Michigan Law Review

Volume 9 | Issue 2

1910

# Recent Important Decisions

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# RECENT IMPORTANT DECISIONS.

BANKS AND BANKING—AUTHORITY OF CASHIER—WHEN KNOWLEDGE OF CASHIER IS NOT IMPUTED TO BANK.—Plaintiff's cashier induced defendant to sign a note, gratuitously, and deliver it to the bank, to be substituted for notes of the cashier, explaining to the defendant that it would not look well to the bank examiner for the bank to have its cashier's paper, and promising defendant that he would never be called upon to pay the note. A statute makes it a penal offense knowingly to make false entries in the books of a bank or knowingly to subscribe or exhibit false papers with intent to deceive the State bank examiner. *Held,* first, that the cashier had no authority to make defendant the promise he did; and, second, that defendant was charged with knowledge that the cashier's purpose was to violate the statute, but that the bank was not charged with the cashier's knowledge that defendant received nothing for the note. *State Bank of Moore* v. *Forsyth* (1910), — Mont. —, 108 Pac. 914.

The promise of the cashier that defendant would never be called upon to pay the note was altogether inoperative and void as an undertaking of the bank, and defendant acted upon it at his peril. 1 MORSE, BANKS & BANKING, Ed. 4, § 167; *Davis* v. *Randall,* 115 Mass. 547; *First Nat. Bank* v. *Tisdale,* 84 N. Y. 655. "A cashier is especially forbidden from releasing a debtor," 1 BOLLES, MOD. LAW OF BANKING, 361; *Hodge* v. *Bank,* 22 Grat. 51; *Sav. Assn.* v. *Sailor,* 63 Mo. 24; *Bank of U. S.* v. *Dunn,* 6 Pet. 51. Defendant was charged with notice of the statute—Rev. Codes, 4001—that the cashier was violating. Defendant could not, in connivance with the cashier, give the bank semblance of solidity and security, and then, when sued upon the note, escape the consequences of his fraudulent act. *Pauly* v. *O'Brien,* 69 Fed. 460. But the cashier's knowledge that defendant received nothing for the note could not be imputed to the bank. The ordinary rule of imputation of an agent's knowledge to his principal does not apply when the agent is acting adversely to his principal. *Bank of Ionia* v. *Montgomery,* 126 Mich. 327, 85 N. W. 879; *Graham* v. *Bank,* 59 N. J. L. 225, 35 Atl. 1053; *Fort Dearborn Bank* v. *Seymour,* 71 Minn. 81, 73 N. W. 724; *Dooley* v. *Hadden,* 179 U. S. 646, 45 L. Ed. 357. Nor if the conduct of the agent raises a clear presumption that he would not communicate the fact in controversy, as when to do so would necessarily prevent the consummation of a fraudulent scheme the agent was engaged in perpetrating. *Findley* v. *Cowles,* 93 Iowa 389, 61 N. W. 998; *Innerarity* v. *Bank,* 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Camden, etc.* v. *Lord,* 67 N. J. Eq. 489, 58 Atl. 607.

BILLS AND NOTES—TITLE TO PERSONALTY RETAINED AS COLLATERAL SECURITY—RIGHT OF TRANSFEREE.—A company sold goods under a contract, retaining title until payment of the price. Purchase money notes were given and, subsequently, were transferred to a purchaser for value, without transfer of the contract. The transferee was ignorant of the existence of the

contract, and filed a claim against the maker's receivers, stating that he had no security. *Held,* that the transfer of the notes carried with it the contract in so far as it reserved title to the goods, as collateral security for payment of the notes; and that the transferee was not estopped from asserting his lien by his claim to the contrary made when he was ignorant thereof. *Gay* v. *Hudson River Electric Power Co., In re Quinn* (1910), —C. C., N. D., N. Y. —, 180 Fed. 222.

The judge, in deciding, said; "The question is not free from doubt." He cited, as holding contrary, *Domestic Sewing Machine Co.* v. *Arthurhultz,* 63 Ind. 322. That case was followed in *Hyde* v. *Courtwright,* 14 Ind. App. 106, and distinguished, in *Heyms* v. *Meyer* (1910), — Ind. App. —, 91 N. E. 973, from the case where both the note and the contract are assigned. *Bank* v. *Thomas,* 69 Tex. 237, 6 S. W. 565, is also contrary to this decision. The great weight of authority, however, holds that the retention of title in the vendor is but as collateral security for the purchase price, and that a transfer of the debt, therefore, carries with it, as an incident, the interest in the chattel, in the same manner as the assignment of a mortgage debt would carry with it the mortgage. *Cutting* v. *Whittemore,* 72 N. H. 107, 54 Atl. 1098; *Duke* v. *Shackleford,* 56 Miss. 552; *Spoon* v. *Frambach,* 83 Minn. 301, 86 N. W. 106; *Standard Steam Laundry* v. *Dole,* 22 Utah 311, 61 Pac. 1103. Georgia cases support the present opinion, but they are based upon a statute. *Cade* v. *Jenkins,* 88 Ga. 791, 15 S. E. 292; Georgia Acts of 1887, p. 62. In Georgia, if the indorsement of the note is without recourse and unaccompanied by an express transfer, to the indorsee, of the title to the chattel, such title, thereupon, vests absolutely in the maker of the note. *Townsend* v. *Southern Product Co.,* 127 Ga. 342, 56 S. E. 436; *Swann Davis Co.* v. *Stanton,* 7 Ga. App. 668, 67 S. E. 888. According to the cases cited above, showing the weight of authority, the subsequent assignment of the collateral contract to the transferee of the note, which was done in the present case, was unnecessary. Nor does the transferee have to know of or rely upon the collateral security. *Kimball Co.* v. *Mellon,* 80 Wis. 133, 48 N. W. 1100. In fact, in the present case, the transferee thought he had no security, and filed a claim so stating; still the court held him not estopped from asserting his lien.

BOUNDARIES—FENCES—EJECTMENT — CHAMPERTY. — Plaintiff in ejectment charges that defendant fenced off twenty feet of plaintiff's land, plaintiff claiming under a deed dated five years after fence was built. Deed called for the fence as a boundary. *Held,* by the deed plaintiff took no title to the land beyond the fence. The disputed strip belongs either to defendant or to plaintiff's vendors, and to recover in ejectment plaintiff must rely upon the strength of his own title, and not upon the weakness of his adversary's. The deed to plaintiff would be champertous as to all land within the fence. *Tool* v. *Kinman* (1910), — Ky. —, 130 S. W. 1073.

At the time of conveyance to plaintiff, the disputed strip was in the adverse possession of the defendant. From an early date the policy of the law has not admitted of the conveyance by anyone of a title of land which

is in the adverse possession of another. This is considered not as passing a title but as transferring a right of action in violation of the laws against champerty. Statute 32 Henry VIII, c. 9. This was also common law in some of the states. *Browne* v. *Browne,* Fed. Cas. No. 2035 (1 Wash. C. C. 429). *Small* v. *Procter,* 15 Mass. 495. Many of the states now allow a person to convey his title as a valid deed, though there be an adverse possession. *Mustard* v. *Wohlford's Heirs,* 15 Grat. 329, 76 Am. Dec. 209; *Allen* v. *Kennedy,* 91 Mo. 324, 2 S. W. 142; *Peck* v. *Heurich,* 167 U. S. 624. By statute in quite a number of states such conveyances are permitted. Some of the states, evidently a minority, hold that such convenance by disseisee is void as to the grantee. *Pearson* v. *Adams,* 129 Ala. 157, 29 South. 977; *Godfroy* v *Disbrow,* Walk. Ch. 260; *Gilman* v. *Dolan,* 100 N. Y. Supp. 186, 114 App. Div. 774. In North Dakota it was considered a misdemeanor to convey land where grantor had not been in possession or taken rent. *Galbraith* v. *Paine,* 12 N. D. 164, 96 N. W. 258. Not having title to the land within the fence, plaintiff in the principal case could not bring ejectment. *Hammond* v. *Shepard,* 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; *Stephens* v. *Moore,* 116 Ala. 397, 22 South. 542. In ejectment plaintiff cannot rely on the weakness of the title of his adversary. *Butler* v. *Davis,* 5 Neb. 521. Unless title remained in plaintiff's grantor, defendant, being in possession, would have the better right. *McCreary* v *Jackson Lumber Co.,* 148 Ala. 247, 41 South. 822. And if the title remained in plaintiff's grantor, still plaintiff had no title, for the fence was designated as the boundary line of the tract conveyed.

