RECENT CASES

CARRIERS—RELATION OF CARRIER AND PASSENGER—TERMINATION OF RELATION.—The plaintiff was a passenger on the defendant company's car with a transfer which he intended to use at X. He got off the car at X and was walking toward the pavement where he would wait for the car on which his transfer entitled him to continue his journey. When he was some distance from the car, but before he had reached the pavement, he was struck by the car from which he had alighted as the rear of that car suddenly swung out of its regular course. He brought suit for injuries. *Held* (two judges dissenting): He could recover as a passenger of the defendant company which owed him a high degree of care because of the contractual relation. Feldman v. Chicago Rys., 124 N. W. 334 (Ill. 1919).

The relation of carrier and passenger terminates, as a general rule, when the passenger alights safely from a street car at his destination and has had a reasonable time to leave the place at which he alights. See 10 Corpus Juris, §1049; Michie on Carriers II, §2137 and cases there cited. But the question in the principal case, whether this relation still exists when the person is on the public street in the act of transferring from one car to another has not been uniformly decided, and is one of first impression in Illinois. The court, however, bases its decision on three former Illinois cases. In Chicago and Alton Railway Co. v. Winters, 175 Ill. 293, 51 N. E. 901 (1898), the court decided that a man was still a passenger while he was walking on the Company's grounds, and under the company's direction from one caboose to another. The court in North Chicago Street Railway Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849 (1900), held that a man with a transfer who was in the act of boarding the second car was a passenger. And in the Chicago City Railway Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087 (1903), it was held that a man with a transfer who either was alighting or had just alighted, when he was injured by the trolley pole of the car he was leaving, was still a passenger. The court could have distinguished the principal case from the Illinois cases to which it refers. In those cases the injury took place while the plaintiff was on the defedant company's grounds; while the plaintiff was boarding the defendant company's car; before the plaintiff had a reasonable time to leave the place at which he had alighted. None of these elements were present in the principal case.

In Keator v. Scranton Traction Co., 191 Pa. 102, 43 Atl. 86 (1899), it was held that a woman having a transfer was still a passenger when she was walking from one car to another in the public street. The court then added, by way of dictum, that she would not be a passenger while she was merely moving about on the sidewalk. This decision is frequently referred to as the majority view, 71 N. J. L. 356, 59 Atl. 14 (1904); 167 Mich. 107, 132 N. W. 762 (1911); and cases cited in 10 Corpus Juris and Michie on Carriers II, *supra*.

The minority view is expressed by Niles v. Boston Elevated Ry. Co., 225 Mass. 570, 114 N. E. 730 (1916). The decision in that case was that the relation of carrier and passenger ended as soon as the passenger stepped safely into the street, even though he had a transfer which he would use on another of the traction company's cars. The theory on which the case was decided—

that the traction company lost all control over a person's movements as soon as that person left the car, so that the basis for the high degree of care ceased—seems logical. An adoption of this view would rid the problem from all speculation as to the exact point when the relation ended, and would recognize the fact that a carrier owes no greater obligation to a person in the street who has a transfer than to any other pedestrian.

CONSTITUTIONAL LAW—PRIVILEGE AND PROPERTY TAX—INHERITANCE TAX—EXTRA-TERRITORIAL TAXATION.—In taxing the transfer by will or intestacy of shares of stock of a New Jersey corporation of a non-resident decedent who in addition owns property outside the state, the New Jersey Inheritance Tax Law (Act, April 9, 1914, P. L. p. 267) amending the Inheritance Tax Law (Act, April 20, 1909, P. L. p. 325) provides that the amount of tax levied upon property within the state be calculated upon the basis of the amount of the total estate, wherever situated. Executors of non-resident decedents, plaintiffs in error, claim that the statute is invalid under the Federal Constitution. *Held:* (The *Chief Justice*, and Justices Holmes, VanDeventer, and McReynolds dissenting) That the statute is valid. Maxwell v. Bugbee and Hill v. Bugbee, 40 Sup. Ct. Rep. 2 (1919).

Both opinions concede that in taxing extra-territorial property, a state takes property without due process of law and the dissenting opinion maintains that a state taxes extra-territorial property when the levy upon the privilege to succeed to property within its jurisdiction is fixed by the amount of property outside its jurisdiction. Statutes levying a tax upon a corporate privilege of doing business within the state gauged upon the total capitalization of the corporation have been declared valid—when the corporation is a domestic one with part of its capitalization represented by property outside the state, Kansas City, Ft. S. & M. R. R. Co. v. Botkin, 240 U. S. 227 (1915); when the corporation is a foreign one doing but part of its business within the state, Baltic Mining Company v. Mass., 231 U. S. 68 (1913). But such statutes are invalid if they can be interpreted as being a burden on interstate commerce. Western U. Teleg. Co. v. Kansas, 216 U. S. 1 (1909); International Paper Co. v. Mass., 246 U. S. 135 (1917). In the two cases last cited, the court suggested that the statutes would have been declared unconstitutional regardless of the interstate commerce factor. An inheritance tax like the tax on the right of a corporation to carry on business is a tax upon a privilege. Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283 (1898); Knowlton v. Moore, 178 U. S. 41 (1900). The majority of the court views the statute in the principal case as a tax upon a privilege and not a tax upon property. The minority, however, are of the opinion that this inheritance tax is in effect a tax on property and with the act being held constitutional it follows that a state may do indirectly that which it may not do directly—tax extra-territorial property by levying a privilege tax.

