RECENT CASES.

ADVERSE POSSESSION—INTERIOR DEPARTMENT—JURISDICTION.—SAGE V. RUDNICK, 100 N. W. 106 (Minn.).—Plaintiff's grantor was a railroad company to which in 1867 Congress granted certain lands upon the filing by the railroad company of maps of definite location. The land was formally conveyed by patent to the plaintiff in 1891. Defendent, in 1877, settled upon part of the land so granted and has since remained in open and adverse possession. Subsequent to the filing of the maps of definite location, certain contested claims to the land held by the railroad company were presented to the Department of the Interior for adjudication. *Held*, that the grant to the railroad company being *in praesenti*, the Department of the Interior had no jurisdiction to determine these claims, and that the pendency of that controversy before the Department did not suspend the running of the statute of limitations in favor of the defendant's adverse claim.

The opinion in this case purports to distinguish the case of *Co. v. Oleson*, 87 Minn. 117, but the decision rendered in reality overrules the earlier case. Supporting the doctrine laid down in the principal case, it was held in *Dolen v. Black*, 48 Neb. 688, that for purposes of adverse possession the title to land rests when the party receiving land from the United States complies with all the requisites to entitle him to a patent. *Udell v. Peak*, 70 Tex. 547; *Doe v. Herrick*, 14 Ind. 242; *Cady v. Eighmey*, 54 Ia. 615. But in *Redfield v. Parks*, 132 U. S. 239, where the circumstances were very similar to those in the principal case, the Supreme Court held that until the actual issuance of the patent, the legal title to the land is in the United States, and no adverse possession of it can confer title. Like decisions have been given in regard to patents issued by the states. *Kennedy v. Townsley*, 16 Ala. 239; *Hartley v. Hartley*, 60 Ky. 56; *Overton v. Davisson*, 1 Grat. 211. While the cases on this point of law are in conflict, the authority of the Supreme Court is against the doctrine laid down in the principal case. *Gibson v. Chouteau*, 13 Wall 102; *Redfield v. Parks*, *supra*.

ATTORNEY AND CLIENT—LUNACY—CONTRACT FOR RETAINER.—CHASE V. CHASE, 71 N. E. 485 (Ind.). Where a lunatic in an interval of lunacy contracts with an attorney to defend him, *held*, that no authority is conferred on the attorney to appear for him nor to prosecute an appeal from the court's decision.

While at first sight it appears to deprive a person under inquisition for lunacy of his natural means of defense, it soon becomes evident that the relation of attorney and client must be regulated by the regular rules of contract when the client is insane. *Am. & Eng. Encyc. of Law*, 329. For even should a contract be made for his defense by a lunatic while in a sane condition and in view of future contingencies, it would be an unnecessary measure, the law always suitably providing for the protection of incompetent persons, as being their theoretical guardian. *Johnston v. State*, 12 L. R. A. 235. A concession is often made by statute, in allowing a defendant to traverse such

inquisition by attorney. *In re Cummings*, 1 De G., M. and G. 537. But even in such cases it is necessary that the defendant be privately examined before the chancellor before traversing, subject to being refused permission if his insanity is patent. *In re Lindsley*, 49 N. J. Eq. 358.

CARRIERS—LIABILITY FOR INJURIES BY CROWD AT STATION—NEGLIGENCE.—WAGNER V. BROOKLYN HEIGHTS R. Co., 88 N. Y. Supp. 792.—Plaintiff purchased a ticket and crossed a platform to reach defendant's depot. Owing to a blockade on the road, a crowd of passengers was obstructing the passageway, and the plaintiff, pushed about by the mob, stumbled and was injured. The platform was not under defendant's exclusive control, although it was constantly used by its passengers. *Held*, that, as the premises were public, the defendant was not liable. Hooker, J., *dissenting*.

