RECENT CASES.

ACCIDENT INSURANCE—ACTION FOR DEATH OF INSURED—CONSTRUCTION OF POLICY—MILLER V. FIDELITY AND CASUALTY CO., 97 Fed. 836.—A policy insured against "bodily injuries sustained through external, violent and accidental means," but not against "injuries fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled * * * or any disease or bodily infirmity." Insured took some hard pointed and resistant substances of food, and by reason of his weakened condition they killed him. *Held*, that insured died from bodily injuries, and that consequently his representatives could recover.

The present case is one that requires the application of the doctrine of proximate and remote cause. The court has shown very acute reasoning in applying it. The proximate cause of the internal injury is the result of external means. It does not appear so because there is no external violence. This is the feature of the case that makes it peculiar. Whether the violence is external or internal is not the question. It is, rather, where did the means by which the injury resulted originate? Following out this line of reasoning, it is difficult to see any distinction between a case like the present and one where poison has been substituted for the hard substances. But the distinction will be plainer if we give more prominence to the fact that "bodily injury" resulted; actual, physical injury, a rupturing of the bodily tissues.

ASSIGNMENTS—FUNDS IN HANDS OF ANOTHER—PARTIES—DANVERS V. LUGAR, 61 N. Y. Sup. 778 (App. Term).—A assigned a certain fund to B. B assigned *part* of this fund to C. *Held*, that C might bring an action at law to recover the amount assigned without joining his assignor, B.

A set up as a defence to C's action the fact that the assignment to C was an assignment of a *part only* of an indivisable claim, and that C could recover only in an action in equity in which the assignor, B, should be joined. This defence was not sustained. The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well settled rule in this State. *Risley* v. *Phenix Bank*, 83 N. Y. 329, and cases cited. But this is not the universal rule. In *Mandeville* v. *Welch*, 5 Wheat. 288, a common law action, it was said that a part only of a chose in action could not be assigned for the reason that a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor. This case is discussed, and cases with and against it cited in 5th edition Bispham's Equity 248.

CHARITABLE TRUST—MASSES FOR SOUL OF TESTATOR—WEBSTER V. SUGHROW, 45 Atlan. 139 (N. H.).—Testator left a bequest in trust for the saying of annual masses for himself, his deceased wife, and her deceased sister. *Held*, that this was a charitable trust in so much as the officiating priest would be performing a religious service, and that it was none the less so because the intercession would be specially invoked in behalf of the testator.

In England, a bequest for such a purpose is void, as being for a superstitious use. In the United States, the doctrine of superstitious uses does not obtain, but the courts differ in their opinions as to whether such a trust will be upheld, there being no beneficiary to enforce it. 5 *Am. & Eng. Encycl. of L.*, 2d Ed., 927, and cases cited.

CONSTITUTIONAL LAW—EXTENT OF JUDICIAL POWER—INTERFERING WITH EXECUTIVE POWER—LA ABRA SILVER MINING CO. v. UNITED STATES. —Reported advance sheets decisions United States Supreme Court, February, 1900.—An act of Congress conferring jurisdiction upon the courts of the United States to investigate and render a final decision as to alleged frauds in obtaining an award of damages against the Mexican government, rendered by a commission appointed in accordance with the terms of a conference, is not encroaching upon the provinces of the Executive, and therefore not in conflict with the Constitution of the United States. See Comment.

CRIMINAL LAW—TRIAL BY JURY—DIRECTING VERDICT—PEOPLE v. WARREN, 81 N. W. 360 (Mich.).—In a trial by jury for embezzlement, the judge directed a verdict of guilty. The jury at first disagreed, but being severely reprimanded by the court, at once returned a verdict according to the direction. They were then polled, and eleven jurors stated that they would have voted "Not guilty" had they not believed that in so doing they would have been guilty of contempt of court. *Held*, that the judge could direct a verdict of guilty in a criminal case, but could not compel the jury to find accordingly.

