RECENT CASES.

ACCORD AND SATISFACTION—PART PAYMENT.—After maturity of a note the defendant agreed to pay a small sum in satisfaction of the larger at a different place than that named in the note. *Held:* That after maturity plaintiff could recover wherever he found the defendant, and there was, therefore, no consideration for the agreement. Foster County State Bank v. Lammers, 134 N. W. 501 (Minn. 1912).

The payment of a part is not itself payment of the liquidated whole, nor is it an accord and satisfaction; for an accord is an agreement. But there is no agreement without a consideration and receiving part only is no consideration for an agreement not to collect the rest. Warren v. Skinner, 20 Conn. 559 (1850); Holloway v. Talbot, 70 Ala. 389 (1881); Booth v. Campbell, 15 Md. 569 (1859); Bunn v. Gorden, 57 Miss. 93 (1879).

Where, however, the agreement is not a nude pact but rests on a new and adequate consideration, the execution of the agreement constitutes a good accord and satisfaction. Warren v. Skinner, *ante*. But the least consideration in such a case has been held sufficient to make the agreement binding. Tenny, J., in Hinckly v. Arey, 27 Me. 365 (1847).

The statement that payment at a different place is sufficient has frequently been made, Cavanesse v. Ross, 33 Ark. 572 (1878); McKenzie v. Culbute, 66 N. C. 534 (1872), and was actually decided in Jones v. Perkins, 29 Miss. (7 Cush.) 139 (1855). These statements probably only refer to payment at a different place on the day of maturity.

BANKRUPTCY—OBTAINING CREDIT BY FALSE REPRESENTATION AS A BAR TO DISCHARGE.—In response to a request from a mercantile agency for a statement of his financial condition, a merchant sent to the agency a statement which was materially false. More than a year later credit was advanced to him by the petitioner, on the faith of a copy of this statement furnished by the agency. It was held in Novick v. Reed, 192 Fed. 20 (1911) that the creditor had no standing to oppose the merchant's discharge in bankruptcy, under sub-section 3 of section 14b of the Act of 1898, as amended in 1903; "Obtained property on credit from any person upon a materially false statement in writing made to such persons for the purpose of obtaining such property on credit."

This sub-section was usually interpreted to mean that the ordinary statement of financial condition made to a mercantile agency for general circulation among its inquiring subscribers was not within the statute. *In re* Foster, 186 Fed. 254 (1910); *in re* Steed, 107 Fed. 682 (1901); *in re* Russell, 176 Fed. 253 (1910).

But if the statement was given to an agency for the express purpose of deceiving a particular creditor, the creditor might object to the discharge. *In re* Dresser, 146 Fed. 383 (1906); *in re* Pincus, 147 Fed. 621 (1906); *in re* Kyte, 147 Fed. 867 (1909), and *in re* Carton, 148 Fed. 63 (1906), it was said that any party in interest who chooses to bring the wrongful act to the attention of the court is entitled to do so, whether he was defrauded by the statement or not.

In 1910 the sub-section in question was amended, to read that the bankrupt shall not be discharged if he has "obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." There have been no reported decisions interpreting the sub-section as amended.

BILLS AND NOTES—ADMISSIBILITY OF EVIDENCE THAT AN APPARENT MAKER IS AN INDORSER.—In Lumbermen's National Bank v. Campbell, 121 Pac. 427 (Ore. 1912), an action was brought on a note reading "I promise to pay," etc., and signed by the maker below, whose name appeared as that of the defendant. The latter sought to introduce evidence that his position on the paper was really that of an anomalous indorser and that he had inadvertently written his name on the face of the paper. It was held that where a party places his name as a maker on the face of a promissory note before delivery, he cannot be permitted to show by parol evidence that he was in fact an indorser.

An indorser's name need not appear on the back of the instrument, Daniel, Negotiable Instruments, Section 688, but this does not establish the converse proposition that because the name appears on the face of the instrument it may be shown that the party was merely an indorser. Such an interpretation is a misconstruction of the text and a distortion of the cases cited. Those whose names have been signed below the drawer's and who have been allowed to show their characters as indorsers have been the payees also of the notes. Quin v. Sterne, 26 Ga. 223 (1858); Herring v. Woodhull, 29 Ill. 92 (1862).

It is submitted that Sec. 17, Cl. 7, of the Negotiable Instruments Law is decisive of this case, though not cited by the court. Merely because the emphasis is usually laid on the fact that the party is a *joint* and *several* maker, Byles, Bills 9; Ullery v. Brahm, 20 Colo. App. 389. (1905), should not prevent the emphasis being laid on the face that he is a maker. The case is interesting rather than constructive.

BILLS AND NOTES—BURDEN OF PROVING UNREASONABLE DELAY IN HAVING CHECK CASHED.—Sec. 186 of the Pennsylvania Negotiable Instrument Law (Act of May 16, 1901, P. L. 194) provides that: "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Interpreting this section, in Rosenbaum v. Hazard, 82 Atl. Rep. 62 (233 Pa. 206, 1911), the court decided that the burden of proving such loss as will discharge the drawer rests not on the holder, but on the drawer, because it is a matter peculiarly within the drawer's own knowledge.