A railroad is not required to exercise highest degree of care with reference to stations, platforms, and approaches, but must maintain them in a reasonably safe condition. *Keefe v. Boston R. Co.*, 142 Mass. 251. In some cases, however, the rule is so expressed as to require more than ordinary care in these respects. *Kelly v. R. Co.*, 8 N. Y. 123; *Johns v. R. Co.*, 39 S. C., 162. The rule applies to avoiding or controlling crowds of persons at its stations, imperiling the safety of passengers. *R. Co. v. Treat*, 75 Ill. App. 327; *Dawson v. Trustees*, 52 N. Y. Supp. 133; and in *Graham v. R. Co.*, 149 N. Y. 336 it was held that carriers are bound to so regulate the movements and disposition of passengers from the stations to the vehicles of conveyance as to preserve the safety of all. Opening but one of five exit gates when a crowd is making its way to a train is a lack of ordinary care. *Taylor v. Pennsylvania Co.*, 50 Fed. 755. The dissenting opinion in the present case contends that the duty of a common carrier to protect passengers is as great in a place not owned or controlled by it, as it is in its own station, if it has adopted it as such.

CARRIERS—LIMITATION OF LIABILITY—NEGLIGENCE—BURDEN OF PROOF—CALL V. TEXAS & P. RY. Co., 24 Sup. Ct. 663.—Where bills of lading stipulate against carrier's liability for destruction by fire and the goods are so destroyed, *held*, that the burden of proof lies on the shipper to show that the carrier was negligent.

Many courts show a leaning toward the old strictness regarding carriers. Thus it is said the carrier must not only show that the loss was caused by one of the excepted agencies, but must also rebut the presumption of negligence under the rule that the burden of proof is on him who best knows the facts. *Ryan v. Ry. Co.*, 65 Tex. 13. So, 2 *Greenleaf Ev.* (14th Ed.) §79. But the present case is in line with the main current of modern decisions. Where a special contract exempts the carrier from liability for losses by fire, negligence on the part of the carrier cannot be inferred from the mere fact that the fire occurred while the goods were in the carrier's possession in transit; it must be affirmatively proven by the party asserting it. *Indianapolis Ry. Co. v. Forsythe*, 4 Ind. App. 326. It is argued against the rule of evidence applied in *Ryan v. Ry. Co.*, *supra*, that to load down the carrier's contract with this measure of proof is simply to hold that he may not limit his responsibility. *Patterson v. Clyde*, 67 Pa. St. 506.

CONFLICT OF LAWS—STATUTORY TORT COMMITTED IN FOREIGN COUNTRY—JURISDICTION OF FEDERAL COURT—MEXICAN CENTRAL R. Co. V. SLATER, 24 Sup. Ct. 581.—Mexican statutes impose a liability for death by wrongful act, but provide that damages shall be awarded in the form of support. *Held*, that

inasmuch as a federal court cannot make such a decree, it cannot take jurisdiction of this sort of cause. Fuller, C. J., Harlan, and Peckham, JJ., *dissenting*.

In the case of contracts the *lex fori* governs procedure and remedy. *Don v. Lippman*, 5 Cl. and F. 1, 13; *Scudder v. Bank*, 91 W. S. 406. Thus it determines whether there can be attachment for debt. *De la Vega v. Vianna*, 1 B. & Ad. 284; *Hinkley v. Marean*, 3 Mason 88. On principle, the same rule should apply in case of torts. *Story, Conf. of Laws*, 9557. And the English courts, with some of those in this country, have so held, *Machad v. Fontes*, 2 Q. B. (1897) 231; *W. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608,616: but see *Carter v. Goode*, 50 Ark. 155. The better view places statutory torts on the same basis as those arising out of the common law. *Illinois Central R. Co. v. Ihlenberg*, 43 U. S. App. 726; *C. & E. I. R. Co. v. Rouse*, 178 Ill. 132. But the majority of the courts still emphasize the similarity of their own statutes to that sought to be enforced. *Cincinnati, Etc., R. Co. v. McMullen*, 117 Ind. 439; *Morris v. Ry. Co.*, 65 Ia. 727.

