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RECENT CASES

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ASSAULT AND BATTERY—ADMISSIBILITY—ABUSIVE LANGUAGE BY PLAINTIFF.—THOMPSON V. SHELVERTON, 62 S. E. 220 (GA.).—*Held*, in an action for damages on account of an assault and battery, the defendant may give in evidence any opprobrious words or abusive language used by the plaintiff to him in order to justify his conduct or mitigate the damages; and it is for the jury to determine, in view of the character of the provocation and the nature and extent of the battery, whether such opprobrious words or abusive language amount to a justification, or only to a mitigation of damages recoverable.

Under the common law, opprobrious words or abusive language could not be pleaded in justification of an alleged assault and battery; *Berkner v. Dannenberg*, 116 Ga. 954. As words never constitute an assault, neither will they justify force in the protection against them, however grossly abusive they may be; *Cooley on Torts*, 3rd Ed. 289. Mere words, no matter how abusive they may be, never justify an assault; *Murry v. Boyne*, 42 Mo. 472. No provocative words or epithets will justify an assault, nor can they be given in evidence in mitigation of actual or compensatory damages, but only upon the question of punitive damages; *Goldsmith's Admr. v. Joy*, 61 Vt. 488. Yet when used at the time or immediately preceding the battery, may be shown in evidence under the general issue in mitigation of damages; *Mitchell v. Gambill*, 140 Ala. 316. Provocation cannot be shown unless it is so recent and immediate as to form part of the transaction; *Dupee v. Lentine*, 147 Mass. 580. Matters of provocation must have happened contemporaneously with the assault and battery, or so recently prior thereto, that the blood had not time to cool; *Keiser v. Smith*, 71 Ala. 481. When provocation is not immediate, but a sufficient time has elapsed for reflection and coolness, it is not admissible, even in extenuation; *Thrall v. Knapp*, 17 Ia. 468.

BAILMENTS—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.—JOHNSON V. PERKINS, 62 S. E. 152 (GA.).—*Held*, that in all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence.

This is in accord with the holdings of the courts in many states. *Burlingame v. Horne*, 30 Ill. App. 330; *Baren v. Cain*, 15 Ill. App. 387. In New York the nature of the accident may be *prima facie* proof of negligence and require proof from the bailee to counteract its effect. *Wintringham v. Hayes*, 144 N. Y. 1. Some courts, however, hold that the bailor must not only show loss but also that the damage was caused by the negligence of the bailee or his servants; *James v. Orrell*, 68 Ark. 284; *Willett v. Rich*, 142 Mass. 356; *Schmidt v. Blood*, 9 Wend. (N. Y.); and that the burden of proof may not be shifted to the bailee by showing that the subject matter had been injured in such a way that does not ordinarily occur without negligence. *Maloney v. Taft*, 60 Vt. 571.

BASTARDS—LEGITIMIZATION—CONSENT OF MOTHER.—ALLISON V. BRYAN, 97 PAC. 282 (OKLA.).—The father of an illegitimate child married a woman not its mother, and sought to legitimate the child by adopting it into his family. To this the mother objected. Both parties appeared to be able to care for the child. *Held*, that the primary question was the preparation of the infant to confront the world in his later life, and that the father was entitled to its custody, for the purpose of legitimization, even though the mother objected. Williams, C. J., *dissenting*.

The general rule is that the mother of an illegitimate child has a right to its custody and control and is bound to maintain it. *Wright v. Wright*, 2 Mass. 109; *Fricsner v. Symonds*, 46 N. J. Eq. 521. But the father has no right as against the mother. *Hudson v. Hills*, 8 N. H. 417. Nor is he entitled to it if the mother has moved to another state, married a third person, and deserted the child. *Olson v. Johnson*, 23 Minn. 301. Even the gift of the child to another person will not deprive her of the right to subsequent custody. *Dalton v. State*, 6 Blackf. 357. According to a statute, in one jurisdiction the father was entitled to possession of his illegitimate child after giving a bond for its maintenance. *Wright v. Bennet*, 7 Ill. 587. However, the best interests of the child will be considered when the legal right to custody is not fully and satisfactorily established. *Matter of Nofsinger*, 25 Mo. App. 116.