Delay in the presentment of a check does not *per se* release the drawer, since he is not a surety, but the principal debtor. Nelson v. Kastle, 105 Mo. App. 187 (1904). It is only when he suffers loss by reason of that delay that he is discharged, and then *pro tanto*. N. I. L., Sec. 186. Yet it has, curiously enough, been held in almost all the states that have had to decide the point that the drawer will be discharged unless the holder proves that there has been no loss. This result is accomplished by raising a presumption of fact that the drawer has suffered loss by reason of the delay. Hamlin v. Simpson, 105 Ia. 125 (1898); Arnold v. Mangan, 89 Ill. App. 327 (1899); Nelson v. Kastle, 105 Mo. App. 187 (1904); Little v. Phoenix Bank, 2 Hill, 425 (N. Y. 1842); Kirkpatrick v. Puryear, 93 Tenn. 409 (1894); McLain v. Lowther, 35 W. Va. 297 (1891). However, it is sufficient to rebut this presumption for the holder to show that the drawer has himself drawn out the funds against which the check was drawn, or that, if there was presentment, the drawee was solvent when the check was presented. Planters' Bank v. Merritt, 7 Heiskell, 177 (Tenn. 1872).

But in Minnesota, Mitchell, C. J., decided in Spink v. Ryan, 72 Minn. 178 (1898), that the burden of proving loss is on the drawer, because it is a matter peculiarly within his own knowledge. This opinion was expressly followed in the Pennsylvania case. Apparently the only other jurisdiction in accord is Kansas. Cox v. State Bank, 73 Kan. 789 (1906). Mitchell, C. J., points out, however, that in all the cases which threw the burden of proof on the holder, the drawee bank had actually become insolvent, so that a presumption of loss to the drawer by reason of the delay might fairly arise.

It is interesting to note that while, as between the holder and drawer of a check presentment may be made at any time and delay in presentment does not discharge the drawer, unless loss has resulted to him, a different rule obtains as between the holder and indorser. Delay in presentment discharges the indorser from liability as such, irrespective of any question of loss or injury. Carroll v. Sweet, 128 N. Y. 19 (1891).

CHAMPERTY AND MAINTENANCE—ATTORNEY'S INTEREST IN SUBJECT MATTER.—Certain attorneys and clients made an agreement for the prosecution of certain demands. They stipulated that no settlement of any matters concerning the suit should be made without full approval and consent of both clients and attorneys. *Held:* The agreement was champertous and void, as giving the attorneys an interest in the subject matter of the suit. Kauffman v. Phillips, 134 N. W. 575 (Iowa, 1912).

It is almost universally agreed that such a contract, whereby a party to the suit is prevented from settling the case without the consent of the attorney, is void as being against public policy. Weller v. Ry. Co., 68 N. J. Eq. 659 (1905); Davis v. Chase, 159 Ind. 242 (1902); Ry. Co. v. Ackley, 171 Ill. 100 (1897).

Champerty is defined as a bargain with the plaintiff or defendant for a part of the thing recovered in a suit in law or chancery. Casserleigh v. Wood, 119 Fed. 308 (1902). At common law maintenance and champerty were public offences, and punishable by fine and imprisonment. 4 Bl. Com. 135. At the present day a champertous contract is void. Emslie v. Glass Co., 25 Ohio Cir. Ct. 548 (1903); Jackson v. Stearns, 48 Or. 258 (1906).

The defence of champerty is an affirmative defence and must be specially pleaded. It cannot be put in under a general denial. Comstock v. Flower, 109 Mo. App. 275 (1904). Of course the burden of proof is upon the defendant. Hadlock v. Brooks, 178 Mass. 425 (1901). However, there seems to be some authority for the position that proof of champerty is admissible under the general issue. Miles v. Life Association, 108 Wis. 421 (1901).

This defence is available only upon an action between the parties to the champertous agreement. M'f'g Co. v. Cain, 20 Wash. 351 (1898). It cannot be set up as a valid defence by a third person against whom there exists a just cause of action. Woods v. Walsh, 7 N. D. 376 (1898); Forbes v. Mohr, 69 Kan. 342 (1904); Potter v. Ajax Co., 22 Utah, 273 (1900).

CRIMES—EMBEZZLEMENT—DEMAND AND REFUSAL.—In State v. Ensley, 97 N. E. Rep. 113 (Ind. 1912), an indictment against a county treasurer for embezzlement failed to allege a demand and refusal. It was held that, since the statute imposed upon him a duty to turn over to his successor the funds in his hands at the expiration of his term, no demand was necessary. From that time the possession was wrongful and constituted the required conversion. *Accord:* Com. v. Kelley, 125 Ky. 245 (1907); Cox v. Delmas, 99 Cal. 104; State v. Hunnicutt, 34 Ark. 562 (1879).

The dissenting opinion in the principal case draws a distinction between actual conversion and constructive conversion by mere failure to pay over, and requires a demand in the latter case. The authority chiefly relied on is State v. Munch, 22 Minn. 67 (1875); but it is to be noted that the statute there created no duty to turn over the funds until after demand.

