RECENT CASES.

ADMIRALTY JURISDICTION—TORTS—A passenger on a launch who jumped from the boat to a pier at the command of the master in charge, was injured by the boat bumping against him while he was drawing himself up on the pier. *Held:* The federal courts of admiralty have no jurisdiction of an action to recover for this injury. Gordon v. Drake, 159 N. W. 340 (Mich. 1916).

The admiralty courts have no jurisdiction over torts which are not consummated on the high seas or navigable waters of the United States. The "Plymouth," 3 Wallace 20 (U. S. 1865). Docks and wharves are but extensions of the shore whether they project over the water or not. The "Mary Stewart," 10 Fed. 137 (1881). But admiralty has jurisdiction of injuries to property located in navigable waters which is solely an aid to navigation, such as a beacon, even though the foundations thereof are built on the bed of the river. The "Blacksheath," 195 U. S. 361 (1904). The location and purpose of the structure are controlling. The "Raithmoor," 241 U. S. 166 (1916).

To give the courts of admiralty jurisdiction it is sufficient that the actual injury occurs on the water, even though the active agent originated on the land. Hermann v. Port Blakely Mill Co., 69 Fed. 646 (1895). It is, however, not always easy to say just where the injury occurred. See as to this the interesting cases of "The H. S. Picklands," 42 Fed. 239 (1890), and "The Strato," 98 Fed. 998 (1900).

In the absence of a statute, admiralty has no jurisdiction of an action to recover for the death of a seaman, Rainey v. N. Y. and P. S. S. Co., 216 Fed. 449 (1914), but when such remedy is given by a state statute it can be enforced by proceedings in admiralty. Swayne and Hoyt v. Barsch, 226 Fed. 581 (1915). If the injury which causes the death occurs on the water, the statutory remedy may be enforced in admiralty even though the death occurs on shore. The "Chiswick," 231 Fed. 452 (1916).

Until recently it was thought that the locality of the tort was the sole test of admiralty jurisdiction. But in Campbell v. Hackfeld, 125 Fed. 696 (1903), it was decided that though the tort occurred on the water, if it was not of a maritime nature, admiralty had no jurisdiction. This case was followed in "The St. David," 209 Fed. 985 (1913), on identical facts. Though the injury which was said to be non-maritime in those cases was held to be of a maritime nature in Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 (1914), the question of whether the non-maritime nature of the tort would be a bar to the jurisdiction of admiralty is expressly left open. See 16 Harv. L. R. 210, and 25 Harv. L. R. 381.

BANKRUPTCY—JURISDICTION OF BANKRUPTCY COURT OVER ESTATE OF THE BANKRUPT—The vendor of goods obtained by fraud brought replevin to rescind after an involuntary petition in bankruptcy was brought against the vendee. The referee ordered him to refrain from prosecuting this action. *Held:* Upon filing of the petition all the property in the bankrupt's possession came under the jurisdiction of the bankruptcy court, and is no

longer the subject of action in a state court. *In re* Wellmade Gas Mantle Co., 233 Fed. 250 (1916).

The filing of the petition in bankruptcy is a *caveat* to all the world and acts as an attachment of all the property then in the possession of the bankrupt, Mueller v. Nugent, 184 U. S. 1 (1901), and the bankruptcy court has the paramount jurisdiction of that property no matter how the bankrupt obtained it. Blake v. Openhym, 216 U. S. 322 (1909). This also applies to property of the bankrupt in the possession of a sheriff under an attachment which is dissolved by the adjudication in bankruptcy, *In re* Walsh Bros., 159 Fed. 560 (1908); to property constructively in the bankrupt's possession, Orinoco Iron Co. v. Metzel, 230 Fed. 40 (1916); and to debts due the bankrupt, *In re* Ransford, 194 Fed. 658 (1912). This property may not be seized by attachment and garnishee process, State Bank of Chicago v. Cox, 143 Fed. 91 (1906); under a writ of replevin, *In re* Walsh Bros., *supra*, or by attachment under a chattel mortgage, Fairbanks Shovel Co. v. Wills, 240 U. S. 642 (1916).

If the property is seized by legal process after filing of the petition and converted, the trustee may waive the tort and sue in assumpsit for the proceeds. State Bank of Chicago v. Cox, *supra;* Dittemore v. Cable Milling Co., 101 Pac. 594 (Idaho 1909). A creditor who removes and conceals such property is guilty of a contempt against the District Court. *In re* Iron Clad Mfg. Co., 195 Fed. 781 (1912).

The law was the same under the Bankruptcy Act of March 2, 1867 (14 U. S. Stat. at Large, 517). *In re* Fogel, 7 Blatchf. U. S. C. C. Rep. (1869); *In re* Steadman, 22 Fed. Cases 1155 (1873).

BANKS AND BANKING—COLLECTIONS—TO BANK TRUSTEE OR DEBTOR—The proceeds of two notes deposited for collection, having been placed to depositor's credit, were appropriated by the cashier. *Held:* The depositee was liable as debtor. Minnesota Mutual Life Ins. Co. v. Taggus State Bank, 158 N. W. 1063 (N. D. 1916).

The general view is that where paper is deposited for collection, the paper is in trust until collection, Peoples Bank v. Miller, 152 N. W. 257 (Mich. 1915), and that after collection, the relation of debtor and creditor arises. Marine Bank v. Fulton Bank, 2 Wallace 252 (U. S. 1864).

The modern cases present many variations and not infrequent contrary views. It has been held that the collecting bank had no authority to mingle the proceeds after collection with its general deposits since the proceeds were being held in trust. State Bank v. National Bank of Atchison, 187 S. W. 673 (Ark. 1916). This trust passes to the assignee after an assignment for the benefit of creditors. Anheuser-Busch Ass'n v. Morris, 36 Neb. 31 (1893). If the proceeds are mixed with the general deposits, the whole is impressed with the trust. Kansas Bank v. First State Bank, 62 Kan. 788 (1901). In Young v. Teutonia Bank, 134 La. 879 (1914), it was held that the bank has the authority to mix the proceeds unless an express agreement bars the right, and, if such an agreement exists, a trust arises for the proceeds. First National Bank of Raton v. Dennis, 146 Pac. 948 (N. M. 1915). If, contrary to instructions, the bank does mingle the proceeds and credits the depositor therewith, a debt arises. Citizens Bank of Danville v. Haynes, 87 S. E. 399 (Ga. 1915).

