RECENT CASES

BANKS AND BANKING—DEPOSITS—ACTIONS.—MURPHY V. FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK ET AL., 116 N. Y. SUPP. 228.—A wife, upon her marriage, had her deposit at a bank transferred from her individual account to the joint account of herself and husband, so that the signatures of both were required to withdraw funds. *Held,* that the husband had such an apparent interest in the deposit that he should be made a party to an action to compel the bank to pay it. Houghton, J.. *dissenting.*

When money is received in a bank on general deposit, it becomes the property of the bank, and the amount is a debt payable on demand by the bank to the person entitled to it. *Coffin v. Anderson,* 4 Black 395. It is laid down in *Rand v. State Nat. Bank,* 77 N. C. 152, and seems to be the prevailing doctrine, that when two persons have deposited money and papers with a bank upon the agreement that the same shall be drawn out only upon their joint order, action by one against the bank for recovery of the deposits, to which the other was not made a party, is not maintainable. The dissenting judge disagrees with the doctrine of the case at hand, in that the actual owner of money on deposit in a bank is entitled to the same by proving ownership, notwithstanding the particular form in which the deposit is made. *Nolting v. Natl. Bank,* 99 Va. 54. But where the ownership of a fund is in doubt, the question will not be determined until all parties interested are before the court. *In re Marshall,* 5 Dem. Sur. (N. Y.) 357.

CIVIL RIGHTS—DRAWING OF JURY—EXCLUSION OF DISREPUTABLE NEGROES.—STATE V. LAWRENCE, 50 So. 406 (LA.).—*Held,* that the fact that the jury commissioners select persons for service on juries with the aid of a city directory, from which are excluded only the names of disreputable negroes, affords a defendant in a criminal prosecution, even if colored, no legal ground of complaint.

It has been repeatedly held that whenever by state action all persons of the African race are excluded from the jury on account of their race and color, in the trial of a negro, such action is contrary to the 14th Amendment to the Federal Constitution. *Strauder v. West Virginia,* 100 U. S. 303; *Neal v. Delaware,* 103 U. S. 370, 397; *Gibson v. Mississippi,* 162 U. S. 565. And this is true, whether the action is by the state itself or by its agencies. *Ex parte Virginia,* 100 U. S. 339. However, the unauthorized act of the agent of a state is not chargeable against the state, but is subject to review and correction by the courts. *Virginia v. Rives,* 100 U. S. 313. When there has been no discrimination on account of color in selecting the jury, a reversal will not be granted to a colored man because no colored men were on the jury. *Bush v. Commonwealth,* 107 U. S. 110; *Haggard v. Commonwealth,* 79 Ky. 366; *State v. Joseph,* 45 La. Ann. 503. This is true even where no colored man was a member of

the jury commission, of the grand jury, or of the petit jury. *Hanna v. State,* 105 S. W. 793 (Tex.); *Lewis v. State,* 45 So. 360 (Miss.). The general law is well stated in *Dixon v. State,* 74 Miss. 271; *Gibson v. State,* 162 U. S. 565.

CONSTITUTIONAL LAW—PRIVACY—PICTURES.—FOSTER-MILBURN CO. v. CHINN, 120 S. W. 364 (KY.).—*Held,* that a person is entitled to the right of privacy as to his picture, and that the publication of the picture of a person without his consent as a part of exploiting the publisher's business, is a violation of the right of privacy, and entitles him to recover without proof of special damages.

