RECENT CASES.

ADMIRALTY—JOINDER OF PROCESS.—THE PLANET VENUS ET AL., 113 Fed. 387.—*Held* that process in rem and in personam may be permitted to issue upon the same libel in a proceeding brought to enforce a contract of affreightment.

Courts have been slow to recognize the utility of this rule. The court acknowledged that the practice in Pennsylvania had heretofore been otherwise in accordance with the decision of Judge McKenna in *The Alida* (C.C.), 12 Fed. 343, but held that the contrary practice was clearly adapted to avoid circuity of action. The first case to recognize the opposite practice was *The Zenobia,* Fed. Cas. No. 18,208. This decision has been followed in the later cases in many of the States. *The Director,* (D. C.), 26 Fed. 708, *The Keokuk,* 9 Wall 517.

The court restricts the rule to proceedings brought to enforce a contract of affreightment, adding that exceptional cases may arise to which the rule cannot be applied.

ATTORNEY'S FEE—WORTHLESS JUDGMENT—CONSTRUCTION OF CONTRACT.—LESLIE V. YORK, 31 So. W. 751 (Ky.).—In an action brought by attorneys against a client, under a contract where client agrees to pay his attorneys an amount equal to one-half what they may recover. *Held,* That they were entitled to an amount equal to one-half the amount the client actually recovered from the judgment and not one-half the judgment itself.

This decision rested entirely upon the construction to be given the word "recover" and in deciding the court acted entirely upon the principle that it would be unreasonable to expect in fees one-half the amount of a worthless judgment.

BANKRUPTCY—DISCHARGE—JUDGMENT FOR CRIMINAL CONVERSATION.—COLWELL V. TINKER, 7 Am. B. R. 334.—A judgment for criminal conversation with plaintiff's wife was secured against defendant who was subsequently discharged in bankruptcy. *Held,* motion to vacate judgment properly denied.

Under Section 17 of the Bankruptcy Act a bankrupt is released from all provable debts except judgments for "willful and malicious injuries to the person or property of another." Malice need not be actual as in *Burnham v. Pidcock,* 5 Am. B. R. 590, it may be implied. *In re Feeche,* 6 Am. B. R. 479. It is also held on principle that this was a personal injury to the husband; as well as a violation of his right of property. *Cregin v. Brooklyn, ect., Ry. Co.,* 83 N. Y. 595. *Contra, Mitchell v. Rochester Ry. Co.,* 151 N. Y. 107; *Bigaonette v. Paulet,* 134 Mass. 123.

BANKRUPTCY—INVOLUNTARY PETITION—SUBSEQUENT VOLUNTARY PETITION.—IN RE DWYER, 112 Fed. 777.—*Held,* where a bankrupt against whom an involuntary petition is pending files a voluntary petition, notice should be given to the creditors filing the former before action on the latter. Such action should then be taken with respect to the two petitions as is for the best interests of the estate.

Whether under the Bankruptcy Act of 1867 adjudication could be had on a voluntary petition during the pendency of an involuntary petition was variously decided. *In re Stewart,* Fed. Cas. No. 13,419, held it could not. *In re Canfield,* Fed. Cas. No. 2380, *contra.* In the present case, administration under the voluntary petition would have worked injustice by making unassailable certain preferences by reason of the expiration of the four-months' limitation fixed by Section 60 of the Act of 1898.

BANKRUPTCY—PREFERENCE—SURRENDER.—IN RE GRETH, 112 Fed. 978 (Penn.).—A creditor received preferences of a bankrupt and contested his right to a lien upon bankrupt's estate until final judgment of State Supreme Court in favor of trustee. Subsequently creditor proved his claim before a referee with surrender of preferences. *Held,* that this constituted no voluntary surrender within Act of 1898, Section 57, and claim should be rejected.

Authorities greatly vary as to what constitutes a surrender and how far proceedings may go leaving the right to surrender. It has been repeatedly held that surrender may be made at any time before final entry of judgment. *In re Riordan,* 14 Nat. B. R. 332, and cases cited. Voluntary surrender is a prerequisite to right to prove claim. *In re Lee,* 14 Nat. B. R. 89. Under act of 1898 the few cases which have considered the subject have left it in an unsettled state. *In re Richards,* 94 Fed. 633, and *In re Owings,* 109 Fed. 624, holding directly the contrary. In the principal decision the court follows the very recent case. *In re Keller,* 109 Fed. 126, against the weight of authority, but not without support.