In First National Bank v. McMillan, 83 S. E. 149 (Ga. 1914), it was considered a question of the intent of the parties, whether a note was deposited for collection or whether it was sold, the presumption being that where paper is deposited in blank, that it is deposited for collection merely; but where the paper is drawn in favor of the bank, the contrary presumption is authorized. Gettysburg National Bank v. Kahns, 62 Pa. 88 (1869).

Where a bank credits a depositor with the amount of the draft before collection, such has been held a trust. Stones River National Bank v. Leman Milling Company, 63 So. 776 (Ala. 1913). But oppositely to this it has been held that an agreement whereby the bank credited the depositor with the amount of the paper before collection, created a debt. German Bank v. Carnegie Trust Company, 158 N. Y. Supp. 222 (1916). Still another view is that such a transaction merely creates a presumption in favor of a debt. Franklin National Bank v. Roberts, 168 N. C. 473 (1915).

In Arkansas Bank v. Martin, 163 S. W. 745 (Ark. 1914), it was held that where the owner of a note demanded the proceeds after the crediting of the proceeds to a depositor who had obtained possession of the note by fraud, for collection by the bank, that it was the duty of the bank to pay such proceeds to the owner.

A collection after insolvency of collecting bank is outside the bank's authority and it holds such proceeds in trust. Walker v. O'Neill, 66 So. 994 (Fla. 1914).

CONSTITUTIONAL LAW—UNREASONABLE POLICE REGULATIONS—"IMPORTED EGGS"—A statute provided that any person selling imported eggs shall: (1) Mark each egg, "imported"; (2) report each shipment received to the state board of health; and (3) display a sign in his store, "Imported eggs sold here." *Held:* This imposes such an onerous burden upon dealers as to be an unjust attempt to exercise the police power. *Ex parte* Foley, 158 Pac. 1034 (Cal. 1916).

According to the interpretation of the commerce clause of the Fourteenth Amendment by Chief Justice Marshall in Brown v. Maryland, 12 Wheaton 419 (1827), a state statute not based on considerations of public welfare but solely to prevent non-residents from the advantages of local trade or discriminate in favor of local residents is unconstitutional as an attempt to regulate commerce. Spellman v. New Orleans, 45 Fed. 3 (1891). Statutes have been held unconstitutional which require peddlers to be licensed but which except those who sell goods made in the state, Welton v. Missouri, 91 U. S. 275 (1875), which prohibit the sale of trees not grown in the state unlesss the vendor file a bond, *etc.*, with the Secretary of State, *In re* Schrechter, 63 Fed. 695 (1894), which prohibit the sale of convict-made articles unless so stamped, People v. Hawkins, 157 N. Y. 1 (1898), which prohibit the importation of docked horses, Stubbs v. People, 90 Pac. 1114 (Colo. 319) (though a statute prohibiting the use of docked horses is constitutional, Bland v. People, 32 Colo. 319 [1904]), which require very onerous duties from persons without the state who wish to deal in stocks. Geiger-Jones Co. v. Turner, 230 Fed. 233 (1916). But see State v Stucker, 58 Ia. 496 (1892) where a statute prohibiting the sale of liquors except those made from fruit grown in the state was upheld.

Where, however, the purpose of the statute is to guard the public health or prevent fraud upon the public, it is within the state's police power. So a statute requiring lard substitutes to be so labelled is valid. State v. Snow, 81 Ia. 642 (1891); State v. Aslesen, 50 Minn. 5 (1892). Or one prohibiting the manufacture and sale of oleomargarine. Powell v. Pennsylvania, 127 U. S. 678 (1887); affirming Powell v. Commonwealth, 114 Pa. 265 (1886).

It has been held that when an article is so wholesome that a trial court must take judicial notice of the fact, the legislature cannot prohibit the sale; but if there is a dispute, the legislature can regulate or prohibit. State v. Layton, 160 Mo. 474 (1900). Oleomargarine is such an article as it is not within the state's police power to exclude it from commerce. Schollenberger v. Pennsylvania, 171 U. S. 1 (1897); reversing Commonwealth v. Powell, 170 Pa. 284 (1895).

CONTRACT—GUARANTY—NOTICE TO GUARANTOR—A guaranty was made in response to an offer by the guarantee and acted upon without notice of acceptance being given. *Held:* Notice was unnecessary. Oklahoma City Nat'l Bank v. Ezzard, 159 Pac. 267 (Okla. 1916).

Whether a guaranty is only an offer or an absolute promise, depends on the intention of the parties and the facts and circumstances attendant thereon. Stewart v. County Bank, 71 Ark. 585 (1903); Booth v. Irving Bank, 116 Md. 668 (1911). If a direct and absolute guaranty, not a mere proposal, no notice of acceptance is necessary. Frost v. Standard Metal Co., 215 Ill. 240 (1905); Reese v. Medical Co., 172 S. W. 820 (Ark. 1914); Valley Bank v. Cowrie, 145 N. W. 904 (Ia. 1914). It has been held an endorsement of the buyer's performance of a contract of sale on the back of said contract, is a binding guaranty. York v. Powell, 187 S. W. 628 (Ark. 1916). Also, a promise to make a loan if certain guaranty was furnished. Nat'l Bank v. Zimmer Co., 156 N. W. 265 (Minn. 1916). A guarantor may, by a stipulation in the contract, waive notice of the acceptance. Holmes v. Schwab, 80 S. E. 313 (Ga. 1913); International Co. v. Mabbott, 159 Wise, 423 (1915). It has been held that no notice need be given, that the names of two additional guarantors were added to the guaranty, after guarantor had signed, without his knowledge or consent. State Bank v. King, 90 Atl. 453 (Pa. 1914). A request for the execution of a second guaranty containing additional provisions, does not constitute a rejection of the guaranty first given. American Co. v. Moskowitz Bros., 159 App. Div., N. Y. 382 (1913).