DAMAGES—MENTAL ANGUISH—TELEPHONE COMPANY.—The agents of defendant telephone company negligently failed to give a mother connection with her children in a distant town so as to notify them of the death of her child. When the call was delivered, the agent of the company was informed of the relationship and of the purpose of the call. The mother claims damages for

the mental pain suffered because of the absence at the funeral of her children who would have been present if they had been notified. *Held:* Damages should be allowed since there was sufficient notice to the company of the natural consequence that might be expected to result from failure to communicate the message. Southwestern Telegraph & Telephone Co. v. Harris, 214 S. W. 845 (Tex. 1919).

Mental suffering accompanying personal injury or physical pain is always the subject of compensation. Maher v. Phila. Traction Co., 181 Pa. 391, 37 Atl. 571 (1897); Shay v. Camden & Suburban Ry. Co., 66 N. J. L. 334, 49 Atl. 547 (1901); but, unless the wrong complained of is a wilful or malicious tort, mental pain and suffering will not alone constitute a sufficient basis for recovery of substantial damages. Kalen v. Terre Haute & Indianapolis R. Co., 18 Ind. App. 202, 47 N. E. 694 (1897); Cole v. Gray, 70 Kan. 705, 79 Pac. 654 (1905).

In some jurisdictions, however, as an exception to the general rule, it has been decided that damages for independent mental suffering will be allowed when it results, as in the principal case, from the negligence or default of a telegraph or telephone company in transmitting a message. See cases collected in 37 Cyc. 1776; also Sedgwick on Damages (9th ed.), Vol. 3, p. 1849.

DEEDS—CONDITIONS IN RESTRAINT OF ALIENATION—REPUGNANCY TO INTEREST CREATED—SALE TO NEGROES.—*Held:* A condition in a grant in fee simple against selling or leasing the land to persons of African, Chinese, or Japanese descent, during a definite period of about fourteen years, is void as being repugnant to the interest created. Title Guarantee & Trust Co. v. Garatt, 183 Pac. 470 (Cal. 1919).

The case is important as the question of law involved has been the subject of much uncertainty. An absolute restraint on alienation in a grant in fee is void. Gray's Restraints on the Alienation of Property, p. 8, and this is so whether the restraint be in the form of a condition, a convenant, or a limitation. Prey v. Stanley, 110 Cal. 423, 42 Pac. 908 (1895); Diamond v. Rotan, 58 Tex. Civ. App. 263, 124 S. W. 196 (1909). A restraint that is total as to persons and of limited duration is void according to the weight of authority; Mandlebaum v. McDonell, 29 Mich. 78 (1874); Potter v. Couch, 141 U. S. 296 (1890); but is valid, when reasonable, under the Kentucky rule. Wallace v. Smith, 24 Ky. Law Rep. 139, 68 S. W. 131 (1902). This latter rule can be traced to the case of Stewart v. Brady, 3 Bush 623 (Ky. 1868), in which a condition in a will that the devisee should not alienate until she was thirty-five was held valid. No previous cases were referred to. In following this precedent the Kentucky court has repeatedly indicated that it did so as a matter of duty and not because convinced of the soundness of the rule. Lawson v. Lighfoot, 27 Ky. Law Rep. 217, 84 S. W. 739 (1905). A restraint qualified as to persons was held good in the English case of *in re* MacLeay, L. R. 20 Eq. 186 (1875), where a devise was made to a brother on condition that he never sell out of the family. This decision was criticized in the later case of *in re* Rosher, 26 Ch. Div. 801, 817 (1884). In Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915), and in Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918), conditions in grants in fee providing for forfeiture in case of sale or lease to negroes were held valid. As the court points out in the principal case, the decision in the Louisiana case

was based on the principles of the civil law, and that in the Missouri case on a dictum in Cowell v. Colorado Springs, 100 U. S. 55 (1879). In some cases the dicta are strong toward allowing the validity of such restraints, when reasonable, M'Williams v. Nisly, 2 S. & R. 507 (Pa. 1816); Langdon v. Ingram, 28 Ind. 360 (1867); but the reasoning in other cases would indicate that any restraint on alienation should be void, DePeyster v. Michael, 6 N. Y. 467 (1852), Murray v. Green, 64 Cal. 363, 367 (1883).

The question is one of expediency rather than of logic. For if it is argued that the right of alienation is an essential element of an estate in fee, and any abridgment of that right, however slight, is inconsistent with the idea of the fee, it may be answered that that depends upon our conception of the qualities of such estate. So the controlling reason for the decision in the principal case is that public policy in this country calls for the unhampered ability on the part of land owners to convey their lands.

EMINENT DOMAIN—COMPENSATION—DAMAGES TO REMAINING PROPERTY. *Held:* That in taking part of a property for the opening of a street, it was an element of damages that the remainder would be left twenty-five feet below the intended grade. *In re* Putnam Ave., 177 N. Y. S. 768 (1919).

The right of eminent domain is generally limited by a constitutional or statutory provision, that property shall not be taken for public use without just compensation. Nichol's Eminent Domain, 2nd Ed., §23. Just compensation includes not only a fair price for the property taken, but also damages for such injuries to the remainder as arise from the taking. Commonwealth v. Combs, 2 Mass. 489 (1807); South Buffalo Ry. Co. v. Kirkover, 176 N. Y. 301, 68 N. E. 366 (1903). Injury arising from the establishment of a new grade, as contrasted with the changing of an old grade, has been held a proper element of damages; Patton v. Philadelphia, 175 Pa. 85, 34 Atl. 344 (1896), the measure of damages being the cost of adapting the property to the new grade, Baltimore v. Garrett, 120 Md. 608, 87 Atl. 1057 (1913). The decision in the principal case is in accord with universal opinion.