CONSTITUTIONAL LAW—CHANGE OF VENUE—BARRY V. TRUAX, 99 N. W. 769 (N. D.).—*Held*, that a clause in a state code providing for a change of venue upon application of the state's attorney does not violate the right of trial by jury, as it existed at common law.

The provisions in the various state constitutions relative to trial by jury generally declare that this right "shall remain inviolate." The common law, as announced in IV. *Blackstone* 350, provides that the jury shall be composed of "freeholders of the *visue* or neighborhood; which is interpreted to be the county where the fact is committed." A number of courts have held that the constitutional right of trial by jury includes the right of having the jurors selected from the county in which the offense is alleged to have been committed. *Buckrice v. People*, 110 Ill. 29; *People v. Powell*, 87 Cal. 348; *Kirk v. State*, 1 Cold. 344. In *State v. Potter* 16 Kan. 80, it was held that this right is one which the accused may waive or insist upon. Contrary to this, it has been held by the Michigan court that a change of venue may be granted on request of the State as well as on request of the accused. *People v. Fuhrmann*, 103 Mich. 593. So in *State v. Miller*, 15 Minn. 344, it was held that when an impartial trial cannot be held in the county where an indictment is found, the court has the power, on application of the prosecution, to change the place of trial to an adjoining county. This doctrine, which is in harmony with the decision in the principal case, is the prevailing view. *Price v. State*, 8 Gill 295; *People v. Harris*, 4 Denio (N. Y.) 150; *Commonwealth v. Davidson*, 91 Ky. 162.

CONSTITUTIONAL LAW—DISCRIMINATING STATUTE—LEGISLATIVE DISCRETION—MISSOURI, K. & T. RY. CO. V. MAY. 24 Sup. Ct. 638.—A Texas statute imposed a penalty upon railway companies alone for permitting Johnson grass to mature upon their lands. *Held*, that inasmuch as the court is "unable to say that the law may not have been justified by local conditions," this discrimination against these companies is a valid exercise of legislative discretion. Brown, White, and McKenna, JJ., *dissenting*.

M'Culloch v. Maryland, 4 Wheat. 316, is relied on to support the ruling; but that decision, in requiring that the means adopted by the legislative body should be "appropriate," "really calculated to effect the object in view," seems to place on the courts the duty of satisfying themselves of the fulfill-

ment of this condition. pp. 409, 423; see also *Fisher v. Blight*, 2 Cranch 358. Language more closely restricting the judiciary has at times been used. *Civil Rights Cases*, 109 U. S. 3, 51. But the court has hitherto justified discriminating statutes by establishing positive grounds of distinction. *Legal Tender Cases*, 12 Wall. 457; *Minneapolis, &c., Ry. Co. v. Beckwith*, 129 U. S. 26. So it has positively shown the reasonableness of classifications of taxable property. *Magoun v. Bank*, 170 U. S., 283, 294; but see *Am. S. R. Co. v. La.*, 179 U. S. 89, which is theoretically the sound rule. *Cooley, Const. Lim.* 393. In failing to require this positive justification, the court has advanced a step.

CONSTITUTIONAL LAW—HABEAS CORPUS—EXCLUSION OF CHINESE.—UNITED STATES V. SING TUCK ET AL., 24 Sup. Ct. 621.—Chinese persons claiming United States citizenship, but offering no proof, upon being refused admission to this country, obtained writs of *habeas corpus* without first making appeal to the Secretary of Commerce and Labor. *Held*, that such appeal is prerequisite to an appeal to the courts, and that due process of law is not disregarded by the Chinese regulations of the Department of Commerce and Labor. Mr. Justice Brewer and Mr. Justice Peckham, *dissenting*.

