RECENT CASES.

BANKRUPTCY—INDICTMENT FOR PERJURY AT CREDITORS' MEETING.—Subdivision 9 of section 7 of the Federal Bankruptcy Act (Act of July 1, 1898) provides that a bankrupt shall, at a meeting of his creditors, give such information about his business dealings as may be required of him, but that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." In Glickstein v. U. S., 32 Supreme Ct. Rep. 71 (1911), the Supreme Court of the United States held that this does not bar a prosecution for perjury for false swearing in the giving of such testimony.

The earlier cases under the Act took an opposite view. In *Re* Marx, 102 Fed. 676 (1900), and in *Re* Logan, 102 Fed. 876 (1900), it was held that the giving of false testimony at a meeting of creditors was not a valid objection to a discharge, because it was not a criminal offense punishable by imprisonment, immunity being conferred by Section 7 of the Act. In U. S. v. Simon, 146 Fed. 89 (1906), it was likewise held that the defendant could not be convicted.

In *Re* Gaylord. 112 Fed. 668 (1901), the court refused to grant a discharge, upon the same objection, but intimated that the bankrupt was immune from prosecution. Edelstein v. U. S., 149 Fed. 636 (1906), and Wecksler v. U. S., 158 Fed. 579 (1907), both decide that the immunity conferred by Subdivision 9 does not extend to perjury at an examination by creditors, and are approved by Chief Justice White in his opinion in the principal case.

This immunity from the use of testimony does not prevent prosecution for acts testified to upon examination; it is immunity from the use of evidence so given, not from prosecution. Burrell v. Montana, 194 U. S. 572 (1903); *'In re* Walsh, 104 Fed. 518 (1900).

BANKRUPTCY—JURISDICTION OF THE STATE AND FEDERAL COURTS.—A petition in involuntary bankruptcy having been filed, the bankruptcy court refused to appoint a receiver on the ground that a committee of creditors had, by agreement of a majority of the creditors, taken charge of the bankrupt's affairs, and that there really was no insolvency. An action was brought in the state court to recover the price of goods sold and judgment was given for the plaintiff. The Supreme Court of the state having affirmed this judgment, an appeal was taken to the United States Supreme Court on the question of jurisdiction. *Held,* that the pendency of bankruptcy proceedings in a Federal court precludes a state court from proceeding in an attachment suit brought by a single creditor. But the refusal to appoint a receiver and the recognition of an adjustment of the affair outside the courts, takes the matter. out of the hands of the bankruptcy court and the state court may resume jurisdiction. Acme Harvester Co. v. Beekman Lumber Co., 32 Sup. Ct. Rep. 96 (1912).

The decision in this case is strictly in accord with other well considered cases touching the same point. The bankruptcy court always has jurisdiction over the property of an adjudged bankrupt, exclusive of the state courts. In *Re* Reynolds, 127 Fed. 760 (1904); Beall v. Walker, 26 W. Va. 741; In *Re* Lemmon, 112 Fed. 760 (1901). Even where the action in the state court was begun before the bankruptcy proceedings, the Federal court having jurisdiction over the latter action may stay the suit in the state court, *In re* Potterfield, 138 Fed. 192 (1905), or the Federal court may, within its discretion, allow the first action to be prosecuted to judgment. Moore v. Green, 145 Fed. 472 (1906).

Where an entire stranger to the bankruptcy proceedings, claims to be the owner of goods in the hands of the bankrupt, nevertheless he will not be allowed to prosecute replevin in a state court without the consent of the

bankruptcy Court. *In re* Russell, 101 Fed. 248 (1900); White v. Schloerb, 178 U. S. 542 (1900).

Obviously, none of these rulings apply where the bankruptcy court has refused to take jurisdiction. Acme Co. v. Beekman Co., *supra.*

BANKS AND BANKING—PASSAGE OF TITLE TO CHECK DEPOSITED WITH BLANK INDORSEMENT.—A check on another bank, indorsed in blank, was deposited in a bank without any special agreement or understanding as to whether it was to be treated as cash or as a deposit for collection, and the bank gave the depositor credit for the check as cash. The court held that in such a case there is a presumption that the transaction constituted a sale to the bank, and that title to the check passed to the bank, although that presumption is subject to be rebutted by the facts. Downey v. National Exchange Bank, 96 N. E. Rep. 403 (Ind., 1911).

There is a definite cleavage of opinion on the effect of a deposit of a check indorsed "For Deposit" or in blank. Many courts hold, contrary to the principal case, that the bank is merely an agent for collection, and that title remains in the depositor until collection has actually been made. Freeman v. Bank, 87 Ga. 45 (1891); Packing Co. v. Davis, 118 N. C. 548 (1896); Beal v. Somerville, 50 Fed. 647 (1894); City of Philadelphia v. Eckels, 98 Fed. 485 (1896).