Notice is necessary where a guaranty is executed by the guarantor without any previous request, Lester Piano Co. v. Romney, 126 Pac. 324 (Utah 1912), and where notice of acceptance is stipulated for, Asmussen v. Post Pub. Co., 143 Pac. 396 (Col. 1914), or where guarantee's agent in soliciting the guaranty promises that guarantor will receive notice of acceptance. Dakota Bank v. Kleinschmidt, 139 N. W. 348 (S. D. 1913). So in the case of a continuing guaranty, or a guaranty of a future contingent event, notice that the guaranty has become operative, must be given. Davis Co. v. Richard, 115 U. S. 524 (1885); Black v. Grabow, 216 Mass. 516 (1914). It must be within a reasonable time, since failure to give such notice will defeat the guaranty *pro tanto*, at least if it has operated injuriously to the

guarantor. Wanamaker v. Brown, 50 Atl. 512 (Del. 1901); American Agri. Co. v. Ellsworth, 83 Atl. 546 (Me. 1912).

In Pennsylvania, except in cases of absolute guaranty accepted when given, notice of acceptance is necessary, even if the guaranty is made at the request of the guarantee. Evans v. McCormick, 167 Pa. 247 (1895); Columbia Baking Co. v. Schissler, 35 Pa. Super. Ct. 621 (1908). But where the offer is made in one state and accepted in another, it is a contract of the latter state, and the Pennsylvania court will apply the law of that state. Hartley Mfg. Co. v. Berg, 48 Pa. Super. Ct. 419 (1911).

EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER—A statement by the prisoner that he would confess preceded in point of time a remark made by an officer that it was always best to tell the truth. *Held:* Since the prisoner, had already made up his mind to declare the truth, the confession was not involuntary and was, therefore, admissible. People v. Wilkinson, 158 Pac. 1067 (Cal. 1916).

Confessions or disclosures are inadmissible when made under any promise or encouragement of hope or favor. U. S. v. Pumpherys, 1 Cr. C. C. 74 (1802); Commonwealth v. Hanlon, 8 Phila. 423 (Pa. 1870), or under the influence of fear produced by threats, State v. Poole, 84 Pac. 727 (Wash. 1906), or when induced by solitary confinement, as in a dark cell, State v. McCullum, 51 Pac. 1044 (Wash. 1897).

When there is no suggestion or intimation that any benefit might result from the confession, it is admitted as voluntary, Strong v. State, 88 N. W. 772 (Neb. 1902), even when coupled with a proposition by the prisoner to compromise the case, such offer not being induced by another. Hecox v. State, 31 S. E. 592 (Ga. 1898). Failure to caution the prisoner about making statements is no bar to their admissibility, State v. Baker, 36 S. E. 501 (S. C. 1900); State v. Hand, 58 Atl. 641 (N. J. 1904), nor need he be told that they will be used against him, Golson v. State, 26 So. 975 (Ala. 1899). *Contra*, Wright v. State, 37 S. W. 732 (Tex. 1896). Warning given a few hours before the confession is not too remote, Balls v. State, 40 S. W. 801 (Tex. 1897); but it has been held otherwise if given the day before. Perry v. State, 61 S. W. 400 (Tex. 1901).

The fact that the accused was under arrest at the time of the confession is not of itself sufficient to exclude it, People v. Miller, 135 Cal. 69 (1901); Commonwealth v. Devaney, 64 N. E. 402 (Mass. 1902); nor is his protection by an officer considered an inducement, Price v. State, 40 S. E. 1015 (Ga. 1902); Stevens v. State, 35 So. 122 (Ala. 1903). It is immaterial whether the one making the inducement be a private person or an officer so far as the admissibility is concerned, *In re* Thorn, 4 City H. Rec. 81 (N. Y. 1819), and People v. White, 68 N. E. 630 (N. Y. 1903), where a confession was made to an officer feigning friendship.

If the confession be voluntary, the fact that unsuccessful attempts were previously made to obtain it by undue influence does not render it inadmissible, Commonwealth v. Crocker, 108 Mass. 464 (1871); Levison v. State, 54 Ala. 520 (1875). A confession following an inducement is voluntary if not so connected with it as to be a consequence of it, Moore v. Commonwealth, 2 Leigh 701 (Va. 1830); State v. Hopkirk, 84 Mo. 278 (1884). Con-

vincing affirmative proof must show this. Porter v. State, 55 Ala. 95 (1876); McMaster v. State, 34 So. 156 (Miss. 1903). Further confessions not asked for are admissible even when following inducements. Brewer v. State, 78 S. W. 772 (Ark. 1904).

A confession made on promise of freedom is admissible though the prisoner later refuses to testify, Commonwealth v. Knapp, 27 Mass. (10 Pick.) 477 (1830). *Contra,* Womack v. State, 16 Tex. App. 178 (1884), or where he escapes from custody and so fails to perform his agreement, State v. Moran, 14 Pac. 419 (Ore. 1887). On the other hand it has been held that there must exist previous warning that the confession will be used in such case. Lopez v. State, 12 Tex. App. 27 (1882).

EVIDENCE—DECLARATIONS OF CONSPIRATORS—In a prosecution for conspiracy, the court admitted in evidence the declaration of a co-conspirator, made after the conspiracy had ended and when the declarant was under subpoena to appear before the grand jury. *Held:* That such declarations were not admissible against the declarant's co-conspirators. Erber v. United States, 234 Fed. 221 (1916).

After a conspiracy has come to an end, whether by the accomplishment of the common design or by abandonment, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others, People v. Kief, 126 N. Y. 661 (1891); Novkovic v. State, 135 N. W. 465 (Wis. 1912); Kahn v. State, 105 N. E. 385 (Ind. 1914), whether the declarations tend to implicate the others, Crosby v. People, 137 Ill. 325 (1891), or exonerate them. People v. Hall, 94 Cal. 595 (1892). Such declarations are only competent against the declarant. State v. Beaucleigh, 92 Mo. 490 (1887); Hicks v. State, 75 S. E. 12 (Ga. 1912).

An error, on the part of the court, in admitting the declarations of a co-conspirator, made after the termination of the conspiracy, as evidence against anyone but the declarant himself, is not cured by a subsequent instruction to the jury to disregard the statement. People v. Oldham, 111 Cal. 648 (1896).

Before a statement of one conspirator may be admitted in evidence against the others, the court must determine whether sufficient evidence of a conspiracy has been adduced, or the evidence will be objectionable as hearsay. Stager v. United States, 233 Fed. 510 (1916). The evidence need only establish *prima facie* the existence of the conspiracy. Baker v. State, 80 Wis. 417 (1891).