BANKRUPTCY—PREFERENCE—WARRANT OF ATTORNEY TO CONFESS JUDGEMENT—CONSTRUCTION SECT. 3, CLAUSE 3, BANKRUPTCY ACT JULY 1, 1898.—WILSON BROS. V. NELSON, 7 Am. B. R. 142, 22 Sup. Ct. 74.—A judgment was entered and execution levied thereon upon an irrevocable warrant of attorney to confess judgment given 1885, and the insolvent debtor failed to vacate or discharge executor by filing a petition of bankruptcy at least five days before. *Held,* this was a preference "suffered or permitted" under Sect. 3, Clause 3, and constituted an act of bankruptcy irrespective of intent or ability to prevent. Fuller, C. J.; Shiras, J.; Brewster, J.; Peckham, J., dissenting.

This decision reverses *Wilson v. City Bank,* 17 Wall. 413; *Clark v. Iseliro,* 21 Wall. 360; *National Bank v. Warren,* 96 U. S. 539, decided under act of 1867, and also *Buckingham v. McLean,* 13 How. 150, under act of 1841, where the issues were the same. The interest centers upon the interpretation of Sec. 3. Clause 3: *"having suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days"* before execution *"vacated or discharged"* same. The former acts expressly include *intent* to prefer. In the present case the debtor is passive. The dissenting opinion ably shows that under the statute an *act* is necessary to constitute bankruptcy, that an act and volition are in law inseparable from each other, and that the warrant of attorney was not made in view of the provisions of the Act of 1898. The State decisions show much divergence.

COMMON CARRIER—EXPULSION FOR NON-PAYMENT OF FARE.—UNITED RAILWAYS & ELECTRIC CO. V. HARDESTY, 51 Atl. 406 (Md.).—Plaintiff presented detached coupon to conductor, who rang up fare and then demanded to see

coupon book which he could not produce. Conductor did not demand cash fare, nor did plaintiff tender such payment. *Held,* defendant not liable for expulsion.

Whether cash fare must be demanded after tender of invalid ticket does not appear from the reported cases to have been hitherto directly in issue. *Railroad Co. v. Kirby,* 88 Md. 409; *Boylan v. Railroad Co.,* 132 U. S. 146. Judicial notice, however, will be taken of a passenger's obligation to pay; *Condran v. Railroad Co.,* 14 C. C. A. 506, 28 L. R. A. 749, and from this the court infers that the custom of demanding fare cannot be treated as a requirement, but that the duty rests with the passenger to tender payment.

COMMON CARRIER—LIABILITY—STOPPAGE IN TRANSITU—NEGLECT.—ROSENTHAL ET AL. V. WEIR, 63 N. E. 65 (N. Y.).—*Held,* where a common carrier agrees to stop goods in transit and then negligently delivers them it is liable for the full value of the goods, notwithstanding the fact that the goods were carried under a bill of lading limiting its liability.

The exercise of the right of stoppage *in transitu* by the plaintiff puts an end to the contract of carriage, and revests the possession of the goods in him. *Cross v. O'Donnell,* 44 N. Y. 661, 4 Am. Rep. 721. *Penn. R. R. Co. v. Am. Oil Works,* 126 Pa. 485, 17 At. Rep. 671. A common carrier from the time it is notified and directs its agent not to deliver goods becomes the bailee of the shipper to which relation a bill of lading has no reference. If it then delivers goods it becomes liable in trover. *Litt v. Crowley,* 7 Taunt. 169, 23 Eng. Ruling Cases 411.

COMMON CARRIER—RIDING ON PASS—ASSUMPTION OF RISK.—DUNCAN V. MAINE CENT. R. Co., 113 Fed. 508 (Me.).—*Held,* that one riding on free pass, assenting that he should assume all risk and that carrier should not be liable, cannot recover for injuries from negligence of carrier's servants.

This decision directly departs from the well-established rule that a common carrier cannot stipulate against responsibility of himself or servants,—5 Am. & Eng. Ency., 508; *R. R. Co. v. Lockwood,* 17 Wall 357; *Waterbury v. R. R. Co.,* 17 Fed. 671. It follows the distinction laid down in the *New York* and *New Jersey* cases, generally denied as having no solid foundation. *Whart. on Neg.,* 641. See also *R. R. Co. v. Voight,* 17 Fed. 671.