In *People* v. *Neumann*, 85 Mich. 98, the court declares this to be the rule in Michigan, but says that it differs from that in most of the States, which is, that in a criminal case the court may not direct a verdict of guilty. The reason for the general rule, given in *U. S.* v. *Taylor*, 11 Fed. Rep. 470, is as follows: "A verdict of acquittal can not be set aside, and therefore if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly." With the exception of *U. S.* v. *Anthony*, 11 Blatchford (U. S.) 201, we find no case outside of Michigan in conflict with this general rule. The court says in this case that whenever the facts constituting the guilt are undisputed, it is the duty of the court to direct a verdict of guilty.

COMMON CARRIERS—RAILROAD COMPANY—EXCLUSIVE PRIVILEGES TO EXPRESSMEN—HEDDING v. GALLAGHER, 45 Atlan. 96 (N. H.).—A railroad company entered into a contract with the plaintiff whereby the latter was to have the exclusive privilege of soliciting the carriage of baggage from the former's station. This was a prayer for an injunction restraining the defendant, another expressman, from soliciting patronage on the railroad's premises. *Held*, that a common carrier owes the duty to furnish to passengers reasonable and equal facilities at its station and is bound to accord equal facilities to all who come to that station for the purpose of carrying passengers or baggage beyond its line of road.

Markham v. *Brown*, 8 N. H. 523, declares that the same duty exists in the case of inn-keepers. The general rule seems to be in accordance with these cases, but the Massachusetts court, in the case of *Old Colony R. Co.* v. *Tripp*, 147 Mass. 35, distinguished between inn-keepers and common carriers, and decided that a contract like the one under consideration was a reasonable regulation. The N. H. court says in answer to this that "regulation is not discrimination."

CORPORATIONS—FILING ANNUAL REPORT—UPTEGROVE v. SCHWARZWAELDER, 61 N. Y. Sup. 623.—*Held*, that § 30, Chap. 688 *N. Y. Laws*, 1892, requiring each corporation of a given class to file an annual report in the county where its principal business office is located, was complied with,

where the report was filed in the county to which the principal business office had, in fact, been legally removed, though the certificate of incorporation still stated it to be in the county where it had originally been located.

In a dissenting opinion, *People* v. *Barker*, 87 Hun. 342; *Transportation Co.* v. *Scheu*, 19 N. Y. 410, and *Factory* v. *Dolloway*, 21 N. Y. 449, are cited as being directly opposed to this decision. These cases, and many others in New York, assert emphatically that the statement in the certificate of incorporation is conclusive as to the location of the principal business office. The majority of the court, however, holds that what was said in those cases related to the domicile of the corporation for the purpose of taxation only, and says that, since the present action is brought under a penal statute, a rule more favorable to the defendant applies, the change of location being perfectly legal, and no fraud appearing.

DAMAGES—MENTAL ANGUISH—WESTERN UNION TEL. CO. v. HINES, 54 S. W. (Ky.) 627.—A telegram given to defendant for transmission, reading: "Mother started at nine to-night," was delivered to plaintiff in a changed form, so that it read: "Mother died at nine to-night," *Held*, that damages for $780 for mental anguish was not excessive.

The weight of authority does not recognize mental anguish unaccompanied by physical injury, as a ground of recovery, but in many of the Southern States the courts hold that damages for mental suffering should be allowed in just cases, though unaccompanied by physical suffering. This rule is now firmly established in Texas, Alabama, Iowa, Indiana, North Carolina and Tennessee.

Kentucky limits the application of the rule to the "nearest degree of blood relationship."

DEEDS—PRESUMPTION AS TO ACCEPTANCE—PORT JERVIS NATIONAL BANK v. BONNELL, 61 N. Y. Sup. 521.—Where a mother, in consideration of a debt due to her daughter, executes and records a deed to the daughter without her knowledge, and delivers it to a third party, reserving no further control over it, the estate passes, as the daughter's acceptance of the deed is presumed from the fact that the conveyance is to her benefit.

The general rule is that the law presumes that a deed clearly beneficial to the grantee is accepted by him when it is placed in the hands of some third party for his use and benefit. *Moore* v. *Giles*, 49 Conn. 570; *Cram* v. *Wright*, 114 N. Y. 307; *Hedge* v. *Drew*, 12 Pick. (Mass.) 141.