In the case of *In re* Skillman Ave., 177 N. Y. S. 767 (1917), the same court reached a different conclusion, holding that it was not an element of damage that the remaining tract would be left several feet above the intended grade. It argues that since the opening of a street is of substantial benefit to every foot of vacant land adjoining it, such vacant land cannot be damaged by the very means "which everyone conceded, and by law must assume, is a benefit." There is no necessity to assume in law a preponderance of benefits over damages, when both may be exactly ascertained by commissions or juries appointed for that purpose. Furthermore, were the damages in fact greater than the benefits, as in the principal case, such an assumption would deprive the petitioner of his right to just compensation. The general method of disposing of benefits and damages is for a commission or jury to determine both, and set-off one against the other, within certain limits prescribed by law; Long v. Harrisburg etc. R. R. Co., 126 Pa. 143, 19 Atl. 39 (1889); Mangles v. Hudson County Board, 55 N. J. L. 88, 25 Atl. 322 (1892); Bauman v. Ross, 167 U. S. 548, 574 (1896); *in re* City of New York, 190 N. Y. 350, 83 N. E. 299 (1907); Nichols' Eminent Domain, 2nd Ed., Chap. XVI. Because in this class of case benefits usually exceed damages,

there is no reason to assume that this always will be so. That matter is for the determination of the commission and *In re* Putnam Ave., *supra*, represents the better view.

EVIDENCE—HEARSAY—STATEMENTS OF THIRD PERSONS.—Following the admission of a letter written by her husband at the time of leaving her, in which he said he could not then explain his reasons for so doing, the wife in an action against the husband's parents for alienation of affection, was allowed to testify that two weeks later the husband explained to her that his parents had told him that he was not the father of the wife's infant son. *Held:* This evidence was improperly received. Gilmore v. Gilmore, 173 N. W. 865 (S. D. 1919).

The applicability of the Hearsay Rule to exclude such statements depends on the purpose for which the statements are introduced. If offered to prove the truth of the facts stated, they are admissible when they come within the Spontaneous Exclamation exception to the Rule. Hadley v. Carter, 8 N. H. 40 (1835), Baker v. Baker, 16 Abb. N. C. 293 (N. Y. 1885). In such cases the circumstances surrounding the statements lend credit to them. Hadley v. Carter, *supra;* Wigmore on Evidence, §1749.

Where the statements are given in evidence only to show an existing state of mind or motive or reason for action of the person making the statement, they may be properly admissible under another exception to the Hearsay Rule. But when admitted under this exception, the declarations may not be used as evidence that any other person has caused that state of mind of the declarant to exist. Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724 (1890), *per* Holmes, J. Wigmore on Evidence, Vol. V, p. 395.

A few courts superimpose the *Res Gestae* doctrine on the last-named exception to the Hearsay Rule, and hold such statements as those in the principal case entirely inadmissible if made after the time of the act concerning which the state of mind is to be established, on the ground that the statements then are not part of the *Res Gestae.* Walker v. Meetze, 2 Rich. 570 (S. C. 1846); Brison v. McKellop, 41 Okla. 374, 138 Pac. 154 (1914). However, the doctrine thus established seems faulty, for such statements though made after the time of the act still satisfy the reason at the basis of this exception to the Hearsay Rule—that extra-judicial statements of a person as to his state of mind are more reliable than those given by the person in court. Elmer v. Fessenden, *supra;* Wigmore on Evidence, §1714, 1748, 1796(4).

In actions for loss of affections the act concerning which a state of mind is to be proved is the act of alienation. This would seem to be an act continuing during the whole time the husband or wife remains away. Thus a statement made during that time might even under the superimposed rule be held part of the *Res Gestae* and admissible. The English bankruptcy cases holding admissible declarations of the bankrupt during the time he remains out of the country, as well as those made at his actual flight, are of a similar nature. Bateman v. Bailey, 5 T. R. 512 (Eng. 1794); Rawson v. Haigh, 2 Bing. 99 (Eng. 1824).

The court which decided the principal case consisted of five judges, each of whom delivered a separate opinion, three for reversing the judgment of the lower court and two for affirming it. The judge who gave the decision of the Court and from whose opinion the reporter's headnote is taken, considered the

evidence under objection as not admissible, because given after the time of the act, and therefore not part of the *Res Gestae.* This follows the minority doctrine set forth above, and further considers the act as ending with the desertion. The other two judges of the majority consider the evidence in question admissible to prove the husband's state of mind, but not to show that the parents had caused that state of mind to exist. They concur in the decision to reverse, because they consider that if the statements cannot be used to show the parents' connection, there was not sufficient evidence to support the finding of the jury that the parents were responsible for the lessening of the husband's affection for his wife. The decision seems sound on this reasoning, which requires a careful distinction between the different uses to which the same piece of evidence may be put. Except for the fact, however, that there was almost no other evidence connecting the parents with the husband's state of mind, it would have been impossible for the appellate court to determine whether the jury had made improper use of the statement, when once it had been properly admitted for another purpose.

For a full discussion of the admissibility of declarations as part of the *Res Gestae,* see the article by Professor F. H. Bohlen in 51 Am. Law Register 187.