EVIDENCE—LEADING QUESTIONS—DISCRETION OF COURT—In an action against a railroad for negligence, the court overruled an objection that a certain question was leading. *Held:* Whether or not a question is leading is purely a discretionary matter for the court. Mingoes v. Central R. R. of N. J., 98 Atl. 459 (N. J. 1916).

It is the general rule that the allowance or exclusion of leading questions is within the discretion of the court, and in the absence of a palpable abuse of discretion, resulting in substantial injury to the accused, their allowance is not of itself ground for reversal. People v. Kromphold, 157 Pac. 599 (Cal. 1916); Talley v. State, 159 Pac. 59 (Ariz. 1916); Commonwealth v. Turner, 112 N. E. 864 (Mass. 1916). A great latitude is allowed

where a witness appears to be hostile, Blair v. State, 72 Neb. 501 (1904); State v. Dalton, 43 Wash. 278 (1906), or is young and does not readily understand English, State v. Drake, 128 Iowa 539 (1905), or is feeble-minded, State v. Simes, 12 Idaho 310 (1906). A question which is improper on direct examination may be proper on cross-examination. Hayward v. Scott, 114 Ill. App. 531 (1904). Some courts hold that the right of reasonable cross-examination by leading questions is absolute; the denial of it is the denial of a valuable right and, if prejudicial, constitutes reversible error. Hempton v. State, 111 Wis. 127 (1901); Bell v. State, 48 Tex. Crim. Rep. 256 (1905). But see *contra*, Mann v. State, 134 Ala. 1 (1902), where it is held to lie within the discretion of the court. On redirect examination it is within the discretion of the court to say whether the questions are leading. Mann v. State, *supra*. Questions in the alternative are not necessarily leading, although a question, "Was the headlight a regulation one or another kind?", was held leading in Chicago City Ry. Co. v. Shaw, 220 Ill. 532 (1906). It has been held that the test of a leading question is whether it suggests the answer desired, but the fact that it may be answered "yes" or "no," does not make it leading. DeWitt v. Skinner, 232 Fed. 443 (1916).

EVIDENCE—JUDGE—COMPETENCY AS WITNESS—A judge cannot be compelled to testify in a case as to matters before him on a previous trial, but may do so, if he wishes. Hale v. Wyatt, 98 Atl. 379 (N. H. 1916).

It is a well-settled rule of law that a judge cannot testify in a trial over which he is presiding unless the evidence is formal or undisputed. People v. Miller, 2 Parker 197 (N. Y. 1854). State v. Dyer, 58 Atl. 947 (Del. 1904). And certainly he cannot testify therein over the objection of the party against whom he is called as a witness. Rogers v. State, 60 Ark. 76 (1894); Maitland v. Zanga, 14 Wash. 92 (1896). A judge is justified by public policy in refusing to testify as to the happenings or testimony given, in a former trial before him, but it will furnish no ground of exception should he not insist upon his right to be excused. Welcome v. Batchelder, 23 Me. 85 (1843). There are few courts which maintain a doctrine that it is not competent for a judge to testify if he wishes, as to facts occurring on a previous trial before him, State v. Hindman, 65 N. E. 911 (Ind. 1903); State v. Bringgold, 82 Pac. 132 (Wash. 1905); Garnett v. Comm., 83 S. E. 1083 (Va. 1915), or that he may not be called upon to explain the grounds of the decision, so that it will not be necessary to determine them exclusively from the record. Barlow v. Clark, 67 Mo. App. 340 (1896); Warfield v. Security Brewing Co., 199 Fed. 358 (La. 1912). Some state statutes provide, that a judge may be called as a witness by either party, or to explain an alleged irregularity in the former proceedings, there being vested in him the discretion of either ordering the trial postponed or suspended and if postponed, directing a change of venue or a continuance to take place before another judge, or in his own court. State v. Houghton, 75 Pac. 887 (Ore. 1904); Breen v. State, 34 Mont. 107 (1906). The fact that he is a principal witness is not a circumstance which could have any weight with the jury, and therefore it is not necessary that a jury be instructed how to receive

such testimony. State v. Duffy, 57 Conn. 526 (1889); People v. Hartwell, 55 App. Div. N. Y. 234 (1900).

A very few courts take the position that it is contrary to public policy and convenience to permit a judge who has tried a case and decided it, to be called as a witness, even with his consent, either to state the grounds upon which his decision was based, Noland v. People, 80 Pac. 887 (Col. 1905), or to testify concerning statements or transactions taking place before him. Delaware Lodge v. Allmon, 39 Atl. 1098 (Del. 1897).

JUDGMENTS—RES JUDICATA—Having lost a suit under statute for mental anguish through failure to deliver a telegram, plaintiff sues at common law for wilful failure to deliver. *Held:* The previous judgment on the same transaction is a complete bar. Greer v. Western Union Tel. Co., 89 S. E. 782 (S. C. 1916).

The general rule is that where the subject matter and the cause of action in both cases are the same, the prior adjudication is a bar to recovery in the second. Hatch v. Coddington, 32 Minn. 92 (1884); McCain v. Louisville & N. R. Co., 97 Ky. 804 (1893); So. Pac. R. R. Co. v. United States, 168 U. S. 1 (U. S. Sup. Ct. 1897). There are many exceptions to this rule as in Lovell v. Hammond Co., 66 Conn. 500 (1895), where it was held that a judgment in replevin was no bar to an action to recover value of non-repleviable property taken in one trespass; or as in Matthews v. Hennon, 67 N. W. 226 (Iowa 1896), which held that a replevin judgment was no bar to a subsequent action for the "use" of similar property taken at the same time.

A plaintiff has no right to split up a ground of action into several causes of action. It is his duty to put in issue in the one suit every issuable matter which naturally arose out of the transaction, Marble v. Keyes, 75 Mass. 221 (1857); Roby v. Eggers, 130 Ind. 415 (1891). However, it has been held his duty does not extend to libel suits. Cook v. Conners, 109 N. E. 78 (N. Y. 1915).

