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BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE—IN RE HAMMOND, 98 Fed. 845.—Within four months of filing of petition in bankruptcy, a creditor attached property of bankrupt's wife, she not having filed certificate making her a feme sole trader. The trustee in bankruptcy instituted proceedings for the recovery of said property. *Held*, that it was within the jurisdiction of the District Court to compel such surrender.

As the attachment was in connection with proceedings in bankruptcy, the presumption would be in favor of Federal Court jurisdiction under the act of '98, and the weight of authority seems to sustain the decision reached. *In re Francis-Valentine Co.*, 94 Fed. 793. The attachment was through the State Courts, and hence there may be grounds for disputing the jurisdiction of the District Court, as was held in the majority opinion of *In re Abraham*, 93 Fed. 767.

BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEES, 99 Fed. 546.—The trustee in bankruptcy brought a bill in equity to set aside a sale of goods to the defendants, as being fraudulent to creditors. The suit was brought in the District Court, and, relying upon a clause in the Banks Act, 1898, § 23 b, providing that "suits by the trustee shall only be brought in the courts where the bankrupt might have brought them," the respondents demurred to the bill on the ground that the District Court lacked jurisdiction. *Held*, that the court had jurisdiction.

The decisions of the courts upon this question have been far from uniform. The section of the Banks Act quoted above, however, was simply a limitation of the jurisdiction of the Circuit Courts. It does not affect the jurisdiction in bankruptcy conferred upon the District Court in other clauses of the Act. *In re Sievers*, 91 Fed. 366; *Carter* v. *Hobbs*, 92 Fed. 594. As regards State courts, this decision is not to be taken as a limitation of their jurisdiction in suits brought by trustees in bankruptcy, but the court taking cognizance of the case first shall have final and conclusive disposition of it. *Woolridge* v. *McKenna*, 8 Fed. 650; *In re Bruss, Ritter Co.*, 1 Nat. Banks, N. 58, 90 Fed. 651.

CARRIERS—BAGGAGE—COMMERCIAL TRAVELER—SAMPLES—EXTRA COMPENSATION—TRIMBLE V. NEW YORK CENT. AND H. R. R. Co., 56 N. E. 532 (N. Y.). —*Held*, that where a baggageman received a trunk from a traveling salesman for transportation, making extra charge for overweight, the company could not escape liability for its loss on the ground that the baggageman had no authority to check the baggage in violation of a rule of the company against checking baggage of this class without the signing of a release of liability by the shipper. Parker, C. J., and O'Brien and Landon, J. J., dissenting.

The question raised in this case is, whether the baggageman had knowledge of the contents of the trunk when he checked it. Since he asked no questions the presumption is against him. If anything is delivered to a person to be carried it is the duty of the person receiving it to ask such questions about it as may be necessary, or he is bound to carry the parcel as it is. *Walker* v. *Jackson*, 10 M. & W. 168. O'Brien, J., in a dissenting opinion, holds that the baggageman had no knowledge of the contents of the trunk, except from its appearance, which does not constitute knowledge, and therefore the company should not be held liable.

COMMON CARRIERS—CONTRACT LIMITING LIABILITY—JENNINGS v. SMITH, 99 Fed. 189 (Ill.).—Plaintiff, with full knowledge of facts, signed a contract providing that in consideration of a lower rate of freight, his recovery in case of damage should be limited to $100.00 for each horse shipped. *Held*, notwithstanding an Illinois statute to the contrary, that the contract was binding on the shipper.

The opinion in this case is by no means clear and would seem at first glance to be at variance with the rule laid down by the Supreme Court in the leading case of *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wallace 357 (1873). In *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888), the case on which the judge bases his opinion, *Hart* v. *R. R. Co.*, 112 U. S. 331 (1884), is approved as being in accordance with the Lockwood case. However, here the common carrier is not denying its liability for loss resulting from the negligence of its servants, but merely limiting the amount of such liability. In view of the fact that the common carrier and the individual are by no means on an equal footing, to prevent a dangerons extension of this exception, the reasonableness of the exemption must always be the criterion. In New York State, however, a contrary doctrine has long since been established, and the carrier can exempt itself from every claim of damages, even though same be occasioned through fault on its part, provided that the contract of transportation fairly embodies such exceptions. *Plattsburg* v. *Erie R. R. Co.*, 43 N. Y. 123.

CARRIERS—FREE TRANSPORTATION—CONSTITUTIONAL LAW—ATCHISON, T. & S. F. RY. CO. v. CAMPBELL, 59 Pac. 1051 (Kan.).—*Held*, that the statute (Chap. 167, Laws 1897) requiring railroad companies to furnish free transportation to a drover accompanying a car of stock, at the usual price of shipment, to and from his destination, is a deprivation of property without due process of law and unconstitutional under the fourteenth amendment of the Federal Constitution.

While it is well settled that the Legislature has a certain control over rates, the extent of this control has not been so well settled. This is an extreme attempt, but the opinion is sustained on the principle of *Railroad Co.* v. *Smith*, 173 U. S. 684, 19 Sup. Ct. 685, in its reversal of 72 N. W. 328 (Mich.). See also cases cited in note to *Winchester* v. *L. Turnp. Road Co.* v. *Crorton*, 33 L. R. A. 177 (Ky.)

CARRIERS—INJURY OF PASSENGER AT STATION—CONTINUANCE OF RELATION—CHESAPEAKE & O. R. CO. v. KING, 99 Fed. 251 (Ky.).—Passenger, having properly left train at a place where it was necessary to cross intervening tracks in order to reach a public road, was injured in crossing such tracks. *Held*, that company was liable, as there was an implied agreement not to make such exit unnecessarily dangerous.