COMMON CARRIER—TICKET AS EVIDENCE—RIGHT TO STOP-OFF.—SCHOFIELD V. PENN. Co., 112 Fed. 855 (C. C. A.).—Where R. R. Co. agrees to transport passenger between specified points with right to stop off at intermediate points, there being nothing on face of ticket inconsistent with such right nor rule of company contrary, and conductor takes coupon covering distance between such points, *Held* that passenger may resume journey from point of stop-off without ticket and action lies for expulsion.

There is much conflict as to the value of a ticket as conclusive evidence of rights of passenger. Many cases hold that upon failure to exhibit ticket passenger may be expelled upon refusal to pay fare whatever be the circumstances. 25 Am. & Eng. Ency., 1075-77; 18 Am. & Eng. R. Cas. 347. The current of recent cases, however, in what would seem the better doctrine. supports this decision. *Murdock v. Boston R. Co.,* 137 Mass. 293; *Phila, etc., R. Co. v. Rice,* 64 Md. 63.

CONTRACTS—CONFLICT OF LAWS—SURETYSHIP.—UNION NAT. BANK v. CHAPMAN ET AL., 62 N. E. 672 (N. Y.).—Defendant, residing in Alabama, signed, as surety, her husband's note, which was made negotiable in Illinois. Defendant did not know where the note was to be negotiated. *Held*, that her contract was an Alabama contract and, as such, void under its laws. Bartlett and Vann, J. J., dissenting.

Several well considered cases are found which support the conclusion of the New York court. *Vorjt v. Brown*, 42 Hun. 394; *Scudder v. Bank*, 91 U. S. 406. But in the leading case of *Milliken v. Pratt*, 125 Mass. 374, upon a similar state of facts, the court held that the contract was governed by the laws of State where negotiated. The distinction between these classes of cases, seems to rest upon the question whether the surety was aware of the place of negotiation. The dissenting opinion holds that the contract of suretyship had no inception until the note was negotiated.

CONTRACTS—OPTIONS—RIGHT OF A STATE TO PROHIBIT CONTRACTS FOR FUTURE DELIVERY.—BOOTH v. STATE OF ILLINOIS, U. S. Sup. Ct. (Mar. 3, 1902). A statute of the State of Illinois invalidating contracts giving an option to sell or buy at a future time any grain or other commodity, whether delivery is contemplated or not, is not in violation of any constitutional provision. Brewer and Peckham, Justices, dissenting.

The statute is held not repugnant to the clause of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws, and the interpretation put on that clause in *Algeyer v. Louisiana*, 165 U. S. 578, namely, that it means the right of a citizen to pursue any avocation and for that purpose to enter into all contracts necessary and proper. If the State thinks certain evils cannot be successfully reached unless the calling be actually prohibited the courts cannot interfere unless the statute clearly has no real relation to that object. *Mugler v. Kansas*, 123 U. S. 623; *Minnesota v. Barber*, 36 U. S. 313; *Voight v. Wright*, 141 U. S. 62. And following the principle that courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so, the decision of the Illinois Supreme Court, *Booth v. People*, 186 Ills. 43 is upheld.

It is an interesting question as to how far States may go in the exercise of the police power, in depriving the citizen of the right to make any contract not in itself harmful or injurious to the public. The liberty to contract cannot be restrained by arbitrary legislation resting on no reason by which it can be defended. *Shaver v. Penn., Co.*, 71 Fed. Rep. 931; *State v. Goodwell*, 33 W. Va. 179. There can be no question as to the legality of option contracts in general, and they are perfectly valid and enforceable. *Bigelow v. Benedict*, 79 N. Y. 202; *Kirkpatrick v. Bousal*, 172 Pa. St. 155. But in Illinois and other States option contracts have been invalidated and placed in the category of gambling contracts and hence unenforceable and void. *Schneider v. Turner*, 130 Ill. 28; *Preston v. Smith*, 156 Ill. 359; *Osgood v. Bander*, 75 Iowa, 550; *Schlee v. Guckenheimer*, 179 Ill. 593. There is, however, much difference of opinion as to the operation of these statutes, and the opinion of Justice Harlan should go far toward putting an end to these contracts.

