay for it, he obtains that property by false pretence," it was *held*, that, aside from the question whether a man's present intention as to a future act is a fact, such a fraud was not intended by the legislature to be the statutory crime of larceny by false pretences. Com. v. Althause, 92 N. E. 202 (Mass., 1910).

The general rule, universally adopted, is that a pretence, within the meaning of the statute, is a representation of a fact as existing, or as having existed. A promissory pretence to do an act is not within the statute. Com. v. Moore, 99 Pa. 574 (1882). See 19 Cyc. 397, note 57. Interpreting this rule logically, a misrepresentation of one's intention to do a thing in the future is a misrepresentation of an existing fact, "for the state of a man's mind is as much a fact as the state of his digestion;" and this view has been adopted by many jurisdictions with respect to civil actions for fraud. Edgington v. Fitzmaurice, 29 Ch. D. 459 (1885); Swift v. Rounds, 19 R. I. 527 (1896). To admit such an interpretation in criminal cases would be to overthrow the fundamental principle that a promissory pretence is not within the statute. State v. Blanchard, 90 N. Y. 314 (1882); and for this reason the courts, although recognizing the logic of the theory, have always avoided the perplexing question. See remark by Wells, J., in Reg. v. Gordon, 23 I. B. D. 354 (1889). Some few cases can be found which, in their facts, will support the logical conclusion, but in none of these cases did the court squarely state, or even intimate, that a misrepresentation of one's present intention is a misrepresentation of an existing fact, but, on the contrary, in each case is expressly stated a doctrine irreconcilable with the result reached that a promissory pretence is not indictable. State v. Dome, 27 Ia. 273 (1869); State v. Cowdin, 28 Kan. 269 (1882); State v. Nichols, 1 Houston 114 (Del., 1862). It is submitted that in these cases the courts erred in interpreting a promise as an existing fact. In other cases, although the courts have gone very far, as, for example, in holding that a misrepresentation of a power, seemingly psychic and consequently a mental state, is a misrepresentation of an existing fact, still they have refused to take the final step. Reg. v. Lawrence, 36 L. T. 404 (1877).

The controversy has been settled in England by statute providing, *inter alia*, that a promise as to future conduct not intended to be kept is not by itself a false pretence. 62 and 63 Vict., C. 22.

EQUITY—BLACKLISTING—CONCERTED REFUSAL TO DEAL—WANT OF JUSTIFICATION.—In Arbour v. Pittsburg P. T. Asso., 229 Pa. 240, the plaintiff filed a bill in equity to restrain certain actions of the defendants under their by-laws. The plaintiff was a retail produce dealer. The defendants were members of an incorporated association of wholesale produce dealers. In accordance with their by-laws the defendants refused to deal either on credit or for cash with the plaintiff, until the plaintiff paid a disputed claim the defendants had against him, or agreed to submit the matter to arbitrators chosen by the defendants and members of their association. The plaintiff alleged damage to his business and the court enjoined the acts in question, and declared void the by-laws under which they were committed. This conclusion is correct according to the modern view. The court occupies most of its opinion in justifying its jurisdiction in passing on the by-laws of a corporation of this character, and seems to take for granted the illegality of the by-laws in question and the defendants' acts thereunder. The apparent ground of their conclusion in the latter question is that: "The plaintiff was not a member, and his business standing and credit with other dealers, as well as his lawful claims, demands and defences, were disposed of without regard to the forms prescribed by our legal procedure."

The case seems to be a plain instance of a concerted refusal to deal between two parties resulting in injury to one of them, the plaintiff. So many courts have held to the view that the right to refuse to deal between two parties is absolute and cannot be questioned (*e. g.*, Bohn Mfg. Co. v. Hollis, 54 Minn. 223 [1893]), that it would not have been amiss for the court to give their reasons for adopting the more radical view, that even between two parties the exercise of a right of this class which results in injury, requires justification. There is, however, to be found an increasing number of cases which have taken this view, and held the exercise of the right to refuse to deal not justified by a variety of objects; Carew v. Rutherford, 106 Mass. 1 (1870) (the object was to collect a fine imposed

by the defendant association on the plaintiff, a non-member); Ryan v. Burger & Howe Brewing Co., 13 N. Y. Sup. 66 (1891) (the object was to collect a claim for which the plaintiff was not liable at law); Boutwell v. Marr, 42 Atl. 607 (Vt., 1899) (the object was to collect a fine imposed by the defendant association on the plaintiff, a non-member). In the two last cases there appeared to be some evidence of economic coercion of the minority of the association, thus giving the cases the aspect of three party cases, or "boycotts." This view having once been adopted, the want of justification is apparent, for the sole object of the defendants was to collect disputed claims without having them passed on by the courts. The court below, whose ruling was affirmed, said that the conduct of the defendants constituted a "combination and monopoly in restraint of trade." It is submitted that in all cases of this class the characteristics of combination and monopoly in the defendants' acts are a practical necessity to accomplish the injury complained of, but are not necessary legal component parts of the act.

It is possible that the fact that the members of the defendant association had been incorporated by the State, and had thus received the benefits and franchises of incorporation rendered the court more ready to hold them for unsocial conduct.

CARRIERS—LIABILITY TO PASSENGERS FOR INSULT BY SERVANT.—In May v. Shreveport Traction Co., 53 So. 671 (La. 1910), the plaintiff, a Caucasian, boarded a car of the defendant company, with compartments for "white" and "colored," as required by statute. She took her seat in the compartment for "white" persons. When the conductor came to collect her fare, pointing to the seats for "colored" passengers, he said: "Don't you belong over there?" He then proceeded to collect fares in another part of the car, and, when passing the plaintiff on his return, she asked what he meant. The conductor replied: "You are in the wrong seat; you belong over there." The conductor was disposed to end the conversation, but the plaintiff continued it until she left the car. It was *held*, that the plaintiff could recover for the humiliation and embarrassment caused by the remarks of the conductor.