The right of privacy prior to 1890 was practically unknown to the common law in this country. 4 *Harvard Law Review,* 193. The older decisions in this respect being based upon property or contractual rights. *Abernethy v. Hutchinson,* 3 L. J. 209; *Prince Albert v. Strange,* 1 McN. & G. 24. On the right of privacy independent of property or contractual rights, the modern decisions are in conflict. 1 *Cooley on Torts,* 365 (3rd). In a suit to restrain the unauthorized publication of a photograph, the New York courts decided against this right. *Robertson v. Rochester Folding Box Co.,* 171 N. Y. 538. A contrary rule prevails, however, in some jurisdictions, where the courts give relief as a purely personal right. *Edison v. Edison Polyfom Mfg. Co.,* 67 Atl. 392 (N. J.); see also 18 *Yale Law Journal,* 127. However, when a private individual becomes a public character, he waives all right to privacy. *Corliss v. Walker,* 64 Fed. 280. The right when it does exist is purely personal. *Murray v. Lithographic Co.,* 28 N. Y. Supp. 271.

CORPORATIONS—POWER TO PURCHASE THEIR OWN STOCK.—MOSES v. SOULE, 118 N. Y. SUPP. 410.—*Held,* that a provision in incorporation articles or by-laws which prohibits a stockholder from selling his stock without first giving the corporation and other stockholders opportunity to purchase, is not against public policy.

Unless the charter or governing statute limits specified cases, as in *State v. Ferguson,* 33 N. H. 424, every corporation by the principle of common law possesses the inherent power to make by-laws, although such power may not be expressly conferred in its charter, or in the statute of its creation. *People v. Erie Co. Medical Soc.,* 24 Barb. 570 (N. Y.). However, the prevailing doctrine is that a by-law prohibiting the alienation of stock, or putting restrictions thereon is void as being in restraint of trade and against public policy. *Taylor v. Edson,* 58 Mass. 522; *Brightwell v. Mallory,* 18 Tenn. 196; *Board of Com'rs of Tippecanoe Co. v. Reynolds,* 44 Ind. 509. Even if the restriction is indorsed on the certificate of stock. *Herring v. Ruskin Co. Op. Ass'n,* 53 S. W. 327 (Tenn.). And in New York, section two of the *General Corporation Law* authorizing a corporation to make by-laws for the transfer of its stock, does not empower it to limit the unconditional right of transferring the stock. *Kinnan v. Sullivan Country Club,* 50 N. Y. Supp. 95. But a by-law adopted by a corporation, forbidding the transfer of stock so long as the owner is in-

debted to the corporation is valid, although inconsistent with the general law of the state governing the transfer of property. *Farmer's Bank v. Wasson,* 48 Iowa 336; *Mechanics Bank v. Merchants Bank,* 45 Mo. 513.

CORPORATIONS—ACTIONS BY RECEIVERS—SET OFF.—COURTRIGHT ET AL. V. VREELAND, 117 N. Y. SUPP. 952.—*Held,* that where receivers of a corporation appointed in Pennsylvania sued in New York on an undertaking of defendant and another to pay damages sustained by the corporation from an attachment, alleging the assignment of the claim to them by the corporation, defendant could set off a judgment obtained in New York against the corporation, assigned to defendant before the assignment of the claim sued on to plaintiffs, but after their appointment as receivers.

On the appointment of receivers for an insolvent corporation, the rights of the corporation and its creditors who are under the jurisdiction of the appointing court become fixed. *Colt v. Brown,* 12 Gray (Mass.) 233. Accordingly, claims against the corporation which are assigned to debtors of the corporation after the appointment of receivers cannot be advanced by way of set off. *Ogden v. Cowley,* 2 Johns. (N. Y.) 273; *Long v. Penn. Ins. Co.*. 6 Pa. St. 421. If the debtor to be pursued must be sued in another jurisdiction, however, the case is different. It is well established that in the absence of statute, the debtor of an insolvent corporation may set off claims of his against the corporation which have accrued to him personally before the appointment of the receivers. *Wheaton v. Daily Telegraph Co.,* 124 Fed. 61; *Mix v. Ellis,* 118 Ga. 345. So, although states, by comity, often do recognize the appointment of receivers in other jurisdictions, they generally will not recognize such appointment when by doing so they would interfere with the rights of local creditors. *Booth v. Clark,* 17 How. (U. S.) 331; *Blake v. Williams,* 6 Pick. 285.