FRAUD—LOSS OF REMEDY—DAMAGES.—B by fraudulent representations prevailed upon A not to bring an action for damages for the death of A's testator caused by B's negligence, within the statutory period. A sued B for fraud. *Held:* A could recover in damages the fair value of the claim as it existed at the time the fraud was practised. Desmaris v. Peoples' Gaslight Co., 107 Atl. 491 (N. H. 1919).

It has been held that an action may be maintained for fraudulent representations whereby one has been induced to forego a legal right. Brown v. Castles, 11 Cush. 348 (Mass. 1853); Alexander v. Church, 53 Conn. 561, 4 Atl. 103 (1885); Mlnazek v. Libera, 83 Minn. 288, 86 N. W. 100 (1901); Wood v. Dudley, 176 N. Y. App. Div. 136, 176 N. Y. S. 494 (1919). However, where no steps have been taken to enforce a legal right before the fraudulent statements are made no recovery is allowed. Austin v. Barrows, 41 Conn. 287 (1874); Bradley v. Fuller, 118 Mass. 239 (1875); Evans v. Burson, 164 Pac. 471 (Okla. 1919).

The principal case differs from the cases cited above inasmuch as in the latter the measure of damages would not be difficult of ascertainment. In the only other case exactly the same on its facts as Desmaris v. Peoples' Gaslight Co., *supra,* the court would not allow recovery on the ground that the amount of damages would be speculative. Whitman v. Seaboard Air Line Ry. Co., 107 S. C. 200, 92 S. E. 861 (1917). However, the principal case is supported by Urtz v. N. Y. C. & H. R. R. Co., 202 N. Y. 170, 95 N. E. 711 (1911), where it was held that substantial damages would be granted provided plaintiff could prove an original valid and existing claim; and by Rochester Bridge Co. v. McNeill, 122 N. E. 662 (Ind. 1919), where it was held that the measure of damages would be the value of the claim as it existed at the time the fraud was practised.

The rule in the principal case seems logically sound and desirable, for the loss of merely a reasonable probability of recovery should be damage sufficient to support an action for deceit, and it would be no more difficult to determine

the value of the claim on the date the fraud was practised than it would be to determine the measure of damages had the action been brought within the statutory period. Furthermore this rule would prevent the party practising the fraud from profiting by his own deceit.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—VERMIN.—The lessee of an apartment abandoned possession and refused to pay rent, claiming constructive eviction in the fact that cockroaches appeared in such numbers as to make the premises unfit for occupation. An attempt by the lessor to exterminate the pests had been unsuccessful. *Held:* This did not amount to a constructive eviction. Hopkins v. Murphy, 124 N. E. 252 (Mass. 1919).

The only cases to be found with facts similar to the principal case have come up in the courts of New York. At first it was there held that it was no defense to an action for rent for an apartment that the rooms were infested by vermin. Pomeroy v. Tyler, 9 N. Y. St. Rep. 514 (1877). But recently it has been held in that jurisdiction that the defense of constructive eviction could be successfully based upon an unbearable condition in an apartment because of the smell of dead rats in the walls, Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N. Y. S. 1050 (1913); or upon the presence of large numbers of bedbugs in the apartment, Streep v. Simpson, 80 Misc. 666, 141 N. Y. S. 863 (1913); or upon the presence of rats in the apartment, Batterman v. Levenson, 102 Misc. 92, 168 N. Y. S. 197 (1917). In these decisions the courts have taken the view that conditions unknown to the ancient common law are created in apartments where tenants have control only inside their limited premises, and that it is the duty of the landlord to protect his tenant from pests of this nature coming from other parts of the building, since the tenant is powerless to protect himself.

It is well settled at common law that in the absence of a provision in a lease that the lessor shall repair, it is no defense to an action for rent that the demised premises are not in a tenantable condition, Murray v. Mace, 8 Ir. R. C. L. 396 (1874); Reeves v. McComeskey, 168 Pa. 571, 32 Atl. 96 (1895). Following this rule, it is apparent that the decision in the principal case is correct. But according to the rule laid down by the New York courts as to the peculiar circumstances attending modern apartment leaseholds, fixing a duty on the landlord which was unknown to the common law, the very presence of vermin amounts to an act of omission by the landlord. That an act of omission by the landlord, essentially interfering with the tenant's beneficial enjoyment of the demised premises is a constructive eviction, has now been well settled. Alger v. Kennedy, 49 Vt. 109 (1876); Siebold v. Heyman, 120 N. Y. S. 105 (1909); Russell v. Olson, 22 N. D. 410, 133 N. W. 1030 (1913).

The attitude of the New York courts is representative of the modern tendency to depart from the harsh rulings of the common law in favor of landlords, still followed by the Massachusetts court in the principal case.

LANDLORD AND TENANT—COVENANT NOT TO SUBLET NOT BROKEN BY ASSIGNMENT.—The plaintiff having acquired title to property subject to a lease brought action against the defendant who was in possession as assignee of the lease. The lease contained a covenant not to sublet, but no covenant not to

assign. *Held:* The assignment of the lease did not constitute a breach of the covenant not to sublet. Goldman v. Daniel Feder & Co. 100 S. E. 400 (W. Va. 1919).

It has been long established that a covenant not to assign is not broken by a sublease. Crusoe v. Bugby, 3 Wils. C. P. 234, 2 W. Bl. 766 (1771); Jackson v. Harrison, 17 Johns. 66 (N. Y. 1819). That the converse of this proposition, as in the principal case, is equally true is established by the great weight of authority. Lynde v. Hough, 27 Barb. 415 (N. Y. 1857); Field v. Mills, 33 N. J. L. 254 (1869). The fact that this latter rule has been disputed at all, while the former has been universally admitted, is due to a misconception of the case that has been generally cited as the leading case to the contrary. Greenaway v. Adams, 12 Ves. Jr. 395 (1806). While not using the word "assign," the lessee in this case covenanted not to "let, set, or demise" the property, "for all or any part" of the term, and the case merely held that these words covered an assignment as well as a sublease.