Many jurisdictions hold it to be negligence per se if a traveler fail to look and listen before crossing a track. *R. R. Co.* v. *Houston*, 95 Fed. 697. But in this case it is held that the person using the means of egress provided by the company was still a passenger, and, as such, while not excused from all care, was nevertheless entitled to expect a high degree of care on the part of the carrier. The question of passenger's negligence is usually one of fact for the jury. *Graven* v. *MacLeod*, 92 Fed. 846.

CARRIERS—PASSENGER ELEVATORS—NEGLIGENCE—OWNER'S LIABILITY—GRIFFEN v. MANICE, 62 N. Y. Sup. 364.—The plaintiff sues, as administratrix, to recover damages for death of her husband, which she claims was caused by the negligence of defendant. The decedent was killed by the falling of some weights attached to certain cables intended to be used in operating an elevator

in defendant's office building. Plaintiff claims that defendant was negligent in not having the elevator properly inspected and kept in a safe condition. *Held*, that defendant was liable for negligence.

The court decided this case entirely on the ground that the owner of an elevator is a carrier of passengers, and as such, is under obligations to use the utmost care and diligence in providing and maintaining safe and suitable appliances. *Mitchell* v. *Marker*, 62 Fed. Rep. 139; *Hartford Deposit Co.* v. *Sollitt*, 172 Ill. 222. The same degree of care is not necessary with reference to the surroundings and other structure forming a part of the elevator plant. *McGrell* v. *Building Co.*, 153 N. Y. 271 When accident occurs through the giving way of some portion of the machinery or appliances by which the passenger is carried, in absence of rebuttal testimony offered by carrier, plaintiff is held to have made out a *prima facie* case, establishing the negligence of carrier, and entitling him to recover. *Amer. and Eng. Ency. of Law* (new ed.), vol. 10, page 948; *Treadwell* v. *Whittier*, 80 Cal. 574; *Goodsell* v. *Taylor*, 41 Minn. 207.

CARRIERS—WRONGFUL EJECTION OF PASSENGERS—LIABILITY—LOUISVILLE H. & ST. L. RY. CO. v. JOPLIN, 55 S. W. 206 (Ky.).—In this case the appellee had purchased a ticket on appellant's line, and lost it out of the car window just as the train started. He offered to pay the conductor his ticket fare, which the conductor accepted. Shortly afterward the conductor came back and demanded the train fare, an additional sum which companies are allowed to charge those who travel with no ticket. Appellee refused to pay this sum and was ejected from the car by the conductor in a lonesome spot. *Held*, that he could recover.

The conductor has no right to eject a passenger after having received, as satisfactory, his ticket fare. *Wardwell* v. *Chicago, etc., Ry. Co.*, 56 Minn. 514. It is a well established rule that if a ticket be lost and the owner refuse to pay the fare, he may be summarily ejected. But in this case the conductor having accepted the ticket fare, is precluded from demanding the residue. It may be distinguished from that line of cases where the conductor, having discovered his mistake, is allowed to demand the remainder. *Wardwell* v., *Chicago, etc., Ry. Co.* (supra). In this case no discovery of a mistake is alleged.

CHATTEL MORTGAGES—ADVANCES TO "CROPPER"—TENANCY IN COMMON—MCNIEL v. RYDER, 81 N. W. 830 (Minn.).—This was a contract for the cultivation of a farm on shares, by the terms of which the landlord reserved the title to the cropper's share of the crops raised, as security for advances made to him. *Held*, that the parties thereto, until division, were tenants in common of the crops, and that the contract was in legal effect a chattel mortgage, and was required to be filed on record, as against creditors and subsequent bona fide purchasers.

There is some diversity of opinion in other jurisdictions over this question. See note 1, 8 *A. & E. Encl. of L.* (2d ed.) 323; but the weight of authority seems to be that the legal title, control and possession of the crops shall remain in the owner of the land until the cropper has fully performed, and until there has been a division of the crops, the reservation or contract does not operate merely as a mortgage to secure the landlord, but the title of the entire crop is in him, and it can neither be sold by the tenant, nor levied on by his creditors. 8 *A. & E. Encycl. of L.* (2d ed.) 323–325, and cases cited.

CHECKS—OPERATION—TRANSFER OF TITLE—RICKERT v. SUDDARD ET AL., 56 N. E. 344 (Ill.).—The Mechanics and Traders Savings, Loan & Building Association gave to Mabel T. Rickert, upon her withdrawal from the association, a check on the American Exchange National Bank of Chicago, where the association had sufficient funds to meet it. Before presentation of the check the

State Auditor took charge of the affairs of the association, including the money in the bank. *Held*, that plaintiff was entitled to the full amount of the check, though the association was insolvent at the time it was given.

The doctrine that is sustained by the weight of authority in the United States, is that an unaccepted check drawn in the ordinary form, not describing any particular fund, or using words of transfer of the whole or any part of any amount standing to the credit of the drawer, does not amount to an assignment at law or in equity of the money to the credit of the holder. *Harrison* v. *Wright*, 100 Ind. 515; *Lunt* v. *Bank of North America*, 49 Barb. (N. Y.) 221. Some States hold that the giving of a check transfers to its holder the title to so much of the money in the bank as the check calls for. *Chouteau et al.* v. *Rouse*, 56 Mo. 65. Under the Negotiable Instruments Act, now in force in New York, Connecticut, Massachusetts and some other states, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

CONSTITUTIONAL LAW—DEPARTMENT STORES—POLICE POWER—TAXATION—STATUTES—VALIDITY—STATE EX REL. WYATT V. ASHBROOK ET AL., 55 S. W. 627 (Mo.).—An act passed in Missouri in 1899, known as "The Anti-Department Store Act," divided merchandise into a certain number of classes, and prohibited any person, firm or corporation, in towns of 50,000 inhabitants or more and employing fifteen or more clerks, from selling goods of more than one class without first paying a special tax of not more than $500 or less than $300, to be determined by the different commissioners for each city. *Held*, to be unconstitutional.