CONTRACTS—PRIVITY—CITIZEN AND MUNICIPALITY.—GRAVES COUNTY WATER CO. v. LIGON, 31 S. W. 725 (Ky.).—City of Mayfield passed an ordinance granting to a water company the privilege of supplying city with water, for protection

against fire. *Held,* that where private property is destroyed by fire, as a result of the negligence of the water company, an action will lie in favor of the owner of the property, for failure of the company to perform its contract. After accepting the benefits of the contract the company is estopped from denying its liability under the statute of frauds for its failure to sign the contract.

It is well settled that no action will lie against a city in favor of a private owner, for city neglecting to provide a sufficient water supply. *Tainter v. Worcester,* 123 Mass. 311. But in this case the court reasoned that the contract was made by the city for the benefit of its citizens and as there is a privity of contract an action may be maintained. *Gorrell v. Supply Co.,* 124 N. C. 328; *Paducah Lumber Co. v. Paducah Water Supply Co.,* 89 Ky. 340.

COURT-MARTIAL—REGULAR OFFICERS INCOMPETENT TO TRY VOLUNTEERS.—DEMING V. MCCLAUGHRY, 113 Fed. 639 (C. C. A.).—A volunteer was tried and convicted by a court-martial composed of officers of the regular army. *Held,* that the volunteer force is not a part of the regular army, and that regular officers are incompetent to try volunteers.

Although the general commanding the army has held that regular officers can lawfully try volunteers, *Circular 21, H. I. A., June 30, 1898,* the uniform course of legislation, decision and practice establishes the fact that it has become the policy of the United States to prohibit the trial of officers and soldiers of the volunteer force by the officers of the regular army. *1 Stat.* 424; *2 Stat. 371; Bênet, Military Law, 25; 18 Stat. 113.*

DOWER—MINERAL RIGHTS—LIFE ESTATE—OIL.—HIGGINS OIL & FUEL CO. V. SNOW, 113 Fed. 433 (C. C. A.).—Defendant was entitled to dower estate in certain land under the laws of Texas. *Held,* that she had the right to drill oil wells and claim the proceeds.

The general rule at common law is that a life tenant may work mines that are open when the tenancy commenced but he cannot open new mines. *Stoughton v. Leigh,* 1 Taunt. 402; *Coates v. Cheever,* 1 Cow. 460; *Wentz's Appeal,* 106 Pa. 301. And some of the more modern cases go further, holding that mining will be allowed if the owner of the preceeding estate has fixed on it the character of mining land. *Piddy v. Griffith,* 150 Ills. 560; *Seager v. McCabe,* 92 Mich. 186. But the Court disregarding the common law follows boldly the rule of the civil law, *2 Dom. Civil Law, 945-968, Bryan, Petroleum, 41,* and declares that the tenant in dower has the right to seek for and open every kind of mine and is entitled to the proceeds thereof.

ELECTIONS—QUALIFICATIONS—CONSTITUTIONAL LAW—POWELL V. SPACKMAN, 65 Pac. 503 (Id.).—*Held,* that a soldier making his permanent residence at a soldier's home does not thereby acquire a right to vote in the county or precinct where such institution is situated. Sullivan, J., dissenting.

The leading case, decided under New York constitutional provision (copied by many States) witholding this right where persons are supported by the public in charitable institutions is, *Silvey v. Lindsay,* 107 N. Y. 55; followed here and in Michigan and Kansas, but rejected in California, Oregon and in *U. S. v. Rowdebush, Fed. (Ia., not reported).* There seems to be reluctance in applying the rule without exception, and a conflict of opinion as to circumstances justifying exception.

MASTER AND SERVANT—INJURY FROM DANGEROUS MACHINERY—PROMISE TO REPAIR—ASSUMPTION OF RISK.—RICE v. EUREKA PAPER CO., 75 N. Y. Sup. 49.—Plaintiff worked on a defective rag-cutter. He knew the danger but was induced to remain at work by defendant's promise to repair. He was injured before the expiration of the specified time. A divided court *held*, plaintiff assumed the risk.

The assumption of risk in employment is contractual in nature. By promising to repair defective machinery does master create a new contract by which he assumes risk? The majority feeling constrained to follow N. Y. decisions decide in the negative. *McCarthy v. Washburn*, 42 App. Div. 252; *Marsh v. Chickering*, 101 N. Y. 396. The minority answer affirmatively in agreement with Cooley on Torts, 559-60, the U. S. Supreme Court, and decisions of other states. *Hough v. Ry. Co.*, 100 U. S. 213; *Ferriss v. Machine Works*, 90 Wis. 541.