Embezzlement being a crime of statutory origin, it would seem that it should be enough to follow the terms of the statute. It appears to be the general rule that the demand need not be alleged when not specifically required by the terms of the law. People v. Van Ewan, 111 Cal. 144 (1896); State v. Flournoy, 46 La. Ann. 1518 (1894); Com. v. Mead, 160 Mass. 319 (1894); State v. Comings, 54 Minn. 359 (1893); Bartley v. State, 53 Neb. 310 (1897).

A refusal after demand is evidence of a conversion; but it is superfluous when the conversion is shown by other circumstances, as by a retention of money which it was the defendant's duty to pay over. Bradley v. Harden, 73 Ala. 701 (1882); Wood v. Young, 141 N. Y. 21 (1894).

DAMAGES—DIMINUTION OF EARNING CAPACITY AS AFFECTING DAMAGES FOR DISFIGUREMENT.—In a recent decision by the Circuit Court for the Eastern District of Kentucky the plaintiff was allowed damages for disfigurement of her person and for mental pain in contemplation thereof, although such disfigurement did not affect her earning capacity. Power v. City of Augusta, 191 Fed. Rep. (C. C.) 647 (Ky. 1912).

That part of the decision holding that the injury need not necessarily affect the earning capacity of the person injured is supported by the great majority of the decisions. Denver & Rio Grande Co. v. Harris, 122 U. S. 597 (1886); Western Ry. Co. v. Young, 81 Ga. 397 (1888); City of Birmingham v. Lewis, 92 Ala. 352 (1890); Giffen v. Lewiston, 6 Idaho, 23 (1898). The state courts of Kentucky take a view contrary to this doctrine. In those courts an injury in no way affecting the plaintiff's ability to labor and earn his living will not support a recovery. Lexington R. R. Co. v. Herung, 96 S. W. Rep. 558 (Ky. 1906); Belleview v. England, 118 S. W. Rep. 994 (Ky. 1909).

Upon the question of whether or not mental suffering arising from disfigurement is an element of damages for personal injuries the courts are divided. Powers v. Augusta, *supra*, would seem to be supported by the weight of authority. Rockwell v. Eldred, 7 Pa. Super. Ct. 95 (1898); Nichols v. Brabason, 94 Wis. 549 (1896); Gray v. Power Co., 30 Wash. 665 (1903); Power v. Harlow, 57 Mich. 107 (1885); R. R. Co. v. Lasseter, 122 Ga. 679 (1905). Those courts which refuse to allow the consideration of mental anguish of this character do so on the ground that it is too remote, indefinite and intangible, resting entirely upon the belief of the sufferer and not capable of contradiction. R. R. Co. v. Caulfield, 63 Fed. (C. C.) 396 (Mo. 1894); R. R. Co. v. Anderson, 182 Ill. 298 (1899); Salina v. Trosper, 27 Kan. 544 (1882). See note in 15 L. R. A. (N. S.) 775.

DECEIT—PROOF OF FRAUDULENT INTENT.—The defendant, the manager of an oil company, received a cablegram from their property stating that rich new wells had been discovered. This information was private and confidential, and was intended only for officers and stockholders of the company. Shortly after receiving this news he was pressed for information by stockbrokers as to whether or not such a discovery had been made, and, the situation being such that silence was equivalent to an admission, he replied that he had received no information whatever. A broker who, naturally enough, believed that no discovery had been made, acted upon this belief; and, upon sustaining a loss, brought an action of deceit against the defendant. The jury's verdict for the defendant on the ground of lack of fraudulent intent was sustained in the appellate court. Tackey v. McBain, L. R. (1912) App. Cas. 186.

In several American jurisdictions it has been held that it is immaterial whether a false statement has been made innocently or fraudulently, if the party to whom it is made is injured by acting upon it. Krause v. Cooke, 144 Mich. 365 (1906); Bauer v. Taylor, 96 N. W. Rep. 268 (Neb. 1903); O'Neal v. Weisman, 39 Tex. Civ. App. 512 (1905). The better opinion, however, is *contra:* and requires some proof of fraudulent intent, either express or implied. Pitts. Life & Trust Co. v. Cent. Life Ins. Co., 78 C. C. A. 408 (1906); Polhemus v. Polhemus, 100 N. Y. S. 263 (1906). It is settled beyond question, however, that the defendant's motive need not be to benefit himself; and in fact that his motive is absolutely immaterial. Foster v. Charles, 7 Bing. 105 (Eng. 1830); Endsley v. Johns, 120 Ill. 479 (1887); Rothmiller v. Stein, 143 N. Y. 581 (1894).

It is submitted that the finding of the jury in the principal case, namely, that there was no fraudulent intent, arose from a failure to distinguish between the legal meaning of intent as contrasted with motive. It seems clear that the defendant's statement was made with the intent to lead the inquisitive broker to believe that no discovery had been made, while the motive prompting the statement was a desire to preserve the secrecy of the confidential information in a situation where silence alone would divulge it. It is possible, however, to argue that the defendant's intent was, in reality, not to mislead any one, but merely to avoid divulging any information whatever. If this view is adopted, then it is reasonable to hold that his words, under the circumstances, should be regarded as equivalent to absolute silence as far as he was concerned. It would seem to be upon this ground only that the finding of the jury could logically be upheld; namely, that his intent was purely negative, although his words might easily be given a different inference.