It is generally held that where there has been no physical impact but the passenger has been insulted by an employe of the carrier, recovery may be had; but it must be noted that the language used in these cases has been more malicious than in the leading case. Gillespie v. Brooklyn Heights R. R. Co., 178 N. Y. 347 (1904), passenger charged with beating way; L. & N. R. R. Co. v. Donaldson, 19 Ky. L. R. 1384 (1897), same; Cole v. A. & W. P. R. R., 102 Ga. 474 (1897), same; Tex. & Pac. Ry. v. Tarkington, 27 Tex. Civ. App. 353 (1901), same; C. N. O. & T. P. Ry. v. Harris, 115 Tenn. 501 (1905), same; Lafitte v. L. & N. O., C. & L. R. R., 43 La. Am. 34 (1891), passenger charged with passing counterfeit note. The case of Knoxville Traction Co. v. Lane, 103 Tenn. 376 (1899), more closely resembles the leading case, but the language used was slanderous, the employe imputing unchastity to the passenger: "The contract to carry passengers is not one of mere toleration and duty to transport the passenger on its cars, but it also includes the obligation on the part of the carrier to guarantee to its passengers respectful and courteous treatment, and to protect them not only from violence and insults from strangers, but also against violence and insult from the carrier's own servants." In some cases the words and acts would constitute an assault, in which case, the liability is unquestioned. Inter. Natl. & G. N. R. Co. v. Henderson, 82 S. W. 1065 (Tex., 1904); St. L., S. W. Ry. v. Wright, 84 S. W. 270 (Tex., 1904); Gulf, C. & S. F. Ry. v. Luther, 40 Tex. Civ. App. 517 (1905).

The leading case is certainly an extreme extension of the liability, and on exactly similar facts an opposite conclusion has been reached. Little Rock Ry. & Elec. Co. v. Putsche, 104 S. W. 554 (Ark., 1907.) See also So. Ry. in Ky. v. Thurman, 121 Ky. 716 (1906), similar facts: "But if he (brakeman) in good faith believed and in the exercise of ordinary care

had a right to believe that she was a woman of color and was not insulting to her, the jury should find for the defendant;" Daniels v. F. C. & P. R. R., 62 S. C. 1 (1901): "The company is not liable for strict business language—firm, business-like talk—but if the rudeness goes to such extent as to be abusive, I would not charge you that the railroad is not liable."

The following cases deny the proposition that where there is abuse without physical injury, there is nevertheless recovery. Spohn v. Mo. Pac. Ry., 116 Mo. 617 (1893); Grayson v. St. L. Transit Co., 100 Mo. App. 60 (1903); Taylor v. Atlantic Coast Line R. R., 78 S. C. 552 (1907).

In view of the racial feeling in Louisiana, the words used by the conductor undoubtedly were of a more slanderous nature than had they been spoken in the North, but the decision is certainly a questionable one.

COSTS—LIABILITY OF INFANT TO INDEMNIFY NEXT FRIEND.—An action, properly instituted and conducted, by a next friend in the interest of an infant, having been dismissed with costs and damages to be paid by the next friend, in a subsequent suit, the infant was *held*, bound to indemnify the next friend against such costs and damages, and the costs, charges and expenses properly incurred in relation to the former action. Steeden v. Waldon, 2 Ch. 393 (1910).

According to some authorities an infant plaintiff suing by guardian, *ad litem*, or next friend, is liable for costs; Whittaker v. Marlar, 1 Cox 285 (1786); Myers v. Rehkopf, 30 Ill. App. 209 (1888); Howett v. Alexander, 12 N. C. 431 (1828); this is denied by other authorities. Holmes v. Adkins, 2 Ind. 398 (1850); Waring v. Crane, 2 Paige 79 (N. Y., 1830); Stephenson v. Stephenson, 3 Hayw. 123 (Tenn., 1816). A few cases hold both the infant and next friend liable. Turner v. Turner, 2 P. Wms. 297 (1725); Albee v. Winterink, 55 Iowa 184 (1880). Apart from statute, by the weight of authority in England and this country the next friend is liable in the first instance. Aderton v. Yates, 5 Deg. & Sm. 202 (1852); Caley v. Caley, W. N. 89 (1877); Smith v. Gafford, 33 Ala. 168 (1858); Rauche v. Blumenthal, 4 Pennew. 521 (Del., 1904); Wainwright v. Wilkinson, 62 Md. 146 (1884); *contra*, Crandall v. Slaid, 52 Mass. 288 (1846); Soule v. Winslow, 64 Me. 518 (1874). In many States statutes make the next friend primarily liable. Robidon v. Judge, 110 Mich. 297 (1896); Wead v. Cantwell, 43 N. Y. 528 (1885); Burbach v. Ry. Co., 119 Wis. 384 (1903). His liability is undoubted where the suit was improper or unnecessary. Pearce v. Pearce, 9 Ves, Jr. 548 (1804); Campbell v. Campbell, 2 My. & Cr. 25 (1837); Thomas v. Elsum, L. J. R. 46 Ch. D. 793 (1877). As was said by Lord Langdale, in Cross v. Cross, 8 Beav. 455 (1845), "there is considerable difficulty in dealing with cases of this kind. On the one hand, there is danger of encouraging useless and expensive litigation on behalf of infants by strangers; on the other hand, you may discourage interference, which very often is absolutely necessary for their protection."