To be a bar the judgment must now be on the merits of the case, Coyle v. Taunton Trust Co., 103 N. E. 289 (Mass. 1913), reviewed in 62 U. OF P. L. R. 390, and must have been judicially passed upon in a court of competent jurisdiction, Rogers v. Wood, 2 B. & Adol. 245 (Eng. Chan. 1831), except in certain cases where a party has voluntarily bound himself to abide by the decision of some tribunal other than a court. Woolsey v. Independent Order of Odd Fellows, 61 Iowa 492 (1883), and the cases collected in Black on Judgments (2d Ed.) 780.

A former judgment may not have the effect of a bar, but still be conclusive as to one or more issues of fact or law between the parties litigant. Southern Pac. R. R. Co. v. United States, *supra*.

Where the previous judgment was that the judgment of the court below be reversed, and the complaint dismissed, it was held that all questions which were made or could have been made upon the former trial have become *res judicata*. Halsall v. Railway Co., 100 S. C. 483 (1914).

For a further discussion of Judgments and the doctrine of *Res Judicata* see 62 U. OF PA. L. REV. 659, and 63 U. OF PA. L REV. 140.

MASTER AND SERVANTS—INJURY TO THIRD PERSONS—JOINDER OF PARTIES—An automobile negligently driven by a servant injured a third person.

Held: Though liable on different grounds, the master and servant may be joined in a suit to recover for the injury. Royer v. Rasumssen, 158 N. W. 988 (N. D. 1916).

Although it was well established law, that a master would be liable as joint tort feasor with his servant for an injury caused by the servant at his direction, yet the courts in early cases were troubled with the question when this fact was not apparent. Michael v. Alestree, 2 Levinz 172 (Eng. 1680). In 1838, Cowen, J., in Wright v. Wilcox, 19 Wend. 343 (N. Y.), held that the master would not be liable for the servant's wilful injury; but if it was a case of strict negligence while in the master's service, a joint action would lie. But in Massachusetts it was held that unless the master directed or commanded the trespass or injury he would not be liable jointly with the servant because there would be no right of contribution. Parsons v. Winchell, 5 Cush. 592 (1850). To hold otherwise would be allowing a misjoinder of causes of action because the master's liability is in case while that of the servant is in trespass. Campbell v. Portland Sugar Co., 62 Me. 552 (1873); Clark v. Fry, 8 Ohio St. 358 (1858); McNemar v. Cohn, 115 Ill. App. 31 (1904). The majority of jurisdictions, however, including the court in the principal case, are in accord with Wright v. Wilcox, *supra.* Central of Georgia Ry. Co. v. Carlock, 72 So. 261 (Ala. 1916). The cases point out that there is a right of contribution, for the master can recover from the servant, and the other reasons for refusing to allow joinder are purely technical. Mayberry v. Northern Pacific Ry. Co., 100 Minn. 79 (1907).

The question of joinder arose in the Federal courts in regard to the right to removal thereto, and the decisions are not in accord. In an elaborate and well reasoned opinion, Judge Taft held that the master could not be joined with the servant on the ground of *respondeat superior* alone. Warax v. Cincinnati, *etc.,* Ry. Co., 72 Fed. 637 (1896). Other courts reached different conclusions. Deere, Wells & Co. v. Chicago, *etc.,* Ry. Co., 85 Fed. 876 (1898); Davenport v. Southern, *etc.,* Ry. Co., 135 Fed. 960 (1905). But as far as the right to removal is concerned, the question was settled by the Supreme Court holding that they could be joined. Railway Co. v. Thompson, 200 U. S. 206 (1906).

PROPERTY—ADVERSE POSSESSION—COLOR OF TITLE—TAX DEED—In a suit involving a claim of title by adverse possession. *Held:* Occupancy under a certificate of purchase at a tax sale is not under color of title. Bruschi v. Cooper, 159 Pac. 728 (Cal. 1916).

Since color of title is any writing which purports to convey the title to land by apt words of transfer, it has been held that a tax deed, being subject to an equity of redemption, cannot constitute color of title. Pease v. Lawson, 33 Mo. 35 (1862). There is a split of authority on the question. Some cases hold that a tax deed constitutes color of title from the date of expiration of the equity of redemption. Morse v. Seibold, 147 Ill. 318 (1893); Davis v. Howe, 176 S. W. 759 (Tex. 1915). Where by statutory provision the sale was made on absolute investiture of title, a deed was held to create color of title. Fletcher v. Worthen, 71 Ark. 386 (1897). Other cases hold a tax deed, color of title. Reddick v. Long, 124 Ala. 260 (1899); Winters v. Haines, 107 Tenn. 337 (1901); Earl v. Harris, 182 S. W. 273 (Ark. 1916).

Since the split is on the question as to whether the instrument to constitute color of title must purport to convey title or not, it would be expected that where a tax deed is held sufficient, that the certificate of purchase at a tax sale would likewise constitute color of title. Such a certificate was held insufficient in McKnight v. Taylor, 37 Mo. 310 (1866), and in De Graw v. Taylor, 37 Mo. 310 (1866), it was held that a tax deed contributed color of title from the date of its issuance and not from the date of the sale.

There is a tendency to hold that any instrument defining the claim will constitute color of title, whether it purports to convey a fee or not. So a bond for title, Continental Realty Co. v. Harvey, 52 S. W. 255 (Ky. 1913), a contract for a right of way, Scott v. Texas & P. R. R., 94 Fed. 340 (Tex. 1899), and a mere knowledge of the land claimed, Thompson v. Williamson, 177 S. W. 987 (Tex. 1915), were held to constitute color of title.

PROPERTY—EASEMENTS—SURRENDER BY NON-USER—A land owner used a road, which had not been used for thirty-eight years, and relied on a right either of a public or private right of way. *Held:* Unexplained cessation to use a way, originally acquired by use, for twenty years, is a surrender of the easement. Wooster v. Fiske, 98 Atl. 378 (Me. 1916).

