RECENT CASES.

Telegraph Companies — Negligence — Damage. — The Supreme Court of Iowa in the recent case of *Garrett* v. *Western Union Telegraph Co.*, 49 N. W. Rep. 88, has decided for that State the rights and obligations of telegraph companies. The plaintiff, a cattle dealer, living in Iowa, wired his correspondent in Chicago: "Send me market, Kansas City, to-morrow and next day." Plaintiff had wired from this office on several occasions. There was an agreement that if market remained unchanged the correspondents were not to answer, and plaintiff would buy as per prices of market at last wiring. Defendant neglected to deliver message to correspondent, owing to negligence of its employees, and from the evidence deduced would leave it uncertain whether the message was ever taken from the hook. There was a stipulation in the message to the effect that plaintiff would not hold defendant liable for "errors, delays, or non-delivery of the message happening from any cause, beyond a sum equal to ten times amount paid for sending it." Upon an appeal from the lower court, this court held: That the stipulation in the message did not apply to company's negligence to make an attempt to send the message, as a telegraph company cannot stipulate against its own negligence; and secondly, that the words of the message advised the defendant that the plaintiff was on his way to Kansas City, and desired the state of the Chicago market, and that it was a proper question to submit to the jury as to whether the defendant ought to be charged with knowledge that the plaintiff intended to act upon the result of his message; and thirdly, that the damages were not those stipulated for in the message, but that the jury should have been directed to determine whether the plaintiff acted upon the absence of an answer from his correspondent, and whether loss, if any, was proximate or remote, contrasting case of *Tel. Co.* v. *Hall*, 124 U. S. 444, and that plaintiff was entitled to damages he sustained by acting upon the absence of an answer. As to the question of the duty of plaintiff to ascertain Chicago market from bulletin at Kansas City, this court says it was not a question of law, but of fact for the jury, and consequently not within its province.

Principal and Agent — Rights of Principal — Duties of Agent.—In *Eunean* v. *Rieger et al.*, 16 S. W. Rep. 854 (Mo.), the court sets out at length the strictness to which an agent is held in dealings with his principal. Eunean, who lived in the Indian Territory, owned a house in Kansas City which had been condemned as unsafe. After an inspection of the house, he authorized Rieger, his agent, to sell it and the lot for $4,500.00. Rieger sold the property to Mills, an impecunious acquaintance, agreeing to save him harmless and take the property himself if Mills could not pay for it. Of the transaction with Mills, Rieger fully informed Eunean, who was satisfied therewith. Afterwards Mills conveyed the property to Rieger's brother who in turn conveyed it to Rieger himself. Of this last conveyance Rieger did not tell Eunean till about a month before this suit was brought. The property was worth $12,000.00. The court ordered a re-conveyance to Eunean. In the decision Thomas, J., says: "He [Rieger] was the plaintiff's agent in respect of this property, and it was his duty as such to get as much for it as possible; the law will not permit him to reap an advantage he has acquired by reason of his confidential relation. Nor does it make any difference that plaintiff may have known that defendant was to become the owner of the property in a certain contingency, and that he did in fact become the owner of it. The only question a Court of Equity will ask, in the investigation of transactions between parties sustaining a confidential relation to each other, is whether an advantage has been obtained by virtue of that relation. * * * The fairness or unfairness of the transaction will not be considered in such case. An agent cannot serve two masters. If he undertakes to act for himself and at the same time for his principal, and reaps an advantage by his double dealing, the law will take it from him, unless the principal, knowing all the facts, has allowed the agent to so change his condition that he cannot be put in *statu quo*, and thus make it inequitable to rescind the contract." Citing *Michaud* v. *Girod*, 4 How. 503; Story on Agency, § 210.