That the statutes may constitutionally make the authority of executive officers exclusive in the case of aliens is well established. *Fong Yue Ting v. U. S.*, 149 U. S. 698. The court in the principal case expressly disclaims deciding whether their decisions may be made final upon the facts of citizenship, referring to the *Japanese Immigrant Case*, 189 U. S. 86; *Fok Yung Yo v. U. S.*, 185 U. S. 296; and *Chin Bak Kan v. U. S.*, 186 U. S. 193, as the available precedents if a decision of this point should become necessary. In the district court it has been held that the question of citizenship is one which cannot be committed for final decision to executive officers. *U. S. v. Yee Mun Sang*, 93 Fed. 365. But the tendency both in the Supreme Court and in the lower courts seems to be in the other direction. That a claim of citizenship is not enough to affect the finality of the jurisdiction of a United States Commissioner was decided in *Chin Bak Kan v. U. S.*, *supra*, but in that case the commissioner's judgment had been already affirmed by the district court. In the case of an alien, irregularity in conducting the hearing, and a refusal to hear cumulative testimony have been held not to constitute grounds for review by the courts. *In re Leong Youk Tong*, 90 Fed. 648. See also *In re Lee Ping*, 104 Fed. 678.

CONSTITUTIONAL LAW—VALIDITY OF MUNICIPAL ORDINANCES—BILL BOARDS.—BILL POSTING SIGN CO. V. ATLANTIC CITY, 58 Atl. 342 (N. J.)—*Held*, that an ordinance forbidding the construction of signs upon private property, regardless of whether such signs are a menace to the public safety, is unconstitutional, as an attempt to appropriate private property to public use without compensation.

Municipal ordinances against bill boards are generally enacted on grounds of public safety. Whether they are upheld as safety measures, *Rochester v. West*, 164 N. Y. 510, or held to be unreasonable, *Crawford v. Topeka*, 51 Kan. 756, they do not purport to prohibit upon the ground of unsightliness. It was held in *People v. Green*, 83 N. Y. Supp. 460, that a statute giving a municipality unlimited power to regulate the erection of signs upon private property is inimical to the constitutional provision. But the limitation of height of bill boards to six feet has been upheld as a proper safety measure. *Rochester*

v. West, supra. It is conceded that the police power is adequate to restrain offensive noises and odors, and it is argued, *Freund Police Power*, § 182, that a statute affording similar protection to the eye would not be unconstitutional; that it would only be an amplification of a recognized principle, and not the creation of a new one.

CRIMINAL LAW—TRIAL—EFFECT OF WAIVER OF ARGUMENT BY ACCUSED.—CUNNINGHAM V. PEOPLE, 71 N. E. 389 (Ill.)—When after the opening argument in a prosecution for rape the defendant waived the right to address the jury, *held*, that the people had no further right to address the jury.

The discretion of the court as to the opening and closing argument in criminal cases is allowed a wide range, even in the Code states. This discretion once exercised is seldom disturbed. *Vines v. State*, 19 S. W. 545. An almost unbroken line of authority permits each of two states' attorneys to address the jury, regardless of whether the defense presents argument or not. *State v. Stewart*, 9 Nev. 120. In the principal case this was not done in the trial court, but the first states' attorney was allowed to address the jury after he had closed his argument. As is shown in *Barden v. Briscoe*, 36 Mich. 255, the effect is apt to be to cut the plaintiff off from half his argument, a result to which the defendant has no absolute right.

DISCHARGE OF SERVANT—MALICIOUS PROCUREMENT.—LANCASTER V. HAMBURGER, 71 N. E. 289 (OHIO).—*Held*, that where a patron of a railroad company secures the discharge of a conductor because of rudeness, he incurs no liabilities to the conductor, even though actuated by malice.