NEGLIGENCE—LIABILITY OF LESSOR—MCCABE'S ADMX. v. M. & B. S. R. CO., 66 S. W. 1054 (Ky.).—By authority of the legislature M. & B. S. R. R. had been leased to C. & O. R. R. Owing to negligence of lessee in operating one of its trains over the leased line intestate was killed. In suit brought by administratrix to recover damages lessor and lessee were joined as defendants. It was argued by defendants that lessee was alone responsible. *Held*, that the lessor was liable for the torts of the lessee.

The tort here was not caused by any defect in instruction, but solely by the negligence of lessee. It is not settled whether the lessor is responsible for the torts of the lessee, but the best cases seem to hold as in the main case. *R. R. v. Brown*, 17 Wall. 450; *Balsley v. R. R. Co.*, 119 Ill. 68; *Southern R. R. v. Bouknight*, 70 Fed. Rep. 442; *Nelson v. R. R.*, 26 Vt. 717. Some very carefully considered cases, however, take the opposite view. *St. L. W. & W. R. R. v. Curl*, 28 Kans. 622; *Ditchett v. R. R.*, 67 N. Y. 425; *Langley v. R. R.*, 10 Gray 103.

NEGLIGENCE—RAILROAD CARRYING MAIL.—GERMAN STATE BANK v. MINNEAPOLIS, ETC., RY. CO., 113 Fed. 414.—Plaintiff deposited in the United States mail a registered package, containing $3000 in currency. The package was carried in a mail sack on defendant's train to its station, where through negligence of the company, it was extracted from the mail sack. *Held*, that the railroad company was not liable.

No legislation has ever arisen before on this subject. A railroad company carrying the mails does not assume as to them any of the duties or responsibilities of a common carrier. As to the mail itself the railroad has no duty except what it owes to the government, its employer.

NEGLIGENCE—STREET R. R.—REPAIRS OF STREET—ADMISSIBILITY OF MUNICIPAL RESOLUTION.—WELCH v. SYRACUSE RAPID T. CO., 75 N. Y. 173.—R. R. Law, Section 98 requires street Ry. Co. to keep in permanent repair portion of street two feet outside its tracks, under supervision of city. City Charter, Section 30 authorizes mayor and council to regulate and repair streets. Passenger on defendant's cars was injured by stepping into a hole in pavement made by a paving company working under city authority. *Held*, the resolution of city council empowering company to repave street is admissable to show whether or not defendant was negligent.

Such resolution is competent as bearing on its negligence, even though defendant was not relieved of duty to keep street in repair by reason of action of city. *Snell v. Ry. Co.*, 19 N. Y. Sup. 476. The dissenting judges argue from *Conway v. Rochester*, 51 N. E. 395, that Ry. statute is mandatory and city has no authority to relieve Ry. Co. of its duty but only to supervise. Defendant is also negligent for stopping car opposite the hole. *Wolf v. Ry. Co.*, 74 N. Y. Sup. 336.

NEGLIGENCE—WALLS OF BURNED BUILDING—CARE REQUIRED OF OWNER—DAMAGES.—AINSWORTH V. LAKIN, 62 N. E. 746 (Mass.).—*Held*, where walls of a burned building, which could not be used in rebuilding, were left standing without any precaution being taken to prevent their falling, the owner, after a reasonable time in which to take such steps
jury from the wall, is liable for all damages caused thereby.

Any person who for his own purpose brings on his land and collects and keeps anything likely to do mischief if it escapes, must keep it in at his peril. *Fletcher v. Rylands*, L. R. 3 H. L. 330. This rule has been applied to cesspools, *Ball v. Nye*, 99 Mass. 582; to artificial reservoirs, *Gray v. Harris*, 107 Mass. 492; to accumulation of snow and ice upon a building by reason of the shape of its roof, *Shipley v. Fifty Associates*, 106 Mass. 194; and to an ordinary wall; *Gorham v. Gross*, 125 Mass. 232; *Channtler v. Robinson*, 4 Exch. 163. The only exceptions to the liability which have been judicially recognized are in cases of the plaintiff's own fault, or acts of God, or acts of third persons, which the owner had no reason to anticipate.