But in the majority of states, title passes to the bank at the time the depositor is credited with the amount of the check as cash. Bank v. Miller, 77 Ala. 168 (1884); Doppelt v. Bank, 175 Ill. 432 (1898); Noble v. Doughten, 72 Kan. 336 (1905); Auto Co. v. Bank, 81 Atl. Rep. 294 (Md., 1911); *In re* Bank, 72 Minn. 283 (1898); Bank v. Loyd, 90 N. Y. 530 (1882); Bank v. McMurrough, 103 Pac. Rep. 601 (Okla., 1909); Burton v. U. S., 196 U. S. 283 (1904).

In practically all these cases, there was a custom by which the depositor could draw against such a credit, even before actual collection took place. The courts which hold, nevertheless, that title remains in the depositor, explain this as a mere courtesy on the part of the banks. Packing Co. v. Davis, *supra.* If the check turns out to be worthless, the bank can always charge it back to the depositor's account, whether title has passed or not, because in the former case the bank is not bound to buy the check, and in the latter it has the rights of an indorsee against an indorser. Noble v. Doughten, *supra.*

CRIMES—MATERIALITY OF TESTIMONY AS AFFECTING GUILT ON A CHARGE OF PERJURY.—Upon a trial for perjury the degree of the materiality of the testimony upon which the charge is based is of no importance. Any false statement made by a witness which detracts from, or adds weight and force to, the testimony of any witness upon matters that are directly material thereby becomes material itself and constitutes perjury. Coleman v. State, 118 Pac. Rep. 594, (Okla., 1911).

The question of the materiality of the matter assigned is generally one for the court alone, R. v. Courtney, 7 Cox C. C. 111 (1856); but occassionally, as a mixed question of law and fact, it is left to the jury. Com. v. Pollard, 12 Met. 225 (Mass., 1849); 2 Bishop's New Crim. Law, Sec. 1039.

The materiality may appear on the face of the indictment by examining the relation of the alleged false testimony to the issue or it may be averred in the indictment. State v. Vorrhis, 52 W. S. L. 356 (1891). That the matter was material, however, must be clearly shown; it will not be presumed. Wood v. People, 59 N. Y. 117 (1875); State v. Aikens, 32 Ia. 403 (1871). Whether it is material or not depends, of course, upon the circumstances of the particular case.

In general, testimony tending to corroborate evidence concerning a material matter is material. Com. v. Parker, 2 Cush. 202 (Mass., 1851); Wood v. People, 59 N. Y. 117 (1875). A charge of perjury, accordingly,

may be predicated upon false testimony tending to increase or mitigate damages, State v. Swafford, 98 Ia. 362 (1896); or to procure the admission in evidence of a document that is material to the issue, Reg. v. Phillpotts, 5 Cox C. C. 363 (1853); or upon a false affidavit on a motion for a continuance, State v. Shupe, 16 Ia. 36 (1865); or for a new trial. State v. Chandler, 42 Vt. 446 (1869). The fact that the evidence was incompetent, is immaterial. Chamberlain v. People, 23 N. Y. 85 (1861). Nor does it matter that the affidavit or deposition was not used, State v. Whittemore, 50 N. H. 245 (1872); but compare Monell v. People, 32 Ill. 499 (1865). So also it is no defense that the evidence did not affect the verdict or decision, Pollard v. People, 69 Ill. 148 (1881); or that the testimony was privileged, State v. Maxwell, 28 La. Ann. 361 (1876); or that the accused attended as a witness voluntarily and without the service of a subpœna. Com. v. Knight, 12 Mass. 273 (1865). See also Clark and Marshall on Crimes, pp. 658-662.

CRIMES—THE ILLEGALITY OF THE TRANSACTION AS A DEFENSE TO AN INDICTMENT FOR FALSE PRETENSES.—In Horton v. State, 96 N. E. Rep. 797 (Ohio, 1911), the accused falsely pretended that he was selling counterfeit money to the prosecutor.

In holding that it is no defense to an indictment for obtaining money or property by false pretenses that the person defrauded parted with his property to accomplish an illegal purpose, the decision merely follows a principle adopted in nearly all jurisdictions. Comm. v. Henry, 22 Pa. 253 (1853); People v. Martin, 102 Cal. 558 (1894); Regina v. Hudson, 3 Cox C. C. 305 (1860); *In re* Cummins, 16 Colo. 451 (1891); People v. Watson, 75 Mich. 582 (1889); Cunningham v. State, 61 N. J. L. 67 (1897); Lovell v. State, 48 Texas Crim. Rep. 85 (1905). The reasons for the rule are: (1) The doctrine in civil actions that the guilt of the plaintiff is generally a good defense does not apply to criminal cases because in the latter the prosecution need not necessarily be instituted by the party defrauded: it is the state which is seeking to redress a wrong done to the public. (2) Public policy, for the crime of one ought not to be the shield of the other. See opinion of Justice Cullen in People v. Livingston, 47 N. Y. App. Div. 284 (1900): "Where one offender is punished and another escapes, there may properly be a feeling of dissatisfaction, but the dissatisfaction should not be because one man is in prison, but because the other man is out."