Electric Street Railways—Rights of Telephone Companies in Streets.—The Supreme Court of Ohio in a recent case (*Cincinnati Inc. Plane R'y. Co.* v. *City and Sub. Telegraph Ass'n*, 48 Ohio St., 27 N. E. Rep. 890) has considered the question as to the respective rights of electric railroad and telephone companies when operating lines in the same street. The telephone company attempted to enjoin the railroad from employing the ground circuit for the return current of electricity, claiming such use seriously interfered

with the working of their wires in that vicinity. The Supreme Court refused the injunction, holding that no exclusive rights to the use of the ground circuit existed in the association, it being an elementary principle of science discovered forty years prior to the invention of the telephone. Neither was there any vested interest in the association by virtue of prior use and operation in the street. "The primary and dominant purpose for which streets were established was to facilitate travel and transportation; they belong from side to side and end to end to the public, for public use. The telephone poles, wires and appliances are not among the original and primary objects for which streets were opened. As a general rule, an occupation of the streets, otherwise than for purposes of travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes; and the fact that permission is given to occupy the streets for other purposes does not confer a prior and paramount right to occupy them, to the exclusion of their use for travel in a mode different from what obtained when such permission was given. As against the railroad company, the telephone company has no vested interest and exclusive rights in and to the use of the ground circuit in the streets as a part of the telephone system."

An opposite view has been taken in the lower courts of New York in *Hud. Riv. Tel. Co.* v. *Watervliet Turnpike and R. R. Co.*, decided Sept. 10th, and the decision in the Court of Appeals will be awaited with interest.

Contributory Negligence—Proximate Cause—Smithwick v. *Hall & Upson Co.*, 59 *Conn.* 261.—The plaintiff, employed in storing an ice house, was warned to keep away from a certain part of the platform which had no railing and was slippery. Plaintiff disobeyed, and the wall falling, he was knocked to the ground and injured. Upon these facts the defendant contended that the plaintiff was guilty of such contributory negligence as to bar his right to recover more than nominal damages. But as his injury was not the result of the manifest perils, but was caused through the negligence of the defendant, by the falling walls, from which source he had no reason to anticipate the slightest danger, he could be guilty of no negligence with respect to the latter by changing his position contrary to orders, for negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its legal equivalent. The defendant seems to claim, however, that although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall, and as he prob-

ably would not have fallen if he had remained behind the railing, he contributed to his injury by placing himself where there was nothing to prevent his fall. But if the truth of this could be demonstrated it would not change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition. And if the claim means that the plaintiff by his act increased the injury merely, then, if this were true, it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though of course it may affect the amount of damages recovered in a given case.

Imputed Negligence—Voluntary Exposure—Rescue.—In *Pennsylvania Co.* v. *Langendorff*, 48 Ohio St., 28 N. E. Rep. 172, the Supreme Court of Ohio has discussed the question as to how far one may expose his life in attempting to rescue another and yet not be charged with contributory negligence if injured. In that case the defendant was injured in attempting to rescue from in front of an approaching train a child, who had strayed upon the track at a street crossing where the gateman had left his post so that the gates were not lowered. The lower court refused to charge that thus voluntarily risking his life was negligence *per se*, and the refusal is sustained by the Supreme Court. The court hold that the question whether one so acting should be charged with contributory negligence is one of mixed fact and law to be submitted to the jury upon the evidence, with proper directions from the court. "The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light of all the circumstances that compelled him to their commission, and that he would not be charged with contributory negligence, so as to defeat a right of action, because the result showed that the risk he assumed was greater than, in the excitement of the moment, he had contemplated." In

such cases the injury must be attributed to the one that negligently exposed to danger the person who required assistance.

Carriers — Negligence — Act of God.— In *Gleeson* v. *Virginia Midland Ry. Co.*, 11 Sup. Ct. Rep. 859, the U. S. Supreme Court held that a land-slide in a railway cut, caused by a fall of rain not of unusual violence, is not an act of God so as to excuse the company from liability for an accident caused thereby. Lamar, J., who delivered the opinion, says in the course of it: "Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses have been held to be 'acts of God'; but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. * * * If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravitation will cause a heavy train to fall through a defective or rotten bridge, just so surely will those same laws cause land-slides and the consequent dangerous obstructions to the track itself from ill-constructed railway cuts. * * * Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to over-balance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads."