The grounds of the rule that a covenant against subletting does not prohibit assigning the lease are, first, the general principle that such covenants, being restraints on the alienation of property, are to be strictly construed. Wainwright v. Bankers' Loan & Investment Co., 112 Va. 630, 72 S. E. 129 (1911); Burns v. Dufresne, 67 Wash. 158, 121 Pac. 46 (1912); 16 R. C. L. 832; and, second, as emphasized by the Court in Field v. Mills, *supra*, that as assignment differs from a sublease, not merely in being for the whole instead of a part of the term, but in that it places the assignee in privity of contract with the lessor and makes him liable directly to the lessor for the performance of covenants running with the land, such as the payment of rent and the repair of the premises, while there is no such relation between a subtenant and the lessor.

MALICIOUS PROSECUTION—PRIVILEGE—PERJURED TESTIMONY.—The defendant maliciously gave perjured testimony before a grand jury and this evidence alone secured the indictment of the plaintiff, who was later acquitted. *Held:* The testimony, though relevant to the investigation before the grand jury, is not privileged, and the action for malicious prosecution will lie. Kintz v. Harriger, 124 N. E. 168 (Ohio 1919).

The primary requisite of the action for malicious prosecution is that the defendant has prosecuted the plaintiff. He must have instituted or instigated the prosecution. Wheeler v. Nesbit et al., 65 U. S. 544 (1860); Farnam v. Feeley, 56 N. Y. 451 (1874); Vinal v. Core and Compton, 18 W. Va. 1 (1881). In the principal case, therefore, the gist of the action is misconceived, for the defendant is not shown to have had any connection with the prosecution beyond his testimony as a witness. This alone is not sufficient to establish the necessary causal relation of instigator or institutor.

On the question of privilege also the great weight of authority is against the decision in the principal case. The rule is that words spoken in the course of judicial proceedings by judge, party counsel or witness, though they would be actionable if spoken elsewhere, are absolutely privileged, if relevant and pertinent to the subject of inquiry. Garing v. Fraser, 76 Me. 37 (1884); McClarty v. Bickell, 155 Ky. 254, 159 S. W. 783 (1913).

This immunity extends to actions for defamation as well as malicious prosecution. No distinction is drawn between them in this respect; Cooper v.

Phipps, 24 Ore. 357, 33 Pac. 985 (1893); Cooley v. Galyon, 109 Tenn. 1, 70 S. W. 607 (1902); Laing v. Mitten, 185 Mass. 233, 70 N. E. 128 (1904), nor on principle should there be, since the purpose of the privilege is to obtain unhampered testimony. Proceedings before a grand jury are of such judicial character as to furnish this immunity. Kidder v. Parkhurst, 85 Mass. 393 (1862).

The reason given for the absolute privilege is one of public policy. The interest of the state is better served if witnesses are not fettered in their testimony by fear of civil actions for malicious prosecution or defamation at the instance of those who are dissatisfied with their evidence. Vogel v. Gruaz, 110 U. S. 311 (1884); Garing v. Fraser, *supra*. The policy is not, of course, to protect the wrong-doer, but the presumptive right-doer, whose sense of public duty might not outweigh his trepidation were his testimony actionable.

The principal case arose without precedent in Ohio and was decided upon the ground that, admitting that public policy should govern, it does not demand the protection of the ubiquitous perjurer. The fact that the perjurer is indictable has, however, been overlooked.

NEGLIGENCE—MANUFACTURER'S LIABILITY TO PERSONS NOT IN PRIVITY OF CONTRACT.—The defendant, a manufacturing company, negligently permitted a loaded air rifle, advertised as a harmless toy, to be sold to a wholesaler, who resold it to a retailer. Both the vendees and the defendant were ignorant of its dangerous condition. The plaintiff, a saleswoman in the retailer's store, was injured by the discharge of the gun by a prospective customer. *Held:* The defendant was liable. Herman v. Markham Air Rifle Co., 258 Fed. 475 (1918).

The general rule is that a manufacturer of an article is not liable, to persons who have no contractual relation to him, for negligence in the construction, manufacture, or sale of the article. Winterbottom v. Wright, 10 M. & W. 107 (1842); Loop v. Litchfield, 42 N. Y. 351 (1870); Losee v. Clute, 51 N. Y. 494 (1873); Goodlander v. Standard Oil Co., 63 Fed. 400 (1894); Bragdon v. Perkins-Campbell Co., 87 Fed. 109 (1898). A well-recognized exception to this rule is that the manufacturer of an article that is "imminently dangerous" is liable to a person not in privity of contract who is injured because of a defect in the article. Norton v. Sewall, 106 Mass. 143 (1870); Standard Oil Co. v. Parrish, 145 Fed. 829 (1906). But this exception has generally been limited to cases where the article was of a dangerous class, namely, goods intended to "preserve, affect, or destroy human life," or the defect of which was known to the manufacturer, Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (1903), and has not generally been held to include articles of a class ordinarily harmless, an individual article of which class causes injury because of a defect unknown to the manufacturer. Marquardt v. Ball Engine Co., 122 Fed. 374 (1903); Cadillac Motor Car Co. v. Johnson, 221 Fed. 801 (1915); *contra*, Devlin v. Smith, 89 N. Y. 470 (1882); Kahner v. Otis Elevator Co., 96 App. Div. 169, 89 N. Y. S. 185 (1904).