Since the next friend is liable in the first instance in England, the principal case seems clearly right in allowing the action over against the infant, as he is the real party in interest. Though the question is *res integra* in England, in many cases property of the infant under control of the court has been made available to meet the next friend's expenses and liabilities. Clayton v. Clarke, 7 Jur. (N. S.) 562 (1861); *In re* Jones, W. N. 14 (1883); Sanderson's Admrs. v. Sanderson, 20 Fla. 292 (1883); *contra*, Lindley, L. J.; *In re* Fish, 2 Ch. 422 (1893); Insurance Co. v. Van Rensselaer, 4 Paige 85 (N. Y., 1833). *Dicta* in support of the principal case are found in Taner v. Jore, 2 Ves. Sr. 465 (1752); Pritchard v. Roberts, L. R. 17 Eq. 222 (1873). This is law in America. Voorhees v. Polhemus, 36 N. J. Eq. 456 (1883).

DESCENT—RELEASE OF AN EXPECTANCY IN LIFETIME OF ANCESTOR—HELD VOID IN EQUITY.—A recent decision in South Dakota is to the effect that the release by an heir of his interest in the estate of the ancestor, made in the lifetime of the latter, is inoperative and void. *In re* Thompson's Estate, 128 N. W. Rep. 1127 (S. D., 1910).

There was no question of inadequacy of the consideration raised; and none of fraud, the court giving as their reason, for the decision, that this was a release of a mere expectancy not coupled with an interest, and as such void under Sections 215 and 918 of the Civil Code, which adopted the common law rules on this subject. These sections were copied from similar ones in a proposed Civil Code for New York State, and the New York cases cited by the Code Commissioners of that State, as a basis for the sections in question, are referred to, and quoted from, with approval by the court in the present case.

While not specifically stating so, the court apparently decide the question in equity as well as at law. There is no doubt that at law such a release would be invalid; but the weight of authority is in favor of upholding it in equity. Batham v. McKneely, 89 Ga. 812; Power's Appeal, 63 Pa. 443; Smith v. Smith, 59 Me. 214; Havens v. Thompson, 26 N. J. Eq. 383; Daniel v. Lewis, 13 Ky. L. Rep. 827; 2 Story Eq. Jur., 13th Ed., Section 1040b; and 2 Pomeroy Eq. Jur., 3d Ed., Section 953. In Daniel v. Lewis the Court spoke of the release as including a covenant of non-claim; and the Court in the present case intimates that, had there been a covenant of warranty by the heir, there might have been an equitable estoppel, which would have necessitated a different decision; but it is submitted that this distinction is more apparent than real, and that the two cases are in fact *contra*. The ground of the authorities deciding against the view adopted in the principal case is that the release, being for an adequate consideration, and no fraud appearing, is enforcible in equity. This view is considered at some length in Pomeroy, *supra*. In Indiana a release for a money consideration operates as an advancement of the amount, and does not bar the heir. Stokesbury, *et al.*, v. Reynolds, 57 Ind. 425. In Illinois, where the release is in consideration of a transfer of real estate to the value of the interest which the heir has, or rather would get, in the ancestor's estate, it operates as a bar to his participation in the distribution of same; and the statute of advancements does not apply. Bishop, *et al.*, v. Davenport, *et al.*, 58 Ill. 105. A similar statute is in force in Indiana, and the two jurisdictions seem to have the same views on the question, and to be in accord with the weight of authority, where the case is not affected by the statute just referred to.

The only decisions which go as far as that in the principal case are those in New York, which were made the basis of the sections in the proposed code for that State, later adopted in the code of South Dakota. It may even be doubted whether two of these go so far as the court in the present case appears to think they do; and they certainly represent the minority view, in any event.

EVIDENCE—CRIMINAL PROSECUTION—RESEMBLANCE OF CHILD AS EVIDENCE OF INTERCOURSE.—On a trial for carnal abuse of a female under the age of sixteen, the Supreme Court of Arkansas allowed the production before the jury of the child of the female and permitted her to testify that the child was the result of the intercourse with accused. Cook v. State, 132 S. W. 455 (Ark., 1910).

There is no little conflict in the authorities as to whether it is competent to introduce parol testimony relative to the resemblance between the child and defendant in cases of bastardy, seduction, carnal abuse, and the like. In England testimony upon such resemblance seems to have been almost uniformly received. Douglas Case, 2 Coll. Jur. 402 (1769); Day v Day, Hubback, Evid. of Succession, 384 (1797); Burnaby v. Baillie, 42 Ch. Div. 282 (1889); and in the Tichborne Case (1871), Cockburn, C. J., held the resemblance of the claimant to a family daguerreotype was relevant. The weight of authority in the United States seems to be against the admission of such evidence. *In re* Jessup, 81 Cal. 408 (1889); Jones v. Jones, 45 Md. 144 (1876); U. S. v. Collins, 1 Cranch 592 (1810); *contra*, Sheehan's Est., 139 Pa. 168 (1891).