A contrary doctrine was laid down in McCord v. People, 46 N. Y. 470 (1871). The later New York cases admit the unsoundness of their law but stand committed to it by the early decisions, suggesting that the legislature should alter it. People v. Tompkins, 186 N. Y. 413 (1906). Other decisions which hold that there can be no connection are State v. Crowley, 41 Wis. 271 (1876), and Foster v. State, 8 Ga. App. 119 (1910). The last case makes a distinction between a case where the defrauded party believes he is getting something of value and where he knows he is getting something of no value (*e. g.*, counterfeit money), holding that in the latter case there can be no conviction.

It is to be noted that the prevailing doctrine is not applicable to false pretenses only but that it is a doctrine running through the criminal law. Clark and Marshall on Crimes, 2nd Ed., Sec. 157.

DAMAGES—LOSS OF LATERAL SUPPORT.—In excavating for gravel on certain land, the surface of the adjacent land fell in. *Held,* the damages recoverable by the adjacent land owner should be the cost of reconstructing the land provided such cost would be less than the diminution of the value of the land. Orr v. Dayton and M. Traction Co., 96 N. E. Rep. 462 (Ind., 1911)

An owner of land has a right to the support of his land, in its natural condition, by the adjacent land. This is an absolute right and does not depend on the negligence of the adjacent land owner. Yandes v. Wright, 66 Ind. 319 (1879); Gilmore v. Driscoll, 122 Mass. 199 (1877).

As to the question of what shall be the measure of damages, if this right is violated, there is a difference of opinion. It has been held, for instance, that the measure of damages for the removal of lateral support is the actual damage to the soil. Bohrer v. Dienhart Harness Co., 49 N. E. 296; McGettigan v. Potts, 149 Pa. 155 (1892). This rule seems to have found very little support. Another rule which has been laid down is that the damages shall be the cost of restoring the property to its former condition with as good means of lateral support as before. Stummel v. Brown, 7 Houst. 219 (Del., 1885). But the great weight of authority holds that the measure of damages shall be the dimunition of the value of the land as the result of its loss of lateral support. Moellering v. Evans, 121 Ind. 195 (1889); Schultz v. Bowers, 64 Minn. 123 (1896); McGuire v. Grant, 25 N. J. L. 356 (1856); Ulrick v. Dakota Loan & Trust Co., 2 S. D. 285 (1891).

The principal case shows a tendency to limit the recovery to the smallest amount of damages which will adequately protect and reimburse the plaintiff. It seems, however, to be in accord with the prevailing view as to the proper measure of damages.

EVIDENCE—THE VALUE OF DYING DECLARATIONS.—In People v. Falletto, 96 N. E. Rep. 355 (N. Y., 1911), Vann, J., in discussing the admissibility of dying declarations in evidence, said: "Dying declarations are dangerous because made with no fear of prosecution for perjury, and without the test of cross-examination, which is the best method known to bring out the full and exact truth. The fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down."

At the Old Bailey, in 1784, the court said dying declarations should be admitted because "the mind, impressed with the awful idea of approaching dissolution acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath." King v. Drummond, Leach, 4th Ed., 337. Some modern courts are still of that view. In State v. Knoll, 69 Kan. 767 (1904), the court said: "A realization by the declarant of the certain and speedy approach of death would be as powerful an incentive on his part to tell the truth as would the administration of an oath." However, even where dying declarations are favored, their competency as evidence is open to the same objections and must be dealt with upon the same principles as that of a living witness. Donnelly v. State, 26 N. J. L. 506 (1857).

In 24 Harvard Law Review 484, there is an interesting discussion of the admissibility of dying declarations of persons who, for religious or other reasons, have no fear of future punishment.

The New York opinion is an interesting reflection of the pragmatism of the times.