Such an act is not a proper police regulation, so it contravenes the Constitutional provision which vests the taxing power for municipal purposes in the municipal corporations under authority of the General Assembly. It also violates the Constitutional provision that all taxes for public purposes shall be uniform on the same class of subjects within the limits of the authority levying the tax, and that all taxes shall be levied and collected by a general law. It is aimed directly at department stores in large cities, and as such is distinctly class legislation. *State* v. *Trenton*, 42 N. J. L. 486.

CONTRIBUTORY NEGLIGENCE—STREET REPAIRS—TATJE V. FRAWLEY, 27 South. Rep. 339 (La.).—Defendant contracted with the City of New Orleans to re-arrange the guttering on a certain street, protecting public safety with lights, etc. A hole of three feet in the gutter was left without light or boarding over, into which defendant fell when running for a car at night. *Held*, no recovery.

While the court virtually concedes the negligence of the defendent, it further announces that a man running for a car at night is necessarily so intent on catching the car that he does not take proper care of where he is going, hence finds plaintiff guilty of contributory negligence. Judge Blanchard dissents, but writes no opinion. See *Mahan* v. *Everett*, 50 La. Am. 1167.

CORPORATIONS—DIVIDENDS—TRUST FUNDS—HUNT V. O'SHEA, 45 Atl. Rep. 480 (N. H.).—Suit is brought against defendant as assignee of an insolvent company for a dividend declared some time before its insolvency on stock held by plaintiff, but which dividend was not collected. *Held*, a recovery may be had only on a basis with other creditors.

A dividend declared by a corporation is not a trust fund for the stockholders' benefit, but a debt from the corporation to them. *Lowne* v. *Ins. Co.*, 6 Paige 482, I Mor. Priv. Corp., § 445. However, if the company had set funds aside to pay the dividend a trust would have resulted, and the plaintiff would have recovered the entire dividend. *King et al.* v. *R. R. Co.*, 29 N. J. L. 82.

CORPORATION—ORGANIZATION—LIABILITY OF STOCKHOLDERS AS CO-PARTNERS—SLOCUM V. HEAD ET AL., 81 N. W. 673 (Wis.).—Defendants claim that they are a corporation, incorporated under Chapter 113, Laws of 1874, to carry on a general banking business. They had failed to comply with all the statutory requirements, but had by the manner in which they had carried on their business and by their intent become a corporation de facto. Plaintiff sues to recover a sum of money deposited with defendants, and seeks to hold the stockholders liable as co-partners on the ground that defendant's cashier had informed plaintiff that defendants were partners. *Held*, that on the evidence defendants were liable as partners.

In general one who contracts with a corporation as such is estopped from denying its corporate existence, or the regularity of its organization. *Amer. and Eng. Ency. of Law* (old ed.) Vol. 4, p. 199; *Johnson* v. *Gibson*, 78 Ind. 282; *Chubb* v. *Upton*, 95 U. S. 666. But where plaintiff had dealt with an agent, and was apparently ignorant that the principals even claimed to be a corporation, they were held liable as partners. *Martin* v. *Fewell*, 79 Mo. 401.

DAMAGES—MENTAL ANGUISH—BREACH OF CONTRACT—JONES V. TEXAS AND N. O. RY. CO., 55 S. W. 371 (Tex.).—Plaintiff sued on a breach of contract for damages for mental suffering and loss of time sustained by reason of defendant's agent's negligence in not stopping a train. *Held*, he could not recover, his anxiety and circumstances not being known to the station agent.

Some courts have held that damages for mental anguish cannot be recovered unless connected with bodily pain. *Tripp* v. *St. Louis, etc., Ry. Co.*, 74 Mo. 147; *Spohn* v. *Missouri Pac. Ry. Co.*, 116 Mo. 617. Others, and this seems the better rule, hold that mental suffering, though not sufficient per sè to support an action, may constitute an element of damages when it results from an injury sufficient to give rise to an action. *Stretry* v. *Chicago, etc., Ry. Co.*, 73 Wis. 147; *Missouri Pac. Ry. Co.* v. *Kaiser*, 82 Tex. 144; *Sedgwick on Damages*, § 44. There seems to have been a sufficient injury in this case to give rise to an action, since for a failure to carry, a passenger can recover for the actual loss sustained by him *Indianapolis, etc., Ry. Co.* v. *Birney*, 71 Ill. 391; But the courts have always held that only such damages for a breach of contract are recoverable as are reasonably within the contemplation of the parties when the contract was entered into. *Burton* v. *Pinkerton*, L. R. 2 Exch. 340; *Walrath* v. *Whittekind*, 26 Kan. 482. The station agent not being informed by the plaintiff that it was necessary for him to take that train, or what damages he would sustain if he did not take it, the court properly held that there could be no recovery for mental suffering incurred by the agent's ignorance.

DURESS—AVOIDANCE OF CONTRACTS—JAEGER V. KOENIG, 62 N. Y., Sup. 803.—Where plaintiff paid money to defendant equal in amount to a sum stolen by her husband under threat of prosecution in case of non-payment, *held*, duress, and money so paid recoverable. See discussion of *Bank* v. *Cox*, immediately following.