It is well settled that non-user of a way originally acquired by prescription, coupled with an intent to abandon the way, is a surrender of the easement. Corning v. Gould, 16 Wend. 531 (N. Y. 1837); Dana v. Valentine, 46 Mass. 8 (1842). But mere non-user for twenty years is simply evidence of an intention to abandon and may be explained. Pratt v. Sweetser, 68 Me. 344 (1878). If there is the intention to surrender the right, then non-user for however short a time suffices. R. R. v. Covington, 2 Bush. 526 (Ky. 1866); Snell v. Levitt, 18 N. E. 370 (N. Y. 1888). But if there is no intention to abandon the right, then non-user for twenty years will not work an abandonment. New Eng. Structural Co. v. Distillery Co., 75 N. E. 85 (Mass. 1905). Some courts hold that there must be both non-user and adverse use to work a surrender. Citizens' Electric Co. v. Davis, 44 Pa. Super. 138 (1910); City of Baltimore v. Canton Co., 93 Atl. 144 (Md. 1915).

The cases distinguished between easements acquired by prescription and those acquired by grant. Adams v. Hodgkins, 84 Atl. 530 (Me. 1912). It has been pointed out that there should be no distinction where the easement acquired by prescription is based on the fiction of a lost grant. Veghti v. Raritan Water Co., 19 N. J. Eq. 142 (1868). The decisions are uniform that mere non-user does not make a surrender, where there has been a grant. *In re* City of Buffalo, 120 N. Y. S. 611 (1919); Burnham v. Mahoney, 111 N. E. 396 (Mass. 1916).

The mere fact that another way is used for a time does not indicate a surrender of the old way; this rule applies whether the easement was acquired by prescription or by grant. McCue v. Water Co., 31 Pac. 461 (Wash. 1892); Bowen v. Cooper; 66 S. W. 601 (Ky. 1902). Whether there is a surrender of an easement is a question to be determined from the circumstances of each case, and neither non-user nor length of time is absolutely determinative. Mason v. Ross, 71 Atl. 141 (N. J. Ch. 1908).

PROPERTY—NAVIGABLE WATERS—RIGHTS OF LITTORAL OWNERS—The title to the subaqueous land of a lake is in the state as trustee for the benefit of the people; yet a littoral owner, under certain conditions, is entitled to access to navigable water. State v. Cleveland, Penna. Ry. Co., 113 N. E. 677 (Ohio 1916).

The state holds title to the beds of navigable lakes below the natural high water mark for the use and benefit of the people, subject to the rights vested by the Constitution, Atlee v. Packet Co., 21 Wall. 389 (U. S. 1874); *Ex Parte* Powell, 70 So. 392 (Fla. 1915); Bond v. Reynolds, 159 N. Y. S. 317 (1916), and cannot delegate its trusteeship. Jackson Co. v. Quarles, 182 S. W. 283 (Ark. 1916). But the sovereign authority may authorize the construction of a pier or wharf, even though it will be an obstruction in navigable waters. Austin v. Rutland Ry. Co., 45 Vt. 215 (1873); Howell v. Jessup, 160 N. Y. 249 (1900); Panama Co. v. Ry. Co., 71 So. 608 (Fla. 1916). The rule that the title to submerged lands in front of adjoining uplands is not burdened with an easement in favor of the owner of the upland, for the purpose of building wharves or other structures upon the submerged land to reach navigable waters, is unquestioned. Cobb v. Comms. of Lincoln Park, 202 Ill. 427 (1903); People v. The D. and H. Co., 213 N. Y. 194 (1915). Indeed every and all rights of such owners are subject to public easements for the purposes of nagivation, and must yield thereto when asserted by the state or its agencies. Barnes v. Terminal Co., 193 N. Y. 378 (1908); Borrell v. Mfg. Co., 111 N. E. 932 (Ind. 1916). And inasmuch as ownership of the shore extends only to the water's edge, erection of piers. which interfere with the public's use of navigable bodies of water, constitutes a purpresture. Commissioners of Park. v. Fahrney, 250 Ill. 256 (1911); People v. Steeplechase Park, 165 App. Div. N. Y. 231 (1915).

Yet acts of such a character are not to be prohibited absolutely, because by such an interpretation, the execution of the trusteeship of the waterways would defeat the very purpose for which it was established. Providence Co. v. Stonington Co., 12 R. I. 348 (1879); McBurney v. Young, 67 Vt. 574 (1895). And it has naturally followed that a littoral owner may build wharves from the upland to navigable water for the purpose of rendering his means of access more available, practical, and serviceable when superior public rights are not obstructed thereby. Brookhaven v. Smith, 188 N. Y. 74 (1907); Bissell v. Mfg. Co., *supra* (Ind. 1916).

PROPERTY—TITLE BY PRESCRIPTION—EFFECT OF A PAROL GIFT—A Creamery Company gave to a Railroad a right of way over its land which the Railroad used for general switching purposes for twenty-four years. The Creamery Company having gone out of business, their grantee brings an action to establish his title. *Held:* The railroad acquired no easement either by parol dedication or by prescription. Shamanek v. Chicago, M. & St. P. Ry. Co., 159 N. W. 237 (Iowa 1916).

The weight of authority is clearly to the effect that an easement can not be acquired by a railroad through a parol dedication. Lake Erie & Western Ry. v. Whitman, 155 Ill. 514 (1895); Mahar v. Grand Rapids Terminal Ry. Co., 174 Mich. 138 (1913). The reason was well stated in Watson v. Chicago, M. & St. P. Ry. Co., 46 Minn. 321 (1891), where the court said "Where land is to be employed in the public use, by a business corpora-

tion, there is no reason founded on necessity, for the doctrine of dedication; because there is in such case a grantee *in esse* capable of taking a grant. The ownership of property is private, though the use required to be made of it is public. The private ownership prevents the acquisition of it by dedication."

There are, however, several cases which hold a contrary view basing such views on the ground that the public character of such a corporation enables it to acquire land in that way. It is a dedication by estoppel *in pais*. Morgan v. Railroad Co., 96 U. S. 716 (1877); Texas & New Orleans Ry. Co. v. Sutor, 56 Tex. 496 (1882); Rutger v. Medina Valley Co., 153 N. W. 380 (Tex. 1913). A dedication can be made under statute in many jurisdictions by the filing of a town plat with a right of way to a railroad laid out thereon. Morgan v. Railroad Co., *supra;* Nobelsvill v. The Lake Erie & Western Railroad Co., 130 Ind. 1 (1891). Since the plat acts as a deed of conveyance the dedication thereunder must be evidenced wholly by the plat. It can not rest partially on parol evidence. Watson v. Railroad, *supra*.