MUNICIPAL CORPORATIONS—OFFICERS—COMPENSATION—PAYMENT TO OFFICER DE FACTO.—STEARNS V. SIMS, 104 PAC. 44 (OKLA.).—*Held,* that where a *de jure* chief of police of a city is pending suit on charges against him in the district court, wrongfully suspended by order of the judge thereof at chambers, which said order is later set aside and said suit dismissed, and where said city pays a substitute chief of police *de facto,* during his incumbency, the salary provided by law, the original officer *de jure* after obtaining possession of the office cannot recover from the city the salary for the same period.

The preponderance of authority is with the above case and holds that a *de jure* officer cannot recover salary from a municipal corporation, which has been paid to a *de facto* official for services rendered during suspension of the officer *de jure. Chicago v. Luthardt,* 191 Ill. 516; *Newark v. McDonald,* 58 N. J. L. 12; *Seifen v. Racine,* 129 Wis. 343. In *Westberg v. Kansas City,* 64 Mo. 493, the court holds that whether removed or suspended the *de jure* officer was not entitled to recover his salary or any part thereof from date of suspension. On the other hand, numerous jurisdictions hold that *de jure* officers can recover their compensation from the

municipal corporation when suspended without cause. *Emmett v. New York,* 128 N. Y. 217; *Andrews v. Portland,* 73 Me. 484. Several jurisdictions rule that the salary of an office is an incident to its title and not to its occupation. *Carroll v. Siebenthaler,* 37 Cal. 193; *Tanner v. Utah,* 31 Utah 80. *Contra*: *Gorman v. County,* 1 Idaho 655. holds that the right to compensation is an incident to the service rendered and not to the office. In some states where the *de jure* official cannot recover his salary from the municipal corporation, the *de facto* officer is liable to the officer *de jure* for the salary wrongfully received. *Coughlin v. McElroy,* 74 Conn. 397.

CRIMINAL LAW—IDENTITY—IDENTITY OF PERSONS.—STATE V. LEPITRE, 103 PAC. 27 (WASH.).—*Held,* that on an issue of the defendant's identity, as the person alleged to have been previously convicted, identity of name was *prima facie* evidence of the identity of the person and sufficient to establish a *prima facie* case.

It is an inference of fact that identity of name indicates an indentity of person. *Lee v. Murphy,* 119 Cal. 364. But some doubt has been intimated as to whether the mere identity of name would make out a *prima facie* case without further proof of corroborating circumstances. 2 *Greenleaf on Evidence,* Sect. 278 d. And very slight evidence may be sufficient to overcome the presumption of identity of person raised by the identity of name. *Morris v. McClary,* 43 Minn. 346. There is old authority to the effect that in criminal cases the presumption of innocence without additional proof is sufficient to overcome this presumption of identity of person. *Wedgwood's Case,* 8 Me. 75. But the more modern rule would seem to be contrary. *State v. McGuire,* 87 Mo. 642.

CRIMINAL LAW—EVIDENCE—OPINION.—STATE V. HAMILTON, 49 SOUTHERN REPORTER, 1004 (LA.).—In a case of homicide, an eye-witness was asked his opinion as to which of the parties to the difficulty was in the most danger of being shot. *Held,* inadmissible. Monroe, J., *dissenting.*

Generally, testimony of opinion is excluded except in a few cases. *Taylor on Evidence,* Sect. 1414. But in some cases, opinions formed from personal observations may be admissible as being the best evidence that the nature of the case admits of. *DeWitt v. Barley,* 17 N. Y. 340. There are certain qualifications to the admission of such evidence. The witness' opportunity of observation must first justify an opinion. *State v. Baldwin,* 36 Kans. 1. Furthermore, if the opinion of a witness is allowed, the opinion must be based upon matter such as men in general are capable of comprehending. *Russell v. State,* 66 Neb. 497. And if the facts and circumstances can be so clearly defined by testimony that the jury can form a correct conclusion therefrom, the opinion of the witness will not be allowed. *Thomas v. State,* 122 Ga. 151; *State v. Foley,* 144 Mo. 600; *State v. Musgrave,* 43 W. Va. 672. In any instance, a question calling for the opinion of a non-expert will be carefully scrutinized. *Territory v. Claypool,* 11 N. M. 568.