DURESS—MORTGAGES—NATIONAL BANK OF REPUBLIC OF NEW YORK V. COX, 62 N. Y., Sup. 314.—Action brought to foreclose a mortgage alleged to have been made by defendant. Defendant's son had forged checks on plaintiff bank, using name of one Minor. Minor had sued bank to recover amount of forged checks. Defendant claims that she was induced to execute the mortgage by promises that the bank and Minor would not prosecute her son if she executed the mortgage. These promises and threats were made to her before one Fisher, who claimed that he had made the arrangements with the bank and Minor. *Held*, that mortgage was executed under duress and was voidable, though the bank had never authorized the statements.

This case resembles *Jager* v. *Koenig*, just preceding, and both together would seem to clearly settle the present law of New York on the subject of duress. Whether it is duress *per minas* to threaten to do what one has a legal right to do, namely, to prosecute for a criminal act, is not definitely settled by the decisions. On the one hand some jurisdictions hold that threats to coerce the undoing of an act of which the party has been guilty are not threats of unlawful imprisonment. Cf. *Thorn* v. *Pinkham*, 84 Me. 103; *Knapp* v. *Hyde*, 60 Barb. (N. Y.) 80. Other jurisdictions, however, hold that such threat is of unlawful imprisonment when made for the sole purpose of inducing the execution of a contract or conveyance, even though the party was guilty of the charge for which prosecution was threatened. Cf. *Morse* v. *Woodworth*, 155 Mass. 235. This is also the later view of the New York courts. Cf. *Schoener* v. *Tissner*, 107 N. Y. 111; *Adams* v. *Bank*, 116 N. Y. 606; *Jaeger* v. *Koenig*, 62 N. Y., Sup. 803, supra.

EMINENT DOMAIN—IMPROVEMENTS ON RIGHT OF WAY—ST. LOUIS K. & S. W. R. Co. v. TRYCE ET AL., 59 Pac. 1040 (Kan.).—A railroad company obtained deeds for mortgaged land and built its road thereon. The mortage being foreclosed, the railroad company instituted condemnation proceedings against the new owner. *Held*, that improvements placed upon the land by the railroad and necessary to the operation of the road, are trade fixtures and not accessories of the land to which they are attached, and are not to be recovered for when the land is condemned.

This case overrules *Briggs* v. *Railroad Co.*, 43 Pac. 1131, 56 Kan. 526, which held that the improvements became real property and might be recovered for by the owner of the land when condemned by the railroad. The result reached in the present case undoubtedly accords with the weight of authority as to what may be recovered for. *Am. Eng. Ency. of Law* (2d ed.) 10–1159; *Ellis* v. *Rock Island, etc., R. Co.* 125 Ill. 82, and cases cited in opinion under review. The difficulty of the courts in reaching this result has been in determining the character of the improvements. The road-bed, rails, depots, etc., were held real property in *Farmers' Loan and Trust Co.* v. *Hendrickson*, 25 Barb. 493; personal chattels, in *Albion River R Co.* v. *Hesser*, 48 Cal. 435. This opinion and *Northern Cent. R. Co.* v. *Canton Co.*, 30 Md. 347, solve this difficulty by classing them as trade fixtures.

EVIDENCE—ADMISSION—REVERSIBLE ERROR—DRURY v. TERRITORY, 60 Pac. 101 (Okla.);—*Held*, where illegal and incompetent evidence has been permitted to go to the jury and subsequently they are directed to disregard it, if the illegal evidence were of such a character as would ordinarily create such a prejudice against the defendant as was reasonably calculated to make a fixed impression on the minds of the jury, and influence their verdict, and the court is unable to say, on an examination of the whole case, that such evidence did not affect the verdict, there is reversible error.

This is a modification of the rule laid down in *Pa. Co.* v. *Roy*, 102 U. S. 451, that a subsequent withdrawal from the jury cancels the admission of improper evidence. *Throckmorton* v. *Holt*. 12 App. D. C. 451. The rule is well established in the United States Courts. The jury are presumed to follow the instruction of the court and disregard improper evidence. *Anthony* v. *Travis*, 148 Mass. 513; *Smith* v. *Whitman*, 6 Allen 502. The rule of this case is substantially in accord with *Wersebe* v. *Broadway & S. A. R. Co.*, 1 Misc. Rep. (N. Y.), 472; *City of Chicago* v. *Brennan*. 61 Ill. App. 247; *Taylor* v. *Adams*, 94 Mich. 106. See also *Enc. Pl. & Prac.* 2–560.

EVIDENCE—EXCLAMATIONS OF PAIN—ADMISSIBILITY—JACKSON v. MISSOURI K. &. T. RY. Co. 55 S. W. 376 (Texas).—Plaintiff having been injured while working in a sand pit, through the negligence of the defendant, sought to introduce evidence of his exclamations of pain uttered after suit had been brought. *Held*, they were admissible.

Such exclamations as are natural and spontaneous utterances caused by present pain, are competent testimony. *Fay* v. *Harlan*, 128 Mass. 244; *Wheeler* v. *Railway Co.*, 43 S. W. 876. They are part of the res jestae and not hearsay evidence. Under proper circumstances, they are admissible, even after suit has been instituted. *Ry. Co.* v. *Newell*, 104 Ind. 264; *Quaife* v. *Ry. Co.*, 4 N. W. 658. Greenleaf on Evidence: "The mere fact that a suit was pending would not exclude such testimony." 1 Green, § 626.