The same conflict exists upon the question whether a child may be

exhibited to the jury as evidence of relationship; although some courts which prohibit testimony upon resemblance permit the jury to determine from inspection whether any personal resemblance exists. Shorter v. Judd, 56 Kan. 43 (1895); Jones v. Jones, *supra*. The principal case would seem to be in accord with the weight of authority in America on the admissibility of this kind of demonstrative evidence. Gilmanton v. Ham, 38 N. H. 108 (1859); Finnegan v. Dugan, 96 Mass. 197 (1867); St. v. Horton, 100 N. C. 443 (1888); Crow v. Jordon, 49 Oh. St. 655 (1892). Some courts go so far as to allow counsel to comment on the similarity of features of the infant and its putative father. St. v. Danforth, 72 N. H. 215 (1905), and cases cited. In other States the child may not be exhibited to the jury for the purpose of proving paternity by resemblance. Robnett v. People, 16 Ill. App. 299 (1885); Risk v. St., 19 Ind. 152 (1862); Fuller v. Carney, 36 N. Y. 47 (1883); Hanawalt v. St., 64 Wis. 84 (1885). The mere presence of the child in court within the vision of the jury in a prosecution for bastardy is not ground for complaint. People v. White, 53 Mich. 537 (1884); Hutchinson v. St., 19 Neb. 262 (1886). So the child may be brought into court, in a prosecution for rape, to corroborate the testimony of the prosecutrix, and its birth and identity as a result of the illicit intercourse may be shown, although it can not be introduced to show resemblance to defendant. St. v. Ned, 23 Utah 541 (1891).

It is submitted that the best rule is to admit the child in evidence only where it has attained an age when its features have assumed some degree of maturity or permanency. The argument for this qualified admission rule given in Clark v. Bradstreet, 80 Me. 454 (1888) has been quoted with approval in several recent cases. "While it may be a well known physiological fact that peculiarities of form and feature are often transmitted from parent to child, yet it is equally true that during the first few months of a child's existence it has that peculiar immaturity of features which characterize it as an infant, and that it changes very much in looks and appearance during that period." Resemblance is then more imaginary than real. Copeland v. St., 40 S. W. 589 (Tex., 1897); St. v. Smith, 54 Iowa 104 (1880); compare St. v. Harvey, 112 Iowa 416 (1900); Shorten v. Judd, *supra*. But this discrimination as to age was expressly disapproved in Adams v. St., 124 S. W. 766 (Ark., 1910); Scott v. Donovan, 153 Mass. 378 (1891); Garret v. St., 50 N. J. L. 490 (1888).

EVIDENCE—PAROLE EVIDENCE ADMISSIBLE TO EXPLAIN A BOND.—In the case of Kernodle v. Williams, *et al.*, 69 S. E. 431 (N. C., 1910), action was brought on a bond. The defendants admitted the execution of the bond and set up a further agreement showing that the money had been given by the father to his children, and the bond given by way of receipt and not to operate as an obligation unless the money was needed to meet the calls upon the executor for payment of debts. The plaintiff was the father of the obligors. It was decided by a divided court that the admission of such evidence was proper.

The decision proceeded on the ground that while parole evidence is not admissible to vary, alter or contradict a written agreement, the evidence in the case at bar did not have that effect, but merely added certain terms of the agreement which had not previously been reduced to writing. That is, that the entire contract was composed of the parole as well as the written terms, and therefore admission of the evidence was not a change but an addition.

There is some authority for the reasoning employed as well as for the result reached. The fundamental principle, it is stated, is that deeds and specialties cannot be explained or varied in their signification by parole evidence if the terms made use of in the instrument are capable of sensible explanation of themselves; and that the rule extends to any written contract. Stackpole v. Arnold, 11 Mass. 27 (1814); Brown on Parole Evidence, Section 1. The reason for the existence of such a rule is equally stated by Coke 3, 26. "Also it would be inconvenient that matters in writ-

ing made by advice and upon consideration, and which finally import the certain truth of the agreement of the parties should be controlled by the averments of the parties to be proved by the uncertain testimony of slippery memory." Courts have found it necessary to introduce many qualifications to this rule, and it cannot be doubted that evidence is always admissible where the original contract was verbal and entire and part only reduced to writing. Chapin v. Dobson, 78 N. Y. 74 (1879), or where there is a collateral agreement not embraced in the written one. Brown, Parole Evid., Section 50, and cases cited. In Brook v. Latimer, 44 Kan. 431 (1890), in a suit upon a promissory note evidence that this was by way of an advancement by father to child, and that the note was a mere receipt was admitted on the ground that the consideration recited is always the subject of judicial inquiry. Under the authorities there seems to be strong ground for the decision in the principal case.

It would seem, however, that this is a dangerous extension of the law. While it may be admitted that, strictly speaking, the evidence did not vary the written instrument as to the words used, yet it did effect a change in that its character was completely altered. What was formerly an obligation to pay became an acknowledgment of payment. It would be hard to imagine a greater antithesis. There is no suggestion of fraud or mistake. There appears to be no reason for allowing the evidence. It is admitted that, granting the facts to be true, the case is a hard one, but this is no reason for allowing the parties who have had recourse to the dignity of a legal instrument to go behind their solemn declaration. Keeping in mind the reason for the rule excluding parole evidence the case seems to be within the strict letter of the law, but far outside its spirit. Nor is this view of the case unsupported by authority. Many cases have held that evidence may not be admitted to show an instrument purporting to be an obligation is a mere receipt. Clarke v. Allen, 132 Pa. 40 (1890); Shaw v. Shaw, 50 Me. 94 (1863); Billings v. Billings, 10 Cush. 178 (1890). It will be noted that the bond in the present case was given for a valuable present consideration so that the evidence could not have been admitted to show failure of consideration. On the whole, the dissenting opinion is a far more convincing statement of what the law should be on this disputed point, although it is impossible to say that the decision as rendered conflicts with existing authorities.

EVIDENCE—PRESUMPTION OF SURVIVORSHIP—INSURANCE.—A casualty insurance policy provided that the indemnity should be paid to the beneficiary named therein, or in event of her "prior death" to the legal representatives of the deceased. The assured and the beneficiary named perished in the "Slocum disaster" and the survivorship was unascertainable. *Held:* The intention of the assured as expressed in the language of the contract was that the beneficiary should not take under the policy unless she survived the assured. The burden was therefore upon the representatives of the beneficiary to prove her survivorship, and since that burden was not satisfied the proceeds of the policy passed to the subsequent claimants, the legal representatives of the assured. Dunn v. New Amsterdam Casualty Co., 162 N. Y. Supp. 229 (1910).