Some authorities dissent from this view, holding that evidence of acceptance or some other act equivalent to acceptance is necessary. *Building Association* v. *Heil*, 81 Ky. 513; *Maynard* v. *Maynard*, 10 Mass. 456; Cf. 3, Washburn on Real Property, bk. III c. 4. § 2 (Fifth Edition). Hopkins on Real Property says, at p. 435, "There may be a presumption of acceptance from the beneficial character of the instrument, but this presumption does not obtain unless the grantee had knowledge of the existence of the deed." *Jackson* v. *Phipps*, 12 Johns. (N. Y.) 418; *Younge* v. *Guilbeau*, 3 Wall. 636; *Fisher* v. *Hall*, 41 N. Y. 416.

FACTORS—UNAUTHORIZED SALE OF GOODS—BONA FIDE PURCHASER—ROMEO v. MARTUCCI, 45 Atlan. 1 (Conn.).—The plaintiff, a wholesale grocer, shipped goods to Ricciardelli & Bro., to be sold by them in their business as retail grocers, an accounting to be made by them for the proceeds of such sales; the title to said goods to remain in the plaintiff until the same were sold. The defendant bought out the business and stock of R. & Bro. in good faith. *Held*, in an action of replevin to recover possession of plaintiff's goods, that the relation between the plaintiff and R. & Bro. is that of principal and factor; that the consignee having transferred the

property out of his usual course of business, the consignor is entitled to retake the property even from a bona fide purchaser for value; that the consignor is not estopped from setting up his title inasmuch as he has done nothing inconsistent with the real transaction between himself and his factor. Andrews, C. J., and Hall, J., dissented.

The general rule is that where the goods are to be sold by the party receiving them on his own account, the owner merely reserving title until the purchase money is paid, the transaction is a conditional sale and not a consignment, and hence under statute in most States is an absolute sale as to third parties unless recorded. But it has also been held that a purchaser of the entire stock will not be so protected, nor will a purchaser not in the regular course of trade. *Burbank* v. *Crooker*, 7 Gray 158; *Pratt* v. *Burhans*, 84 Mich. 489.

INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENTS—ADRIANCE, PLATT & CO. v. NATIONAL HARROW CO., 98 Fed. 118. —An owner of a patent published letters and circulars asserting the validity of his patent, that another manufacturer infringed it, and that any one who purchased the infringing article would be sued by the owner of the patent. *Held*, that a bill asking for an injunction against such circulars cannot be dismissed on demurrer.

This decision recognizes that equity may have jurisdiction to enjoin a party from advertising his goods. It all depends upon whether the advertisement uses false, malicious, offensive or opprobrious language, with the purpose of injuring the party claimed to be infringing. *Kelly* v. *Ypsilanti Dress-Stay Manuf. Co.*, 44 Fed. 19. In view of the undoubted right every one has to advertise his goods so long as he does it in good faith, and of the adequate remedy at law which the plaintiff may claim, if in such advertisement anything libelous has been published, courts are bound to consider such questions as this with great care. There is little law as yet on this subject, but since the case of *Kidd* v. *Horry*, 28 Fed. 773, courts seem inclined to recognize the jurisdiction of equity in cases where a malicious motive and bad faith are clear.

INN-KEEPERS—LIABILITY FOR GOODS OF GUEST—MISCONDUCT OF GUEST —LUCIA V. ORNEL, 61 N. Y. Sup. (App. Div.) 659.—The plaintiff, a guest in a hotel, took a woman of ill-fame to his room with him for consort, who absconded with a sum of his money. Plaintiff then requested the hotel clerk to keep the remainder of his money for him, but the clerk refused to do so, and after plaintiff went back to his room, the balance of his money was stolen from him. *Held*, that plaintiff's misconduct and immorality did not bar him from recovering the balance, subsequently stolen.

Curtis v. *Murphy*, 63 Wis. 4. holds that if a man takes a woman to a hotel for the purpose of prostitution, he does not thereby acquire the rights of a guest. But this does not apply in the present case, as the man was not robbed while occupying the room with the strumpet, but afterwards.