The opinion in the principal case, as in these exceptional New York cases, places the loaded air gun in the "imminently dangerous" class, and does not profess to cut deeper into the general rule. But the air gun was in fact not intended to destroy or affect human life, but was intended to be a harmless toy, and it does not come within the class of articles to which liability beyond the contractual relation has ordinarily been attached. The court considers the

disastrous result a conclusive proof of the article's "imminently dangerous" character. If this test be followed, every article the defective condition of which causes injury will come within the exception; the exception will become as broad as the rule, and the rule will be wiped out. Thus the case really attacks the whole doctrine that privity of contract is a necessary element to liability. In a few recent cases on similar facts the same result has been reached though on a different theory. The reasoning there employed is that the manufacturer "ought to have known" of the defect, and that this is equivalent to the actual knowledge generally required. Davidson v. Montgomery, Ward & Co., 171 Ill. App. 355 (1912); Armstrong Packing Co. v. Clem, 151 S. W. 576 (Tex. 1912).

There is no valid reason why, if a defective article causes an injury, the manufacturer's liability should depend on whether the article is of a kind that generally causes injuries or of a kind that is dangerous only in rare cases. The fact, as the Court points out, that the air gun was advertised by the defendant, and believed by the plaintiff, to be a harmless toy, should in all reason increase rather than decrease his responsibility to make it harmless. The decision of the principal case is a decided improvement over the old narrower definition of what constitutes an "imminently dangerous" article, for it is against dangerous articles whose danger is least suspected that the public needs most the protection of the law.

PRACTICE—ACTION OF TRESPASS—NECESSITY OF AFFIDAVIT OF DEFENSE —PA. PRACTICE ACT OF 1915.—The plaintiff delivered horses to the defendant, a common carrier, for transportation. The horses were injured or killed in a wreck and the plaintiff brought an action of trespass. The defendant did not file any affidavit of defense. At the trial the defendant offered in evidence a copy of a contract, limiting the liability of the defendant company and allowing the plaintiff a minimum rate. The plaintiff objected to the evidence, on the ground that since the defendant had not set forth its limited liability in an affidavit of defense, no such matter could be used at the trial. *Held:* That the evidence was admissable. Wilson v. Adams Express Co., 72 Pa. Super. Ct. 384 (1919).

Under the old Pennsylvania Practice it was not necessary to file an affidavit of defense in actions *ex delicto*. Pa. Act of May 25, 1887, P. L. 271; Corry v. R. R. Co., 194 Pa. 516, 45 Atl. 341 (1900). Evidently such practice did not satisfy all the demands because the courts of several counties made rules which required the defendant to file a bill of particulars in an action of trespass, if the plaintiff so requested. Such rules compelled the defendant to state the elements of his defense and at the trial he was not allowed to deviate from the particulars he had set forth in his bill. 64 U. of P. Law Review 223, at 256.

The new Pennsylvania Practice Act provides for an affidavit of defense in actions of trespass. Pa. Act of May 14, 1915, P. L. 483. The language could hardly be plainer: "Neither party shall be permitted at the trial to make any defense which is not set forth in the affidavit of defense." Section 16 of the Act. The Act as a whole establishes the procedure for actions in assumpsit and trespass. While the Act was under discussion a draft of the proposed bill was submitted to the Pennsylvania Bar Association. In the conference of that body concerning the Act, it was evidently understood that all matter to be pleaded

should be set up in an affidavit of defense and after considering what a benefit it would be for the defendant to give notice of his defense, the Association voted that affidavits of defense should be required in actions of trespass. Twentieth Annual Report of the Pennsylvania Bar Association, pages 205–210.

The case under discussion cites but one section of the Act, Section 13, which provides that certain averments which are necessary in actions of trespass shall be considered as admitted if not denied and concludes "the averments of other facts on which the plaintiff relies to establish liability, and averments relating to damages claimed, or their amount, need not be answered or denied but shall be deemed to be put in issue in all cases unless expressly admitted." It is true, as the opinion states, that the Act does not say in so many words that an affidavit of defense must be filed in actions of trespass; it is also true that the Act does not say the penalty for failure to file an affidavit shall be a judgment for the plaintiff. The opinion goes on: "It must follow therefore the statute contemplated that substantial defense along many lines might be properly heard in the trial of an action of trespass even where no affidavit had been filed." It is impossible to see how this conclusion "follows" at all. All that the last clause of Section 13 means is that, notwithstanding the fact that no affidavit of defense has been filed, the plaintiff must still prove his case. The strange thing is that the court in the principal case said the same thing and yet arrived at their *non sequitur*.

If the decision of the court in this case is followed it will put matters in an even worse condition than before the Act was passed. The whole purpose of simplified practice is to arrive at a well defined point of issue between the parties. Such a result can never be achieved if the defendant is allowed to bring in all sorts of evidence contradicting the plaintiff's claim, without filing an affidavit of defense.

The questions of whether contributory negligence or the statute of limitations could be pleaded in any way except in an affidavit of defense since the Act was passed have been raised but not answered in cases which were decided on other points. Cores v. Messinger, 27 Pa. Dist. Rep. 494 (1918); McGinniss, Rec. v. Schneebeli, 28 Pa. Dist. Rep. 368 (1918).