BREACH OF MARRIAGE PROMISE—DAMAGES—RECOVERY AGAINST HEIRS.—JOHNSON V. LEVY, 47 So. 422 (LA.).—*Held*, that compensatory damages may be recovered against the heirs of the descendant, for his breach of promise of marriage.

At common law an action for breach of promise of marriage, where no special damages are alleged did not survive against the personal representative of the promisor. *Stebbins v. Farmer*, 1 Pick. 70. Because it was regarded as a personal injury and died with the person. *Hayden v. Vreeland*, 37 N. J. L. 372. But a right of action survives against decedant's personal representatives if his breach of promise causes special damage to the property of the promisee. *Finaly v. Chirney*, 20 Q. B. D. 494. And an allegation in a similar action that the promisee had a child born to her out of wedlock, as a result of such promise, is not such an allegation of special damages, to bring it within the rule. *Hovey v. Page*, 55 Me. 142. In two jurisdictions, it is provided by statute that the right of action shall not abate upon the death of the defendant. *Allen v. Baker*, 86 N. C. 91; *Stewart v. Lee*, 46 Atl. 31 (N. H.).

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.—JOHNSON V. YAZOO & M. V. R. Co., 47 So. 785 (MISS.).—*Held*, that a passenger is not guilty of contributory negligence as a matter of law in merely riding on the platform of a vestibuled train.

Conflicting views are found on this question but the trend of late decisions appears to be that it is not negligence *per se* to be on the platform while the train is in motion. A railroad is responsible for the safety of passengers in any place it provides for their accommodation. *Globe v. Delaware L. & W. R. R. Co.*, Fed. Cas. No. 5, 488a. And the modern vestibuled platform is for the convenience of passengers and its comparative safety invites use by them. *Marquette v. Chicago & N. W. R. R. Co.*,

33 Ia. 562. Even as to open platform trains it is held in many jurisdictions not negligence *per se* for a passenger to ride on the platform of a car. See *Meesel v. Lynn etc., R. R. Co.*, 8 Allen 234; *Gerstle v. U. P. R. R. Co.*, 23 Mo. App. 361. Contrary to the more liberal view in *Louisville & Nashville R. R. Co. v. Morris*, 23 Ky. L. R. 488; *Camden & Atlantic R. R. Co. v. Hoosey*, 99 Pa. St. 492; *The Cleveland, etc., Railway Co. v. Moneyhun*, 146 Ind. 147, it was declared to be negligence as a matter of law for the passenger to be riding upon the platform and a bar to recovery. For a case in which this rule was asserted but contingent upon the company providing seats. See *Graham v. McNeil*, 20 Wash. 466.

CARRIERS—PASSENGERS ON STREET CAR—RIGHT TO SEAT.—WEEKS V. AUBURN & S. ELECTRIC RY. CO., 113 N. Y. SUPP. 636.—Where plaintiff accepted transportation in a crowded street car and surrendered her ticket, *held*, that she waived strict performance so far as her contract rights were concerned to a seat, and the only duty defendant then owed her was that owing to a passenger who had contracted to ride standing.

The duty of a carrier of passengers to provide fit and suitable accommodations for all passengers that it receives for transportation includes the duty to furnish a seat. *Lane v. Choctaw, O. & G. Ry. Co.*, 91 Pac. 883 (Okl.). A passenger who exhibits his ticket and demands a seat need not surrender the ticket till the seat is furnished. *Hardenbergh v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 3. It is not the duty of the passenger to so act, in providing himself with a seat, that he perform that which more properly is the duty of the conductor. *Louisville, N., O. & T. Ry. Co. v. Patterson*, 69 Miss. 421. Nor does he forfeit any rights by such temporary inconvenience. *Willis v. Long Island Ry. Co.*, 34 N. Y. 676. But if he insists upon his right to a seat he cannot remain standing and ride free; but should repudiate the contract *in toto* by quitting the train at the first suitable opportunity and recover for breach of contract. *Thompson on Carriers of Passengers*, p. 67. Upon refusal to give up ticket he does not thereby become a trespasser and can be ejected only at a regular station. *Maples v. N. Y., N. H. & H. Ry. Co.*, 38 Conn. 557.