This case bears an analogy to the "strike order" cases, but even the opinions in the latter favorable to recovery against the person ordering the strike are not based on the element of malice; *Allen v. Flood* (1898) App. Cases, 1—81. *Quinn v. Leatham* (1901) App. Cases, 495; it being absolutely settled that while malice has some importance in the commission of an illegal act, it is of no importance where a person keeps within his legal rights, *Paine v. Chandler*, 134 N. Y. 385. However, there are cases in which this is not so, especially in the exercise of property rights; see *Chesley v. King*, 74 Me. 164. 'A wanton infliction of damage can never be a right.' *Burke v. Smith*, 69 Mich. 380. But as the opinion in the principal case forcibly suggests, if absence of malice were necessary to safely report the misconduct of a servant, his chance of immunity would grow proportionately to the enormity of his offense.

HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR WIFE'S TORTS.—GOKEN V. DALLUGGE, 99 N. W. 818 (Neb.). *Held*, that the common-law rule that a husband is liable jointly with his wife for torts committed by her in his presence, does not exist in Nebraska.

The common-law rule holding the husband liable for the wife's tort's, 11 Kent's Com. 149, has been abrogated by statute in several of the states but the decision in the principal case, following *Martin v. Robson*, 65 Ill. 129, proceeds upon the theory that in giving the wife the right to manage her separate property, the law has so modified the disabilities of the wife and the rights of the husband as to remove the reason for holding the latter liable for the torts of the former.

In repudiating this doctrine it was said in *Quick v. Miller*, 103 Pa. 67. "A statute will not be deemed to exempt a husband from the common-law liability for his wife's torts unless it expressly so declares." Married Women's Property Acts have been passed in most of the states and has been held

almost without exception that these do not abrogate the common-law rule of the husband's liability for the torts of the wife. *Fitzgerald v. Quaun* 33 Hun 652, *McElfresh v. Kirkendall* 36 Iowa 562.

INHERITANCE TAX—EXEMPTIONS—CONSTITUTIONAL LAW.—STATE EX REL. TAYLOR V. GILBERT, 71 N. E. 636 (Ohio). *Held*, that a tax on the right of inheritance is an excise and not a property tax and is therefore not in violation of a constitutional provision which requires uniformity and equality in the imposition of burdens of taxation and which limits the amount of exemption to less than that exempted by the tax in question. Price and Davis, JJ., *dissenting*.

The right of receiving property is a bonus from the hands of the State and is not property. *Scholey v. Rew*, 23 Wall. 331; *Magoun v. Bank*, 170 U. S. 283: *contra*, *Com. v. Coleman*, 52 Pa. 486; *Curry v. Spencer*, 61 N. H. 624. The constitutional provision *supra*, applies only to taxes on property. *Baker v. Cincinnati*, 11 O. St. 540. In most states the subject of taxation apportionment in subjects other than persons and property is legislative rather than judicial. *Bell Gap R. R. v. Penn.*, 134 U. S. 237; so that the remedy for discriminating taxation in such cases lies with the legislature only, *Kirby v. Shaw*, 19 Pa. 261; *Youngblood v. Sexton*, 32 Mich. 414; the constitutional limitation on exemptions therefor, not applying. The dissenting opinion in the principal case grounds its argument on *Ex rel. Ferris*, 53 Ohio St. 1, and upholds the view that the Constitution limits the right of the legislature to tax and that it is over-refinement of reasoning to exclude a right of inheritance from its protection.

LANDLORD AND TENANT—BREACH OF CONTRACT TO REPAIR—INJURY TO TENANT—LIABILITY OF LANDLORD, DAVIS V. SMITH, 58 Atl. 630. (R. I.) *Held*, that the landlord is not liable to tenant for injuries from defective premises which the landlord has covenanted to repair.

If the duty of the landlord had been a positive one he would have been liable for all the consequences. *Schick v. Fleischauer*, 26 N.Y. App. Div. 210. Thus it has been held that where a landlord actually undertakes to repair and does so negligently and injury results he is liable, for there the law imposes a positive duty to repair with due care. *Gill v. Middleton*, 105 Mass. 477; *Hine v. Cushing*, 53 Hun (N. Y.) 519. It was even held in *Flinn v. Trask*, 11 Allen 550, that in a covenant like the present one the landlord is liable for resulting injury. The great weight of authority is, however, to the effect that such a covenant entails simply ordinary contract liability and only damages which are in contemplation at the time of its inception are assessable. *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169; *Bowe v. Hun King*, 135 Mass. 180; *Spellman v. Bannigan*, 36 Hun. 174.