The evidence offered in this case is a defense as to the amount of damages claimed and Section 13 of the Act states that "all averments relating to damages claimed or their amount" are to be considered in issue unless expressly admitted. But that means nothing more than that the plaintiff is put to the burden of proving all statements relating to damages, even though they are not actually denied by the defendant. The clause, so interpreted, has no bearing on the question as to whether the defendant must file an affidavit of defense. Section 16 of the Act stands as it reads: Neither party can make any defense at the trial which has not been set forth in an affidavit of defense and there is no distinction between actions of assumpsit and actions of trespass.

PRACTICE—JUDGMENT FOR WANT OF AFFIDAVIT OF DEFENSE BEFORE RETURN DAY—PA. PRACTICE ACT OF 1915.—Under the Act of May 14, 1915, Pa. P. L. 483, a plaintiff may enter judgment against the defendant for want of an affidavit of defense fifteen days after service of the writ and statement of claim, even though the return day has not intervened. Beishline v. Kahn, 265 Pa. 101 (1919).

This is one of the few cases involving the new Practice Act of 1915 that have reached the Supreme Court of Pennsylvania, and settles a question which had already caused a distinct split among the trial court judges. The United States District Court for the Middle District of Pennsylvania, and the Courts of Common Pleas in Cumberland, Luzerne, Northampton and Lancaster Counties were of the opinion that no judgment by default for want of an affidavit of defense could be entered until after the return day of the writ of summons. Watson v. Pennsylvania Railroad Co., 25 Pa. Dist. Rep. 1034 (1916); Philadelphia and Reading Coal and Iron Co. v. Stambaugh, 26 Pa. Dist. Rep. 275 (1916); Riegel v. Birmingham Insurance Co., 19 Luz. Leg. Reg. 312 (1917); Brownworth v. Sulkin, 26 Pa. Dist. Rep. 660 (1917); Beishline v. Kahn, 20 Luz. Leg. Reg. 181 (1918) the case reversed by the principal case. A contrary view was held in Dauphin, Chester, Armstrong and Blair Counties. American Lumber Co. v. Ensminger Co., 26 Pa. Dist. Rep. 1051 (1917); Curry v. Phoenixville Railway Co., 26 Pa. Dist. Rep. 802 (1917); Shipley-Massingham Co. v. Golden, 27 Pa. Dist. Rep. 953 (1918); Patterson v. Shallcross, 47 Pa. C. C. Rep. 117 (1917); Nicholson v. Wolfe Co., 15 Schuyl. Leg. Rec. 239 (1919). For a discussion of the cases down to February 14, 1918, see articles by David Werner Amram in 65 U. of P. Law Rev. 424, at 441, and 66 U. of P. Law Rev. 195, at 210, in which the writer argues for the view which was sustained by the Supreme Court.

PRINCIPAL AND AGENT—INDEMNITY—PUNITIVE DAMAGES.—A principal wrote a letter containing libelous remarks concerning a third person to his confidential agent. Through the carelessness of the agent the letter came into the hands of the third party, who sued the principal and recovered heavy punitive damages, the jury finding that the principal was actuated by express malice, the letter having been written on a privileged occasion. Thereupon the principal brought an action against his agent to recover as damages the sum which he had to pay as damages and costs in the libel suit. *Held:* The principal is only entitled to nominal damages. Weld-Blundell v. Stephens (1919) 1 K. B. 520.

This decision recognizes the well-known principle that it is an agent's duty to keep secret confidential communications made to him by his principal, even though they be evidence of a public or private wrong, except where disclosure is required by process of law. The difficulty with the case is in the holding that the principal was not entitled to the special damages claimed as accruing from the agent's breach of this duty. This the court justifies on the ground that they were "in substance in the nature of an indemnity against the consequences of his own wilful and deliberate wrong-doing" and "legally recoverable from him independently of the defendant's breach of his obligation." A person convicted of a criminal offense cannot be eased of the punishment by a recovery from the person on whose behalf he did the act, or whose act rendered him liable to the prosecution, either of the amount of any fine or costs, or of damages to compensate him for any imprisonment. Mills Novelty Co. v. Dupouy, 203 Fed. 254 (1913); Leslie v. Reliable Advertising and Addressing Agency, (1915) 1 K. B. 652. Punitive damages are awarded for the same purpose as fines and imprisonment in criminal cases—as a punishment to wrongdoers and a warning to others—and not as a compensation for any actual injury

suffered. Scott v. Donald, 165 U. S. 58, (1896). In the principal case the court rightly considers that to permit a principal to recover such damages from his agent would defeat the purpose for which they are imposed just as much as would such recovery over if allowed in purely criminal cases.

PROCESS—SERVICE—IMMUNITY.—A resident of the state of Illinois who was plaintiff in an action pending in that state came into California for the sole purpose of attending the taking of a deposition in a commissioner's office by his adversary. While there he was served with a summons in an action brought against him in California by a third party. *Held:* This was a good service. Hand v. Superior Ct. of Los Angeles Co., 183 Pac. 456 (Cal. 1919).