CHARITIES — RELIGIOUS CORPORATIONS — TORTS — RESPONDEAT SUPERIOR. — The plaintiff, a journeyman mechanic, while engaged in making repairs on the premises of the Salvation Army, was injured by reason of the defective condition of a runway. *Held,* that defendant was not relieved from liability for negligence of its agents and servants on the theory that the rule of respondeat superior does not apply to religious or charitable corporations, *Hordern* v. *Salvation Army* (1910), — N. Y. —, 92 N. E. 626.

The decision reached in this case is in accord with that of the Supreme Court of New York in *Kellogg* v. *Church Charity Foundation* (1908), 112 N. Y. Supp. 566, 128 N. Y. App. Div. 214. See 7 MICH. L. REV., p. 270. In these cases an attempt has been made to limit the operation of the rule that a charitable corporation is not liable for injuries resulting from the negligent or tortious acts of a servant in the course of his employment, where such corporation has exercised due care in his selection. The courts of Pennsylvania, Maryland, Tennessee, Kentucky, Illinois and Missouri have held that this immunity is universal, on the ground that the funds of such corporations are trust funds and cannot be applied to any such use. In several jurisdictions, however, the reason given for the rule is that one who has accepted the benefit of a charity thereby releases the benefactor from liability for the negligence of his servant in administering the charity; *Powers* v. *Mass. Homoeopathic Hospital,* 109 Fed. 294; and where this view is taken the courts refuse to extend the immunity to cases where the injured party

is not a beneficiary. *Hewett* v. *Woman's Hospital Aid Ass'n* (1906), 73 N. H. 556, 64 Atl. 190, 7 L. R. A. 496; *Bruce* v. *Cent. Meth. Ep. Church* (1907), 147 Mich. 230, 110 N. W. 951; *Gallon* v. *House of Good Shepherd* (1909), 158 Mich. 361, 122 N. W. 631. This is the position taken by the court in the principal case. No attempt was made in its opinion to differentiate charitable and religious corporations. The exemption of charitable corporations from liability has not been, as a rule, extended to religious corporations. *Chapin* v. *Holyoke Y. M. C. A.* (1896), 165 Mass. 280, 42 N. E. 1130; *Davis* v. *Congregational Church*, 129 Mass. 367, 37 Am. Rep. 368; *Rector etc. of Church of Ascension* v. *Burkhart*, 3 Hill, 193; *Bruce* v. *Cent. Meth. Ep. Church*, supra. Had the court distinguished these classes and taken the view that the Salvation Army is a religious rather than a charitable corporation, abundant authority might have been found to support its decision. For a full discussion of the liability of charitable corporations, see 5 MICH. L. REV., pp. 552, 662.

CONSTITUTIONAL LAW—DUE PROCESS—REGULATION OF RAILROAD.—A state railway commission ordered a railway company to construct a spur track between stations, to a private mill and furnish cars and facilities to the mill owner for loading the produce of his mill thereat for shipment. *Held*, (FULLERTON, J. dissenting) a taking of its property without due process of law. *Northern Pac. Ry. Co.* v. *Railway Commission* (1910), — Wash. —, 108 Pac. 938.

All regulation of railways is limited in its scope by the due process clause of the Constitution. *United States* v. *Delaware & Hudson Co.*, 164 Fed. 215. So that the powers of a commission must be largely decided by the "gradual process of judicial inclusion and exclusion." Railways may be required to do many things as long as they are for the use or the protection of the public. A public benefit is not a public use, and just what is a public use is a judicial question. *Healy Lumber Co.* v. *Morris*, 33 Wash. 490. For example, a railway may be compelled to fence its road. *People* v. *Illinois Cent. Ry. Co.*, 235 Ill. 374. To build depots. *Railway Commission* v. *The P. and O. Cent. Ry. Co.*, 63 Me. 269; *State* v. *The Wabash, St. L. and Pac. Ry.*, 83 Mo. 144. To build side tracks on its own right of way. *State* v. *White Oak Ry. Co.*, 65 W. Va. 15. To make connections with cross lines for the transfer of cars. *Wisconsin, M. and P. Ry.* v. *Jacobson*, 179 U. S. 287. Nebraska went further and required a railway to put in a side track to a private elevator, and in so doing to cross land not belonging to the company; but the United States Supreme Court reversed that decision, holding that the Nebraska law was unconstitutional in that it did not provide indemnity for what it required. *Missouri Pac. Ry.* v *Farmers' Elevator Co.*, 217 U. S. 196, 30 Sup. Ct. 461. On the other side, Washington has gone further than the United States Supreme Court, in refusing to compel a railway to extend its track 250 feet to a grain warehouse though a deed of the right of way was offered to the company at the time of trial. *Northwestern Warehouse Co.* v. *O. R. and N. Ry. Co.*, 32 Wash. 218. In the principal case the court holds that to require the company to put in the said sidetrack for the private use of the mill owner was a taking without due process of law.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—USE OF AUTOMATIC COUPLERS—POLICE POWER.—An Ohio law makes it unlawful for a common carrier engaged in business within the state to use cars not equipped with automatic couplers. (Sec. 3365—27 b. Rev. Statutes of Ohio.) *Held*, a valid and reasonable exercise of police power, and not a direct regulation of interstate commerce. *Detroit T. and I. Ry. Co.* v. *State* (1910), — Ohio —, 91 N. E. 869.

The contention of the railroad company is that since the cars in question were commonly carrying interstate commerce and were at the time of complaint a part of a train most of the cars of which were carrying interstate commerce, they were instruments of interstate commerce and exclusively under Federal control. Of course it is settled law that a direct regulation of interstate commerce by a state is repugnant to the Constitution. *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328. But laws passed in pursuance of the acknowledged power of the State having indirect effect upon interstate commerce are valid and enforceable in these merely incidental matters; and the state's control is not withdrawn, until action on the part of the United States comes into actual conflict with the state regulations at which time the United States regulations prevail. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194; *Reid* v. *Colorado*, 187 U. S. 137; *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612. This is done under the police power of the state, as a few examples will point out. It is a misdemeanor to transport cattle into Kansas without inspection. *Asbell* v. *Kansas*, 209 U. S. 251. Regulating speed of trains within corporate limits and the stops thereof at certain places may be valid police legislation. *The Chicago and Alton Ry. Co.* v. *Carlinville*, 200 Ill. 314; *Cleveland, etc. Ry. Co.* v. *Illinois*, 177 U. S. 514. So, also, forbidding freight trains to be run on Sunday, and requiring "full crews" are valid police regulation. *Hennington* v. *Georgia*, 163 U. S. 299; *Seale* v. *State*, 126 Ga. 644; *State* v. *Southern Ry. Co.*, 119 N. C. 814; *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Indiana*, 172 Ind. 147. However, the states cannot regulate foreign and interstate commerce under the guise of inspection. *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345. The principal case holds that though it may indirectly interfere with interstate commerce, the cars used usually in such commerce, are nevertheless under state control when they dip into intrastate commerce. This must be allowed in order to enforce the proper relation between Congress and the states. *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612.

CORPORATIONS—MONOPOLIES—COLLATERAL CONTRACTS—DEFENSES.—A foreign corporation, having complied with the laws of Michigan, so as to enable it to do business within the state, sued certain of its agents to recover the purchase price of goods sold and delivered to such agents by the corporation. The agents attempted to defeat recovery by proof that plaintiff was a "trust" organized to create a monopoly in the manufacture and sale of harvesting and farm machinery in violation of Public Acts 1899, No. 255 and Public Acts, 1905, No. 329. *Held*, that the defense claimed is not available to, and cannot be maintained by the defendants. *International Harvester*

*Co. of America* v. *Eaton Circuit Judge* (1910),— Mich. —, 127 N. W. 695.

Although there are apparent conflicts in the decisions involving the legal status of corporations which do business in violation of Anti-Trust Laws, the variance is due usually to differences in the statutes and to the varying nature of the contracts upon which the action is instituted. The view expressed in the principal case is undoubtedly correct and is sustained by the following decisions. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. 491; *The Charles E. Wisewall*, 74 Fed. 802; *Chicago Milk Shippers' Assn.* v. *Ford*, 46 Ill. App. 576; *Bishop* v. *Am. Preservers' Co.*, 51 Ill. App. 417. The uniform doctrine presented by these decisions is that a contract for the sale of goods, wares and merchandise is not rendered void and unenforceable by the fact that the selling corporation is a "trust" or monopoly organized in violation of law, either federal or state; the contract of sale being collateral and having no direct relation to the unlawful combination. The question of the lawful existence of a corporation cannot be raised in a collateral proceeding, by a private party; the sovereign alone can object, in a direct proceeding for that purpose. In some states the statute expressly provides that the violation of Anti-Trust Laws by a corporation may be pleaded as a defense in an action on contract instituted by the corporation. *Nat. Lead Co.* v. *Grote Paint Store Co.*, 80 Mo. App. 247; *Wagner* v. *Minnie Harvester Co.* (1910), — Okla. —, 106 Pac. 969. In such cases the defense is conclusive. It has been decided, also, that in case the contract sued on by the corporation is in direct furtherance of the illegal purpose of the corporation and an essential part of the illegal scheme, such contracts are void and unenforceable. *Continental Wall Paper Co.* v. *Voight*, 148 Fed. 939, 78 C. C. A. 567; Affirmed, 212 U. S. 227.

DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES.—Plaintiff, a lumber company, entered into a contract with defendant company for the purchase of a site for a large lumber manufacturing plant, part of the consideration for the purchase price, was the promise of the defendant to furnish to the plant certain track connections with lines of railroad. *Held*, the difference between the value of the plant as constructed with and without such connections may fairly be taken as the measure of damages for breach of such contract. *South Memphis Land Co.* v. *McLean Hardwood Lumber Co.* (1910), — C. C. A., 6th Cir. —, 179 Fed. 417.

Specifically stated the rule of contract is laid down that the plaintiff should recover such damages as may be fairly and reasonably considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach. *Hadley* v. *Baxendale*, 9 Exch. 341. If the action is not premature, the rule is applicable that the plaintiff is entitled to compensation based as far as possible on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason

of circumstances of which he ought reasonably to have availed himself. *Roehm* v. *Horst*, 178 U. S. 1. The injured party is entitled to recover, first, the expenses necessarily and actually incurred in the unsuccessful attempt to operate the factory; and, second, the fair rental value of the idle factory, and, if it has no rental value, then the interest on the money invested in the same together with interest on any idle working capital the use of which had been lost by reason of the violation of the contract. *The Paola Gas Company* v. *The Paola Glass Company*, 56 Kan. 614, 44 Pac. 621. But the injured party is under a duty to use ordinary care and diligence to lighten the consequential damages resulting from the breach of the contract. *Aikin* v. *Perry*, 119 Ga. 263, 46 S. E. 93.

DAMAGES—FRIGHT PRODUCING MISCARRIAGE—TRESPASS.—Defendant's agent wrongfully entered the premises of plaintiff, a married woman, and by violent and abusive language to her nurse so frightened the plaintiff that a miscarriage resulted. *Held*, that plaintiff could recover damages for the miscarriage resulting from the fright and mental anguish caused by the trespass, though the defendant's agent did not know of the pregnancy of the plaintiff. *Bouillon* v. *Laclede Gas Light Co.* (1910), — Mo. —, 129 S. W. 401.

This is one of the cases among those in which fright without physical impact produces deleterious physical results. The miscarriage cases fall in the main in three categories: (1) Those in which only negligence in the defendant is charged; perhaps the leading case among those in the United States is *Mitchell* v. *Rochester R. R. Co.*, 151 N. Y. 107, 34 L. R. A. 781, in which no recovery was allowed for a miscarriage resulting from mere fright caused by negligence, the reason being given that it would open a wide field for fictitious claims to allow recovery for the consequences of fright alone. The House of Lords declined to establish a precedent allowing a claim for damages as the result of fright alone. *Victorian Rys. Com'rs.* v. *Coultas* L. R. 13 App. Cas. 222. (2) Those in which the miscarriage is caused by malicious or wanton action of defendant. *Kimberly* v. *Howland*, 143 N. C. 398, 7 L. R. A. (N. S.) 545, and (3) Those in which the action is accompanied by trespass and it is under this last class that the principal case falls. In Massachusetts no recovery can be had for visible illness resulting from mere fright caused by defendant's wrong; but if the wrong produce a slight physical impact the defendant becomes liable for the nervousness and ensuing hysteria without proof that the shock was caused by the blow. *Spade* v. *Lynn & Bost. R. R. Co.*, 168 Mass. 285; *Smith* v. *Postal Tel. & Cable Co.*, 174 Mass. 576. South Carolina takes the opposite view in holding that recovery may be had for physical injuries resulting from mere fright caused by negligence. *Mack* v. *South Bound R. R.*, 52 S. C. 323, 40 L. R. A. 679. In the principal case the court also considered the question of the responsibility of a corporation as principal for the malicious or wanton act of the agent but put it aside because of the evidence. But it has been held that in order to secure to the public better service from corporations and exemption from reckless and insolent servants, the wantonness of the servant may be imputed

to the corporation. *Goddard* v. *Grand Trunk Ry.*, 57 Me. 202, 2 Am. Rep. 39.

DEEDS—PRIVY EXAMINATION OF MARRIED WOMEN OVER TELEPHONE.—A married woman joined her husband in a deed of trust of her separate property for the purpose of securing a debt which her son owed to the defendant. After signing the deed, it was taken to the notary public who called Mrs. Wester, the grantor, over the telephone and attempted to take her privy examination in that manner. *Held,* a privy examination thus taken was ineffective under the statute. *Wester* v. *Hurt et al.* (1910), — Tenn. —, 130 S. W. 842.

Very few reported cases are to be found which involve acknowledgments or privy examinations taken over the telephone. It has been held that an acknowledgment of a married woman taken by the notary over the telephone did not of itself vitiate the deed, when the certificate was in due form and not impeached by fraud, duress or mistake. *Banning* v. *Banning,* 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156; and in *Sullivan* v. *Bank,* 37 Tex. Civ. App. 228, 83 S. W. 421, it was held that the oath to an affidavit which the statute requires shall be administered to the affiant in the personal presence of the officer administering the oath cannot be administered by use of the telephone though the officer is familiar with the voice of the affiant; and in *Ex Parte Terrell* (Tex. Crim. App.) 95 S. W. 536 it was held that a statute requiring the reading of a subpoena in the hearing of a witness was not complied with by reading it over the telephone. These cases and the principal case seem to be correctly decided, and perhaps the reason for the scarcity of similar decisions is to be found in the fact that the officer's certificate is considered conclusive as to all matters except fraud. *Baldwin* v. *Snowden,* 11 Ohio St. 203; *Council Bluffs Sav. Bank* v. *Smith,* 59 Neb. 90, 80 N. W. 270.

ESTOPPEL—WHAT CONSTITUTES.—E., holding a beneficiary certificate issued by appellee, changed the beneficiary, naming appellant in place of one D. Upon E's death both appellant and D. claimed the money due on the certificate. Appellee wrote to appellant that it recognized her as the rightful beneficiary, but requested that she bring suit to dispose of the claim of D. and the appellee would interplead and pay the money into court. Suit was brought by appellant against appellee in which D. intervened and set up her claim. The appellee defended on the ground that the contract was ultra vires and void. *Held,* appellee was estopped to deny its liability. *Irwin* v. *Sovereign Camp of Woodmen of the World* (1910), — N. M. —, 110 Pac. 550.

It is well settled that if representations or admissions are made with the intention that a party shall act upon them, and that party, believing them to be true does act upon them, the party so making the representations or admissions will be estopped to deny them if the party, relying and acting thereon, would be prejudiced or injured by such denial. *Ensel* v. *Levy & Bro.,* 46 Ohio St. 255; *Meister* v. *Birney,* 24 Mich. 435; *Chesapeake &c Ry.* v. *Walker,* 100 Va. 69, 40 S .E. 633. The elements which must be present to

create an estoppel are, first: representations or admissions of material facts inconsistent with the claim the party making them proposes to set up, *Holcomb* v. *Boynton*, 151 Ill. 294; *Estis* v. *Jackson*, 111 N. C. 145, 32 Am. St. Rep. 784, second: the representations or admissions must be wilfully intended to lead the party setting up the estoppel to rely upon them, *Leather &c. Bank* v. *Morgan*, 117 U. S. 96; *Lackman* v. *Kearney*, 142 Cal. 112, 75 Pac. 668; *Hardy* v. *Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, third: they must be made with a knowledge of the facts by the party to be estopped, *Keifer* v. *City of Bridgeport*, 68 Conn. 401, 36 Atl. 801; *Fay* v. *Slaughter*, 194 Ill. 157, 62 N. E. 592; *Smith* v. *Miller*, 66 Tex. 74, 17 S. W. 399, fourth: the party claiming to be influenced must be ignorant of the facts, *Kiefer* v. *Klinsick*, 144 Ind. 46; *Adams* v. *Ashman*, 203 Pa. St. 536, 53 Atl. 375; *Brothers* v. *Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786, fifth: the party setting up the estoppel must do some act in reliance upon the representations, *Lincoln* v. *Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; *Hull* v. *Hull*, 48 Conn. 250, 40 Am. Rep. 165, whereby he will be substantially injured if the other party is permitted to retract his statements, *The Penn. &c. Co.* v. *Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273; *Goodwin* v. *Norton*, 92 Me. 532; *Kirkham* v. *Bank of America*, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714. In the principal case it is not apparent how the appellant was prejudiced by the representations and admissions of the appellee. A party is not estopped from asserting a claim on the trial by the fact that he made a different representation in regard thereto to the adverse party before the trial, where the latter was not misled thereby. *Fischer* v. *Johnson*, 106 Ia. 181, 76 N. W. 658; *Troy* v. *Rogers*, 113 Ala. 131, 20 South. 999; *Pearson* v. *Brown*, 105 Ga. 802, 31 S. E. 746. Had the appellee made no representations or admissions, but had simply refused to pay the appellant, she would have had to take the same steps to enforce her claim and her action would have been open to the same defenses.