Under the civil law, where several persons lose their lives in a common disaster, there is a presumption of survivorship based upon the age, sex and strength of the various persons. Louisiana and California have adopted similar presumptions in their codes. Grand Lodge, etc., v. Miller, 96 Pac. Rep. 22 (Cal. 1908). The common law, however, recognizes no presumption either of survivorship or of simultaneous death. The person whose rights are conditional upon the survivorship of any particular person must prove that such person did in fact survive. Survivorship must be proved by the party asserting it. Wing v. Angrave, 8 H. L. Cas. 183 (1860). This is settled law, but it is difficult to determine upon whom the burden of proof rests in a given case. Where a testamentary devise is in question the English courts interpret the language of the condition literally and sometimes defeat

what seems to be the obvious intention of the testator. Elliot v. Smith, 22 Ch. Div. 236 (1882).

The American courts have adopted a more liberal and reasonable mode of construction. They give to the language of the condition the meaning it had to the testator. Y. W. C. A. v. French, 187 U. S. 401 (1902). The principal case applies the same rule of construction to cases of insurance contracts and is in accord with the weight of authority. Hildebrandt v. Ames, 66 S. W. Rep. 311 (Tex. 1901). Where, however, no right to change the beneficiary is reserved it has been held that the beneficiary has a vested interest in the policy, which is divested only by his prior death, and a subsequent claimant can succeed only by proof of the beneficiary's prior death. U. S. Casualty Co. v. Kacer, 169 Mo. 301 (1902).

HUSBAND AND WIFE—STATUTES—WIFE'S RIGHT TO SUE HUSBAND FOR PERSONAL TORT.—In Thompson v. Thompson, 31 Sup. Ct. Rep. 111 (1910), a majority of the United States Supreme Court *held* a statute authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried," did not give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person. Mr. Justice Harlan dissented, with him, Holmes and Hughes, JJ. The differences of opinion was whether the act should be confined to property actions or given a broader construction. It would seem there is much to be said for a broader interpretation of such Acts. Sykes v. Speer, 112 S. W. 422 (Tex. 1908).

Arising out of the common law doctrine of the legal unity of husband and wife is the general rule that neither spouse can sue the other at law, except as authorized by statute. Stewart, Husband and Wife, §39 and cases cited. While the enabling acts have to a large extent separated the personality of the wife from that of her husband, and removed most of her disabilities, the few reported cases support the narrow construction given the Act in the principal case. Peters v. Peters, 42 Iowa 182 (1875); Longendyke v. Longendyke, 44 Barb. 366 (N. Y. 1863); Freethy v. Freethy, 42 Barb. 641 (N. Y. 1865); Decker v. Kedley, 79 C. C. A. 305 (1906). And this disability continues after divorce. Phillips v. Barnet, L. R. 1 Q. B. D. 436 (1876); Main v. Main, 46 Ill. App. 106 (1892); Abbott v. Abbott, 67 Me. 304 (1877); Bandfield v. Bandfield, 117 Mich. 80 (1898); Strom v. Strom, 6 L. R. A. (N. S.) 191 (Minn. 1906). *Contra:* Shultz v. Shultz, 27 Hun. 27, reversed in 89 N. Y. App. 644 (1882); *dicta* in Wilson v. Wilson, 36 Cal. 447 (1868), overruled in Peters v. Peters, 23 L. R. A. (N. S.) 699 (Cal. 1909), where a husband's right to maintain an action against his wife for a personal injury was denied. With equal unanimity tort actions to recover property are maintainable by married women against their husbands; ejectment, Cook v. Cook, 125 Ala. 583 (1900); detinue, Larned v. Larned, 2 K. B. 539 (1905); trover, Smith v. Smith, 20 R. I. 556 (1898); Gillespie v. Gillespie, 64 Minn. 381 (1896); replevin, White v. White, 58 Mich. 546 (1885); Howland v. Howland, 20 Hun 472 (N. Y. 1880); *contra*, Hobbs v. Hobbs, 70 Me. 383 (1880).

The doctrine is sometimes stated in general words, that husband and wife may sue each other in equity, Cannel v. Buckle, 2 P. Wins. 243 (1724); Porter v. Bank, 19 Vt. 410 (1847), 2 Story Eq. Jur. 699; but the later authorities limit this right to cases in which questions concerning property arise. Lombard v. Morse, 155 Mass. 136 (1891); Buttlar v. Buttlar, 67 N. J. Eq. 136 (1904); Heckman v. Heckman, 215 Pa. 203 (1906); 1 Pomeroy, Eq. Jur. §99.

LANDLORD AND TENANT—LIABILITY TO PAY RENT WHERE BENEFICIAL ENJOYMENT IS MADE ILLEGAL.—In the recent New York case of Adler v. Miles, 126 N. Y. S. 135, a lessor brought an action for rent against the defendant as surety of the lessee. A tenement house had been leased "to be used and occupied for the purpose of a place of amusement for the exhibition of moving pictures and no other purpose whatsoever," and the defense was that

prior to the accrual of the rent sued for the Mayor of New York, acting under an ordinance, had prohibited moving picture licenses for tenement houses, and that without such license the activity was illegal. *Held:* The defendant is not liable on the covenant as surety unless his principal would be liable, and the latter is not liable because the law has made the performance of the contract impossible and it is therefore rescinded. To hold the defendant under the altered circumstances of the law would be to hold him to a contract he never made.