The question of exemption from service arises from statutes, to be found in almost all states, providing that in certain specified cases, one attending judicial proceedings is exempt from service. This precise question has arisen in many jurisdictions in almost always a slightly different form. In the principal case, the service of process was made on behalf of one not a party to the suit in the foreign jurisdiction, while in the vast majority of the cases the service is between the same parties to a suit in another jurisdiction. In these latter cases the courts almost unanimously allow a privilege of exemption from service. *In re* Healey, 53 Vt. 694 (1881). Exemptions were allowed in the following instances; examination before a notary public, Parker v. Marco, 136 N. Y. 585, 32 N. E. 585 (1893); taking of depositions, Partridge et al. v. Powell, 180 Pa. 22, 36 Atl. 419 (1897); Langdon v. Baker, 5 Ohio N. P. 118 (1898); proceedings in the U. S. Patent Office, Engle v. Manchester, 46 App. D. C. 220 (1917). Furthermore, only a very few states have refused the right of non-resident suitors to attend the trial of their causes, without being subjected to service of summons in other suits instituted against them in the jurisdiction of the cause, the trial of which occasioned their presence. The cases so holding are, Bishop v. Vose, 27 Conn. 1 (1858); Capwell v. Sipe, 17 R. I. 475, 23 Atl. 14 (1891); Baisley v. Baisley, 113 Mo. 544, 21 S. W. 29 (1893); Guyn v. McDaneld, 4 Idaho 605, 43 Pac. 74 (1895). But with the exception of these few states, it can safely be said that the courts of all the others hold exactly the opposite, and allow such an exemption. Murray v. Wilcox, 122 Iowa 188, 97 N. W. 1087 (1904); Richardson v. Smith, 74 N. J. L. 111, 65 Atl. 162 (1906); Morrow v. H. Dudley Co., 144 Fed. 441 (1906); Diamond v. Earle, 217 Mass. 499, 105 N. E. 363 (1914); Stewart v. Ramsay, 242 U. S. 128 (1916).

The underlying reason for the decision in the principal case was doubtless, because the suitor plaintiff's attendance before the commissioner was not an attendance before a court, nor before any tribunal vested with the authority of a court. The decision in Greer v. Young, 120 Ill. 184, 11 N. E. 167 (1887) supports such a theory. But other courts feel that it is an advantageous rule of public policy to allow suitors to feel free and safe at all times to attend, within any jurisdiction outside of their own, any judicial proceedings in which they are concerned, without incurring the liability of being served and held to answer to some other judicial proceeding against them. Powers v. Arkadelphia Lumber Co., 61 Ark. 504, 33 S. W. 842 (1896); Roschynialski v. Hale, 201 Fed. 1017 (1913). And if it is granted that a suitor is exempt in a state into which he comes for suit, then there is no reason why he should not be exempt when he

comes to attend depositions which are made a part of the regular proceedings of the suit in the state from which he comes. And this was the dictum in Burroughs v. Cocke, 56 Okla. 627, 156 Pac. 196 (1916), where under a precisely similar state of facts to those of the principal case, the court reached an exactly opposite conclusion. See Baxter v. Conroy, 26 Pa. Dist. Rep. 430 (1916), *in re* the privilege of a suitor who comes into Pennsylvania to attend the taking of a deposition.

WORKMEN'S COMPENSATION—EMPLOYEE ENGAGED IN INTERSTATE COMMERCE—FEDERAL EMPLOYERS LIABILITY ACT 1908.—Defendant and another railroad employed a flagman at a crossing where tracks of both companies were used indiscriminately for interstate and intrastate commerce. The flagman was killed by an interstate train of the other company while in the course of his employment. Deceased's administrator brought action under the Illinois Workman's Compensation Act. *Held:* That the employee was engaged in interstate commerce within the Federal Employers' Liability Act and therefore the Illinois Act was superseded. Chicago and Alton R. R. Co. v. Industrial Commission et al., 124 N. E. 344 (Ill. 1919).

A right of recovery under the Federal Employers' Liability Act arises only where both the defendant and the employee are engaged in interstate commerce or work so closely related to such commerce as to be in practice and in legal contemplation a part of it. Pederson v. D. L. & W. R. R., 229 U. S. 146 (1913); Luchetti v. Philadelphia & R. Ry. Co., 233 Fed. 137 (1916). The general nature of the employee's work is immaterial; it is only the work in which the employee is engaged at the time of the injury which determines whether he is within the Act or not. Ill. Cent. R. R. Co. v. Behrens, 233 U. S. 473 (1914); Boyle v. Pennsylvania R. R. Co., 228 Fed. 266 (1915).

Where the injury arises out of the work of maintaining an instrumentality used in interstate commerce the employee cannot recover under a State act, for he is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Pederson v. D. L. & W. R. R., *supra;* Shanks v. D. L. & W. R. R., 214 N. Y. 413, 108 N. E. 644 (1915). A track or bridge may be used in both interstate and intrastate commerce, but when so used it is a permanent instrumentality of the former for it is indispensable to such commerce at all times and repair work thereon is not done independently of interstate commerce. P. B. & W. R. Co. v. McConnell, 228 Fed. 263 (1915); C. N. O. & T. P. Ry. Co. v. Tucker, 168 Ky. 144, 181 S. W. 940 (1916). However, a locomotive, or a car, may be used in both interstate and intrastate commerce, but whether it is an instrumentality in interstate or intrastate commerce is determined from the actual use to which it is being put at the time of the accident. Shanks v. D. L. & W. R. R., *supra;* Boyle v. Pennsylvania R. R. Co., *supra.*

The function of a flagman, as determined by the principal case and recent cases, *vide* Southern Pac. Co. v. Industrial Acc. Com., 174 Cal. 8 (1916), is to keep the track clear, therefore partaking of the nature of the duty of an engineer and brakeman of a train. It would seem, therefore, that the principal case was decided correctly and that whether a flagman is engaged in interstate or intrastate commerce depends upon whether he is keeping the track clear for an interstate or intrastate train at the time of the accident.