LIBEL—CRITICISM MADE IN JEST.—TRIGGS V. SUN PRINTING AND PUBLISHING ASS'N., 71 N. E. 739 (N. Y.). *Held*, that a publication ridiculing an author's private life and representing him as a presumptuous literary freak, cannot be justified on the ground that it was made in jest.

It is not libelous to criticize an author's works in any way, but the private life of an author is protected. *Carr v. Hood*, 1 Camp. 354; *Hamilton v. Eno*, 81 N. Y. 116; *Townshend, Slander and Libel* § 255. The fact that a criticism, tending to bring its object into ridicule, is in jest, is no excuse, *Donoghue v. Hayes*, Irish Exchequer 265, 266; the words being sufficient if they tend to make a person seem contemptible and ridiculous. *Foster v. Scripps*, 39

Mich. 389. The principal case is of peculiar interest in that it shows the limits within which newspaper writers are allowed to exercise their humor—though such limits are elastic in different courts.

LOTTERY—'CHANCE'.—PEOPLE EX REL. ELLISON V. LAVIN, 71 N. E. 753. (N. Y.).—Where a penal code defines a lottery as a scheme for the distribution of property by chance among persons who have paid a valuable consideration therefor, *held*, that an estimate on the amount of taxes to be paid on all cigars in a given month is necessarily so uncertain as to come within the term 'chance'.

In the absence of statutory or code provisions a lottery must contain the element of pure chance. *People v. Elliott*, 41 N. W. 916. But it is generally provided, or at least held that any scheme or game in which judgment, skill, practice or brains may be thwarted by chance, is a lottery. *State v. Nates*, 3 Hill L. 200; *Harris v. White*, 181 N. Y. 532. So that most of the cases go beyond the decision in the principal case, in that, while this decision merely requires that chance be the dominating element, they hold that schemes or games in which the result is determined more by skill than chance are nevertheless lotteries. *State v. Lovell*, 39 N. J. L. 458; *Swigart v. People*, 154 Ill. 284. In some cases stakes at horse-races are held to be lotteries. *Davis v. State*, 13 Lea 228. But the better opinion is to the contrary. *People ex rel. Lawrence v. Fallon*, 152 N. Y. 12. In the principal case, however, chance is easily the dominating element, all opportunity for judgment formed by knowledge or investigation being eliminated by information given in the advertisement.

MASTER AND SERVANT—SAFE MATERIALS—INJURY TO SERVANT—LIABILITY OF MASTER.—TIERNEY V. WUNCK, 88 N. Y. Supp. 612. *Held*, that the fact that a scaffolding had splits in it, and broke when stepped upon was sufficient evidence of the master's neglect to furnish safe materials. Woodward and Jenks, JJ., *dissenting*.

The case comes under a labor law statute but on this point the statute is practically declaratory of the common law. The decision appears to be contrary to the general rule that a master must use ordinary care, only, in furnishing a safe scaffolding. *Austin Mfg. Co. v. Johnson*, 89 Fed. 677; *McLean v. Standard Oil Co.*, 21 N. Y. Supp. 874. Reasonably safe materials are all that are required. There is no need of furnishing the very best. *Rooney v. Sewall, etc., Co.*, 161 Mass. 153; *Bajus v. Syracuse, etc., R. Co.*, 103 N. Y. 312. So, in the present case, as the dissenting opinion says, the plank was, to all appearances, sufficiently strong. And as the injured party himself had put the plank in place he was better able than any one else to know its defects. *Charmon v. Sanford Co.*, 70 Conn. 573. It is, therefore, difficult to see why the master should have been held liable.