FEDERAL COURTS—WHERE SUIT ON THE BOND OF A PUBLIC CONTRACTOR SHALL BE BROUGHT.—The Act of Congress of Feb. 24, 1905, amending the Act of Aug. 13, 1894, provides that every person entering into a contract with the United States for the construction of any public building or work, shall execute a penal bond for the proper performance of the work, and also for the payment of all sub-contractors or persons furnishing him with materials. (U. S. Comp. Stat., Supp. 1909, p. 948.) The act provides that suit upon such bond is to be brought in the district in which the contract is to be performed. However, it was always a mooted question whether this applied to a suit brought on the bond by the sub-contractors in the name of the United States. This has been settled by the recent case of United States v. Congress Construction Co., 32 Sup. Ct. Rep. 44 (1912). The court held that all suits upon such penal bonds must be brought in the district where the contract was to be performed, regardless of such jurisdictional facts as the amount of the claim, and the district where the defendant may happen to reside. It also decides that the district court in which the suit

is brought shall have authority to obtain jurisdiction over the person of the defendant through service of process upon him *in whatever district* he may be found.

LANDLORD AND TENANT—SAFETY OF THE PREMISES.—A sub-tenant sued the lessor of premises for injuries caused by falling plaster, in Hill v. Day, 81 Atlantic Rep. 581 (Me., 1911). It was held that there could be no recovery in the absence of an agreement by the lessor to keep the premises in repair. There was no implied warranty that the house was fit for use.

Even the breach of a covenant to repair does not ordinarily render the lessor liable for personal injuries to the tenant, Miles v. Janvrin, 196 Mass. 431 (1907); Kusher v. Ginsberg, 188 N. Y. 630 (1905), unless such damages were contemplated by the parties, Cromwell v. Allen, 151 Ill. App. 404 (1909), or the defect constitutes a menace to the safety of the tenant. Graff v. Lemp, 145 Mo. App. 364 (1910). In some jurisdictions, however, the sub-tenant cannot under any circumstances sue on the contract between the tenant and the landlord. Brady v. Klein, 133 Mich. 422 (1903). But in others he may do so, to avoid a circuity of actions. Schwandt v. Metzger Co., 93 Ill. App. 365 (1900).

When, however, the landlord assumes to make repairs he is liable in tort for failure to use due care and skill, even though the repairs are gratuitously made. Gill v. Middleton, 105 Mass. 477 (1870).

Where a landlord has knowledge of a defect not easily discoverable, it is his duty to disclose it to the tenant. Howell v. Schneider, 24 App. D. C. 532 (1905); Morgan v. Sheppard, 156 Ala. 403 (1908); Miner v. McNamara, 81 Conn. 690 (1909); Rhoades v. Seidel, 139 Mich. 608 (1905). And in such case the principle of *caveat emptor* does not apply. Meyers v. Russell, 124 Mo. App. 317 (1907); Sunasack v. Morey, 196 Ill. 569 (1902). But this does not cover defects which the tenant could have discovered by active investigation. Shinkle v. Birney, 68 Ohio St. 328 (1903).

It has been held that the landlord is liable where he ought to have known of the defect. Hines v. Willcox, 96 Tenn. 148 (1895). But this exception to the universal rule laid down in the principal case, has been generally repudiated in the other. O'Malley v. Twenty-five Associates, 178 Mass. 555 (1901); Whitmore v. Orono Co., 91 Me. 297 (1898); Franklin v. Tracy, 117 Ky. 267 (1904); Shinkle v. Birney, *supra*.

LIMITATION OF ACTIONS—PART PAYMENT BY ONE JOINT OBLIGOR AS AFFECTING THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST OTHER JOINT OBLIGORS.—Part payment on a joint promissory note was made by one joint obligor without the knowledge and consent of his co-obligors. In a suit against one of the latter on the note, the statute of limitations was pleaded in bar, and it was held that a payment by one joint debtor cannot be considered an admission as against his co-obligor which would stop the running of the statute. Monidah Trust v. Kemper, 118 Pac. 811 (Montana, 1911).

The English rule was laid down by Lord Mansfield in Whitcomb v. Whiting, 2 Doug. 652 (1781), that a payment made by one of two or more joint contractors will remove the statutory bar as to all. This was changed by Parliament in 1856, by the Mercantile Law Amendment Act (19 and 20 Vict., c 97).

In America today, the doctrine of Whitcomb v. Whiting is almost universally repudiated. In many states statutes provide that no acknowledgment, promise or part payment made by one joint debtor shall deprive the others of the benefit of the statute; in others, statutes require the acknowledgment to be in writing, signed by the party to be charged thereby; and in a few jurisdictions, judicial decisions have altered the rule.

The doctrine of the principal case may be briefly stated to be that one co-debtor can neither suspend nor remove the statute by an acknowledgment or part payment of a joint debt, without the direction, assent, or subsequent ratification of his co-debtors. Whipple v. Stevens, 22 N. H. 219 (1850);

Bush v. Stowell, 71 Pa. 208 (1872); Van Keuren v. Parmalee, 2 N. Y. 523 (1849); Bell v. Morrison, 1 Pet. 351 (U. S. 1828); Wood on Limitations, p. 676.