FRAUDULENT CONVEYANCES—HOMESTEAD—TRANSFER TO WIFE—KETTLESCHLAGER v. FERRICK, 81 N. W. 889 (S. D.).—A transfer of the homestead from the defendant to his wife, was made to prevent creditors from subjecting the premises to the satisfaction of their claims. Seven years afterwards the defendant removed to a new homestead, and an action was then brought by a judgment creditor to set the deed aside as fraudulent. *Held*, that the deed of conveyance did not pass title, but was colorable only, and should be set aside, as the mere contrivance of a dishonest debtor; 60 Texas 139.

The rule in some jurisdictions is that such a conveyance, whether made to defraud creditors or not, would still be valid, as such property cannot be subject to a fraudulent convevance, for the reason that the rights of no creditor can be prejudiced by it. *Patten* v. *Smith*, 4 Conn. 450; *Bump on Fraud*, Con. p. 268; *Deutzer* v. *Bell*, 11 Wis. 114.

GIFT—DEPOSIT IN BANK—PENINSULAR SAV. BANK v. WINEMAN ET AL., 81 N. W. 1091 (Mich.).—Where a husband deposited money in a bank to his wife's credit, and a pass book was issued in her name, the wife not knowing that the money was deposited to her credit until after her husband's death, *held*, in the absence of acts and declarations indicating an intention to donate the fund, it did not constitute a gift. *Broderick* v. *Bank*, 109 Mass. 149; *Sherman* v. *Bank*, 138 Mass. 581; contra, *Howard* v. *Bank*, 40 Vt. 597.

INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENT—A. B. FARQUAHAR CO., LTD., v. NATIONAL HARROW CO., 99 Fed. 160 (N. J.).—The owner of a patent sent out circulars saying that complainant infringes such patent, that complainant is not financially responsible, and that the recipients will be subjected to suit if they continue to handle the infringement. *Held*, that a court of equity will not enjoin the sending out of such circulars.

The English courts have generally granted an injunction to restrain libellous publications against the business of another. The current of American decisions has been the other way on the ground of there being an adequate remedy at law for the alleged libel. It will be seen that this case is at variance with *Adriance, Platt & Co.* v. *Nat. Harrow Co.*, 98 Fed. 118, 9 YALE LAW JOURNAL 233, which seems to incline to the English rule, and it will also be noted that the state of facts and defendants in the two cases are identical.

INJURY TO EMPLOYEE—VICE PRINCIPAL—NEGLIGENCE—METROPOLITAN WEST SHORE R. R. v. SKOLA, 56 N. E. 171 (Ill.)—The foreman of the work of cleaning, repairing and inspecting cars, ran a car into the shed for cleaning. In doing so he ran into a car under which deceased, by order of said foreman, was at work, and killed him. *Held*, foreman was to be considered a vice principal, and that company could be held for the death of the plaintiff's intestate.

The present case is a close one on the question as to the distinction between fellow servants and vice principal, and illustrates the difficulties Shaw, C. J., mentions in *Farwell* v. *Boston & W. R. Co.*, 4 Metc. 49, when we attempt to draw a distinction between them. The Illinois courts have been more willing to recognize this distinction than have those of Massachusetts. *Toledo R. Co.* v. *Ingraham*, 77 Ill. 309, and the present case shows to what an extent it may be carried.

INSURANCE—IGNITION—FITZGERALD V. GERMAN-AMERICAN INS. CO , 62 N. Y. Sup. 824.—Defendant insured plaintiff against fire. Smoke and heat from burning lamp produced damage. *Held*, no recovery.

Some authorities announce the proposition that the results of a fire (not amounting to ignition themselves) cannot be the ground for recovery on an insurance policy unless the fire producing these results creates a liability on the policy. *Hughes on Ins.* 390; *Austin* v. *Drewe*, 6 Taunt. 435; *Gibbons* v. *Ins. Co.* 30 Ills. App. 263. But equally strong authorities take the other view. *Balestricci* v. *Ins. Co.*, 34 La. Ann. 844; *May on Ins.*, § 412. This doctrine has been most frequently applied in actions on insurance policies in consequence of explosions und damages arising from adjacent fires. *St. John* v. *Ins. Co.*, 11 N. Y. 516. *Sohier* v. *Ins. Co.*, 11 Allen (Mass.) 336.

INTERSTATE COMMERCE—STATE REGULATIONS—OLEOMARGARINE LAW OF MISSOURI—IN RE SCHEITLIN, 99 Fed. 273.—The provision of a State law prohibiting the manufacture or sale within the State of any substance "in imitation or semblance of butter," is a proper regulation within the police power of the State, and its enforcement as to original package importations is not a violation of the constitutional interstate commerce clause.

It was strongly contended that no restrictions or limitations upon the sale of oleomargerine could be made by any State, because the Supreme Court in a leading case decided that it was an article of commerce and declared void a Penn. statute which prohibited its sale even when the same was shipped into the State for sale in the original package. *Schollenberger* v. *Penn.*, 171 U. S. 1. It is, without doubt, within the police power of a State to pass regulations to prevent fraud and deception as to articles of food. The Missouri statute is distinguished from the former Pennsylvania law in that it did not prohibit the sale of oleomargarine, bnt merely required it to be sold as such. The case resembles *Plumley* v. *Webb*, 155 U. S. 461, in which Justice Harlan pointedly said: "The Constitution does not secure to anyone the privilege of defrauding the public."