EVIDENCE—ADMISSIBILITY OF DECLARATION OF PAIN AND SUFFERING.—In an action by a passenger against a carrier to recover damages for personal injury, the court allowed witnesses to testify as to exclamations of present pain and suffering made by the plaintiff several months after the injury. *Held*, that the admission in evidence of such exclamations in support of the issues in the case was not error, even though they were not admissible as a part of the res gestae. *Colorado Springs & I. R. Co.* v. *Allen* (1910), — Colo. —, 108 Pac. 990.

It must be conceded, that according to the weight of authority in the United States, exclamations of pain or of physical or mental suffering being undergone at the time, are admissible in evidence as substantive and original evidence of a mental condition or state, whether such exclamations be made under circumstances so intimately connected with the occasion of injury as to constitute a part of the res gestae, or whether they are made at a time and place considerably removed from that of the injury. *Travellers Ins. Co.* v. *Mosly*, 8 Wall. 397; *Anderson* v. *Citizens St. R. Co.*, 12 Ind. App. 194; *Will* v. *Mendon*, 108 Mich. 251; *Ashton* v. *Detroit C. R. Co.*, 78 Mich. 587;

*Indiana R. Co.* v. *Maurer*, 160 Ind. 25; *Battis* v. *Chicago R. I. & P. R. Co.*, 124 Iowa 623; *Beath* v. *Rapid R. Co.*, 119 Mich. 512; *Tex. C. R. Co.* v. *Wheeler* (Tex. Civ. App.) 116 S. W. 83; *Duffy* v. *Consol C. Co.*, (Ia.) 124 N. W. 609. Conceding the general rule to be as stated, still upon principle, such exclamations should not be received if they are made so long after the original source of injury that there is any appreciable danger that their utterance was not entirely an involuntary expression of present suffering, but rather one prompted to a considerable degree by politic and self-seeking considerations. See WIGMORE EVID. §§ 1718, 1719. Keeping in mind this fundamental prerequisite of their admissibility it would seem that the court in the principal case pushed the rule admitting such exclamations and declarations to its fullest extent, if not to a point to which it would be unsafe to go in all cases. Some courts expressly reject exclamations of pain and suffering made a considerable period of time after the original injury. *Olp* v. *Gardner*, 48 Hun 169; *Barelle* v. *Pa. R. Co.*, 51 Hun 540; *Ryan Porter Mfg. Co.*, 57 Hun 253; *Gulf C. & S. F. R. Co.* v. *Ross*, 11 Tex. Civ. App. 201; *Kelly* v. *Detroit L. & N. R. Co.*, 80 Mich. 237; *Lake St. El. R. Co.* v. *Shaw*, 203 Ill. 39; *Union Pac. R. Co.* v. *Hammerlund*, 70 Kan. 888; *Klingman* v. *Fisk & Hunter Co.*, 19 S. D. 139; *Donohue* v. *Brooklyn I. C. & S. R. R. Co.*, 65 N. Y. Supp. 634, 53 App. Div. 348. Still other courts reject such subsequent exclamations only when made after suit for the injury has been commenced, or when made to persons with the evident purpose of qualifying them as witnesses in contemplated litigation. *Mott* v. *Detroit G. H. & M. R. Co.*, 120 Mich. 127; *Chicago & E. I. R. Co.* v. *Donworth*, 203 Ill. 192; *Dorrigan* v. *R. Co.*, 52 Conn. 291; *Grand Rapids & I. R. Co.* v. *Huntley*, 38 Mich. 537; *Laughlin* v. *R. Co.*, 80 Mich. 154. Some states, notably New York, exclude all statements of pain and suffering unless made to a physician for purpose of receiving medical treatment. See, *Chicago St. R. Co.* v. *Kennely*, 170 Ill. 508; *Reed* v. *R. R.*, 45 N. Y. 578; *Roche* v. *R. R.*, 105 N. Y. 294, and see also WIGMORE EVID., pp. 2210-2211 for other cases and criticisms of this exception.

FIRE INSURANCE—WAIVER OF CONDITIONS BY AGENT.—A fire insurance policy issued to plaintiff stated that the policy would be void, if the interest of the insured were other than "sole and unconditional ownership," also that no agent had power to waive any condition unless such waiver was attached to the policy. Plaintiff informed the agent that he held under a mortgage foreclosure certificate but the agent failed to record the same. In an action on the policy, *held*, that the company was liable. *Leisen* v. *St. Paul Fire & Marine Ins. Co.* (1910), — N. D. —, 127 N. W. 837.

This decision, in accord with the weight of authority, is interesting chiefly because of the fact that it marks the repudiation by another state of the doctrine of the U. S. supreme court as laid down in *Northern Assur. Co.* v. *Grand View Bldg. Ass'n.*, 183 U. S. 308, reaffirmed in *Penman* v. *St. Paul Ins. Co.*, 216 U. S. 311, 30 Sup. Ct. 312. The court in the present case expressly rejects so much of its former decisions as are in accord with the supreme court. For an exhaustive treatment of this question see 3 COOLEY, BRIEFS OF LAW OF INSURANCE, pp. 2459-2658; VANCE, INSURANCE, pp. 355-

385; MAY, INSURANCE, Ed. 4, Chap. VII, 8 MICH. L. REV. 664. Late cases upholding the doctrine of the principal case are *Athens Mut. Ins. Co.* v. *O'Keefe* (Ga. 1910), 66 S. E. 1093; *London Guaranty Co.* v. *Miss. Central Ry.* (Miss.), 52 South. 787; *Hulen* v. *Ins. Co.*, 80 Kan. 127, 102 Pac. 52; *Miller* v. *Prussian Ins. Co.*, 158 Mich. 402, 122 N. W. 1093; *Staats* v. *Pioneer Ins. Ass'n.*, (Wash.), 104 Pac. 185; *Wisotzky* v. *Niagara Ins. Co.*, 189 N. Y. 532, 82 N. E. 1134. Contra: *Crook* v. *N. Y. Life Ins. Co.*, 112 Md. 268; *McElroy* v. *Metropolitan Life*, 84 Neb. 866, 122 N. W. 27; *Athens Mutual Ins. Co.* v. *Evans*, 132 Ga. 703, 64 S. E. 993; *Sullivan* v. *Mercantile Mut. Co.*, 20 Okl. 460, 94 Pac. 676; *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178; *Kyte* v. *Corn. Ass'n. Co.*, 144 Mass. 43, 10 N. E. 518; *Parker* v. *Rochester Ger. Ins. Co.*, 16 Mass. 410, 39 N. E. 179.

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE FOR ALIENATION OF HUSBAND'S AFFECTIONS.—Plaintiff and defendant were married women living apart from their husbands, undivorced. Plaintiff sued defendant for alienation of her husband's affections, predicating her right to sue upon two different statutes, one permitting a married woman living apart from her husband to sue and be sued alone in tort actions, the other allowing a married woman to prosecute and defend suits for the preservation or protection of her property as if unmarried. Demurrer. (1) No remedy at common law or by statute. (2) Non-joinder of husbands. *Held*, (1) that at common law a married woman had a *right of action* for this tort, but that inability to sue without joinder of her husband (who was not permitted thus to profit by his own wrong) barred her remedy; and that under either statute plaintiff could recover; (2) that the husbands need not be joined. *Eliason* v. *Draper* (1910), — Del. —, 77 Atl. 572.