DAMAGES—PERSONAL INJURIES—FUTURE MENTAL SUFFERING—INSTRUCTIONS.—UNITED STATES EXPRESS CO. V. WAHL. 168 FED. 848 (OHIO).

—*Held,* that an instruction which permitted the jury, in estimating plaintiff's damages, to consider humiliation resulting from the loss of an eye, was not erroneous.

Humiliation as an element in estimating damages can only be taken into consideratino when there is actual physical injury. *Newport News & M. V. Co. v. Gholson,* 10 Ky. L. R. 938; *Pullman Co. v. Kelly,* 86 Miss. 87. And this suffering from such humiliation must be inseparable from the injuries sustained. *Weston Brewing Co. v. Meredith,* 166 Ill. 306; *McDermott v. Severe,* 202 U. S. 600; *Sherwood v. Chicago & W. M. Ry. Co.,* 82 Mich. 374. But the taking into consideration of the humiliation caused by a defective physical condition has been held objectionable in assessing damages. *Cullen v. Higgins,* 216 Ill. 78. Because mortification and distress of mind caused by a physical defect is too remote to constitute an element of damages. *Southern Pac. Co. v. Hetzer,* 135 Fed. 272.

DIVORCE—EFFECT—SUPPORT OF CHILD.—STATE V. SEGHERS, 49 So. 998 (LA.).—*Held,* a father's obligation to support his child is not dissolved by a divorce, and the assignment of the custody of the child to the wife does not relieve him from his duty.

The general rule is that after divorce it is the duty of the husband to support the children of the marriage. *Thomas v. Thomas,* 41 Wis. 229; *Courtwright v. Courtwright,* 40 Mich, 633. And where the decree contains no provision for their support, the court has the power to make an order directing the father to provide for them. *Washburn v. Catlin,* 97 N. Y. 623. The wife may even pledge the father's credit for necessaries furnished to a child in her custody, for which the father would be liable. *Gilley v. Gilley,* 79 Me. 292. On the contrary it has been held that no liability devolves upon the former husband for the support of the children where the judgment imposes none. *Hampton v. Allee,* 56 Kan. 461; *Finch v. Finch,* 22 Conn. 411. And the wife can at most sue him for contribution. *Pawling v. Willson,* 13 Johns (N. Y.) 192.

ELECTIONS—USE OF VOTING MACHINES—CONSTITUTIONALITY.—STATE EX REL. KARLINGER V. BOARD OF DEPUTY STATE SUP'RS. OF ELECTIONS, 89 N. E. 33 (OHIO).—*Held,* that an act providing for the use of voting machines at elections is void, because repugnant to that article of the state constitution which ordains that "all elections shall be by ballot." Crew and Davis, J.J., *dissenting.*

In re Voting Machines, 19 R. I. 728, which appears to have been the first case to decide the question as to the right to use a voting machine under a constitutional provision for voting by ballot, was decided in the affirmative. The question seems to hinge on whether a vote given or cast by a voting machine, is a vote "given by ballot" within the intendment of a constitution to that effect. *City of Detroit v. Board of Inspectors of Election,* 139 Mich. 548. So long as an absolutely certain meaning is not opposed in interpreting a constitution an adherence to its strict rules may be disregarded. *Temple v. Mead,* 4 Vt. 540. And the courts with entire

unanimity declare that "election by ballot" simply means to give to the individual a secret vote as distinguished from a vote *viva voce. Ex parte Arnold,* 128 Mo. 261. The majority rule seems to accord with the principle laid down in the opinion of *In re Voting Machine, supra,* that the use of voting machines does not contravene the provision of a constitution that all elections shall be by ballot. *Elwell v. Comstock,* 99 Minn. 261; *Lynch v. Malley,* 215 Ill. 574.

EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—CONSIDERATION OF DEAD.—LOUISVILLE & N. R. Co. v. WILLBANKS, 65 S. E. 86 (GA.).—Where one by deed conveys to a railroad company, absolutely and unconditionally, a right of way, it was *held,* that it could not be shown by a parol agreement that the real consideration was other than that expressed in the deed. Atkinson, J., *dissenting.*

The general rule is that in absence of fraud or mistake, parol evidence cannot be received to add to, limit, vary, or contradict the terms of a deed. *Elliot v. Weed,* 44 Conn. 19; *Kelly v. Saltmarsh,* 146 Mass. 585; *Uihlein v. Mathews,* 172 N. Y. 154. And also parol evidence is inadmissible to establish a part of a consideration, as to which the deed is silent. *Schrimper v. Chicago, M. & St. P. Ry. Co.,* 115 Iowa 35. But on the contrary it has been held that the actual consideration for a deed may be shown by parol evidence. *Ely v. Wolcott,* 86 Mass. 506. For example it was held that a plaintiff could show by parol evidence that the agreement of a defendant to erect and maintain a station on an adjoining tract was the real consideration for a deed of a right of way. *St. Louis & N. A. R. Co. v. Crandall,* 86 S. W. 855 (Ark.).

EVIDENCE—PAROL EVIDENCE—LEASES.—ERNEST TRIBELHORN, INC. v. HANAVAN, 116 N. Y. SUPP. 632.—*Held,* that in an action for rent due under a written lease, an oral agreement by a landlord to make repairs may be shown, when made as an inducement to the execution of a lease silent on the subject, at or before the signing of the lease, together with proof that the repairs were not completed, and that the tenant did not occupy the premises. Goff, J., *dissenting.*

The general rule as held in the case above, is that parol evidence is admissible to show an independent agreement made as an inducement to a written contract, notwithstanding the written contract contains no reference to such agreement. *Downey v. Hatter,* 48 S. W. 32 (Tex.). But on the contrary it has been held that in an action on a written lease, the lessee cannot prove that he signed it on the faith of parol representations that certain defects in the premises, then known to him, would be repaired by the lessor. *Hall v. Beston,* 165 N. Y. 632. The dissenting judge denies the doctrine of the case at hand, that a parol inducement is admissible, on the grounds that parol evidence of other obligations cannot be introduced, where a contract purports to contain the entire agreement of the parties, in that it tends to vary the terms of a written instrument. *McConnell v. Pierce,* 116 Ill. App. 103; *Black v. Bachelder,* 120 Mass. 171. And such parol evidence is clearly excluded in the case of a contemporaneous parol agreement, not a part of the inducement. *Haycock v. Johnson,* 81 Minn

49. But it can be used to prove any distinct subsequent oral agreement to rescind a written contract. *Bannon v. Aultman,* 80 Wis. 307.

JUDGMENT—JUDGMENT AS BAR—IDENTITY OF QUESTION IN ISSUE.—MESSINGER V. ANDERSON, 171 FED. 785 (OHIO).—*Held,* that where the parties in two actions were the same and the question at issue is identical, as the construction of the provision of a will, the judgment in the first action is a bar to the second, if properly pleaded, although different property is the subject matter of litigation in the two actions.

To sustain a plea of former judgment in bar of a second action, it must appear that the cause of action in both suits is the same, or that some fact essential to the maintenance of the second action was at issue in the first action and was then determined adversely to the plaintiff. *Perry v. Dickerson,* 85 N. Y. 345. However, the courts do not appear to be in accord with the case at hand, for to render a judgment a bar, the subject matter of the second action must be shown to be the same as in the first. *Haight v. City of Keokuk,* 4 Iowa 199; *King v. Chase,* 15 N. H. 9. But the preponderance of authority however seems to be that the judgment of a court of competent jurisdiction, on a question directly involved in the suit is conclusive in the second suit, between the parties, although the subject matter of the second action is different than that of the first. *Doty v. Brown,* 4 N. Y. 71; *Gardner v. Buckbee,* 3 Cowen 120.