NEGLIGENCE—LIABILITY OF OWNER OF PUBLIC RESORT—INDEPENDENT CONTRACTOR.—DEYO V. KINGSTON CONS. R. Co., 88 N. Y. Supp. 487.—While attending an exhibition of fire works at defendant's public amusement resort, to which an admission fee was charged, the plaintiff was injured by a rocket negligently discharged by an independent contractor employed by the defendant to conduct the exhibition. *Held*, that, as the defendant was not guilty of negligence, no liability attached. Houghton, J., *dissenting*.

It has been held that the proprietor of a public amusement resort is liable for any injury resulting from the improper or unsafe construction of a build-

ing or grand stand, notwithstanding their defective condition resulting from the carelessness of a contractor, and from no negligent act or fault whatever of the owner. *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Barrett v. Imp. Co.*, 174 N. Y. 311. There is little tendency to establish the proposition that the same duty that requires an owner to be responsible for the safe condition of the premises also requires him to be equally responsible for the manner in which the exhibition is conducted. Yet a somewhat analogous principle has been sanctioned by the Indiana court, upon the theory that a peculiar relation was created between the parties, and that the owner, having licensed and permitted the exhibition, could not escape liability by an appeal to the independent contractor doctrine. *Conradt v. Clauve*, 93 Ind. 476.

NUISANCE—POLLUTION OF ICE FIELD—INJUNCTION.—AMERICAN ICE CO. V. CATSKILL CEMENT CO., 88 N. Y. Supp. 456.—*Held*, that the plaintiff was entitled to an injunction restraining the defendant during the ice harvesting season from so operating its manufacturing establishment as to cause dust, cinders, and other substances to settle upon plaintiffs' ice fields, thereby rendering the ice unmerchantable.

This case is, undoubtedly, the first one to be found in the reports affording a remedy of this nature in respect to ice fields, concerning which the law has been slow in developing. The destruction of ornamental and useful trees by the gases from a brick kiln is such irreparable injury as a court of equity will enjoin. *Campbell v. Seaman*, 63 N. Y. 568. That case also held that it was immaterial that the injury was not continuous, but only occurred when the wind was in a certain direction. The fact that the defendant was chargeable with no negligence does not affect the case. *Bohan v. Port Jervis G. S. Co.*, 122 N. Y. 18.

STREET RAILWAYS—INJURY TO PASSENGER—RIDING ON PLATFORM.—BRUMNCHON V. RHODE ISLAND CO., 58 Atl. (R. I.) 656. *Held*, that a passenger thrown from the platform of an electric street car on which he is riding, can recover from the company though his riding there contributed to the injury.

It is well settled that any person standing on the platform of steam cars in motion is guilty of contributory negligence if his being there partly caused the injury. *Hickey v. Boston, etc., R. Co.*, 14 Allen 421; *Memphis, etc., R. Co. v. Salinger*, 46 Ark. 528. On the other hand, it is not held, as a rule, that riding on the platform of horse cars is negligent; *Nolan v. Brooklyn R. Co.*, 87 N. Y. 63; even though there are seats inside. *Bruno v. Brooklyn R. Co.*, 5 N. Y. Misc. 327. In regard to electric railways there seems to be no case directly in point. The cases here all turned on the crowded condition of the cars or some similar circumstance which excused the riding on the platform. *Wilde, v. Lynn & Boston, etc., R. Co.*, 163 Mass. 533; *Reber v. Pittsburg, etc. Co.*, 179 Pa. 339. The best course is probably, as in the present case, to leave it to the jury to say whether on the particular car in question the speed was such as to make it negligence to ride on the platform when there is room inside.

WILLS—DESCENT OF BURIAL LOTS—RESIDUARY DEVISE.—IN RE WALDRON ET AL, 58 Atl. 458 (R. I.).—*Held*, that a burial lot is not included under a general residuary clause, but descends to heirs as intestate property.