That no title was gained by perscription in the principal case is entirely in line with authorities on the subject. An uninterrupted user for the statutory period does not vest an easement when as in the principle case the user was permissive for the first twelve years. Ball v. Kehl, 96 Cal. 606 (1892); First Nation Bank v. Savings Bank, 71 N. H. 547 (1902).

It is no objection, however to obtaining an easement by perscription that the same was originally granted by parol, Lechman v. Mills, 46 Wash. 624 (1907), provided the grant was meant to be an absolute one. This was not found to be so in the principal case.

TORT—INDEPENDENT NEGLIGENCE OF PASSENGER—KNOWLEDGE OF DRIVER'S INTOXICATION—A guest was killed by the reckless driving of the owner of the automobile. Both were intoxicated. *Held:* Plaintiff testator's right of recovery was barred. Powell v. Berry, 89 S. E. 753 (Ga. 1916).

One voluntarily accepting a ride as a guest in an automobile, does not relinquish his right of personal protection; the owner is under a duty to use ordinary care in the operation of the machine. Lockhead v. Jensen, 129 Pac. 347 (Utah 1912); Fitzjarrel v. Boyd, 123 Md. 497 (1914). And the fact that both the owner and the guest are engaged in a common enterprise, or joint venture, does not change the liability the confidence accepted, being an adequate consideration to support the duty. Withey v. Fowler Co., 145 N. W. 923 (Ia. 1913); Beard v. Klusmeier, 164 S. W. 319 (Kan. 1914).

Yet the duty of a guest in a vehicle over a driver of whom he has no control, is to use reasonable care for his own safety, the degree of which care is primarily a question for the jury. Schultz v. Old Colony Ry., 193 Mass. 309 (1907); Mittelsdorfer v. West Jersey Co., 73 Atl. 540 (N. J. 1909); Christopherson v. Minneapolis Co., 147 N. W. 791 (Minn. 1914). Indeed a recovery on his part is defeated when such negligence amounts to a failure to exercise ordinary care. Rollestone v. Cassirer Co., 59 S. E. 442 (Ga. 1907). So riding in an automobile with a driver he must have known to have been so intoxicated. as to be incapable of giving the attention to what he was doing, that a man of prudence and reasonable intelligence would have given, establishes independant negligence upon the guest's part,

so as to deny his right to recover, independant of the driver's negligence. Lynn v. Goodwin, 170 Cal. 112 (1915). The fact that the passenger is also intoxicated, does not change his duty to use ordinary care for his safety. Cunningham v. Erie R. Co., 137 App. Div. N. Y. 506 (1910). It has been pointed out that the true reason of the rule which denies relief to an injured party, who has contributed to the injury by his own fault, is simply the impossibility in most cases of equitably apportioning the damages between the parties in a common law action. Heil v. Glanding, 42 Pa. 493 (1862); Shimoda v. Bundy, 24 Cal. App. 675 (1914).

TORTS—TRESPASS—EXTENT OF THE DOCTRINE OF PENNA. COAL CO. v. SANDERSON—In conducting his business a quarry owner blasted on his premises, casting rocks onto adjoining land. *Held:* This was a direct trespass and liability does not depend on negligence; the doctrine of Penna. Coal Co. v. Sanderson does not apply. Mulchanock v. Whitehall Cement Mfg. Co., 98 Atl. 554 (Pa. 1916).

To cast rocks and debris on another's land by blasting is a trespass according to the general rule, and it is no defense that the operation was conducted with care. Tiffen v. McCormick, 32 Am. Rep. 408 (Ohio 1878); Colton v. Onderdonk, 10 Pac. 395 (Cal. 1886). There is a difference of opinion as to whether a municipality is liable in trespass, when the blasting is done by a contractor engaged in constructing public works. Murphy v. Lowell, 128 Mass. 398 (1880); St. Peter v. Denison, 17 Am. Rep. 258 (N. Y. 1874); City of Joliet v. Harwood, 86 Ill. 110 (1877).

In the principal case, Penna. Coal Co. v Sanderson, 6 Atl. 453 (Pa. 1886), was relied on. This case has been commented upon, and its doctrine has been repudiated in the following jurisdictions: Young & Co. v. Bankier Distillery Co., App. Cas. 1893, 691 (Eng.); Beach v. Sterling Iron & Zinc Co., 33 Atl. 286 (N. J. Eq. 1895); Strobel v. Kerr Salt Co., 164 N. Y. 303 (1900); Straight v. Hover, 87 N. E. 174 (Ohio 1909); Coal Co. v. Ruffner, 10 Ann. Cos. 581 (Tenn. 1907); Arminius Chemical Co. v. Landrum, 73 S. E. 459 (Va. 1912). Nor was the doctrine followed in these cases: Coal Co. v. Pierce, 68 S. 563 (Ala. 1915); Packwood v. Coal Co., 56 L. R. A. (N. S.) 911 (Wash. 1915); Day v. Coal Co., 60 W. Va. 27 (1906). Indiana seems to be the only jurisdiction influenced by the doctrine. Barnard v. Shirley, 47 N. E. 671 (Ind. 1897); Ohio Oil Co. v. Westfall, 88 N. E. 354 (Ind. 1909).

In Pennsylvania the doctrine of Coal Co. v. Sanderson has never been extended beyond the limitation put upon it by its own facts. The early decisions influenced by the doctrine may be found in the article, "Natural Use of Land," by John Marshall Gest, 33 Am. Law Reg. 1, 97. The case has often been referred to, but always strictly limited. Thus, the doctrine was held not to apply to subterranean waters, Collins v. Chartiers' Valley Gas Co., 131 Pa. 143 (1890); nor to the operation of coke ovens, Robb v. Carnegie, 145 Pa. 324 (1891); nor to leakage from oil pipes, Hauck v. Pipe Line Co., 153 Pa. 366 (1893); nor to culm deposited on the bank of a stream, Hindson v. Markle, 33 Atl. 74 (Pa. 1895); nor to the removal of surface support, Robertson v. Coal Co., 33 Atl. 706 (Pa. 1896); nor to pollution of water for public use, Commonwealth v. Russel, 33 Atl. 709 (Pa.