CONTRACTS—ACTIONS—MUTUAL MISTAKE.—COHEN V. HABERMAN, 111 N. Y. SUPP. 67.—Plaintiff and defendant had been partners, and the defendant purchased the business and accounts, including rights to indemnity against defalcations of bookkeeper. The cash on hand was to be equally divided. There was no examination of the books at the time, but it was subsequently discovered that the bookkeeper had forged the firm's indorsement on checks received from customers. Forty-five hundred dollars was recovered by the defendant from bondsmen and the bank which cashed the checks, and the plaintiff sought to recover one-half. *Held*, that there was no mutual mistake, and plaintiff could not recover. Scott, J., *dissenting*.

The only causes which render a mistake of fact the subject of relief are the following: First, when the mistake constitutes a material ingredient in the contract of the parties and disappoints their intention by mutual error. *Allen v. Hammond*, 11 Pet. 63; *Scruggs v. Drivers' Executors*, 31 Ala. 274; *Webster v. Stark*, 10 Lea. (Tenn.) 406. Illustrating the above rule is *Dambmann v. Schulting*, 75 N. Y. 55, holding that a mistake

as to the defendant's financial condition which might have influenced the plaintiff's action, had he known of it, is no ground for equitable remedy. The second cause for avoiding the agreement is where the mistake is inconsistent with good faith, and proceeds from the violation of obligations imposed by law upon the conscience of either party. *Story's Eq. Jur.*, No. 151; *Wood v. Boynton*, 64 Wis. 625; *Thompson v. Jackson*, 3 Rand. 504.

COMMERCE—INTERSTATE COMMERCE.—ST. & S. F. R. Co. v. STATE, 113 S. W. 203 (ARK.).—*Held*, a continuous transportation of freight between points within a state is "interstate commerce," free from the interference of the state, where a part of the route is outside of the state because of the unsafe condition of a bridge forming a part of the line of road in the state between such points.

The general rule is that all transportation of freight and passengers from one state to another, or through more than one state, either by land or water, is interstate commerce. *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557; *Fry v. State*, 63 Ind. 562. The United States Supreme Court holds, that the transportation of freight or passengers from one point to another in the same state, either by land or water, where part of the route is outside of the state, is interstate commerce and not under the control of the state wherein it begins and ends. *Lord v. Steamboat Co.*, 102 U. S. 541. Some states, however, hold that such transportation is not interstate commerce. *Campbell v. Chicago, M. & St. P. Ry. Co.*, 86 Ia. 587; *State v. W. U. Tel. Co.*, 113 N. C. 213; *Seawell v. Kansas City, Ft. S. & M. Ry. Co.*, 119 Mo. 222. In *State v. Chicago, St. P., M. & O. Ry. Co.*, 40 Minn. 267, a distinction was made between a railroad line which is operated, partly through another state, for transportation between points in one state, and one which carries on the ordinary business of a common carrier along the line passing though the other state. The right of a state to tax a railroad running between two points in the state, but partly over the territory of another state, was expressly distinguished from an attempt by the state directly to regulate such transportation while outside of its borders. *Lehigh Val. Ry Co. v. Penn.*, 145 U. S. 192; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217.

CRIMINAL LAW—HUSBAND AND WIFE—SLANDER OF WIFE BY HUSBAND. —STATE v. FULTON, 63 S. E. 145 (N. C.).—*Held*, that a husband may be convicted of slandering his wife, under a statute providing that if any person shall attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words, written or spoken, imputing unchastity, he shall be guilty of a misdemeanor. Brown and Hoke, J. J., *dissenting*.