The law of deceit apparently makes no allowance for this class of case and such findings by the jury would appear to be based upon a feeling of justice rather than as the result of applying any settled principles of law. Since these findings were sustained it would seem but logical to say that there is no real reason why such an inferential deception, necessitated by the duty of secrecy owed to one's company, friends, etc., as against the unwarranted inquisitiveness of third parties should not be legally recognized. The rationale of the decision would appear to uphold this theory and to establish the principle that deceit will not lie when based upon equivocal misrepresentations, which, although deliberate, are made with the sole motive of safeguarding and as the only means of preserving the secrecy of confidential information, when the persons to whom such misstatements are made have no right whatever to the knowledge they seek to acquire and who, by their unwarranted importunities, have necessitated the equivocations by which they are injured.

If this conclusion is correct, it is submitted that the decision has established a new and necessary principle in the ancient action of deceit and forms an exception to the well-known rule that, in this action, motive as a requisite is immaterial.

DETINUE—DEMAND AND REFUSAL AFTER WRIT.—A situation more curious than complex arose in Clayton v. Le Roy (1911), 2 K. B. 1031. A watch was stolen from the plaintiff, and some years later it was left for inspection with the very jeweler of whom plaintiff had bought the watch, and who knew of the theft. To the jeweler's request for instructions, plaintiff sent no reply, but immediately took out a writ of *detinue sur trover* against the jeweler as defendant, and sent a clerk with it down to defendant's shop to get the watch. Upon defendant's qualified refusal to give up the watch the clerk served the writ. The court held that there had been, in fact, no conversion before writ, so the action could not be maintained. Acts subsequent to writ may be weighed as evidence of a conversion before, but if there has been in fact no conversion before writ, nothing which happens after can mend the flaw.

The fact that refusal takes place after writ is not always of itself sufficient to defeat the plaintiff, however. In Morris v. Pugh, 3 Burr. 1242 (1761), which is followed in Wilton v. Girdlestone, 5 B. & Ald. 847 (K. B. 1822), Lord Mansfield said: "Refusal upon demand is not an actual conversion, but evidence of it. If it occurs after writ, it may be shown as evidence of a conversion before writ." The proposition that an unconditional refusal is not necessarily itself a conversion, but only evidence of one, is followed in many American cases. Balch v. Jones, 61 Cal. 234 (1882); Witherspoon v. Blewett, 47 Miss. 570 (1873); Hett v. R. R., 69 N. H. 139 (1897); Watt v. Potter, 2 Mason, 77 (U. S. C. C. 1820).

There is a line of American cases following the opinion of Holt, C. J., in Baldwin v. Cole, 6 Modern, 212 (1704), that "the refusal itself is an

actual conversion, not mere evidence of one." Ball v. Liney, 48 N. Y. 6 (1871); Smith v. Durham, 127 N. C. 417 (1900); Roberts v. Yarboro, 41 Tex. 449 (1874); these are all cases of conversion by bailee, and this rule would seem to apply only when the original possession was rightful.

Of course, if the refusal is qualified, not unconditional, it is not even evidence of conversion, as defendant is then entitled to a reasonable time in which to clear up his doubts. Vaughan v. Watt, 6 M. & W. 492 (Exch. 1840).

EVIDENCE—COMPETENCY OF PARENTS TO TESTIFY AS TO THE LEGITIMACY OF A CHILD.—In Palmer v. Palmer, 82 Atl. Rep. 358 (N. J. 1912) a husband, suing for annulment of marriage, offered to testify that he was not the father of a child born during the period of the marriage. It was held that his testimony was inadmissible to rebut the presumption of legitimacy arising from birth during wedlock. The rule of the common law, founded upon decency and morality, is that the parents of a child born in wedlock shall not be permitted to testify to the relations existing between themselves and thereby show a child to be illegitimate. This does not prevent the admission of evidence from other sources.

This was the early rule in England. Goodright v. Moses, 2 Cowp. 591 (1777). But the former decisions are repudiated in Poulett Peerage Claim, 1903 A. C. 395, holding that parents may testify as to non-access. In this country the rule is that non-access cannot be proved by the testimony of either husband or wife, whether the action is civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir-at-law. Dennison v. Paige, 29 Pa. 420 (1857); Abington v. Duxbury, 105 Mass. 287 (1870); Parker v. Way, 15 N. H. 45 (1844); Scanlon v. Walshe, 81 Md. 118 (1875); State v. Lavin, 80 Ia. 555 (1890); Comm. v. Reed, 5 Phila. 528 (Pa. 1864); Egbert v. Greenwalt, 44 Mich. 245 (1880); Inhabitants v. Bentley, 11 Mass. 441 (1814); Corson v. Corson, 44 N. H. 587 (1863). Where the husband left his wife the day after the marriage, and the child was born a short time later, the testimony of the wife was not allowed to impute the child to her employer. Tioga v. South Creek Twp., 75 Pa. 433 (1874). This case is on all fours with the Poulett Peerage Claim, *supra*, where the testimony was admitted.

In some states there have been statutory changes in the rule. Under a statute a wife was allowed to testify as to the legitimacy of her offspring. Evans v. State, 165 Ind. 369 (1905). Under a statute allowing a married woman to testify in any suit, except for or against her husband in a criminal proceeding, a wife was allowed to testify to non-access by her husband. State v. McDowell, 101 N. C. 734 (1888). But in Pennsylvania a statute declaring that no policy of law or interest shall exclude a party as a witness does not give a wife power to testify to the non-access of her husband. Tioga v. South Creek Twp., *supra*.