JUDGMENT AGAINST CITY—TAXPAYERS' RIGHT TO ENJOIN—BUSH V. O'BRIEN, 62 N. Y., Sup. 685.—This an action by a taxpayer under the Statute (Civ. Code 1925), to restrain certain parties from collecting judgments which are alleged to be invalid, against the City of New York. *Held*, a taxpayer cannot enjoin payment of a valid judgment against a city where there is no fraud alleged as to its entry, on an offer by the corporation counsel, and acceptance by plaintiff, and where the only ground on which it is attacked is that it was irregularly entered in a pending action. His only remedy is by appeal from the judgment, or by a motion to set it aside. McLaughlin, J., dissents.

It would seem that if this statute is to be construed so as to preclude such cases as the above, the object of the statute will be defeated. The judgments which it is sought to enjoin are so irregular as to create much doubt as to their validity, to pay them would be a breach of official duty on the part of the Comptroller, and a breach of official duty is sufficient to enable a taxpayer to bring an action. (*Adamson* v. *R. R. Co.*, 79 Hun 31). In fact all the elements of a right of action exist, "the status of the plaintiff, the illegal judgment, the threatened injury by which the property of the taxpayer will be burdened."

LANDLORD—EVICTION—SICKNESS—PREISER V. WILLANDT, 62 N. Y., Sup. 890. Plaintiff's lease of defendant's premises expired on June 5th. When plaintiff was notified to vacate, he informed defendant that his wife was very ill and could not be moved. On June 6th, defendant started to pull down the house, causing the plaintiff's wife much suffering from the dust and noise,

which so aggravated her illness that she died a few days later. *Held*, that defendant was liable, though deceased suffered no immediate personal injury, and her death was due solely to fright and excitement.

The case of *Herter* v. *Mullen, et al.*, 53 N. E. 700 settles the question of the tenant's right to hold over without a renewal of the lease, provided the delay was caused by serious illness in the family.

Defendant denied right to recover on the ground that there was no immediate personal injury suffered by Mrs. Preiser. In *Spade* v. *R. R. Co.*, 47 N. E. 89, it was held that recovery could be had when "gross carelessness or utter indifference to consequences" was shown. And since the landlord was a wrong-doer, the court was justified in reversing the decision of the lower court.

LICENSES—NON-PAYMENT—PUCKETT V. FORE, 27 South Rep. 381 (Miss.).—Where plaintiff sold goods to defendant, taking notes and mortgage therefor, one of which notes being for merchandise sold during a time when plaintiff had not paid his privilege tax for conducting business, *held*, non-collectible.

The court fails to recognize a distinction frequently laid down, that where the tax is laid simply for raising revenue, the purchase money of a sale is collectible. *Larned* v. *Andrews*, 106 Mass. 435, but when the nature of the license is prohibitory, no recovery may be had. *Miller* v. *Post*, 1 Allen 434.

LIENS—DUE PROCESS OF LAW—INTERSTATE COMMERCE—LINDSAY & PHELPS CO. V. MULLEN, 20 Sup. Ct. Rep. 325.—*Held*, a Minnesota statute was constitutional, giving surveyor general a lien upon all logs in any boom, under which plaintiff's logs were seized and held to answer for charges assessed against the whole boom, although plaintiff's logs formed only a part of said boom. The majority of the court gave the following reasons: (1) it was within the power of the legislature; to require the officer to stand watch at the exit of the boom and collect his fees from each log owner would be unreasonable; (2) was not taking property without due process of law, the plaintiff having voluntarily put his logs in the boom; (3) nor was it a burden upon interstate commerce, but rather facilitated it.

In dissenting, Peckham J., with whom three others concurred, argued that the log owner was practically compelled to put his logs in the boom; under these circumstances to seize them for another's debt leaves no doubt of its utter illegality; and a State regulation that confiscates property engaged in commerce for the debts of another is clearly a restriction upon interstate commerce.

LIFE INSURANCE — SUICIDE — EVIDENCE — SUFFICIENCY — SOVEREIGN CAMP WOODMEN OF THE WORLD V. HALLER, 56 N. E. 255 (Ind.).—A provision in an insurance policy was as follows: "If the member holding this certificate shall * * * die by his own hand * * * this certificate shall be null and void." The insured, a hard drinker, whose family relations were unpleasant, disappeared after being served with notice of divorce proceedings begun by his wife. His body, without marks of violence upon it, was found in a stream. *Held*, that the evidence excluded with reasonable certainty any hypothesis of death by any other cause than suicide. Robinson, J., dissenting.

The court in this case apparently takes little notice of the fact that in most jurisdictions courts are very reluctant to find that a man died by his own hand when there can be the slightest doubt. The legal presumption is that when death is referable to either cause, it was due to accident and not to self-destruction. *Travelers Ins. Co. of Hartford, Conn.*, v. *Nicklas*, 41 Atl. 906. Where a provision in an insurance policy states that the company is relieved from liability for deaths from suicide, the burden is on the insurer to show the violation of an otherwise valid policy. *Malicki* v. *Chicago Guaranty Fund Life Soc.*, 77 N. W. 690 (Ill.).

LIMITATIONS—ASSUMPTION OF MORTGAGE—PAYMENT OF INTEREST—BEDDLE v. PUGH, 45 Atl. Rep. 626 (N. J.).—*Held*, the payment of interest by successive grantees, who assumed a mortgage, kept the statute from running in favor of mortgagor, notwithstanding sixteen years more than the period required had elapsed since any payment by him.

There are two rules, (1) that a tender to one entitled to receive by one liable to pay is sufficient, and successive grantees come within this rule. *In re Frisbie*, 43 Chan Div. 117; *Lewin* v. *Wilson*, 11 App. Cas 639; (2) that such grantees pay merely to keep alive the equity of redemption, and do not keep the statute from running. *Trustees* v. *Smith*, 52 Conn. 434. Where the mortgagor after sale becomes a surety the first seems the better rule, but where by sale of the property in States holding the lien theory he becomes a mere stranger, the second would probably prevail. *Lord* v. *Morris*, 18 Cal. 482.