The conclusion seems to be correct. As the court says: "The general rule was declared in the old case of Paradine v. Jane, Alevyn's Reports, 26, 27: 'Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' This general rule does not apply where performance becomes impossible by a change in the law or by reason of action taken under governmental authority. In such case, the reason for the general rule does not exist. The parties to the lease contracted with a view to the law as it existed at the time the lease was made. To hold them bound to anticipate future legislation would be equivalent to making them obligate themselves to the performance of conditions prescribed by others, which in the nature of things could not have been in the contemplation of the parties at the time the contract was made." This exception to the general rule is supported by a distinct line of New York cases. Jones v. Judd, 4 N. Y. 411; People v. Insurance Co., 91 N. Y. 174; Church v. Mayor, 5 Con. 538, and seems to be accepted in England: Chitty on Contracts, 15th Ed. 711, and cases cited. In Rooks v. Leaton, 1 Phila. 106, it is held that when after performance of a contract by one party, performance of the other is prohibited by law, and the latter party insists upon retaining the benefits which he has obtained under the contract, he will be held to a satisfaction of his agreement by paying an equivalent in money.

A consideration of the case as one of eviction is interesting and not beside the point. The lessee is undoubtedly deprived of the entire beneficial use of the premises for the lease was solely for the purpose in question. The case is closely analagous to an eviction by eminent domain. In these cases the New York rule seems to be that the covenant to pay rent is not rescinded, but this conclusion is reached on the theory that the lessee is compensated by the State; Folz v. Huntley, 7 Wend. 210. In the present case there being no compensation the opposite conclusion would seem justifiable. For a discussion of this question see 58 Univ. of Penn. Law Rev. 98.

MASTER AND SERVANT—STATUTORY PROHIBITION OF CHILD LABOR.—In Norman v. Virginia-Pocahontas Coal Co., 69 S. E. 857 (1910) W. Va., the plaintiff, a boy under fourteen years of age, was employed by the defendants in a mine and was injured in the course of his employment. A statute in the jurisdiction provides that: "No boy under fourteen years of age shall be permitted to work in any coal mine," etc. The decision is the original one in the jurisdiction and the authorities on the various phases of the question are reviewed at some length. It was *held* that "the violation of the statute is actionable negligence whenever that violation is the natural and proximate cause of an injury. If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the non-observance of the law." As to contributory negligence, it was held that the intention of the legislature was to prevent injury to the immature by their own contributory negligence through the curiosity, indiscretion or heedlessness that naturally belongs to their age; that, therefore, when it is shown that the person in question is fully cognizant of the dangers which he is encountering, the defence of contributory negligence should be allowed.

The decision seems to be in accord with the weight of authority. Marino v. Lehmaier, 173 N. Y. 530 (1903); Lee v. Sterling Mfg. Co., 134 N. Y. App. 123 (1909); Evans v. American Iron & Tube Co., 42 Fed. 519 (1890); Darsam v. Kohlmann, 123 La. 164 (1909); Nickey v. Steuder, 164 Ind. 189

(1904); Thompson: Negligence Vol. 4, No. 3827, and authorities there cited. There are numerous cases, however, holding that the mere employment of a minor contrary to the statute is more than "some evidence of negligence" but is negligence *per se*. Rolin v. Tobacco Co., 141 N. C. 300 (1906); Sterling v. Union Carbide Co., 142 Mich. 284 (1905); Syneszewski v. Schmidt, 116 N. W. 1107 (Mich. 1908); Fitzgerald v. International Flax Twine Co., 104 Minn. 138 (1908); Woolf v. Nauman Co., 128 Ia. 261 (1905); Smith's Admr. v. Natl. Coal & Iron Co., 117 S. W. 280 (Ky. 1909). In the above cases, the defence of contributory negligence was or would have been allowed.

It is interesting to note that two members of the court in the leading case dissented as to the defence of contributory negligence being open to the employer. This view, although in the minority, is well substantiated by authority. Lenahan v. Pittston Coal Co., 218 Pa. 311 (1907); Stehle v. Jaeger Automatic Machine Co., 225 Pa. 348 (1909); American Car Co. v. Armentrout, 214 Ill. 509 (1905); Iron & Wire Co. v. Green, 108 Tenn. 161 (1901).

In considering the problem of the defences available to the employer when injury results to an employe from the breach of a statutory duty by the employer, the cases of Narramore v. C. C. C. & St. L. Rwy., 96 Fed. 298 (1899), and St. Louis Cordage Co. v. Miller, 126 Fed. 495 (1903), and the cases following either authority are immediately recalled. The principles involved in assumption of risk and in this case are substantially the same. Is the intention of the legislature in forbidding child labor to prevent it as a social wrong or should the common law rules as to civil liability remain unaltered? If the latter position is assumed, the courts regard the action of the legislature from an individualistic and not from a social standpoint. It would seem that to carry out the true intention of the legislature, the rule making the employers' liability absolute is preferable.

MUNICIPAL CORPORATIONS—WATER SUPPLY—NEGLIGENCE.—In Keener v. City of Mankato, 129 N. W. 158 (Minn. 1910), the complainants charged that the defendant city allowed the supply in its waterworks system to become polluted with poisonous substances and large quantities of filth and sewage to escape into, and saturate it, by reason whereof the plaintiff's intestate contracted typhoid fever and died. The defendants demurred. It was *held* that the municipality was liable for its negligence in its corporate capacity and was not exempt because it was carrying out a governmental function.

It is well recognized that municipal corporations are possessed of dual powers, the one governmental, legislative, or public; the other proprietary or private. 1 Dillon Mun. Corp. 4th Ed., §22, and cases cited. 5 Thompson Neg. 258 and cases cited, Bailey v. Mayor of City of New York, 3 Hill (N. Y.) 531 (1842).