Slander was not a crime at common law, and it is only within comparatively recent times that statutes have been passed making certain slanderous charges indictable. *State v. Wakefield*, 8 Mo. App. 11. The most common of these statutory offenses is that of imputing a want of chastity to a female. *Stutts v. State*, 52 So. 51 (Fla.); *State v. Boos*, 66 Mo. App. 537. Only two cases of a slander of the wife by the husband, however, are to be found in the reports. One of these lays down the rule that such a statute is all-embracing and includes slander perpetrated by

the husband against his wife. *Slayton v. State*, 46 Tex. Cr. R. 205. The other is a North Carolina case which is overruled by a majority of the court in the principal case, but upheld by the dissenting judges. *State v. Eden*, 95 N. C. 693. The basis of that decision was that "the law regards the marriage relation as sacred, and leaves temporary differences and wrongs between husband and wife to the corrective hand of time and reflection. It is to be noted that the common law rule that the identity of husband and wife prevented the wife from maintaining a civil action against her husband, has, in the case of slander, been generally held to be unaffected by statutes giving her a right of action for injuries to her property and person. *Freethy v. Freethy*, 42 Barb. 641; *Mink v. Mink*, 16 Pa. Co. Ct. 189.

INTEREST—PROPERTY DESTROYED BY NEGLIGENCE.—BUEL V. C., R. I. & P. RY. CO., 116 N. W. 299 (NEB.).—*Held*, where property is destroyed by the negligence of another, the owner will be entitled to interest on the value of such property from the time of its destruction.

When property is converted or lost to the owner by a trespass, the plaintiff is entitled to interest on the value of it as a matter of law. *Wilson v. City of Troy*, 135 N. Y. 96, 104; *Hale, Damages*, p. 165, says that it is very difficult to perceive any sound distinction, in this regard, between cases where property is destroyed by a misfeasance, and where it is destroyed by negligence. And some courts allow interest in such cases as a matter of law. *J., T. & K. W. Ry. Co. v. P. L. T. & M. Co.*, 27 Fla. 1; *A., G. S. Ry. Co. v. McAlpine*, 75 Ala. 113. Different views, however, have been adopted by other courts. Some hold that plaintiff is not entitled to interest as a matter of law, but leave it to the discretion of the jury. *Frazer v. Carpet Co.*, 141 Mass. 126; *Lincoln v. Claflin*, 7 Wall. 132. Others hold that interest will only be allowed if the damages are compensatory and not penal. *Gulf, C. & S. F. Ry. Co. v. Dunman*, 6 Tax Civ. App. 101. While still others hold that no interest is recoverable in such cases. *H. & T. C. Ry. Co. v. Muldrow*, 54 Tex. 233; *DeStciger v. H., S. J. Ry. Co.* 73 Mo. 33; unless the defendant receive some benefit by reason of the injury. *Kenney v. H. & S. J. Ry. Co.*, 63 Mo. 99. In Pennsylvania it is held that where the damages are not in their nature capable of exact computation, both as to time and amount, no interest is recoverable *eo nomine*. *Richards v. Citizens N. G. Co.*, 130 Pa. St. 37.

DIVORCE—GROUNDS—CRUELTY.—RYAN V. RYAN, 114 S. W. 464 (TEX.).—*Held*, that where there is no evidence in a suit by a wife for divorce on the ground of cruel treatment, of physical violence by the husband toward her, and it is not shown that the husband's cruel treatment of the wife produced a degree of mental distress threatening to impair her health, the divorce should be refused.

The causes entitling one to divorce for extreme cruelty are such as render life a great burden. *Rosenfeld v. Rosenfeld*, 21 Colo. 16. A divorce will be granted if the proof shows wantonly cruel and inhuman treatment. *Hoyt v. Hoyt*, 56 Mich. 50. Cruelty means an actual personal violence, or reasonable apprehension of it. *Moyler v. Moyler*, 11 Ala. 620. To constitute legal cruelty to authorize a divorce there must be actual violence

committed, attended with danger to life, limb or health, or reasonable apprehension of such violence. Extreme cruelty may be such conduct which produces mental suffering and destroys the peace of mind. *Sylvis v. Sylvis,* 11 Colo. 327; *Caruthers v. Caruthers,* 13 Ia. 256; *Cole v. Cole,* 23 Ia. 433.