Only three jurisdictions now hold that the wife has no remedy for this wrong. *Doe* v. *Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; *Lonstorf* v. *Lonstorf*, 118 Wis. 159, 95 N. W. 961; *Lellis* v. *Lambert*, 24 Ont. App. 653. New Jersey recently repudiated the doctrine. *Sims* v. *Sims* (1910), — N. J. L. —, 76 Atl. 1063. And in Wisconsin it has been held that if two or more effect the alienation the wife may recover substantially the same damages from them in a common law action for conspiracy. *Randall* v. *Lonstorf*, 126 Wis. 147; *White* v. *White*, 132 Wis. 121. Most courts now hold that the *right* existed at common law, (though there seems to have been no direct holding to that effect in the common law courts. *Lynch* v. *Knight*, 9 H. L. Cas. 577) and that the wife now may sue, either by virtue of judicial decision, *Foot* v. *Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258, or under a statute giving a married woman remedy for torts against her, *Sims* v. *Sims*, supra; or to preserve her property rights, *Bennett* v. *Bennett*, 116 N. Y. 584, 58 N. E. 249, 52 L. R. A. 630, and cases cited; or removing her disabilities more generally, *Nolin* v. *Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643 and note; *Keen* v. *Keen*, 49 Ore. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504. And the right to maintain the action has been sustained under such a statute, though the sum recovered might become community property. *Humphrey* v. *Pope*, 122 Cal. 253, 54

Pac. 847. Apparently it is only a matter of time before the right of the wife to recover for the enticing away of her husband will be acknowledged as universally as his right under like facts now is.

JUDGMENTS ON THE MERITS, WHAT CONSTITUTES—FORM—NONSUIT.—At the trial of a cause the plaintiff introduced his evidence and rested, whereupon the defendant made a motion, challenging the legal sufficiency of the evidence and requiring the court to discharge the jury and decide as a matter of law what verdict should be found. The court granted the motion and "adjudged that plaintiff take nothing herein and defendants recover their costs, etc." A Statute of Washington permitted the court to discharge the jury in such cases. *Held,* two judges dissenting, this was a judgment on the merits. *McKim* v. *Porter et al.* (1910), — Wash. —, 110 Pac. 1073.

The two dissenting judges considered this a judgment of nonsuit and no bar. The distinction between a judgment on the merits and a nonsuit is well defined, and the difference in their effect the one as res adjudicata and the other as no bar, it is too well settled to require citation of authority. "Merits" is not employed here in the moral sense. *Tracey et al.* v. *Shumate et al.*, 22 W. Va. 474. A judgment on the merits is based on the real and substantial rights and issues. FREEMAN, JUDG., § 360; *Buck* v. *Collins*, 69 Me. 445; and it is not on the merits when the suit is dismissed for want of jurisdiction, defect of pleadings, or parties, or a misconception of his cause of action, or suit prematurely brought. *Hughes* v. *United States*, 4 Wall. 232. The court in the principal case distinguishes "*legal* sufficiency of the evidence," as provided by the statute under which the motion was made, from *probative* sufficiency of the evidence, and holds that under the former the judgment is on the merits, while if it is the probative sufficiency that is attacked, the judgment is a non-suit. The evidence affirmatively showed defendant entitled to judgment, therefore a verdict based thereon was on the merits. *Morgan* v. *Chi., M. & St. P. R. R. Co.*, 83 Wis. 348; *McGuire* v. *Bryant L. & S. Mill Co.*, 53 Wash. 425. If, from the words used it can be determined what the judgment was, the use of informal or inartificial language will not render a judgment on the merits bad, *Minkhart* v. *Hankler*, 19 Ill. 47; *Buckfield* v. *Gorham*, 6 Mass. 445.

LANDLORD AND TENANT—COLLAPSE OF BUILDING—LIABILITY OF TENANT.—Defendant, tenant of a building, used the same as a slate mantel factory. Building had been condemned, before defendant's occupation, and repaired by the owner. The structure collapsed, killing plaintiff's husband, who had been in the employ of defendant. Suit is brought against the tenant for overloading the floors. *Held,* the tenant may show that the owner of the building was negligent in constructing and repairing the walls and that the owner had notice of the unsafe condition of the building. *Thorp* v. *Boudwin* (1910), — Pa. —, 77 Atl. 421.

Similar to the principal case was *McKenna* v. *Nixon Paper Co.*, 176 Pa. 306, 35 Atl. 131. Here a building used by defendants as a paper warehouse collapsed. It was held that the mere fact of collapse is not proof that defendant overloaded the building, lessee having no notice of the defect;

tenant cannot be charged with negligence by reason of a defect in the building. In the principal case, however, the tenant did have notice of the defect, and must have known that placing heavy slabs of slate on the upper floors would possibly overload the building. Under such circumstances, he might well have been considered negligent in failing to make such repairs himself. Even though the landlord may be liable for the unsafe condition of the building, the tenant should not thereby be absolved from his responsibility to third persons, for a neglect to make such repairs as are incumbent on him. TAYLOR, LANDLORD & TENANT, Ed. 9, § 193; *Ryan* v. *Fowler*, 24 N. Y. 410; *Whalen* v. *Gloucester*, 6 Thomp. & C. 135; *Davenport* v. *Ruckman*, 37 N. Y. 568. Undoubtedly, whether the tenant was negligent and liable or not, the landlord could be shown guilty of negligence. Usually the landlord's liabilities are suspended as soon as the tenant commences his occupation. *Brown* v. *White*, 202 Pa. 297; *Rider* v. *Clark*, 132 Cal. 382. But if the injuries are the result of faulty construction or repair of the premises, the landlord is still liable, notwithstanding the lease. *Samuelson* v. *Cleveland Iron Mining Co.*, 49 Mich. 164. So the plaintiff in the principal case rightfully instituted suits against both landlord and tenant. While judgment might be recovered in each suit, the plaintiff could claim only one satisfaction. *Seither* v. *Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905.

MASTER AND SERVANT—ACTS CONSTITUTING.—The two defendants, a railway company and a brewing company, agreed that for a fixed rental the railway company would rent a locomotive to the brewing company for the exclusive use of the latter in its yard, the ties and rails in said yard being owned by the railway company. The engineer and fireman were selected by the railway company, but paid by the brewing company. There was a failure to ring the bell as was the custom, and the plaintiff, an employee of the brewing company, was injured. *Held*, that the railway and brewing companies were engaged in a joint enterprise and were jointly liable. *Shoen* v. *Chicago, St. P., M. & O. Ry. Co. et al.* (1910), — Minn. —, 127 N. W. 433.

Not a single case is cited, in the opinion, in support of the above decision. *Donovan* v. *Laing* [1893], 1 Q. B. 629, holds that defendants are not liable for the negligence of their employee, in charge of a crane, loaned to a third party. *Rourke* v. *Colliery Co.*, 2 C. P. D. 205; *Powell* v. *Construction Co.*, 88 Tenn. 692; and *Miller* v. *Minn. etc. R. R. Co.*, 76 Iowa 655, support the same view as the English case. *New Orleans etc. R. R. Co.* v. *Norwood*, 62 Miss. 565 and *Coggin* v. *Cent. R. R.*, 62 Ga. 685, taking a contrary view, both cite the so-called Carriage Cases (cases involving the status of a driver sent out by a liveryman with a carriage.) The carriage cases were carefully distinguished from a case like the principal one in the *Donovan* case and in *Little* v *Hackett*, 116 U. S. 366. But passing the Construction Cases and coming to those more nearly on all fours with the principal case we come to *Byrne* v. *Kansas City, Ft. S. & M. R. Co., et al.*, 61 Fed. 605, in which TAFT, J., holds that a railroad company is not responsible for negligence in the operation of an engine, when, at the time of the accident, the engine and

the crew were rented to and under the control of another company. In this case the crew was not only selected, but paid by the railway company. *Sexton* v. *N. Y. C. & H. R. R. Co.*, 114 App. Div. 678 and *McInerney* v. *Canal Co.*, 151 N. Y. 411 on practically the same facts as the principal case were decided differently. In 37 L. R. A. 33 is an instructive note on the test of the relation of master and servant. It would seem that to decide these cases on any such broad ground as that of the principal case, viz., of a joint enterprise, is not in accord with the weight of authority. He being master, who has the control, the decision of the principal case might be followed by some courts on the narrower ground that the railway company had control of the giving of the signals. But in answer to this latter point, it is submitted that the brewing company had the power of control, for had the ringing of the bell, in its yard, for any reason, been obnoxious to it, it would have had the power to stop it.

MERGER—COVENANTS OF GRANTEE IN DEED POLL MERGE IN A BOND.—A father deeded lands to his sons, charging it in favor of each of his daughters, with the provision that if any daughter should die without issue, the installments not then due should be discharged. The sons did not sign the deed. Desiring to free the land from the charge they gave each sister a bond for the amount due and to become due under the deed, and the sisters released their lien. One sister died before all the installments of the charge had become due, and before the bond had been paid. Her administrator sued on the bond and the defendants claimed that there was a failure of consideration as to so much of the bond as represented the installments not due at the time of her death. *Held*, that as the deed was not signed by the sons their obligation to pay the charge was a simple contract, and was merged in the bond upon which they are liable. *Barnes* v. *Crockett's Adm'r.* (1910), — Va. —, 68 S. E. 983.