Negligence of Sub-contractor.—An interesting case has recently been decided in Massachusetts (*Bickford* v. *Richards et al.*, 27 N. E. Rep. 1014) in which the distinction between mere non-feasance and mis-feasance on the part of a sub-contractor is clearly shown. B. had made a contract for the removal of some buildings with C., who subsequently sub-let the contract to R. *et al.* The removal was done in such an unworkmanlike and negligent manner that the buildings were greatly injured, and this suit was entered against defendants by B. for the damages. The lower court ordered a verdict for R. there being no privity of contract between them and B., and this decision is now reversed by the Supreme Court. The court says, "The plaintiff's right of action does not depend on the existence of a contract between himself and the

defendants as would be the case were he suing for damages resulting from non-feasance on part of defendants, but on the fact that defendants have negligently and wrongfully done, or caused to be done, something to his property which has injured it. The gist of the action is the breach by defendants of the duty which they owed to the plaintiff not to injure his property by any wrongful or negligent acts of theirs. That duty did not depend on or grow out of contract. The fact that plaintiff may have an action on the contract against C., does not relieve the defendants from liability to the plaintiff for their negligent and wrongful acts."

Riparian Rights — Lands Bounded on Non-Navigable Lakes.— In *Hardin* v. *Jordan*, 140 U. S. 371, the Supreme Court of the United States has decided that by the common law, under a grant of lands bounded on a non-navigable lake, the grantee takes to the centre of the lake. Grants by the United States of its public lands, bounded on waters, are to be construed according to the law of the State where the lands lie; and the rule of the common law still prevails in Illinois, notwithstanding a mere opinion of the court, not necessary to the decision of the case, in *Trustees of Schools* v. *Schroll*, 120 Illinois, 509, that a grant of lands bounded by a lake does not extend to the centre thereof. Three justices dissented, being of the opinion that, even if the common law was as stated, which they doubted, yet the opinion in *Trustees of Schools* v. *Schroll*, *supra*, amounted to a decision of the case, and established the rule in Illinois that the title of the riparian owner stopped at the water line. As to the value of recent English decisions, which declare the common law, the court says, in speaking of *Bristow* v. *Cormican*, 3 App. Cas. 641: "Of course this decision has not the controlling authority which it would have had if it had been made before our revolution. But it is the judicial decision of the highest authority in the British empire, and is entitled to the greatest consideration on a question like this, of pure common law."

Liability of Employer—Proximate Cause—Contributory Negligence.— The plaintiff was fireman on the engine of the defendant company. The air-brake was unsafe. The plaintiff and engineer were aware of its condition and that directed repairs had been neglected. Application of the brake at a danger signal failed to control the speed, where a sound brake would have stopped the train and prevented the injury to the plaintiff. Upon verdict for the plaintiff, the defendant moved for a new trial because the speed and not the

brake was the proximate cause of the injury, and the rate of speed too high for an unsound brake was due to the engineer's negligence; and that the plaintiff was guilty of contributory negligence by remaining at work after he knew of the condition of the brake. Wheeler, J., denied the motion (In *Young* v. *New Jersey Ry. Co.*, 46 Fed. Rep. 160), considering that it could not be assumed as a matter of law that the plaintiff was guilty of negligence in remaining at work after knowledge of a defect whose repair had been directed. Whether he was negligent in fact or not had been established by the decision of the jury; and similarly the question of proximate cause was ordinarily for the jury. Their verdict found that both the speed and brake were proximate causes of the injury, consequently the engineer and defendant company were joint wrong doers, and were jointly and severally liable.