Connecticut, New Jersey and Rhode Island do not follow this rule. Clark v. Sigourney, 17 Conn. 511 (1846); Corlies v. Fleming, 30 N. J. L. 349 (1863); Woonsocket Sav. Inst. v. Ballou, 16 R. I. 351 (1888).

MASTER AND SERVANT—EXISTENCE OF THE RELATION.—In Ash v. Century Lumber Co., 133 N. W. Rep. 888 (Iowa, 1911), it was held that the owner of a wagon, who hires a team and driver, is not responsible for the negligent conduct of the driver in the management of the team, when the driver is left to drive the team in the manner of his own choosing or as directed by the owner of the team.

In the first of the so-called "carriage cases," Laugher v. Pointer, 5 Barn. & Cress. 547 (1826), Littledale, J., held that he is master who has the right of control over the person inflicting the injury at the time it was inflicted. This test has been generally adopted and was used by the court in the present case.

Where the hirer has no control whatever over the driver otherwise than to direct when and where he shall go, the owner of the hired team is held liable on the ground that the driver remains the servant of his general employer, as the right of control has not been transferred to the hirer. Stewart v. California Imp. Co., 131 Cal. 125, (1900); Huff v. Ford, 126 Mass. 24 (1878); Joslin v. Ice Co., 50 Mich. 517 (1883); Jahn's Admr. v. McKnight & Co., 117 Ky. 655 (1904); Frerker v. Nicholson, 41 Colo. 12 (1907); Kellogg v. Church Charity Foundation, 96 N. E. 406 (N. Y., 1911).

Where the hirer has complete control, having the right to put the driver about other work or discharge him, the driver is held to have left the general employment of the owner of the team and become temporarily the servant of the hirer to whom has been transferred the ultimate right of control. Brown v. Smith & Kelly, 86 Ga. 274 (1890).

In cases where there is conflicting testimony as to whether or not the right of control has been transferred, the question is left to the jury. P. & R. C. & I. Co. v. Barrie, 179 Fed. 50 (1910); Howard v. Ludwig, 171 N. Y. 507 (1902).

Cases on this subject are collected in notes to Hardy v. Shedden Co., 65 L. R. A. 1; Frerker v. Nicholson, 13 L. R. A. (N. S.) 1122, and Morris v. Tredo, 25 L. R. A. (N. S.) 33.

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES TO ABUTTING PROPERTY CAUSED BY AN EXPLOSION IN A CLOSED STREET.—During the course of the construction of a rapid transit subway, a sub-contractor negligently stored an excessive quantity of dynamite in a shack on an inclosed part of the street. The dynamite exploded and severely damaged abutting property. In an action against the city, it was decided that the municipality was not liable, either on the theory that the city had permitted a nuisance to be maintained in the street, or that it was liable for the default of the fire department or bureau of combustibles. Smyth v. City of New York, 96 N. E. Rep. 409 (1911).

In general a failure on the part of a municipality to exercise its charter power to abate nuisances not rendering the streets themselves unsafe, does not give a person who is injured thereby a private action against the corporation. Mansfield v. Brestor, 76 Ohio St. 270 (1907); Miller v. Newport News, 101 Va. 432 (1904); 4 Dill. Mun. Corp. (5th Ed.), sec. 1628. But municipal corporations have no absolute immunity from legal responsibility for allowing the maintenance of a nuisance, and their liability may be predicated upon the facts of the particular case. Bolton v. New Rochelle, 8 Hun 281 (N. Y. 1895); Hart v. Union County, 57 N. J. L. 90 (1893). In the principal case, the court held that the nuisance existed on a part of the street withdrawn from the control of the municipality; but Haight, J., dissenting, held that inasmuch as part of the same street was still open to public use,

this was immaterial and the city was liable for damages resulting from the maintenance of this nuisance on the public highway. The statement that the municipality was not liable for the default of the fire department, etc., while correct, is not applicable in the discharge of non-delegable duties such as the maintenance of safe highways in the principal case. The duty remains a municipal one, and the police and fire departments are merely some of the agencies through which the duty is discharged.

It is submitted that the city is not liable for a reason not assigned in the discussion. The duty of maintaining highways in a safe condition is one owed solely to users thereof, and not to all classes of citizens. For injuries from a breach of this duty, therefore, only those to whom the duty was owed can have an action. Accordingly, since in the principal case the suit was for damages to abutting property, the plaintiff was not in the category of those competent to sue for the breach of duty owed only to the users of the highway. Shearm. & Red., Neg. (4th Ed.), sec. 370, and cases therein cited. See also 4 Dill. Mun. Corp. (5th Ed.), pp. 3019-3034.