The admissions of the putative father were received, where a married woman sued for seduction, but the woman was not allowed to testify to non-access by her husband. Rabeke v. Baer, 115 Mich. 328 (1897). And a wife has been allowed to testify to illicit intercourse, but not to non-access by her husband. People v. Overseers, 15 Barb. 286 (N. Y. 1853); Com. v. Shepherd, 6 Binn. 283 (Pa. 1814); Parker v. Way, *supra*. The testimony of the wife, as to paternity, was admitted when the jury were convinced, by other evidence, of the non-access of the husband. Easby v. Com., 11 Atl. 220 (Pa. 1887).

When a woman has started proceedings before her marriage against the putative father of her child born after the marriage, and her husband joins as co-plaintiff, the testimony of the wife is admitted. Hyde v. Chapin, 56 Mass. 77 (1848); Com. v. Stricker, 1 Browne, Append. 47 (Pa. 1801).

If a child is born before marriage the testimony of the wife is admissible in proceedings started after the marriage. Appeal of McDonald, 147 Pa. 527 (1892).

EVIDENCE—SECONDARY EVIDENCE.—In an action on a lost insurance policy the insured offered verbal evidence to prove that a lightning clause had been attached to the lost policy. The insurer offered entries in a policy register kept by the agent who insured the policy, to prove that such a clause was not attached. *Held:* Though the plaintiff can resort to secondary evidence to prove the clause, this must be the best attainable. A copy, if in existence, must be first offered. Cummins v. Penn. Fire Ins. Co., 134 N. W. 79 (Iowa, 1912).

There is a wide conflict of authority on this point, due, apparently, to the conceded desirability on one hand of employing a copy, as better than mere recollection; and, on the other hand, to the hardship of exacting this of a proponent who may be put to great trouble to obtain such a copy.

In England no preference is now accorded to a copy for proving deeds and other private documents. Doe v. Ross, 7 M. W. 102 (1840); Kensington v. Inglio, 8 East, 273 (1807).

In America a majority of the jurisdictions repudiate the English rule and are in accord with the principal case. Sheddon v. Heard, 110 Ga. 461 (1900); Harrell v. Enterprise Sav. Bank, 183 Ill. 538 (1899); Madison I. & P. R. Co. v. Whitesel, 11 Ind. 55 (1858); Phillips v. U. S. Benevolent Society, 125 Mich. 186 (1900). Many jurisdictions, however, follow the English rule. Jacques v. Horton, 26 Ala. 238 (1884); Minneapolis T. Co. v. Nimrocks, 53 Minn. 381 (1893); Jackson v. Lucett, 2 Cal. 363 (1805).

INJUNCTIONS—ADEQUATE REMEDY AT LAW FOR BREACH OF COVENANT.—The plaintiff leased premises to the defendant, who covenanted that he should buy beer from plaintiff only. *Held:* An injunction restraining defendant from buying from any other company would not be granted. Voight Brewery Co. v. Holtz, 134 N. W. 79 (Mich. 1912).

Equity will not grant an injunction to restrain the violation of an agreement where there is an ample remedy at law. This proposition was stated and applied in the following cases, where under facts similar to those in the principal case, injunctions were refused: Hardy v. Allegan, C. J., 147 Mich. 594 (1907); Steineau v. C. G. L. & C. Co., 48 Ohio St. 324 (1891); Hair Co. v. Huchins, 56 Fed. 366 (1893).

In a number of jurisdictions it has been held that in this class of case equity will restrain the lessee from the breach of covenant, even where no irreparable damage is shown, for while there is a remedy at law a new suit would have to be brought daily for each repetition of the breach, and therefore an injunction will be granted to prevent multiplicity of suits.

MARRIAGE—PRESUMPTION OF MARRIAGE.—Prince v. Edwards, 57 So. Rep. 714 (Ala. 1912), follows the current of authority in holding that where cohabitation was preceded by a ceremonial marriage which was void, the continuance of cohabitation after removal of the impediment in connection with circumstances, even though slight, tending to show that the parties regarded their relations as of a matrimonial character, and held themselves out as husband and wife, created a presumption of marriage, although there was no evidence of another ceremony. Hyde v. Hyde, 3 Bradf. 509 (N. Y. 1856); Fenton v. Clark, 4 Johns, 52 (N. Y. 1809); Adams v. Adams, 57 Miss. 267 (1879); Flannigan v. Flannigan, 122 Mich. 386 (1890). The following cases are flatly contrary. They may, however, be explained by the fact that common law marriages were not recognized in the jurisdiction: Harris v. Harris, 85 Ky. 49 (1887); Thompson v. Thompson, 114 Mass. 566 (1874); Northfield v. Plymouth, 20 Vt. 582 (1848).

Some few jurisdictions hold that lack of knowledge by the parties that the impediment has been removed will defeat the presumption of marriage ordinarily arising from the continuance of cohabitation. Cartwright v. McGown, 121 Ill. 389 (1887). See also Randlett v. Rice, 141 Mass. 385 (1885). In Eaton v. Eaton, 66 Neb. 676 (1902), knowledge, however, was held to be of no importance in the consideration of the question.