MASTER AND SERVANT—WRONGFUL DEATH OF SERVANT—NEGLIGENCE—INDEPENDENT CONTRACTORS—GULF, C. & S. RY. CO. v. DELANEY, 55 S. W. 538 (Tex.).—A brakeman on a freight train was killed by the falling of derricks, used by an independent contractor, due to the breaking of a post to which guy ropes were fastened. The independent contractor was repairing defendant's road-bed. *Held*, the railroad company was liable.

An employe, when placed in a situation of danger, has a right to expect that the employer will not, without proper warning, subject him to perils unknown to the employe. *Haley* v. *Case*, 142 Mass. 316. Moreover, the employer owes his servants, while working on his tracks and his trains, the duty to furnish them a reasonably safe place to work; nothing short of the exercise of reasonable care can absolve him from this obligation. In this case the defendant company were clearly guilty of negligence, as the guy ropes had not been securely fastened, and the derricks ought not to have been used across its tracks, without some care being taken to discover and guard against the danger. As a general rule, the employer is not liable for injuries resulting from fault of an independent contractor, but in this case the negligence of the railway company was properly held to be the proximate cause of the injury.

MASTER AND SERVANT—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—RAILROADS—NEGLIGENCE—TERRE HAUTE & I. R. CO. v. FOWLER, 56 N. E. 228 (Ind.).—A freight conductor learning from the road superintendent that two culverts were likely to be in a dangerous condition, detached his engine and started to examine them; the first was found to be all right and they proceeded to the second. In attempting to cross a trestle between the two it gave way and the conductor was killed. *Held*, that considering the emergency the conductor was not acting outside the scope of his employment.

This case is apparently decided against the long established rule of law that the master's liability to the servant extends only to the duty which the servant is employed to perform, and if he undertakes any employment outside that duty he is without remedy if injured. *Brown* v. *Byroad*, 47 Ind. 435. The question here involved, is whether the detaching of the engine by the decedent, and voluntarily proceeding to inspect the track, was such a departure from the duties of his employment as to constitute negligence per se. The peculiar emergency existing at the time is held to bring the conductor's act within the scope of his employment. *Wood on Master and Servant*, p. 181, says: "Every servant is bound to regard his master's interests, and if a sudden emergency arises in his business, he is justified in departing from the usual routine of his employment.

PARTNERSHIP—WHAT CONSTITUTES—HAWKINS v. CAMPBELL ET AL., 62 N. Y. Sup. 678.—Action against Bell and Campbell as partners, to recover an unpaid balance due the plaintiff. Campbell denied the allegation of partnership. *Held*, an agreement whereby the partners were to share the profits of

the business, and showing that each had contributed something to its capital and *possessed a definite interest in the business*, is sufficient to constitute them partners as to third persons, irrespective of their agreement not to be partners, and that the liability of one of them was to be limited to a certain amount.

The rule in New York as to what constitutes a partnership is evidently construed much more broadly than in most other States, as is shown in the case of *Roper* v. *Shaefer*, 35 Mo. Atl. 30, where it was held, on practically the same state of facts, that a partnership as to third parties did not exist. This latter is the more modern rule. 17 *Am. & Eng. Enc.* 878, and is being followed by most of the States.

PATENTS—INFRINGEMENT—SALE OF INFRINGING ARTICLE, 99 Fed. 568.—The defendant collected the various parts of a machine infringing a patent, and then sold them at a profit to the co-defendant, a corporation. He was subsequently hired by the corporation to set up the completed machine. *Held*, that he was liable as an infringer.

The decision disregards the case of *Nickel Co.* v. *Worthington* (*C. C.*), 13 Fed. 393, and follows the principle that a person cannot retreat behind a corporation and escape liability for infringements in which he actively participates. *Cash Register Co.* v. *Leland*, 94 Fed. 502; *Nat. Car Brake Co.* v. *Terre Haute Manufacturing Co.*, 19 Fed. 514. The gist of the decision is that everyone who has made a separate profit out of the sale of infringing goods is held liable. *Cramer* v. *Fry*, 68 Fed. 201; *Maltby* v. *Bobo*, 53 Fed., cases No. 8, 998.

PRACTICE—BURDEN OF PROOF—GOOD FAITH—GOWING ET AL. V. WARNER ET AL., 62 N. Y., Sup. 797.—Plaintiff sold goods to Gerrish & Co. upon the latter's false and fraudulent representations of its ability to pay. The goods were then sold to defendants, and this action brought to recover possession or their value. *Held*, burden of proof was on defendants to show good faith and not a part of plaintiffs *prima facie* case to prove the contrary.

The presumption of the *bona fide* character of an act does not maintain where the fact of good faith is a material fact in a civil defense. *Devoe* v. *Brant*, 53 N. Y. 462; *McKelvey on Evi*, § 54; *Easter et al.* v. *Allen 8*, *Allen 7*.

PRACTICE—CONCLUSIVENESS OF SHERIFF'S RETURN—TAYLOR V. WELSLAGER, 45 Atl. Rep. 476 (Md.).—Where defendant claimed that the sheriff, after serving her, returned and told her not to appear, that he made a mistake in serving her. *Held*, sheriff's return of service conclusive. *Bennethum* v. *Bowers*, 133 Pa. St. 332.