PARENT AND CHILD—DESCENT OF PROPERTY OF ADOPTED CHILD.—Under a statute providing that, by adoption, the legal relation of parent and child shall be created, together with all the rights and duties of that relation; and that the parents of the adopted child are, from the time of adoption, relieved of all parental duties and responsibility, it was held that the adoptive mother was entitled to inherit real estate from the adopted child. Calhoun v. Bryant, 133 N. W. 266 (S. D. 1911).

Adoption is a creature of statute, imported from the civil law, and the question of the right of inheritance of an adoptive parent depends upon the rights conferred by the statutes. When the statute of adoption does not expressly give the adoptive parents the right to inherit, there is a conflict of authority.

In several jurisdictions it has been held that the general rules of descent have not been changed. Hole v. Robbins, 53 Wis. 514 (1884); Upson v. Noble, 35 Ohio 655 (1880). The property involved in these cases had been inherited from the natural parents, so that no injustice was done by the decisions. The same rule has been applied as to property inherited from one of the adoptive parents. Reinders v. Koppelmann, 68 Mo. 482 (1878).

In other jurisdictions the statutes of adoption have been construed as changing the ordinary laws of inheritance by placing the adoptive parents in the same position as the natural parents. The reason given is that the status of parent and child determines the right of inheritance. Humphries v. Davis, 100 Ind. 274 (1884).

In Massachusetts and Pennsylvania the statutes of adoption expressly stipulate to whom the property of adopted children shall descend. In the former state, all property acquired, by the adopted child himself, or from his adopted parents, or their kindred, descends as though the adopted parents were the natural parents; but property received from natural parents or their kindred descends to them. Rev. Laws of Mass. 1368. In Pennsylvania only property acquired from the adoptive parents descends to them. Act of Apr. 13th, 1887, P. L. 53.

PLEADING—DUPLICITY.—The plaintiff, in one count, set forth six separate and distinct acts of negligence, any one of which was sufficient, if proved, to sustain a verdict. *Held*, that the declaration was not bad for duplicity. Green v. Michigan Cent. R. Co., 133 N. W. Rep. 957 (Mich. 1911).

It is settled, probably beyond dispute, in every jurisdiction today, that the plaintiff may set forth in separate counts as many different acts of negligence as he sees fit, provided only, that they are not inconsistent. This is the purpose of different counts. Whether or not these negligent acts can be set out in the same count is an entirely different question.

Where one of the acts complained of is a breach of statutory duty and the other act is a breach of common law duty, separate counts must be used.

Otherwise the declaration is bad for duplicity. Matz v. Chicago & A. R. Co., 88 Fed. 770 (1898); Haberlaw v. Lake Shore & M. S. R. Co., 73 Ill. App. 261 (1897). Haley v. Missouri P. R. Co., 197 Mo. 15 (1906), contains a contrary dictum. Where the acts are breaches of common law duty alone, as in the principal case, there is a greater diversity of opinion. The majority of the decisions support Green v. R. R. Co. *supra*. Flynn v. Staples, 34 App. D. C. 92 (D. of C. 1909); Woodward Iron Co. v. Herndon, 114 Ala. 191 (1896); Boireau v. Rhode Island Co., 169 Fed. 1015 (1909); Seaboard Air Line v. Rentz, 54 So. Rep. (Fla. 1910); N. Y., C. & St. L. R. Co. v. Robbins, 38 Ind. App. 172 (1906). The last case cited holds that proof of a single act of negligence is sufficient to establish a case. Laporte v. Cooke, 20 R. I. 261 (1897) is contrary to the principal case. Highland Ave. & B. Ry. Co. v. Dussenburg, 94 Ala. 413 (1891) is also *contra*, but there the court held that the several specifications of negligence were stated as disconnected faults, each one being put forward as a separate ground of liability independent of the others. In the other cases cited, the acts complained of were construed as related and co-existent, tending to effect a single complete result.

PLEADING—EFFECT OF A RULING ON DEMURRER ON THE SUBSEQUENT ACTION OF THE COURT.—In Cooley v. Kelley, 96 N. E. Rep. 639 (Ind. 1911), it was held that it was not error for the trial court, after overruling the defendant's demurrer to the declaration, to give a decision holding the declaration bad.

This is a rule followed in nearly all jurisdictions. Cummins v. Gray, 4 S. & P. 397 (Ala. 1833); Johnson v. Pensacola Co., 16 Fla. 623 (1878); De La Beckwith v. Superior Court, 146 Cal. 496 (1905); Perry v. Baker, 61 Neb. 841 (1901); Wiggin v. Federal Stock Co., 77 Conn. 507 (1905). The Illinois decisions have usually been cited as establishing a different rule, but it is submitted that the cases that bear directly on the point are in accord with the cases cited above. Fort Dearborn Lodge v. Klein, 115 Ill. 177 (1885); Dowie v. Priddle, 216 Ill. 553 (1905); Cook v. City of Marseilles, 139 Ill. App. 536 (1908).