PARTIES—ACTION BY MARRIED WOMAN—LOSS OF EARNING CAPACITY —TEXAS R. R. CO. V. HUMBLE, 97 Fed. 837.—A married woman sued for personal injury independently of her husband. *Held*, that she could recover damages for the impairment of her earning capacity, and that this recovery was one in which the husband had no interest.

The present case brings out a distinction that is a source of some confusion, the difference between an impairment of a married woman's earning capacity and her capacity to render services to her husband and family. In the latter case the husband has the right to sue for the injury, not the woman. *R. R. Co.* v. *Hensen*, 58 Fed. 531. But her capacity to earn money may

be entirely independent of the service she renders to her family. She may be engaged in a separate and independent business at the same time that she is performing her family duties. In such cases it seems that the damages she may recover for an injury that impairs her ability to engage in such business are personal, and that the husband has no interest in them. *Tuttle* v. *R. R.*, 42 Iowa 518; *Filer* v. *N. Y. C. R. R.*, 49 N. Y. 47. The fact that in most cases a woman's services to her family are measured by her capacity to do labor, and the resulting difficulty experienced in separating one from the other prevents the distinction from always being clear.

PERCOLATING WATERS—RIGHT OF CITY TO DIVERT—DAMAGES TO OWNER OF ADJACENT LANDS—FORBELL V. CITY OF NEW YORK, 61 N. Y. Sup. 1005.—The city, by means of an extensive system of porous underground conduits connected with a powerful pumping station collected the percolating waters of an area of several square miles. This land was bought by the city and used for this purpose only, and no improvement was made upon it, nor was any intended. The direct result was to lower the water level of the plaintiff's and other lands, and destroy the crops growing, or which might have been grown upon them. *Held*, the city was liable for the damages thus sustained.

The case is an extension of the doctrine laid down in *Smith* v. *The City of Brooklyn*, 54 N. E. 787; 9 *Yale Law Journal* 94. The facts are the same, but here the plaintiff is allowed to recover, not for the loss of the enjoyment of a running stream fed by these percolations, but directly for the loss of the percolating waters resulting in the failure of his crops. There his rights as riparian owner were involved, here only his rights as proprietor of the land. On principle the case is directly contrary to *Chaseman* v. *Richards*, 7 H. L. 349, and *Bradford* v. *Pickles*, 1895 App. Cases 587, though the facts were not so strong in the English cases.

RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—GILBERT V. ERIE R. Co., 97 Fed. 747.—Plaintiff's deceased drove upon a railroad crossing in a covered buggy. At 135 feet from said crossing he saw the approaching train, but drove upon the crossing and was killed. *Held*, the rule that plaintiff's contributory negligence is counteracted by defendant's knowledge of plaintiff's danger and neglect to take reasonable care to avoid injury to plaintiff does not apply where the negligence of plaintiff and defendant is concurrent.

As soon as contributory negligence became a common defence, limitations upon the doctrine began to be developed. One of these limitations is that which is recognized by the Supreme Court in *Railway Co.* v. *Ives*, 144 U. S. 408, and enunciated in *Davies* v. *Mann*, 10 Mees. & W. 546, "that contributory negligence of the party injured will not defeat the action if it be shown that the defendant might by the exercise of reasonable care have avoided the consequences of injured parties' negligence." This supposes an unequal amount of negligence on one side or the other. Where the negligence of both parties is equal, the rule does not apply, and the case becomes one governed by the usual rules in regard to contributory negligence. The present case places a natural and necessary limitation upon *Railway Co.* v. *Ives*.

RAILROADS—INJURY TO EMPLOYEE—POTTER V. DETROIT, G. H., & M. RY. Co., 81 N. W. 80 (Mich.).—A brakeman climbing upon the ladder on the side of a moving freight car, was struck and injured by a telegraph pole located near the track. *Held*, in an action to recover damages for the injury, that, though the plaintiff had many times before passed by this pole, it was a question for the jury as to whether he was chargeable with knowledge of the danger.

This decision rests upon the ground that the plaintiff, having previously passed the pole, either on foot or on the top of a freight car, the danger of being struck might not have been so obvious to him from such point of view as to charge him with knowledge of it. One justice dissents, and says: "This, and like cases that may be found in the reports, we think cannot be sustained upon principle and leave anything of the rule of assumed risks." Cf. Bailey, Mast. Liab., p. 80. "When the location is ascertained the danger is manifest; it being the law and the contract that the servant ought to know that which was plain to be seen, and which it was a part of his duty to learn and know."