This case presents the application of an old and disputed rule to a new and peculiar set of facts. Had the court in the principal case adopted the view that a grantee who has not signed the deed is nevertheless liable as upon a covenant there would have been no merger, and the defense offered would have been proper. There is no question but that the grantees are liable upon conveyances which they have not signed, but under which they have entered. *Maule* v. *Weaver*, 7 Pa. St. 329; but the courts are divided upon whether the grantee is liable in covenant or in assumpsit. The better authority, however, is that they are liable in simple contract. *Locke* v. *Homer*, 131 Mass. 93; 41 Am. Rep. 199; *Willard* v. *Wood*, 135 U. S. 309; *Johnsons* v. *Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Maule* v. *Weaver*, 7 Pa. St. 329; PLATT, Cov. 18. Contra: *Finley* v. *Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Earle* v. *Mayor*, 38 N. J. L. 47; *Ga. So. Ry. Co.* v. *Reeves*, 64 Ga. 492; *Bowen* v. *Beck*, 94 N. Y. 86, 46 Am. Rep. 124. This question becomes important often times in determining when the statute of limitations has run. In *Midland Ry. Co.* v. *Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 8 L. R. A. 604; *Hickey* v. *Railway Co.*, 51 Ohio St. 40, 36 N. E. 672, 23 L. R. A. 396; *Sexauer* v. *Wilson*, 136 Iowa 357, 14 L. R. A. (N. S.) 185, and *Poage* v. *Rail-*

*road Co.*, 24 Mo. App. 199, it was held that the statute in regard to covenants is binding, while *Foster* v. *Atwater*, 42 Conn. 244; *Fowler* v. *Smith*, 2 Cal. 39, and *Trustees* v. *Spencer*, 7 Ohio 149, hold that the statute as regards simple contracts was controlling. The question cannot arise in those states where all distinction between sealed and unsealed instruments has been abolished by statute, except in case of corporate seals. *Dyer* v. *Gill*, 32 Ark. 410; *Ortman* v. *Dixon*, 13 Cal. 34; *Edwards* v. *Dillon*, 147 Ill. 14, 35 N. E. 135. Further see 6 MICH. L. REV. 418.

MUNICIPAL CORPORATIONS—DEFECT IN STREET—INJURIES—QUESTION FOR JURY.—Plaintiff alleged injuries sustained by reason of being thrown from his bicycle while riding on a street of the defendant city, which street he alleged was in an unsafe condition for travel because of an excavation which was negligently permitted to be and remain therein. The following instruction was given. "You are instructed that a person riding a bicycle upon a street of Salt Lake City, being at a greater disadvantage with respect to obstructions,, than a traveller by team or machine, should use a degree of care equal to the risk, to-wit, ordinary care as defined in these instructions, and as a matter of ordinary care and prudence should observe the path or way being travelled, with a view to detect and avoid, if possible, any obstructions that would make it unsafe for a bicycle rider." *Held*, prejudicial to plaintiff's rights and erroneous. *Bills* v. *Salt Lake City* (1910), — Utah —, 109 Pac. 745.

The law in this country in regard to the care necessary to be exercised by a traveller on a public street is set forth in the case of *Pettengill* v. *City of Yonkers*, 116 N. Y. 558, 22 N. E. 1096, where it is stated: A person using a public street has no reason to apprehend danger, and is not required to be vigilant to discover dangerous obstructions, but he may walk or drive in the daytime or night time, relying upon the assumption that the corporation whose duty it is to keep the streets in a safe condition for travel has performed that duty, and that he is exposed to no danger from its neglect. As authority for this rule see also *Osborne* v. *City of Detriot*, (C. C.) 32 Fed. 36; *City of Chicago* v. *McLean*, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; *Anderson* v. *City of Wilmington*, 2 Pennewill 28, 43 Atl. 841; *City of Nokomis* v. *Salter*, 61 Ill. App. 150; *Sherman* v. *Village of Oneonta*, 66 Hun 629, 21 N. Y. Supp. 137. It is possible that the District Court Judge in giving the instruction here criticized may have been influenced by the general tenor of those cases holding that a municipality is not liable for damages arising from injuries to bicycle riders or to persons driving automobiles where the injuries resulted from defects in the highway not ordinarily dangerous to persons travelling by foot or by team, carriage or vehicle ejusdem generis. *Richardson* v. *Inhabitants of Danvers*, 176 Mass. 413, 57 N. E. Rep. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320; *Baker* v. *Fall River*, 187 Mass. 53, 72 N. E. 336. See also 6 MICH. L. REV. 568, for a collection of cases and discussion of this subject. While the law at the present time in regard to damages suffered through accidents to bicyclists and those driving automobiles occasioned by reason of imperfections in highways and streets, is un-

doubtedly that a recovery can only be had when the imperfection is of such a nature as to make the highway unsafe for travel by the ordinary modes of conveyance, yet it is an unwarrantable inference for a court to deduce from this rule and incorporate the deduction thus arrived at in a charge to the jury that bicyclists are therefore required to exercise a greater degree of care in detecting and avoiding obstructions in a public road or highway than persons traveliing by means of other conveyances. This function rests purely in the province of the jury.

MUNICIPAL CORPORATIONS—TAXES—LICENSE TAXES—PARTIAL INVALIDITY OF ORDINANCE.—Acting under the authorization of Sec. 1, Art. 5, c. 24, Hurd's Rev. Statutes 1909, the city council of Chicago passed an ordinance which classified theaters into five classes and fixed an annual license fee for each, based on the price of admission, exclusive of that charged for box seats. The plaintiffs as owners and operators of various theaters in the city of Chicago, filed their bill praying for an injunction against the enforcement of the above ordinance. A demurrer by the defendant being overruled it elected to stand thereon, and a decree was entered perpetually enjoining the enforcement of § 104 of the ordinance in question. On appeal by the city, *Held,* that the ordinance was valid as imposing a tax for revenue, even if unreasonable as imposing a tax for regulation. *Metropolis Theater Co. et al.* v. *City of Chicago* (1910), — Ill. —, 92 N. E. 597.

The question before the court was as to the validity of that section which classified the theaters on a basis of the admission charged. Since the statute under the authorization of which the ordinance was passed gives the city in clear and explicit terms the power to "license, tax, regulate, suppress and prohibit—theatricals and other exhibitions," it follows that the city has all the power so to do that the legislature would have, which body is subject only to the limitations found in the State Constitution. The State Constitution is moreover supreme in its sphere. The only limitation found in the Illinois Constitution upon the power of the legislature to tax occupations is that the tax shall be "uniform as to the class upon which it operates." An occupation tax in the purview of the United States Supreme Court is not a direct tax but is in the nature of an excise or duty, and if levied uniformly fulfills the requirements of the National Constitution. (Justice FIELD in the *License Tax Cases*). The question arises therefore as to whether a taxing power thus validly given carries with it the power to classify the objects of the tax without destroying uniformity of assessment. This question is an old one and has been decided repeatedly in the affirmative. *Knowlton* v. *Moore,* 178 U. S. 41; *Douglas* v. *People,* 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162; *Ould and Carrington* v. *City of Richmond,* 23 Grat. 464. It is agreed that the classification must not be made arbitrarily, but necessarily there must be great freedom of discretion even though it result in ill-advised, unequal, and oppressive legislation, *Heath* v. *Worst,* 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236. Exact justice and equality are not attainable, however, and consequently not required; COOLEY, CONT. LIM., Ed. 7, p. 738, *Slaughter* v. *Commonwealth,* 13 Grat.

767; *Eyre* v. *Jacob*, 14 Grat. 422, 434, 435; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. The court denies that the tax could be supported as a license tax imposed solely for regulation. There is some authority for a contrary view: *City of Philadelphia* v. *W. U. Tel. Co.*, 89 Fed. 454, but see *Postal Telegraph Co.* v. *Taylor*, 192 U. S. 64; *Red C. Oil Mfg. Co.* v. *Board of Agriculture*, 172 Fed. 695. The court lays down the principle that a regulatory license to be valid must bear a reasonable relation to the additional burdens imposed by the business or occupation licensed. This is the better rule in this country today. The chief ground on which the court rests its decision, namely: that the license may be upheld as a revenue measure, is unquestionably sound: *Wiggins Ferry Co.* v. *City of East St. Louis*, 102 Ill. 560; *Howland* v *City of Chicago*, 108 Ill. 496; *People* v. *Steele*, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321, and thus even though partially invalid the ordinance may be upheld: *Webber* v. *City of Chicago*, 50 Ill. App. 110; *Foster* v. *City of Alton*, 173 Ill. 587, 51 N. E. 76; *Ives* v. *Chicago, B. & Q. R. R. Co.*, 105 Ill. App. 37.