Upon a demurrer where there is at least one pleading bad in substance the whole record is opened and the court will give judgment against the party who made the first substantial error. Schwab v. Furniss, 4 Sandford 704 (N. Y. 1852); Wyoming Co. v. Bardwell, 84 Pa. 104 (1877); State v. Moores, 52 Neb. 770 (1897); Railton v. Taylor, 20 R. I. 279 (1897); Wilhite v. Hamrick, 92 Ind. 594 (1883); Currier v. King, 81 Vt. 285 (1908); Massey v. The People, 201 Ill. 409 (1903).

The ruling of the court upon a demurrer to a pleading may be attacked by one of the parties upon a subsequent demurrer. Sykes v. Lewis, 17 Ala. 261 (1850); Lafayette Bridge Co. v. Streator, 105 Fed. 729 (1900), *contra*. Ricknor v. Clabber, 4 Indian Terr. 660 (1903); Fish v. Farwell, 160 Ill. 236 (1896). The last case points out that its rule is not in conflict with Fort Dearborn Lodge v. Klein, *supra*.

Where the declaration is defective in substance, the defendant does not, by pleading the general issue, waive the right to attack the declaration upon a demurrer subsequent to the defense. Auburn Canal Co. v. Leitch, 4 Denio, 65 (N. Y. 1847); Bishop v. Quintard, 18 Conn. 407 (1847); Smith v. Mulliken, 2 Minn. 319 (1858). *Contra:* Supreme Lodge v. McLennan, 171 Ill. 417 (1898).

REAL PROPERTY—EJECTMENT BY MORTGAGEE AGAINST MORTGAGOR.—In an action of ejectment, the defendant showed a decree in chancery declaring that the deed under which the plaintiff claimed was in fact a mortgage, in which the plaintiff was mortgagee and the defendant, mortgagor. The defendant did not prove that the debt was not due, or that it had been paid. It was held that the defense was not sufficient, inasmuch as an action of ejectment will lie by the mortgagee against the mortgagor after condition broken. Ladd v. Ladd, et al., 96 N. E. Rep. 561 (Ill. 1911).

The decision is based on the principle that upon the execution of a

mortgage the legal estate rests in the mortgagee subject to a condition subsequent, namely, payment of the mortgage debt. This is followed in Carpenter v. Carpenter, 6 R. I. 542 (1860); Carroll v. Ballance, 26 Ill. 9 (1861); Allen v. Ranson, 44 Mo. 263 (1869); Ten v. Stockton, 12 N. J. L. 322 (1831); Pierce v. Brown, 24 Vt. 165 (1852).

The old common law went even further and held that in the absence of a special provision that the mortgagor might retain possession until default, the mortgagee might institute an action for the recovery of possession as well before as after default. This rule has been adopted in a few states. Barrett v. Hinckley, 124 Ill. 32 (1888); Hobart v. Sanborn, 13 N. H. 226 (1842); Colman v. Packard, 16 Mass. 39 (1819).

Statutes as now enacted in a majority of the states, generally deny to a mortgagee a remedy by ejectment. In those states a mortgagee has only a lien, and it follows that he no longer possesses any right to possession, either before or after condition broken, except as he may acquire it by a valid foreclosure or through the consent of the mortgagor. Howell v. Leavitt, 95 N. Y. 617 (1884); Rountree v. Denson, 59 Wis. 522 (1884); Fox v. Wharton, 5 Del. Ch. 200 (1878); McMahon v. Russell, 17 Fla. 698 (1879); Mack v. Wetzlar, 39 Cal. 247 (1870); Duty v. Graham, 12 Tex. 427 (1854).

SALES—LIABILITY OF AN INFANT FOR BREACH OF WARRANTY.—In a suit against an infant to recover damages for false representations in the sale of a horse warranted to be sound, the complaint failed to allege that the representations were made by the infant with "intent" to induce a purchase. *Held,* that the complaint was based on a breach of warranty and the plaintiff could not recover on the theory that the infant was liable for damages for deceit. Collins v. Gifford, 96 N. E. Rep. 721 (N. Y. 1911).