SCHOOLS—DISCRIMINATION BETWEEN COLORED CHILDREN—RIGHTS UNDER THE CONSTITUTION—ELIZABETH CISCO V. SCHOOL BOARD OF THE BOROUGH OF QUEENS, NEW YORK CITY—Decided New York Court of Appeals, February 6, 1900.—Where separate schools of equal accommodations are provided for white and colored children, a refusal to grant admission to colored children to the schools maintained for white pupils does not violate any of the rights guaranteed by the Constitution. See Comment.

SCHOOLS—DISCRIMINATION AGAINST COLORED CHILDREN—RIGHTS UNDER THE FOURTEENTH AMENDMENT—J. W. CUMMINGS ET AL. V. COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.—A temporary suspension of a high school for colored children, in order that the funds used in its support might be diverted towards the education of children of the same race in the primary schools, is no ground for the granting of an injunction restraining the Board of Education from using certain funds for the maintenance of a high school for white children. See Comment.

STREET RAILWAYS—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE—WISE V. BROOKLYN HEIGHTS R. CO., 61 N. Y. Sup. 530.—Plaintiff alighted at night from a street car at a station in the suburbs of a city, and on starting to cross a parallel track was struck and injured by a car running at high speed, on a down grade, in the opposite direction. The car from which plaintiff alighted obstructed the view of the approaching car, which at the time was from 800 to 1200 feet distant. *Held*, that the question of his negligence should have been allowed to go to the jury, and not decided to be contributory negligence per se by the court; first, because by reason of the darkness and existing obscurities, plaintiff might not, in the exercise of prudence, have determined that the car was too close to render it dangerous to attempt to cross the track, and, secondly, because, since a street railway company is not justified in running its cars at high speed past a car standing on a parallel track to allow passengers to alight, who might cross to either side of the street, its act in so doing, rendering the place appointed for passengers to alight dangerous, is an act of negligence tending to excuse plaintiff's failure to observe the approaching car.

To constitute contributory negligence, an act must be the proximate cause of the injury, and also show lack of care on the plaintiff's part. The New York rule in *Landrigan* v. *R. R.*, 23 App. Div. 43, holds failure to observe the approach of a car on a parallel track, under circumstances somewhat similar to the present case, contributory negligence per se, but the present case is distinguished because the darkness might have made the failure to see the car not inconsistent with the exercise of due care, and also because, the accident having happened at a station where passengers were being discharged, the company was guilty of negligence in not slackening the speed of the car that struck plaintiff. This may have been the proxi-

mate cause of the accident, thus bringing it within the rule that plaintiff may recover, although careless himself, if the defendant might, by the exercise of care on his part, have avoided the consequences of plaintiff's carelessness. *Cooley on Torts*, p. 812; *R. R.* v. *Ives*, 144 U. S. 429.

Where the facts are undisputed, and it appears that failure to "look and listen" proximately contributed to an injury which would otherwise have been avoided, such failure should be held contributory negligence, as a matter of law. *Schofield* v. *R. R.*, 114 U. S. 615; *Tully* v. *Fitchburg R. R.*, 134 Mass. 499; *Tolman* v. *R. R.*, 98 N. Y. 198; otherwise the question of failure to use ordinary care should be left to the jury. *Hanks* v. *Boston, etc., R. R.*, 147 Mass. 495; *Blaizer* v. *N. Y., etc., R. R.*, 110 N. Y. 638; *Wilson* v. *P. R. R.*, 132 Pa. St. 27.

TAXATION—PERSONALTY—MISSOURI, K. & T. RY. CO. v. BOARD OF COMMISSIONERS OF LABETTE COUNTY ET AL., 59 Pac. 383 (Kan.).—*Held*, under paragraph 6873 Gen. St., 1889, that the roadbed, track and right of way of a railway is personal property, and not real property, and as such, the tax thereon is a personal tax.