Acts held to be in the performance of this latter function are improving or grading a highway, street or sidewalk. Allentown v. Kramer, 73 Pa. St. 406 (1873); Clemence v. Auburn, 66 N. Y. 334 (1876); digging a sewer, Rome v. Portsmouth, 56 N. H. 291 (1876); building a bridge, Stone v. Augusta, 46 Me. 127 (1858); constructing a culvert, Ross v. Clinton, 46 Iowa 606 (1877); erecting and maintaining a public building, Chicago v. O'Brennan, 65 Ill. 160 (1872); *contra:* where building was a public school building, Hill v. Boston, 122 Mass. 344 (1877).

With respect to its water system the rights, powers and duties of a municipal corporation are interpreted the same as in the case of an individual or private corporation. Lynch v. Springfield, 174 Mass. 430 (1899); Galveston v. Posnainsky, 62 Tex. 118 (1884); Wagner v. Rock Island, 146 Ill. 139 (1893); Memphis v. Lasser, 9 Humph. (Tenn.) 757 (1849); White v. Meadville, 177 Pa. 643 (1896); Augusta v. Mackey, 113 Ga. 64 (1901); Esberg-Gemst Cigar Co. v. City of Portland, 55 Pac. 961 (1899); Booth v. Fulton, 85 Mo. App. 16 (1900).

And though it has been held that a city is not liable for sickness or

death caused by drinking impure water from a free public well established and maintained by its authority in one of its streets, in which it had placed a pump for free public use. Danaher v. Brooklyn, 51 Hun 563 (N. Y. 1889); in the principal case the defendant by demurrer acknowledged its negligence; and so the decision would seem to be in line with the cases holding a municipal corporation liable for negligence in the construction or management of waterworks whereby a private person is injured. Stock v. City of Boston, 149 Mass. 410 (1889); City of Ironton v. Kelley, 38 Ohio St. 50 (1882); Ysleta v. Babbitt, 8 Tex. Civ. App. 432 (1894); Wilkins v. Rutland, 61 Vt. 336 (1889); Dammum v. St. Louis, 152 Mo. 186 (1899); Rumsey v. Phila., 171 Pa. 63 (1895); Lockwood v. City of Dover, 73 N. H. 209 (1905).

NEGLIGENCE—LIABILITY OF CONTRACTOR EMPLOYED BY LESSOR FOR DAMAGES SUFFERED BY LESSEE.—A municipality leased a street railway to an operating company, covenanting to keep the roadway in repair. In performance of the contract the city awarded a contract for the relaying of certain tracks, in which the contractor agreed to save the city harmless from all damages that might result. The contractor so negligently performed the work that a car belonging to the operating company was wrecked. *Held*: The contractor was liable to the operating company for all damage caused by his negligent acts. The mutual rights of the parties were not founded upon, nor affected by, the complicated contracts which appeared in the case. Birmingham Tramway Co. v. Law [1910], 2 K. B. 965.

The authorities uniformly support this decision. Where a contractor undertakes to perform an act which, if not done with skill and care, may cause injury to a third party, the law, *ipso facto*, imposes upon him a duty to use such skill and care, for breach of what obligation an action in tort will always lie. Casey v. Bridge Co., 114 Mo. Ap. 47 (1905). This duty does not depend upon, or grow out of, the contract which merely explains the contractor's presence, Bickford v. Richards, 154 Mass. 163 (1891); though the same act may be a tort of negligence as to one party, and a breach of contract as to another, Schutte v. Electric Co., 68 N. J. L. 435 (1902).

Where the work, if performed according to the contract will necessarily and obviously cause injury to a third party, both the contractor and the person employing him are liable, Murray v. Arthur, 98 Ill. App. 331 (1901); but if the defect in the employer's plan is not such as must obviously cause damage, the contractor is not liable in the absence of negligence on his part, Bell & Son v. Kidd & Roberts, 68 S. E. Rep. 607 (Ga. 1909). If the work has been completed and turned over to the owner, the contractor's liability to third persons, even for negligence, ceases, Galbraith v. Steel Co., 133 Fed. 485 (1904); except where the contractor has constructed or repaired an inherently dangerous machine, as an elevator, Kahner v. Otis Elevator Co., 96 Ap. Div. 169 (N. Y. 1904).

Except in Cobb v. Clark Co., 118 Ga. 483 (1903), where a contrary *dictum* is clearly erroneous, the courts have in cases dealing with the negligence of contractors avoided the confusion found in analogous cases where manufacturers and venders of property have been negligent, which confusion is caused by the incorrect conception that the recovery, if any, of a third party must be for breach of contract. See Bohlen; Affirmative Obligation in the Law of Torts, 53 Amer. Law Reg. 290.

QUASI-CONTRACTS—WAIVER OF TORT AND SUIT IN ASSUMPSIT.—An exposition society gave the owner of a gravity railway a license to erect and operate it on their premises during an exposition season. At the end of the season the licensee was in arrears for rent, and did not remove the railway. The society subsequently leased the land with the railway upon it, to other parties; and about a year afterwards the railway was destroyed by fire. *Held:* That the exposition society was liable in assumpsit for the value of the railway. Rees and Sons Co. v. Western Exposition Society, 44 Pa. Super. 381 (1910).

It is too well settled to admit of doubt that if any one in the commission of a tort enriches himself by taking or using the property of another, the latter may, in some cases, instead of sueing in tort to recover damages for the injury done, sue in assumpsit for the value of that which has been tortiously taken or used. Keener, Quasi-Contracts, 159. The only question of doubt concerns the limits of a plaintiff's right to waive the tort and sue in assumpsit.