Insolvency—Discharge of Foreign Creditors—Stirn et al. v. *McQuade et al.*, 22 At. R. 451. The defendants, residents of New Hampshire, were adjudged insolvent, and notice of the assignment was sent to the plaintiffs, who resided in New York. The latter, however, took no part in the proceedings, and some time after the settlement brought suit for the amount of their claim. The court says: "It is settled that the insolvent law of one State has no effect in another State against the citizens of the latter holding claims which follow the person of the creditor unless they place themselves under the jurisdiction of the law by voluntarily becoming parties to the insolvency proceedings. The question presented is whether a discharge in insolvency granted by an insolvent court of this State to one of its own citizens is a bar to an action brought by a citizen of another State in the courts of this State. As the insolvency court of this State had no jurisdiction over the plaintiffs as citizens of New York, the discharge granted to the defendants was inoperative as to the plaintiffs, and cannot be pleaded as a discharge of their claim. The plaintiffs' debt not being extinguished, they have an equal right to enforce the payment of it by suit in the courts of this State with other citizens having claims to be enforced."

Telegraph Companies — Failure to Deliver Message — Mental Anguish.—The Supreme Court of Mississippi, in *Western Union Telegraph Co.* v. *Rogers*, 9 South. Rep. 823, has decided that a telegraph company is not liable in damages for the mental anguish inflicted on the receiver of a message announcing the death of a relative, and the time and place of burial, when such message, by

the negligence of the company's agent, is not delivered in time for him to attend the funeral. The court disapproves the doctrine laid down in the So Relle Case, 55 Tex. 308—followed by the courts of Alabama, Indiana, Kentucky, and Tennessee—that, in such cases, damages may be recovered for the mental anguish. Cooper, J. says: "We are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled; but it is equally true that until recent years this action stood as the marked and single exception in which such damages were recoverable in actions for breach of contract."

Evidence—Parol to Vary Writing.—A peculiar case of admissibility of parol testimony to vary the terms of a written instrument arose in the case of *Evans* v. *Duncan*, 48 N. W. Rep. 922, decided by the Supreme Court of Iowa. Defendant executed a warranty deed to plaintiff and this suit was brought upon alleged breaches of the covenants. On the trial defendant undertook to show that in reality the sale was by parol agreement with C., and that C. agreed to pay the encumbrances as part of the purchase price. It was also alleged by defendant that plaintiff's name was inserted as grantee merely to secure him for the purchase price advanced to C., and that he received the deed with knowledge of, and subject to, C.'s agreement to pay the encumbrances. The question then arises, is this testimony admissible as against the deed. The court held that although the case is unlike any to which they have been referred, inasmuch as the parol agreement set up is with one other than the grantee, still, "the deed is absolute and unlimited, both as to the grantee and covenants of warranty," and that whatever his rights are as between him and C., the parol agreement between them is not admissible to contradict the terms in the deed.

Specific performance of Oral Contract for conveyance of land where the deed is deficient in quantity conveyed.—In *McDonald* v. *Youngbluth* (46 Fed. Rep. 836, U. S. Circuit Court, S. D. Ohio.) there had been an oral contract for the conveyance of land. The consideration which had passed consisted in the payment of certain notes upon which the complainants were already liable as indorsers prior to the oral agreement. The deed accepted in confidence without scrutiny was found afterwards to have conveyed a smaller quantity

than it had been agreed upon. The defence was the statute of frauds. Specific performance was decreed, and it was held that where a written instrument fails through fraud to express the real terms of the oral contract the statute of frauds does not prevent a Court of Equity from reformation of the instrument to accord with the oral agreement and a decree of specific performance of the contract as thus reformed; and this power depends not on part performance but on the control of the court over written instruments. *Glass* v. *Hulbert*, 102 Mass. 24, noticed with disapproval as opposed to the weight of authority.

Liability of Counties.— Counties are said in *Smith* v. *Board of Commissioners*, 46 Fed. Rep. 340, not to be liable for torts of their officers, although acting in the line of their authority. Such officials are acting ultimately under the authority of the State, and the liability of counties for their acts is entirely of statutory definition and limitation.