1896); nor to the operation of steel mills, Sullivan v. Jones & Laughlin Steel Co., 57 Atl. 1065 (Pa. 1904); nor to mines when the water is discharged into a drainage basin other than the natural basin, McCune v. Coal Co., 85 Atl. 1102 (Pa. 1913).

TORTS—VIOLATION OF PENAL STATUTE AS NEGLIGENCE *Per Se*—Violation of a mandatory Factory Act, which provides a penalty for failure to guard dangerous machinery, though it does not expressly provide for the recovery of damages, is negligence *per se*, and deprives the employer of the defense of voluntary assumption of risk, though he may interpose the defense of contributory negligence. Sulzberger & Sons Co. v. Strickland, 159 Pac. 833 (Okla. 1916).

Where the statute provides that damages may be recovered, obviously it matters little whether the violations are termed negligence *per se* or not. But the difference of opinion comes in the case where there is a penal provision only. The weight of authority holds, with the principal case, that a violation of such statute is negligence *per se*, or a breach of duty toward those intended to be protected thereby. Bott v. Pratt, 33 Minn. 323 (1885); Hall v. West & Slade Mill Co., 39 Wash. 447 (1905); Steel Car Forge Co. v. Chec, 184 Fed. 868 (1911) (case of employment of children under lawful age). Other courts hold that such violations are either *prima facie* or competent evidence of negligence to be rebutted by the defendant. Kircher v. Iron Clad Mfg. Co., 134 App. Div. of N. Y. Supr. 144 (1909). Pennsylvania courts hold that violation of such a statute is not negligence as a matter of law, but only "some evidence of negligence" to be considered with the rest of the evidence. Drake v. Fenton, 237 Pa. 8, 11 (1912).

Even though the employee knows of the violation of the statute, he does not assume the risk of the danger, and the employer is deprived of that defense, as in the principal case. Hall v. West & Slade Mill Co., *supra;* Valjago v. Carnegie Steel Co., 226 Pa. 514 (1910); Luken v. Lake Shore and Mich. Southern Rwy. Co., 248 Ill. 377 (1911). There have been many decisions to the contrary, especially in our Federal courts. Denver & Rio Grande R. R. Co. v. Norgate, 141 Fed. Rep. 247 (1905). Under the former rule, where the statute forbids employment of children under a certain age, it has been pointed out that negligence of a fellow servant is no defense, for the contract between the employer and child is void. Dalm v. Bryant Paper Co., 157 Mich. 550 (1909).

The general rule that the employer may interpose the defense of the employee's contributory negligence in these cases is in accord with the principal case. Berdos v. Suffolk Mills, 209 Mass. 489 (1911). Even this is denied by some courts. Fortier v. The Fair, 153 Ill. App. 200 (1910); Glucina v. Goss Brick Co., 63 Wash. 401 (1911). A child has been allowed to recover, where he was employed in violation of a statute, even though the act was not within the scope of his employment, on the theory that he lacks discretion to protect himself. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617 (1908); Frank Co. v. Standard Ins. Co., 176 Fed. 16 (1910).

A father cannot recover for injury to a child employed in violation of a statute which expressly gives the employee the right to recover damages, Gibson v. Packing Box Co., 85 Kan. 346 (1911), for violation of the statute is actionable only as to those intended to be benefited or protected,

even though the recovery of damages is not expressly provided for and the statute is penal. Casteel v. Paving & Brick Co., 83 Kan. 533 (1910).

For a discussion of like questions where ordinances are involved, see a note in 1 Va. Law Rev. 558-561.

TRUSTS—CONSTRUCTION—POWER OF TRUSTEE—Trustees, though prohibited by the will from making any original investments in the capital stock of a corporation, held five hundred shares of bank stock by virtue of the right also given them to continue any investment made by the testator. The bank increased its capital stock giving to each stockholder the right to subscribe for additional shares which subscription the trustees made. *Held:* The investment merely preserved their original holding and was proper despite the inhibition. *In re* Tower's Estate 98 Atl. 576 (Pa. 1916).

With the power expressly given them to continue the testator's investments, the trustees would clearly have been within their rights, had not the inhibition been present and even though the stock was not of the class of approved investments. The Merchants Loan and Trust Trust Co. v. Marshall Field, *et. al.*, 250 Ill. 86 (1911); Ballantine v. Young, 81 Atl. 119 (N. J. 1911). Without, however, a definite authorization to continue any investment practically the same liability attaches as in the case of an original one and the trustee should sell and convert into an approved security anything not a regular investment. Ward v. Ketchin, 30 N. J. Eq. 31 (1878); Matter of Wm. C. Wotton Ex., 59 N. Y. App. Div. 584 (1901); Cannon v. Quincy, 121 N. Y. S. 752 (1909). Where the author of a trust gives explicit directions as to the classes of investments to be made such directions must be followed literally. Worcester City Missionary Society v. Memorial Church, 186 Mass. 531 (1904); Gilbert v. Welch, 75 Ind. 557 (1881). When, as in the principal case, the peculiar conditions seem to warrant a departure from the strict provisions the trustees should seek the instructions of the court, White v. Sherman, 168 Ill. 589 (1897); Derrs Estate, 203 Pa. St. 96 (1902), and if this is not done the burden is on them to show that the investment was prudent. Cridland's Est., 132 Pa. 479 (1890).

Cases like the principal one have usually arisen when the trustees have made such a purchase of the stock increase with an extraordinary dividend declared at the time. The question then arises as to whether the one who has merely the income for life or the remainderman is entitled to this additional stock. The ordinary cash dividends of course belong to life tenant. Ballintine v. Young, *supra.* In an elaborate opinion by Justice Gray, the Supreme Court of the United States, held that stock dividends should always be considered part of the principal. Gibbons v. Mahon, 136 U. S. 549 (1890). This is the English rule and is followed by Mass., Illinois and the New England States. Bouche v. Sproule, 12 App. Cos. 385 (Eng. 1887); Talbott v. Hutchins, 221 Mass. 367 (1915). Pennsylvania very early adopted a different rule by which stock dividends are apportioned according to the time, when the surplus profits which they represent were earned. Earp's Appeal, 28 Pa. St. 368 (1858); Stokes Estate No. 1, 240 Pa. St. 277 (1913). New Jersey, New Hampshire and New York as well as some Western States follow this rule.