When the suit is in assumpsit for money had and received, the general rule is that the mere wrongful detention of property is not sufficient to establish a basis for the plaintiff's waiver of his tort action, and suit *ex contractu*. The goods must be turned into money or its equivalent. Cragg v. Arendale, 113 Ga. 181 (1901). The theory on which this rule proceeds is that until the wrongdoer has received money to which the owner of the property is entitled, there can be no action for money had and received, or upon an implied promise to pay. Nat. Trust Co. v. Gleason, 77 N. Y. 400 (1879). Applying this theory, it has been held that where the tort-feaser sold property, but the plaintiff failed to show what amount of money the wrongdoer received, he could not sue for money had and received. Glasscock v. Hazel, 109 N. C. 145 (1891). So also where the wrongdoer converted a certificate of shares in a corporation, and surrendered it to the corporation in exchange for a new certificate in his own name. Hagar v. Norton, 188 Mass. 47 (1905). However, a sale will be implied under certain circumstances, as where a person is entrusted with property to sell for a fixed price, and he refuses either to re-deliver the property or account for the proceeds. Lord Mansfield, in Longchamp v. Kenny, 1 Doug. 137 (1779). But this presumption ought certainly not be raised in the face of facts which conclusively negative the idea that a sale occurred.

Where the plaintiff waives his tort remedy, and sues for goods sold and delivered, there is a great contrariety of opinion as to whether he can recover. A number of jurisdictions hold that he can. See Keener, Quasi-Contracts, 193 and cases cited. It is submitted that these cases entirely obliterate the distinction between actions *ex delicto* and actions *ex contractu*, where the action is founded on a tort in the conversion of personal property. Taking this view, many American courts refuse to allow waiver of tort in favor of this form of contractual action. Jones v. Hoar, 22 Mass. 285 (1827); Kidney v. Parsons, 41 Vt. 390 (1868); Keener, Quasi-Contracts, 194.

The courts of Pennsylvania in the early cases, seemed to follow the rule that the tort action can be waived only when the goods have been sold, and the seller has received money as a consideration. Willet v. Willet, 3 Watts 277 (1834); Satterlee v. Melick, 76 Pa. 65 (1874). But in Balliet v. Brown, 103 Pa. 551 (1883), it was said: "Where there is a conversion, there is an implied sale, and waiving the tort, an action of assumpsit for goods sold and delivered can be maintained upon the contract implied." If this rule be followed, it is only necessary to show a conversion in order to establish the right of election between the two forms of action.

In Rees and Sons Co. v. Western Exposition Society, *supra*, the Superior Court has gone further than either of the appellate courts of the State have gone before in applying the rule announced in Balliet v. Brown. Plainly the action could not be supported as for money had and received since the defendant had not sold the gravity railroad, and had not, therefore, received money for its value. The case seems to rest on the bare fact that by leasing the plaintiffs' property to a stranger, the defendant asserted rights of ownership in it; and that he had, therefore, impliedly promised to pay for it. The effect of the decision would seem to be to allow an action of assumpsit in any case where the defendant is guilty of a conversion of the plaintiff's property.

SURETYSHIP—LIABILITY OF SURETY AFTER DISCHARGE OF PRINCIPAL IN BANKRUPTCY.—It has been recently decided in Michigan that the surety on an appeal bond in an attachment suit is liable; though his principal has been relieved of liability by a discharge in bankruptcy. Brown and Brown Coal Co. v. Antezak, 128 N. W. Rep. 774 (Mich. 1910).

The decision depends on the construction to be given to §16 of the National Bankruptcy Law of 1898, which provides that "The liability of a person, who is a co-debtor with, or a guarantor, or in any manner a surety, for, a bankrupt, shall not be altered by the discharge of such bankrupt." Act of July 1, 1898, c. 541, §16, 30 Stat. 550 (U. S. Comp. Stat. 1901, p. 3428). The opinion states that, as this is a federal statute, "the construction it has received in the federal courts should control, if that construction is not inconsistent with our own decisions, and is, as we believe it to be, in accordance with the principles of justice." As the court here points out, the interpretation of the above section of the Bankruptcy Law adopted in this case is that of the federal courts. *In re* Albrecht, 17 N. B. R. 287; and *dicta* in Hill v. Harding, 107 U. S. 631, and Wolf v. Stix, 99 U. S. 1. This same view is adopted in the majority of the jurisdictions where the question has been raised. Farrell v. Finch, 40 Ohio St. 337; Ray v. Brenner, 12 Kans. 105; Knapp v. Anderson, et al., 15 N. B. R. 316 (N. Y.); and Fisse v. Einstein, 5 Mo. App. 78, which decides the matter as *res integra* in that State, and reviews the authorities. The reasoning adopted in these cases is that the surety's liability depends in nine cases out of ten upon just such a contingency as has here occurred, and that to allow him to avoid liability because of the discharge in bankruptcy of his principal would be to practically nullify the section of the Bankruptcy Law, quoted above, as far as it applies to such cases as the present, and to enable a debtor to thwart the diligence of his creditor.

Those jurisdictions, which hold that the surety is relieved from liability by the discharge in bankruptcy of his principal, do so on the ground that the surety's obligation is to pay, in case of default of his principal, the judgment to be obtained in the appellate court, not the original debt; and, therefore, since the appeal, which has been stayed until the determination of the bankruptcy question, cannot be continued to final judgment, because of such discharge of the appellant, the obligation, or debt, which the surety has bound himself to pay, does not exist, and cannot be determined. Odell v. Wooten, 38 Ga. 224; Martin v. Kilbourn, 1 Cent. L. J. 94 (Tenn.); Carpenter v. Tuwell, 100 Mass. 450.