Where the relations are clearly meretricious from the beginning, neither deserve nor regard for legal status of husband and wife being evinced by the conduct of the parties, a subsequent actual marriage is necessary in nearly all the jurisdictions. *In re* McLaughlin, 4 Wash. 570 (1892); Edelstein v. Brown, 35 Tex. Civ. App. 625 (1904); Lapsley v. Grierson, 1 H. L. Cases, 498 (1848).

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF AN INFANT.—In Schoonover v. B. & O. R. R., 73 S. E. Rep. (W. Va.) 266 (1912), the plaintiff, a boy of twelve years, while throwing a ball over a fence, stepped backwards upon the tracks of the defendant railroad and was struck by an engine. It was held as a matter of law that the infant was *sui juris*, and that he was guilty of contributory negligence in not exercising that care which is to be expected of a boy of his age and capacity.

The general rule is that there is an irrebuttable presumption that infants under seven years of age are incapable of being guilty of contributory negligence. Richardson v. Nelson, 221 Ill. 254 (1906); McDermott v. Severe, 202 U. S. 600, 607 (1905). But some courts have allowed the jury to find that an infant of such age was guilty of contributory negligence. Serano v. N. Y. Central R. R., 188 N. Y. 156 (1907); McDermott v. Boston R. R., 184 Mass. 126 (1903); Ritscher v. Orange R. R., 79 N. J. L. 462 (1910).

As to the question of the capacity of an infant between the ages of seven and fourteen to be guilty of contributory negligence the cases are not in accord. Some cases hold that it is a rebuttable presumption that the infant is not capable of being guilty of contributory negligence. Birmingham R. R. v. Landrum, 153 Ala. 192 (1907); Lynchburg Mills v. Stanley, 102 Va. 590 (1904). Others hold that the question of capacity is one for the jury along with the question whether there was contributory negligence Dubiver v. City Ry., 44 Ore. 227 (1904). However, where the evidence is not conflicting and only one reasonable inference can be drawn therefrom, the court will direct, as a matter of law, whether or not the infant has been guilty of contributory negligence. Young v. Small, 188 Mass. 4 (1905); Coy v. Missouri R. R., 74 Kans. 853 (1906); McGee v. Wabash R. R., 214 Mo. 530, 546 (1908); Parker v. Washington R. R., 207 Pa. 438 (1903).

Whether an infant between the age of seven and fourteen is *sui juris* is ordinarily a question for the court, and if the evidence is conflicting or doubtful it is for the jury. Payne v. Chicago R. R., 129 Mo. 405 (1895); Tucker v. N. Y. Central R. R., 124 N. Y. 308 (1891).

An infant fourteen years old or over is presumed to be capable and the burden is upon him to rebut the presumption. Doggett v. Chicago R. R., 134 Ia. 690 (1907); Baker v. Seaboard R. R., 150 N. C. 562 (1909); Nagle v. Allegheny R. R., 88 Pa. 35 (1878). For opinion that the same presumption applies to infants even as young as seven years, see Simkoff v. Lehigh Valley R. R., 190 N. Y. 256 (1907).

PARENT AND CHILD—RIGHTS OF SEPARATED PARENTS AS TO THE BURIAL OF THEIR CHILD.—In DeFestetics v. DeFestetics, 81 Atl. Rep. 741 (N. J. Eq. 1911), a mother claimed the right to bury her deceased infant son, whose custody had been awarded to her, but who, before his death, had lived with his father, who had surreptitiously taken him. The parents were bitterly antagonistic. It was held that the burial should be at the expense of the father, in a plot provided by him, within the jurisdiction of the court, and approved by the master of the court, who should supervise the burial, and see to the observance of the decencies and proprieties of civilized life, and that there should be no other burial in that plot, nor monuments erected upon it, without the consent of the court. The parents were to have equal rights of access.

The right of burial, as well as the duty, usually rests with the next of kin. O'Donnell v. Slack, 123 Cal. 285 (1899); Palenzski v. Bruning, 98 Ills. App. 644 (1900); Comm. v. Susq. Co., 5 Kulp, 195 (Pa. 1899). Hus-

band and wife are considered next of kin for this purpose. Pulsifer v. Douglas, 94 Me. 556 (1901); Walker v. Weld, 130 Mass. 422 (1881); Johnston v. Marinus, 18 Abb. N. Cas. 72 (N. Y. 1886); Scott v. Riley, 16 Phila. 106 (Pa. 1883); Hackett v. Hackett, 18 R. I. 155 (1893). The express desire of the deceased will, however, prevail against those having a *prima facie* right. Scott v. Riley, *supra;* Secor v. Secor, 18 Abb. N. Cas. 78 (N. Y. 1886). A duty of burial may devolve upon the personal representatives. Patterson v. Patterson, 59 N. Y. 574 (1875); Tappin v. Moriarity, 59 N. J. Eq. 115 (1899); *contra.* Renihan v. Wright, 125 Ind. 536 (1890); *in re* Gray's Est., 91 N. E. 745 (Ind. 1910). And, where there is no other provision for burial, it may even become the duty of a stranger, under whose roof the deceased has died, to cover the body and suitably inter it. Rex v. Stewart, 12 Ad. & E. 773 (1840); Fox v. Gordon, *supra;* Scott v. Riley, *supra.* Presumably such stranger would also have the right of burial, as against one more remotely connected with the deceased.