The correctness of this decision is unquestionable, as it is in accord with the statute. However, it is of interest to note that the statute negatives the common law rule which considers the roadbed, track and right of way as realty, a rule which has been uniformly followed in the decisions of the courts. That the legislature has power to say that such property shall be considered personalty must be recognized, since it has the power to treat the rolling stock of a railroad as realty for the purpose of taxation. *Louisville Ry. Co.* v. *State*, 25 Ind. 177. Although the better authorities treat it as personalty. *Amer. and Eng. Ency. of Law*, Vol. 19, page 883. The Kansas statute, as far as we are able to learn, is without a parallel.

TELEGRAPH COMPANIES—STOCK EXCHANGE NEWS—MARKET QUOTATIONS—PUBLIC RIGHTS—IN RE RENVILLE ET AL., 61 N. Y. Sup. 549.—A telegraph company contracted with the New York Stock Exchange, a voluntary association, to transmit stock-market reports to such persons as the exchange should designate, and to refuse to transmit such information to persons whom it might designate; the telegraph company paying the exchange for the news, and charging the persons so furnished therefor. Petitioner had been furnished such news by the telegraph company prior to the contract, when the company, under order of the exchange, refused him further service, although it had been paid therefor in advance. *Held*, that the petitioner could not compel the telegraph company to furnish him with such news; that information as to transactions on a stock exchange, which is a voluntary association, whose facilities are limited to its members, is not property clothed with a public interest, so as to entitle persons not members to compel the furnishing of such information against the wishes of the association.

The correctness of this decision is unquestioned. It is based on sound legal principles, and is supported by authority. Cf. *Telegram Co.* v. *Smith*, 47 Hun. 505; *Wilson* v. *Telegram Co.*, 3 N. Y. Sup. 633. A different conclusion was reached in the case of *New York & Chicago Grain & Stock Exchange* v. *Board of Trade of City of Chicago*, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411. The basis of that decision was that as the board had created a standard market in agricultural products, and built up a great system for the communication of market fluctuations, upon which the public relied, it could not be allowed to furnish them to some and refuse them to others. If it gave information to one, said the Illinois court, it had to give the same information to all, and the court could compel it to give such information. It would seem clear that the court has no such power. No franchise has

been conferred upon this voluntary association by the public which justifies an interference by the public with its method of conducting business. The doctrine of *Munn* v. *Illinois*, 94 U. S. 113, does not apply. That case decided that the legislature could regulate the rate of charge for services rendered in a public employment, or for use of property in which the public had an interest. In the present case no property of the Stock Exchange had been devoted to public use, and the public had no legal interest in that property.

TOWN OFFICERS—AUTHORITY TO WAIVE STATUTE OF LIMITATIONS—MCGARY V. CITY OF N. Y., 61 N. Y. Sup. 689.—A town board has no authority to revive a claim against the town after it has been barred by the Statute of Limitations. The town board is in a sense a trustee, and as such is bound to protect the inhabitants of the town against outlawed or other uncollectible demands. They are in the same position as executors, who cannot waive the Statute of Limitations after it has once attached. *Butler* v. *Johnson*, 111 N. Y. 204; *Schutz* v. *Morette*, 146 N. Y. 137.

WRIT OF RESTITUTION—EXPIRATION OF LEASE—STATE EX REL. V. ORTH & BENSON, JUDGE, 59 Pac. 501 (Wash.).—At the time of entry of judgment directing issuance of a writ of restitution, defendant's lease had expired. *Held*, that under contract pleaded by defendant that he was no longer entitled to possession is not ground for refusing to fix the supersedeas bond staying issuance of writ, as 2 Ballingers Ann. St., § 5546, authorizes either party aggrieved by such a judgment to appeal, as in other civil actions. Fullerton, J., and Dunbar, J., dissenting.

Substantially the contention made by the respondent is that no real contention arises upon the appeal, that, the lease having expired, the subject-matter of the contest has ceased to exist. This position is held by the dissenting judges, who rely, as the respondent, upon *Hice* v. *Orr*, 16 Wash. 163. The court, however, held that a mandamus should issue, as it could not inspect the record of the trial to determine the merits of the case, and that as the pleadings disclosed a controvers, the appeal should be allowed as provided by statute.