NEGLIGENCE—INJURY TO CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT.—An infant four years old left home in company with his sister, his parents not knowing where he was going. While running across a street alone, he was struck by an approaching car and killed. In an action for damages for the alleged wrongful death, brought by the father as administrator of the infant's personal estate, *held*, that if plaintiff was guilty of contributory negligence, such negligence might be imputed to the infant. *Feldman* v. *Detroit United Ry.* (1910), — Mich. —, 127 N. W. 687.

This action was brought under sections 10427 and 10428 Comp. Laws, which provide that "the amount recovered in every such action shall be distributed as provided by law for the distribution of the personal estate of persons dying intestate" and "the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages when recovered." The father, as distributee of the infant's estate, was therefore the real beneficiary, and in such a case, by the weight of authority, his contributory negligence should bar the action. *Davis, Admr.* v. *Seaboard Air Line Ry.*, 136 N. C. 115, 48 S. E. 591; *Atch. etc. Ry. Co.* v. *Calhoun*, 18 Okla. 75, 89 Pac. 207; *Ploof* v. *Burlington Traction Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108. The courts of a few states, however, refuse to allow the indirect benefit to the negligent parent to defeat the action. *Miles* v. *St. Louis, I. M. & S. Ry. Co.* (1909), (Ark.), 119 S. W. 837; *Warren* v. *Manchester St. Ry.* (1900), 70 N. H. 352, 47 Atl. 735; *Wymore* v. *Mahaska Co.*, 78 Iowa 396, 16 Am. St. Rep. 449; *N. & W. R. R. Co.* v. *Groseclose's Adm'r.*, 88 Va. 267, 13 S. E. 454. Where an action for damages for injuries is brought by the infant in his own right, the courts of a majority of the States have repudiated the doctrine of *Hartfield* v. *Roper*, 21 Wend. 615, 35 Am. Dec. 273, and refuse to impute the negligence of a parent to the infant. *Berry* v. *St. Louis, M. & S. E. R. Co.* (1908), 214 Mo. 593, 114 S. W. 27. See 3 MICH. L. REV., p. 166; 4 Id., p. 79.

PARTNERSHIP—ACTION—SERVICE OF PROCESS ON ONE PARTNER.—In an action of trespass against a partnership service was had on one partner only. Judgment for want of appearance was entered by the trial court. *Held*, that said judgment was binding on the firm assets. *Walsh* v. *Kirby* (1910), — Pa. St. —, 77 Atl. 452.

The weight of authority is that at *law*, in the absence of a statute, service on each partner is a prerequisite to judgment against the firm *Rice* v. *Doniphan*, 4 B. Mon. 123; *Faver* v. *Briggs*, 18 Ala. 478; *Demoss* v. *Brewster*, 4 Sm. and M. 661; *Peoples Nat. Bank* v. *Hall*, 76 Vt. 280; *Adam* v. *Townend*, 14 Q. B. D. 103; *Feder* v. *Epstein*, 69 Cal. 457; see also 30 CYC. 569. It must be borne in mind that there are now statutes in many states allowing such a judgment as in the principal case. But the Pennsylvania court did not place the decision on a statute. In that state by a long line of decisions one partner has implied authority to confess judgment against the firm. (See *Boyd* v. *Thompson*, 153 Pa. St. 78). The court reasons that if a judgment confessed by a partner is binding, then the partnership should be bound in an adverse proceeding when service is had on that partner. This result seems sound when it is granted that one partner has implied authority to confess judgment against the firm. But this authority is peculiar to Pennsylvania and not in accord with the weight of authority; MECHEM, ELEMENTS OF PARTNERSHIP, § 179 and cases cited; CLEMENT BATES LAW OF PARTNERSHIP, § 377 and cases cited; *Hall* v. *Lanning*, 91 U. S. 160; *Davenport Mills Co.* v. *Chambers*, 146 Ind. 156; *Burr* v. *Mathers*, 51 Mo. App. 470; *Remington* v. *Cummings*, 5 Wis. 138. Hence it would seem that in the absence of a statute, the decision upon facts like those in the principal case would be different, or at least would be placed on some other ground, in that class of states ( and that class includes nearly all of those that have passed on the question) which deny the implied authority of one partner to confess judgment against the firm.

PLEADING—TEST OF CAUSE OF ACTION—INJURIES TO PERSON AND TO PROPERTY.—Plaintiff Ochs while riding in his wagon was run down by a trolley car of defendant company. He was injured in his person, his horse was injured and his wagon damaged. He recovered judgment in a former suit for $200.75 for injuries to his horse and wagon. In present suit for injuries to his person, *held*, that judgment in the first suit is a complete bar to judgment in the second. *Ochs* v. *Public Service Ry. Co.* (1910), — N. J. —, 77 Atl. 533.

The courts have divided on the question whether when a single tortious act of defendant injures both the property and person of plaintiff, the latter has one or two causes of action, which he may bring separately. *King* v. *Chi. etc. R. Co.*, 80 Minn. 83, 82 N. W. 1113, well represents the view of the majority, applying the test that the negligence act determines the cause of action, the injuries to person and property being regarded only as separate items of damage resulting therefrom. The decision in the principal case places New Jersey in the list of states adopting the Minnesota rule. New York in *Reilly* v. *Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772,

has taken the English view established in *Brunsden* v. *Humphrey*, 14 Q. B. D. 141, holding that the right of person and the right of property are distinct and inherently different primary rights and that causes of action arise when these rights are violated and damage results whether the violation is caused by one or more tortious acts. The Minnesota test followed in *Ochs* v. *Ry. Co.* (supra) was adopted in that court as a rule of economy and expediency in bringing litigation to an end. The English and New York views have recognized that the rights of person and property are quite different in character as shown by the statutes of limitation affecting them and the statutes providing what causes of action shall survive and have not allowed a rule of economy to control.

RAILROADS—VIOLATION OF SPEED ORDINANCE—"LAST CLEAR CHANCE DOCTRINE."—The husband of the plaintiff was killed while employed as a freight conductor on D's railway. The decedent was run over by a fast passenger train which was exceeding the lawful speed limit, while he was standing on the main line of D's road, checking off the cars of his train lying on an adjoining side-track in the yards. The deceased knew the train was due but did not hear it or its signals because of the surrounding yard noise, and of his application in checking his train. The engineer of the passenger realized the state of affairs and tried to stop the train but was unable to do what could have been done if the speed had been legal. *Held*, that the deceased was negligent in going on the main line with a fast train expected, and with so much noise existing from the presence of many switch engines, but that his negligence was only a prior condition while D. had the "last clear chance" to avoid the accident, the proximate cause of which was the violation of the speed ordinance. *Neary* v. *Northern Pac. Ry. Co.* (1910), — Mont. —, 110 Pac. 226.

The weight of authority is to the effect that a violation of the speed rate regulated by statute or ordinance is negligence per se. *Chi. etc. Ry. Co.* v. *Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318; *Schmidt* v. *Mo. Pac. Ry. Co.*, 191 Mo. 215, 3 L. R. A. (N. S.) 196; *Brown* v. *Chi. etc. R. Co.*, 109 Wis. 384; *Ga. Cent. R. Co.* v. *Tribble*, 112 Ga. 863. In the principal case this was stated to be the law of Montana. However in some jurisdictions un unlawful rate of speed is merely evidence of negligence. *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408; *L. S. etc. R. Co.* v. *Johnston*, 25 O. Cir. Ct. 41. The application of the "last clear chance doctrine" is not an abrogation of the contributory negligence rule, but merely affords a means of holding the defendant liable if his negligence is the proximate cause of the injury while that of the plaintiff is only a remote cause. *Richmond* v. *S. V. R. Co.*, 18 Cal. 351; *Button* v. *Hudson R. R. Co.*, 18 N. Y. 248; *Nashua, I. & S. Co.* v. *W. & N. R. Co.*, 62 N. H. 159; *Smith* v. *N. & S. R. Co.*, 114 N. C. 728. The court in the principal case points out very clearly that the negligence of the deceased was antecedent in its nature and not continuous and concurrent with that of the defendant and shows that the presence of the decedent on the main track with knowledge of a fast train about due, and of the difficulty of hearing it because of the surrounding noise was only a prior condition of affairs re-

motely connected with the accident, the proximate cause of which was the inability of the engineer to stop because of the violation of the speed ordinance.