The one having charge of the body does not own it, but holds it as a sacred trust for those who may, from family or friendship, have an interest in it, and a court of equity will change the custody if it be improperly managed. Pierce v. Swan Point Company, 10 R. I. 227 (1872). It is well settled that, in the event of a controversy, a court of equity can determine the rights of the parties. Pulsifer v. Douglas, *supra.*

PLEADING—MISJOINDER OF COUNTS.—In Marley v. Slaw, 82 Atl. Rep. 89 (Del. 1911), the court sustained a demurrer for misjoinder to a declaration which joined counts for false imprisonment with counts in slander.

At common law a count in trespass could not be joined with a count in case. Warren v. Fisher, 2 N. J. Law, 240 (1807), because they require different judgments. Courtney v. Collet, 1 Ld. Raym. 273 (1697). This rule has been followed in the states where no statute has changed the forms of action. Smith v. Rhode Island Co., 26 R. I. 24 (1904), except in New Hampshire, where it was decided recently that counts in trespass *quare clausum* and in *trover* are properly joined. Meloon v. Read, 73 N. H. 153 (1905).

But in most of the states, Practice Acts or Codes have abolished the distinction between forms of action, and in these generally it is permissible to join counts in trespass with counts in case. In Harris v. Avery, 5 Kan. 146 (1869), on the same facts as in Marley v. Slaw, *supra,* it was held that slander may be joined with false imprisonment. In Illinois, counts for false imprisonment may be joined with counts for malicious prosecution. Mexican Ry. v. Gehs, 60 Ill. App. 173 (1896). In Michigan, under the Practice Act, and in North Carolina, under the Code, it has been held that trespass and case may be joined. Bellant v. Brown, 78 Mich. 294 (1889); Bryan v. Stewart, 123 N. C. 92 (1898).

But in New York, curiously enough, causes of action for slander and for false imprisonment cannot be united under the Code. De Wolfe v. Abraham, 151 N. Y. 186 (1896).

For discussion of the rights of a plaintiff whose person and property are both injured by the same wrongful act, see "Actions Arising Out of Injury to Both Person and Property," by William H. Loyd, in 60 American Law Reg. 531 (1912).

ROAD LAW—LIABILITY OF COUNTY FOR CHANGE OF GRADE.—By the Pennsylvania Act of May 1, 1905, P. L. 318, the counties were made paymasters for damages caused by changes in the highways improved under that act. The amounts paid were to be apportioned afterwards between the State, the county and the township. The Amending Act of June 8, 1907, P. L. 505, omitted the provision for damages occasioned by change of grade.

In Jamison v. Cumberland County, 48 Pa. Sup. (1911), it was contended that the county was liable in trespass for damages by change of grade, under Art. XVI, Sec. 8, of the Constitution, providing that "corporations . . . invested with the power of taking land for public use shall make just com-

pensation for property taken, injured or destroyed." It was held that the action would not lie. The fact that the county was made paymaster in the first instance for property taken by the state, did not constitute the county a corporation "invested with the power," etc., within the meaning of the Constitution. Lamoreaux v. Luzerne County, 116 Pa. 195 (1887); Wagner v. Salzburg Twp., 132 Pa. 636 (1890).

Counties in Pennsylvania are quasi-corporations, upon whom duties wholly involuntary are imposed. They possess no power and can incur no obligations not authorized by statute. Bucher v. Northumberland County, 209 Pa. 618 (1904). But a county is within the above section of the Constitution when exercising a statutory power to erect and maintain a county bridge, Chester County v. Brower, 117 Pa. 647 (1888), or county roads, when they are covered by the provisions of a statute. But such statutes have no bearing on the responsibility for roads generally. Jamison v. Cumberland County, *supra;* Kelley v. Cumberland County, 229 Pa. 289 (1910).

The principal case originally came before the court on petition for the appointment of viewers to assess the damages, but the petition was dismissed because the Amending Act of 1907 did not include damages by change of grade. The court at that time intimated that the action of trespass here brought would lie. Jamison v. Cumberland County, 39 Pa. Sup. 335 (1909).

For a full consideration of the case as it then arose, see 58 Am. Law Reg. 39 (1909).

TORTS—LIABILITY OF AN ATTORNEY FOR NEGLIGENCE.—In Flynn v. Judge, 133 N. Y. Supp. 794 (1912), the court, following the general rule, permitted an executor to recover the expenses of his accounting upon his showing that, upon the advice of the defendant, such expenses had been charged to the executor personally and not to the estate.

It is universally recognized that an attorney is liable to his client for failure to possess such reasonable knowledge of the law, and to employ such diligence in its application to the matter in hand as is common among members of the legal profession in that locality in similar circumstances. He is not bound to be absolutely accurate or exact, or to be familiar with abstruse or unusual or new points. Morrison v. Burnett, 56 Ill. App. 129 (1894). "God forbid," said Chief Justice Abbott, in Montriou v. Jeffrys, 2 Car. & P. 113 (1825), "that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." He must exercise reasonable care and diligence only, O'Barr v. Alexander, 37 Ga. 195 (1867); unless there has been an express stipulation for a higher degree of care. Babbitt v. Bumpus, 73 Mich. 331 (1889). He is not liable for a mistake on a debatable point not yet settled in the courts. Watson v. Muirhead, 57 Pa. 161 (1868).