PRIZE—SALE OF ENEMY'S VESSELS TO NEUTRALS, 20 S. C. 489.—At the beginning of the Spanish-American war, de Massa, a Spanish subject, made a transfer of the steamer Benito Estenger to Beattie, a subject of Great Britain. Shortly after, as the vessel was on a voyage to Kingston, she was captured by a U. S. patrol and taken to Key West, where she was duly libelled. *Held*, that the vessel was a lawful prize of war.

Formerly transfers of vessels "flagrante bello" were held invalid. Even now in France this rule is stringently enforced. England and the United States have departed from the principle, however, and admit the validity of the sale. The circumstances attending the transfer in this case, however, viz.: the conflicting statements as to price, the remaining of the Spanish master and crew in charge of the vessel, the withholding of a certain interest by the former owner, etc., clearly showed the presence of fraudulent intent and the use of the transfer as a protection against Spanish capture. The *January*, 4 C. Rob. 31; the *Omnibus*, 6 C. Rob. 70. J. J. Shiras, White and Peckham dissented.

RAILROADS—DUTY TO KEEP LOOKOUT AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—CROWLEY V. LOUISVILLE & NASHVILLE RY. CO., 55 S. W. 434 (Ky.).—Plaintiff, after waiting at a public crossing for a passenger train to go by, started across and was struck by an engine, of the approach of which she had no warning. The evidence showed that if those in charge of the engine had kept a proper lookout, her presence on the track might have been discovered and her injury averted. *Held*, she could recover, though guilty of contributory negligence herself in thus going on the track.

Notwithstanding the negligence on the part of the person injured he may recover, if the railway company, after such negligence occurred, could by the exercise of ordinary care, have discovered it in time to have avoided inflicting injury. *Donohue* v. *St. Louis, etc., Ry. Co.*, 28 Am. & Eng. R. R. cases 673; *Kelly* v. *Hannibal, etc., Ry. Co.*, 75 Mo. 138. When the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only remote, the plaintiff may recover. *Kerwhacker* v. *R. R. Co.*, 3 Ohio St. 172; *Morrissey* v. *Wiggins Ferry Co* , 47 Mo. 521.

STATUTE OF FRAUDS—NEW AND INDEPENDENT CONTRACT—CONSIDERATION MOVING TO PROMISOR—MANETTI V. DOEGE, 62 N. N. Sup. 918.—Plaintiff was employed by a sub-contractor to build a foundation. During the progress of the work, plaintiff told defendant, the owner of the premises, that he was afraid he would not be paid by the sub-contractor, and intended to abandon the job, whereupon defendant said that he would pay him in case the sub-contractor did not do so. *Held*, that the defendant, in consideration of the benefit to him from uninterrupted work, made a new and independent contract with plaintiff, enforceable by plaintiff on completion of the work.

There is no doubt that this case is correct according to the New York rule, as stated in similar cases, but in many of the states this case would clearly come under the Statute of Frauds. This is shown in *Hooker* v. *Russell*, 67 Wis. 257, where the court said: "So long as the original debt remains payable by the debtor to his creditor, an agreement by any other party to pay is within the statute, no matter what was the consideration for the latter promise."

SURETYSHIP—REAPPOINTMENT OF PRINCIPAL—LIABILITY—FIDELITY AND DEPOSIT CO. OF MD. V. MOBILE COUNTY, 27 South. Rep. 386 (Ala.).—On June 22, 1897, plaintiff-in-error became surety to Mobile County for the faithful discharge of the tax collector's duties. Prior to that time the collector had failed to account for certain funds collected, but faithfully accounted for returns since that day. *Held*, surety is liable.

The fact that a tax collector has collected funds which he fails to account for on a day of adjustment raises a presumption that they will be paid on the next settlement day, hence, even though plaintiff-in-error became surety after the funds were actually misappropriated, it is still held liable for the embezzlement. *Bruce* v. *U. S.*, 21 U. S. 596.

TAXATION OF PERSONALTY—VALUATION—STATE V. HALLIDAY, 56 N E. 118 Ohio.—The Bell Telephone Co. leased hand telephones to an Ohio concern at $14 rental per year. The Bell Co. manufactured these instruments under a patent, and were taxed on them at the rate of $3.42 per instrument, 20 per cent. more than bare cost. The State Auditor directed the County Auditor to assess these instruments at their true value in money, on the basis of the income they produced to the owner, taking into account the value given by the patent right. On application for mandamus the court said, when a manufacturer leases an article made by him under a patent, for a valuable consideration, he should be taxed on its value, though that value be enhanced by a patent. Its true value is what it is worth to him, and the assessor must decide what that is by every fact that he knows bearing on the question.

The true value of an article is its value for the use to which it is put. This doctrine is applied to railroads. *State* v. *Ill., etc., Ry.*, 27 Ill. 64; *Waterworks. Stein* v. *Mobile*, 17 Ala. 234. It was denied in regard to a toll bridge. *State* v. *Metz*, 31 N. J. L. 378.

USURY—EFFECT ON CONTRACT—PROVISION FOR ATTORNEY'S FEES—UNION MTG., BANKING AND TRUST CO. v. HAGOOD ET AL., 98 Fed. 779.—A statute made loss of interest the penalty for usury, but provided that the contract proper should be valid. A contract contained provision for fees in case of suit. *Held*, that such provision is enforceable, even though the contract be held usurious.

The distinguishing feature of this case is that the promise of an additional payment was not an absolute, but a conditional one. The institution of the suit was at the option of the defendant debtor, and the provision for the payment of fees in such event must be looked on as a collateral contract. This brings the case within the Supreme Court rule as stated in *Spain* v. *Hamilton*, 1 Wall. 626. The defendant relied on the divided opinion of a State tribunal. *Agency Co.* v. *Gillam*, 49 S. C. 350.