TRUSTS—PAROL TRUSTS IN REAL ESTATE—STATUTE OF FRAUDS.—All the members of a family including the plaintiffs and defendant, intended that title to a burial lot should be taken in the name of the father, but by mistake the deed was taken in the name of the defendant. The father died without knowledge of the mistake. After his death the defendant orally agreed to hold the lot for the benefit of the plaintiffs. Later defendant claimed an absolute and unconditional title and plaintiffs thereupon brought suit to establish a trust in the lot. *Held*, under Rev. Laws, c. 147, § 1, providing that no trust in land shall be created, unless by an instrument in writing, equity could not enforce the trust against the defendant. *Tourtillotte et al.* v. *Tourtillotte et al.* (1910), — Mass. —, 91 N. E. 909.

In most of the states the English statute of frauds, providing that all declarations or creations of trusts in lands, except those implied by law, shall be manifested and proved by some writing signed by the party declaring the trust, has been re-enacted in its original or in a slightly modified form. 28 AM. & ENG. ENCY. LAW, Ed. 2, 874. Under such a statute an oral promise by a grantee to hold the land in trust is unenforcible. *Pollard* v. *McKenney*, 69 Neb. 742; 101 N. W. 9; *Thompson* v. *Marley*, 102 Mich. 476, 60 N. W. 976; *Heddleston* v. *Stoner*, 128 Ia. 525, 105 N. W. 56; *Thomas Adm'r.* v. *Merry*, 113 Ind. 83, 15 N. E. 244. If, however, a person, through mistake, obtains the legal title and apparent ownership to property which in justice and good conscience belongs to another, such property is impressed with a trust in favor of the equitable owner. *Cole* v. *Fickett*, 95 Me. 265, 49 Atl. 1060; *Lamb* v. *Schiefner*, 129 App. Div. 684; 114 N. Y. Supp. 34; *Andrews* v. *Andrews*, 12 Ind. 348; *Harris* v. *Stone*, 8 Ia. 322. *Smith* v. *Walser*, 49 Mo. 250. Furthermore equity will raise a constructive trust to defeat fraud. *Rollins* v. *Mitchell*, 52 Minn. 41, 53 N. W. 1020; *Ryan* v. *Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Moore* v. *Crawford*, 130 U. S. 122. The principal case does not seem to be in accord with the weight of authority, unless the court was confined to the question whether or not the oral declarations, apart from the other circumstances in the case, were sufficient to create an enforcible trust.

WILLS—NATURE OF ESTATE—RULE IN SHELLEY'S CASE—"ISSUE."—A devise was made in the following language: "I give and devise unto my son Jacob E. Kemp the use and income for and during his lifetime of * * * (describing certain real property) and immediately after the decease of said Jacob E. Kemp, I give and devise * * * the land devised to him herein for life, to his issue in fee." Then followed a devise over in case of his death without issue. The rule in *Shelley's* case was in force. *Held*, the rule in *Shelley's* case does not apply here, since it was the intention of the testatrix to limit the estate of the first taker to one for life, and his issue do not take as heirs but are intended themselves to become the root of a new succes-

sion, taking as purchasers from the testatrix. *Kemp* v. *Reinhard et al.* (1910), — Pa. —, 77 Atl. 436.

The case of *Guthrie's Appeal,* 37 Pa. 9, is the only case cited by the court in support of its holding. There the words of the will were "I give and bequeath to my daughter * * * the use and life estate in her own proper person (but without power to convey the same to any other person for any period of term) * * * and at the decease of my said daughter Elizabeth, the said lot or tract of land and appurtenances I hereby bequeath to such of her children or their heirs as may survive her etc." The court there held the word children a word of purchase, and proceeded to discuss other such words. They say: "The word "issue" is of doubtful meaning, though usually a word of limitation in a will but requiring only a clear explanation to justify a departure from the ordinary meaning, imposing on those who would translate the term the onus of producing an express warrant under the hand of the author of the gift." In *McKee* v. *McKinley,* 9 Casey (Pa.) 92, it was said that "If the remainder is to persons standing in the relation of heirs, general or special, of the tenant for life, the law presumes them to take as heirs, unless it unequivocally appears that individuals, other than persons who are to take simply as heirs are intended." STRONG, J. in the *Guthrie* case (supra) says such a presumption is made only when technical words of limitation are applied to the remaindermen, when the gift is to "heirs" or "issue." The presumption would according to this case arise in the principal case. The court must therefore have found in the words of the will an unequivocal intent that the issue of the devisee were to become the root of a new succession and were not intended by the testator to take as heirs. This seems to be an example of the extremities to which courts professing to be governed by the Rule in *Shelley's* case will go in order to avoid applying the rule. A few of the cases construing the word "issue" are *McIlhinney* v. *McIlhinney* (1893), 137 Ind. 411; *Gonzales* v. *Barton* (1873), 45 Ind. 295; *King* v. *Melling* (1673), 2 Lev. 58; Denn, ex Dem. *Webb* v. *Puckey* (1793), 5 T. R. 299; *Frank* v. *Storin* (1803), 3 East 548.

WILLS—PROBATE—UNDUE INFLUENCE—BURDEN OF PROOF.—A will left almost the entire estate of testatrix to her brother, his wife and daughters, with a bequest of ten dollars to an only son for whom testatrix had often expressed an intention of providing. The brother had been the business advisor of testatrix, she had lived in his home and he and his family had not for some time prior to her death permitted her to be alone with her son. It was shown that the will, which made the brother executor, was procured by him and drawn under his direction; that testatrix was ill and feeble at the time the will was witnessed and did not speak of the will in the presence of the witnesses. Nor was it shown in proof that the will was ever explained to her—she could neither read nor write—or that she fully understood its contents. *Held,* when a will is executed through the intervention of one occupying a confidential relation toward testatrix whereby such person is the executor and a large beneficiary, the law casts upon him the burden of removing the suspicion thereby created that the will was not the free

and voluntary act of the testatrix. *In re Everett's Will* (1916), — N. C. —, 68 S. E. 924.

The court cites as authority for the holding *Watterson* v. *Watterson*, 1 Head (Tenn.) 1, *Maxwell* v. *Hill*, 89 Tenn. 584, *Coghill* v. *Kennedy*, 119 Ala. 641. Within two months of the above decision, a similar case arose in an adjoining state—testator left his entire estate to his attorney; the will was drawn by the donee's law partner, in their offices, witnessed by their clerks and stenographer, signed by a mark, with no explanation why this was done though testator could write and the donee was made executor. The date of the will bore signs of having been changed and the will revoked another made a few days previous. None of the witnesses could fix the date of its execution. *Held*, upon proof of formal execution of a will, a prima facie case is made out; and with some exceptions, the general rule is that the burden of proof is then on the contestants to prove undue influence, and remains upon them to the end. *Mordecai* v. *Canty* (1910), —S. C. —, 68 S. E. 1049.

The court cites *Black* v. *Ellis*, 3 Hill L. 73; *Scarborough* v. *Baskin*, 65 S. C. 568; *Thames* v. *Rouse*, 82 S. C. 40. Mr. Schouler, in SCHOULER, WILLS, Ed. 2, § 240, states the principle on which these cases may be reconciled: "Indeed, there appears at times a conflict in the cases, concerning this burden of proof, so that evidence which in one instance may be thought plainly inadequate for shifting the burden upon the propounder of the will, puts him in another to repelling the unfavorable imputation which mere circumstances afford. This discrepancy is best met, first by conceding freely that all maxims for balancing the proof of fraud, force or undue influence, must be sensitive and variable; and next, by pointing out that the burden of impeaching a will on such grounds rests far more positively upon a contestant where the fraud, force or undue influence in question is made a distinct issue, there being no doubt that the testator was rational, intelligent and capable, than in those cases, far more common, where issues of insanity or incapacity are closely blended with these darker ones, and the proof tends to setting the will aside on either ground." HOAR, J., in *Baldwin* v. *Parker*, 99 Mass. 79, accurately expresses the same principle. In *Thames* v. *Rouse*, supra, the court was evenly divided as to which party should bear the burden of proof. In the *Everett* case the proof was such as to raise a doubt in the mind of the court as to the capacity of the testatrix to make a will; but in *Mordecai* v. *Canty*, the question was not raised. The general rule is contrary to the holding of the North Carolina court even though a question of capacity is raised with one of undue influence. *Greenwood* v. *Kline*, 7 Or. 17; *Estate of Matz*, 136 Cal. 558; *Gustafson* v. *Eger*, 126 Mich. 454; *Cash* v. *Lush*, 142 Mo. 630; *Cutter* v. *Cutter et al.*, 103 Wis. 258.