RES JUDICATA—EQUITABLE RELIEF—COMMERCIAL UNION ASSUR. CO., LIMITED, V. NEW JERSEY RUBBER CO., 51 Atl. Rep. 451 (N. J.).—Insurance company issued policy with agreement that other concurrent insurance should be procured and so distributed that liability under said policy should be for a proportionate part only of any given item of loss. After occurrence of fire loss, such proportionate part of indemnity was tendered, policy was canceled and unearned premium returned. Insured, having failed to procure the agreed concurrent insurance, brought action at law on policy which was allowed to proceed to judgment, this being that validity of policy had been recognized by cancellation. *Held*, that such adjudication did not make liability on policy *res judicata* so as to prevent court of equity from entertaining bill of relief, for the matter *in pais* had different significance in court of law from that in court of equity. Gummere, C. J., and Fort, Pitney, Adams, and Vredenburg, J. J., dissenting.

This decision draws a distinction between those judgments at law as to matter which has the same significance in courts of law and of equity, and those as to matter having different significance in the two courts. It expresses a broader and more just rule of law than the strict rule admitting no such distinction followed in *Hendrickson v. Hinckley*, 58 U. S. (17 How.) 443; *Breckenridge v. Peter*, Fed. Cas. No. 1,825 (4 Cranch, C. C. 15).

TRADE-NAMES—SUIT AGAINST CORPORATIONS FOR INFRINGEMENT—THE PECK BROS. & CO. V. PECK BROS. ET AL., 113 FED. REP. 291 (C. C. A.).—The fact that a corporation has been chartered by a State under a certain name, which it selected, does not afford it immunity from a suit in a Federal Court

by a corporation of another State to enjoin it from prosecuting its business under such name, where the name was deliberately and fraudulently adopted by its incorporators in imitation of the complainant's.

The defendants relied upon the case of *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, in which the opposite doctrine is well stated. In that case the Court argued that the name of the corporation was conferred by the State as an act of sovereignty, and that a foreign corporation cannot assert rights in contravention of its laws. The Court refuted that theory upon the ground that the name is not conferred by the State but is chosen by the incorporators, and that the act of sovereignty allowing incorporation is permissive, not mandatory. This appears to be the better view since the other would have the effect to protect a corporation from the consequences of its own wrong. The contrary practice though established in Illinois has found little favor in the courts of other states. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769; *Holmes, Booth & Hayden v. Holmes & Atwood Mfg. Co.*, 37 Conn. 278, 293, 9 Am. Rep. 324.

VERDICT—DIRECTING VERDICT.—CAMPBELL V. MANUFACTURERS' NAT. BANK, 51 Atl. Rep. 497 (N. J.).—*Held*, that where bank cashier conducts his individual transactions with bank's drafts, the regular entry on stub of draft book of such acts is no evidence that bank's directors and president had knowledge of and ratified such acts for no fraud could be detected short of an investigation of bank's books and there was no error in directing verdict accordingly. Magie, Ch., and Dixon, Collins, Garretson, Vredenburgh, and Voorhees, J. J., dissenting.

This decision appears to be a departure from the tendency of New Jersey cases as in *Railroad Co. v. Moore*, 24 N. J. L. 830; *Transportation Co. v. West*, 33 N. J. L. 432; *Railroad Co. v. Shelton*, 55 N. J. L. 342. It follows, *Bank of New York Nat. Banking Ass'n v. American Lock and Trust Co.*, 143 N. Y. 559, 564; *Manhattan Life Ins. Co. v. Forty-Second and G. St. Ferry Co.*, 139 N. Y. 146. The weight of the law seems to be against the decision, that is, such questions should be left to the jury.

WILLS—MENTAL INCAPACITY—TESTIMONY OF PHYSICIAN.—JONES V. COLLINS ET AL., 51 Atl. 398 (Md.).—Where a physician has never attended a testator professionally, but has twice prescribed for him, *held*, that his opinion as to mental capacity is admissible without first stating circumstances upon which it is founded. Pearce, J., dissenting.

Whether mere prescription will so constitute one an attending physician has not hitherto been decided. The dissenting opinion would seem to be deduced from good authority in reasoning that it would not, as prescription might be for any cause other than such as would give one an opportunity of observing a patient's mental condition, and this ought clearly to appear. *Waters v. Waters*, 35 Md. 542; *Com. v. Rich*, 14 Gray 335; *Hastings v. Rider*, 99 Mass. 622.