The early standard acquitted the attorney if he acted honestly and to the best of his ability, Lynch v. Com., 16 Serg. & R. 368 (Pa. 1827), although he was held liable for gross negligence. Elkington v. Holland, 9 N. C. & W. 659 (1842).

The requisite degree of care and skill must be computed by comparison in similar circumstances, a metropolitan standard not being applicable to a rural bar. Gambert v. Hart, 44 Cal. 542 (1872).

Actual damage must be the result of the carelessness proved, and the measure of such damage is the amount actually lost by the negligence of the attorney. Dearborn v. Dearborn, 15 Mass. 316 (1818); Lowall v. Gromann, 180 Pa. St. 532 (1897).

TORTS—PARENTS' LIABILITY FOR THE TORTS OF HIS CHILD.—Where a son had taken his mother out, at her request, in the family automobile, of which the son was the only licensed driver, and had negligently injured the plaintiff in a collision, it was held that the father was liable for the tortious acts of his son, when done with his authority or subsequent ratification. This

authority is implied if the act of the son is within the general scope of the authority conferred by the father in carrying out his business, though he may not have known of the specific conduct. The use of the family automobile by the wife cannot be said, as a matter of law, not to be in the business of the husband. Smith v. Jordan, 97 N. E. 761 (Mass. 1912).

At the common law mere paternity imposes no liability for the torts of a child. Dunk v. Grey, 3 Fed. 862 (1880); Ritter v. Thibodeaux, 41 S. W. 492 (Tex. 1897); Taylor v. Seil, 103 Wid. 312 (1899); Tift v. Tift, 4 Den. 175 (N. Y. 1847); McCaulla v. Wood, 2 N. J. L. 63 (1806); Haggerty v. Powers, 66 Cal. 368 (1885). This is true even where the son lives with his father and is under his control. Edwards v. Crume, 13 Kans. 348 (1874). But the common law has been changed by statute in some jurisdictions. Mullins v. Blaise, 37 La. Ann. 92 (1885).

In the absence of statute, however, a liability may, as in the principal case, arise where the relation of principal and agent, or master and servant, exists between the parent and child. Teagarden v. McLaughlin, 86 Ind. 476 (1882); Strohl v. Levan, 39 Pa. 177 (1861); Lashbrook v. Patten, 62 Ky. 316 (1865). In Maddox v. Brown, 71 Me. 432 (1880), the father was not held liable where his son used a carriage for his own purposes without the knowledge of the father. But when a team is used by the son about the business of the father, the presumption is that he is acting on behalf of the father. Berhardt v. Swaty, 57 Wis. 24 (1883).

Similarly, under the rules of negligence, a liability arises where the father has negligently placed it within the power of the child to do injury. Hoover v. Noker, 60 Wis. 511 (1884); Chaddock v. Plummer, 88 Mich. 225 (1891), 14 L. R. A. 675; Palm v. Ivorson, 117 Ill. App. 535 (1905); Phillips v. Barnett, 2 N. Y. City Ct. 20 (1882); Meers v. McDowell, 110 Ky. 926 (1907). Where a father, knowing that his son is committing a tort, makes no attempt to restrain him, he is deemed to have authorized it. Beedy v. Reding, 16 Me. 362 (1839).

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF THE COURSE OF EMPLOYMENT.—The risk of having his hands frost bitten is not incidental to the employment of a baker's boy whose duty it is to deliver bread for his master and to collect payment therefor; and consequently there can be no recovery under the English Workmen's Compensation Act. Warner v. Couchman, L. R. (1912) App. Cas. 35.

The clause in the English Act providing that the injury must be one "arising out of and in the course of employment" has been substantially, if not literally, copied in all similar statutes passed in this country. It is interesting, accordingly, to note that the more experienced British courts have been unable, as yet, to formulate any definite decision as to just how these words should be construed and the cases upon the subject seem irreconcilable.

The reason assigned for the decision in the principal case is that there was nothing in the nature of his employment which exposed him to more than the ordinary risk of cold to which any person working in the open air was exposed on that day. Shortly after this decision, however, it was held in Pierce v. Provident Clothing Co., 1 K. B. 997 (1911), that injury from traffic on the streets was one incidental to the employment of a canvasser who, with his employer's knowledge, used a bicycle to facilitate his employment. The cases seem directly in opposition; since the number of persons exposed to the cold in the first case was certainly no greater than the number of those exposed in the risks of street traffic in the later decision; nor was the frequency or duration of the exposure greater in one case than in the other. Such are the conclusions reached by Prof. Francis H. Bohlen in his interesting article on Workmen's Compensation. Har. L. Rev., pp. 532-537 (April, 1912), in which he also points out that it is apparently the sentiment of the trial judge which generally controls, unless the sentiment of the majority of the appellate court is in conflict. *Ibid.*, p. 532.