It is a fundamental rule that an infant is liable for his torts or frauds just as any other person would be, infancy being unimportant except as it may bear upon the question of malice or damages. Cooley on Torts, page 29. But the fraudulent act with which the infant is charged must be wholly tortious, for if the action is substantially grounded in contract the infant is not liable. This doctrine has come down, though not without some little opposition, from the early case of Johnson v. Pye, 1 Keble 905 (1666), to the present day. In Green v. Greenbank, 2 Marsh. Rep. 485 (1816) the court says, "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise." This decision has been followed in practically every jurisdiction where the question has arisen. Wilt v. Welsh, 6 Watts 9 (Pa. 1837) thoroughly reviews all the previous decisions. See also, Morrill v. Aden, 19 Vt. 505 (1847); Robbins v. Mount, 3 How. Prac. (N. Y. 1867); Lowery v. Cate, 108 Tenn. Rep. 61 (1901). *Contra:* Ward v. Vance, 1 Nott & McCord, 197 (S. C. 1818).

In Bristow v. Eastman, 1Es. Rep. 172 (1787), an action against an infant for money had and received was held good, the court holding that though the action was, in form, *ex contractu,* it was in substance *ex delicto* and infancy was no bar. In Campbell v. Stakes, 2 Wend. 139 (N. Y. 1828), an action of trespass for wilful injury to a horse hired by the defendant was sustained, the court holding that the wilful act amounted to an election on the part of the infant to disaffirm the contract, and entitled the owner to immediate possession. See also, Homer v. Thwing, 3 Pick. 492 (Mass. 1826).

TORTS—COMPARATIVE NEGLIGENCE.—In an action for damages for personal injuries, the jury found, in a special verdict, that the plaintiff had not been guilty of contributory negligence. The lower court set aside this finding. It was held that under a statute the defendant was entitled to a finding of the jury on the comparative negligence of the parties. This question should have been submitted to the jury after their finding was set aside. Schendel v. Chicago, &c., Ry., 133 N. W. Rep. 830 (Wis. 1911).

The doctrine of comparative negligence is recognized in a few juris-

dictions. The author of the negligence is the party to whom the greater fault must be attributed. Whirley v. Whiteman, 38 Tenn. 610 (1858). The plaintiff is entitled to recover where his contributory negligence is slight as compared with that of the defendant. Ditberner v. Chicago, &c., Ry., 47 Wis. 138 (1871). Where the complainant is at fault the damages will be reduced in proportion to such fault except in the case of gross negligence. Central Co. v. Smith, 78 Ga. 694 (1887); Western R. R. v. Abbott, 74 Ga. 851 (1885).

Most jurisdictions have, however, refused to adopt the doctrine of comparative negligence. O'Keefe v. Chicago, &c., Ry., 32 Iowa 467 (1871); Artz v. Chicago, &c., Ry., 38 Iowa 293 (1874); Marble v. Ross, 124 Mass. 44 (1877); Hurt v. St. Louis, &c., Ry., 94 Mo. 255 (1887); Penna. Co. v. Righter, 42 N. J. L. 180 (1880); Reynolds v. Ry. Co., 8 Misc. Rep. 313 (N. Y. 1894); Potter v. Warner, 91 Pa. 362 (1879).

WILLS—EFFECT OF DISCLAIMER OF LIFE ESTATE UPON THE VESTING OF REMAINDERS.—In a recent English case, *Re* Sir Walter Scott, 105 L. T. 577 (Dec. 1911), the testator devised realty to the use of his eldest son for life, remainder to the use of his first and other sons in tail male, remainder to the use of his grandson. The eldest son disclaimed his life estate. He was married but had no children. It was held that under the Contingent Remainder Act, the contingent remainder in tail male was not destroyed by the failure of the particular estate. The estate in the grandson did not take effect in possession until the death of the eldest son without issue, the rents and profits in the meanwhile passing under the residuary clause of the will.

The case of Carrich v. Errington, 2 P. Wms. 361 (1726), where a similar decision was reached under a trust to preserve contingent remainders is authority for the principal case.

Although many American states have passed statutes to the effect that no expectant estate can be defeated or barred by the act of the holder of the present estate (see Stimson Amer. St. Law, sec. 1403), no exactly similar case seems to have arisen. The cases most closely resembling it in principle are those where a life estate has been given to a widow with remainder over, and the widow has elected to take against the will. In such cases the remainder is usually accelerated. Baptist Female University v. Borden, 132 N. C. 476 (1903); Randall v. Randall, 85 Ind. 430 (1897). But where the class in which the remainder is vested is unascertained until the death of the life tenant there is no acceleration. Rodgers v. Safe Deposit & Trust Co., 97 Md. 676 (1903); *In re* Lawrence's Estate, 37 Misc. 702 (N. Y. 1902). In Parker v. Ross, 69 N. H. 213 (1898), a remainder to children took effect in possession on the renunciation by the widow, subject to be divested by their death prior to that of the widow. This decision seems *contra* to that of the principal case.