The ownership of lots in a cemetery is a qualified property, somewhat analogous to an exclusive easement. *Sohier v. Trinity Church*, 109 Mass. 1; *Cemetery v. Buffalo*, 46 N. Y. 503. It is subject to the police power, which may not only prohibit future interments, but may cause the removal of bodies

already buried. *Page v. Symonds*, 63 N. H. 17. But a burial lot is regarded as property in which title may descend to heirs; *Wright v. Cemetery*, 112 Ga. 884; and there is sufficient legal possession to maintain trespass against a tort feasor. *Meagher v. Driscoll*, 99 Mass. 281. A mortgage of a burial lot is not void as against public policy. *Lantz v. Buckingham*, 11 Abb. Pr. N. S. 64. But see, *contra*, *Thompson v. Hickey*, 59 How. Pr. 434. The decision in the principal case is based upon the theory that while a burial lot is property, it has been so limited and qualified in respect to the ordinary attributes of real property as to raise a presumption that a testator would not intend that it should pass under a residuary clause.

WILLS—EXTRINSIC DOCUMENTS—INCORPORATION BY REFERENCE.—APPEAL OF BRYAN, 58 Atl. (Conn.) 748. Where a clause in a will gave a sum of money to be held in trust "for purposes set forth in a sealed letter which will be found with the will," *held*, that such words do not designate a specific existing document with such definiteness as to admit of its incorporation in the will.

There is no question but that an extrinsic paper to be incorporated in a will must be in existence at the time of the will and must be referred to therein. *In re Sunderland*, L. R. 1 P. & D. 198; *Newton v. Seaman's Friend Society*, 130 Mass. 91. But the amount of definiteness required in the incorporating clause is uncertain. In *Allen v. Maddock*, 11 Moore P. C. 427, parol evidence was admissible to show what paper was referred to in the will and it was no objection that other papers might have been found which would have answered the description. Similarly, *Templeman v. Martin*, 1 Nev. & Man. 576. But most courts have been reluctant to incorporate in a will extraneous papers unless they clearly are a part of the will. And as, in the present case, the reference must be certain as to the exact paper and as to its existence at the time of the will. *In re Smart*, 1902 L. R. P. D. 238; *Estate of Young*, 123 Cal. 342; *Phelps v. Robbins*, 40 Conn. 273.

WILLS—FORFEITURE CLAUSE—STIPULATION AGAINST CONTEST.—IN RE FRIEND'S ESTATE, 58 Atl. 853 (Pa.).—*Held*, that a provision in a will, annulling a bequest if the validity of the instrument be attacked by the legatee, is inoperative if there is probable cause for instituting such contest. Mitchell, C. J., and Potter, J., *dissenting*.

There is a wide diversity of opinion upon this question. In support of the decision in the principal case it is urged that to exclude all contests when reasonable ground exists for believing that the testator was insane or unduly influenced at the time of making the will is to intrench fraud and coercion. *Lee v. Colston*, 5 T. B. Mon. 246; *Jackson v. Westerfield*, 61 How. Prac. 399. Squarely opposed to these authorities, however, is the weight of opinion in the United States. *Rogers v. Law*, 66 U. S. 253; *Bradford v. Bradford*, 19 Ohio St., 546; *Breihaupt v. Baushett*, 1 Rich. Eg. 465 (S. C.); *Thompson v. Gaunt*, 82 Tenn. 310; *Donegan v. Wade*, 70 Ala. 501; *In re Riegle's Estate*, 32 N. Y. Supp. 168. The English rule in respect to legacies treats the condition as void when there exists *probabilis causa litigandi; Morris v. Burroughs*, 1 Ath. 404; but this doctrine is denied where lands are concerned *Cook v. Turner*, 15 M. & W. 727. But there seems to be no substantial ground for distinguishing between real and personal property. 2 *Jarman*, 58. A suit to construe the provisions of the will does not violate the condition. *Black v. Herring*, 79 Md. 146. And such conditions are always to be construed strictly, as they divest estates already vested. *Appeal of Chew*, 45 Pa. 228.