MASTER AND SERVANT—"FELLOW SERVANT"—"VICE PRINCIPAL"—WHO ARE.—MCINTYRE V. TEBBETTS, 120 S. W. 621 (MO.).—A manufacturer maintained a wagon for hauling. The servant in charge of the wagon had authority to employ men needed to assist him in the work, and he commanded them in the work. He and the men under him loaded the wagon. The servant drove the team. After a stop, one of the men, while attempting to climb on the front end where he was expected to ride, was injured in consequence of the servant starting the team. *Held,* as a matter of law, that the servant was in driving the team a fellow servant of the men. Nortoni, J., *dissenting.*

The above decision is supported by *Northern P. R. Co. v. Charles,* 162 U. S. 359, and *Page v. Battle Creek P. F. Co.,* 142 Mich. 17. In the latter case an employe in charge of a department with power to hire and discharge men, by his negligence caused injury to another servant. Yet such employee is held to be a vice principal in *Russ v. Wab. West R. Co.,* 112 Mo. 45, under facts not essentially different; and a representative of his master in *A. G. S. R. R. Co. v. Vail,* 142 Ala. 134. The nature of the act causing the injury, however, seems to be the true test. *Shelton v. Pac. Lbr. Co.,* 140 Cal. 507. In some of his acts he may perform the master's duty to the master's servants, while in others he may act as a fellow servant. *McElligott v. Randolph,* 61 Conn. 157. If the act is a personal duty of the master, the employee is a vice principal. *Scott v. C. G. W. R. Co.,* 113 Ia. 381; *Dube v. Lewiston,* 83 Me. 211. So when the duty is one which the law requires of the master. *Capper v. Louisville, Evansville & St. Louis R. Co.,* 103 Ind. 305. But if the act is one pertaining only to the

duty of an operative, the employee performing it is a fellow servant. *Crispin v. Babbitt,* 81 N. Y. 516; *Findlay v. Russel Wheel and Foundry Co.,* 108 Mich. 286. So the injury may be chargeable in part to the negligence of a fellow servant, yet if the negligence of a vice principal contributed to the injury, which would not have occured but for such negligence, the master is liable. *C. Union Traction Co. v. Sawnsch,* 218 Ill. 130.

TELEGRAPHS AND TELEPHONES — FAILURE TO DELIVER MESSAGE — MEASURE OF DAMAGES.—WESTERN UNION TELEGRAPH CO. V. LEAGUE, 121 S. W. 484 (KY.).—*Held,* that the plaintiff could recover damages for mental anguish resulting from the failure to deliver a telegram announcing the death of her sister.

The majority of decisions hold that damages cannot be recovered for mental anguish caused by the negligent delay in the delivery of a telegram, announcing the death of a relative. *West v. Western Union Telegraph Co.,* 39 Kan. 93; *Kester v. Western Union Telegraph Co.,* 55 Fed. 603. As such damages are too uncertain and speculative. *Western Union Telegraph Co. v. Wood,* 57 Fed. 471. But there are numerous decisions in favor of a recovery. *So. Relle v. Telegraph Co.,* 55 Tex. 308; *Mentzer v. Western Union Telegraph Co.,* 93 Ia. 752. For if a message announces death it is notice to the company of an urgent delivery. *Reese v. Western Union Telegraph Co.,* 123 Ind. 294. Even where mental anguish is the only damage done, recovery may be had. *Western Union Telegraph Co. v. Cunningham,* 99 Ala. 314; *Western Union Telegraph Co. v. Newhouse,* 6 Ind. App. 422. In one jurisdiction it is held that damages for mental anguish may be recovered if the action is *ex contractu,* but not if it is *ex delicto. Blount v. Western Union Telegraph Co.,* 126 Ala. 105.