EMINENT DOMAIN—PROCEEDINGS—SECOND TRIAL.—NORTHERN PAC. RY. CO. ET AL. V. CITY OF GEORGETOWN, 97 PAC. 659 (WASH.).—Where a city undertook to extend an avenue across railroad tracks, and a judgment of condemnation with an award of damages was entered, *held,* that the city could not, after abandoning the proceedings because of dissatisfaction with the award, maintain proceedings for the extension across the tracks of another avenue, located six inches south of the location of the first avenue, in order to avoid the award of damages on the first trial and to obtain a new trial on substantially the same proposition. Fullerton, J., *dissenting.*

The same rule applies in eminent domain proceedings as in a court of law, and while one award remains in full force it is conclusive and the petitioner is barred from instituting other proceedings involving the same proposition. *Sandford v. Wright,* 164 Mass. 85. And where he attempts to do so the remedy of the respondent does not lie in equity by injunction but his remedy is at law by a motion to dismiss. *Chicago, R. I. & R. Ry. Co. v. City of Chicago,* 148 Ill. 479. A discontinuance may be effected by a dismissal pending an appeal, and subsequent proceedings may be instituted to condemn another right of way over the same property, provided the dismissal was made in good faith. *Corbin v. Cedar Rapids, I. F. & N. W. Ry. Co.,* 66 Ia. 73. Statutes are to be construed as against the release of private property from subservience to public use however great the emergency. *Trustees of C. S. Ry. Co. v. Haas,* 42 Ohio St. 239. And where it is provided by statute that the failure of petitioner to pay award within a specified time shall constitute a discontinuance, new proceedings may thereafter be immediately instituted. *Ala. Midland Ry. Co. v. Newton,* 94 Ala. 443; *State v. City of Minneapolis,* 40 Minn. 483.

EQUITY—PERSONAL ASSETS—DEBT BY HUSBAND TO WIFE.—SHARPE V. MILLER, 47 So. 701 (ALA.).—*Held,* that a debt by husband to wife, secured by a mortage, is a personal asset, the title to which on the wife's death, vests in her administrator.

It is apparently settled law, that whereas a debt passes to the executor or administrator upon the death of the decedent, a mortgage given to secure the debt is also a personal asset. *Smith v. Dyer,* 16 Mass. 18; *Bird v. Keller,* 77 Me. 270. The principal case, however, is one that could not have arisen at common law, and is interesting as showing the extent to which the rule as to the invalidity of contracts and conveyances between husband and wife has been abrogated. *Kneil v. Egleston,* 140 Mass. 202. In England, money loaned by the wife, from her separate estate, to her husband, upon his promise to repay it, has long been recoverable in chancery. *Woodward v. Woodward,* 3 DeG., J. & S. 672. In this country, too, courts of equity in most jurisdictions have enforced such debts in the absence of fraud or prejudice to third parties. *Medsker v. Bonebrake,* 108 U. S. 66; *Greiner v. Greiner,* 35 N. J. Eq. 134. *Contra: Woodward v.*

Spurr, 141 Mass. 283. Now, also, by virtue of statute in many states, a wife may contract with her husband, or may convey and mortgage directly to him. *Mathewson v. Mathewson*, 79 Conn. 23; *Reynolds v. City National Bank*, 71 Hun. 386.

EVIDENCE—HEARSAY EVIDENCE—PEDIGREE.—SULLIVAN V. SOLIS, 114 S. W. 456 (TEX.).—*Held*, relationship and pedigree may be proved by hearsay evidence.

Declarations concerning pedigree are an exception to the rule as to the admission of hearsay evidence. *DeHoven v. DeHoven*, 77 Ind. 236. But such declarations are allowed only where they are made, before the commencement of the suit, by a deceased person, provided the person making them was related by blood to the person to whom they refer, or was the husband or wife of such person, *McKelvey, Evidence*, § 145; and they are admissible when pedigree is only relevant and not the question in issue. *Inhabitants of Brookfield v. Inhabitants of Warren*, 16 Gray (Mass.) 171. *Contra*: *N. M. & M. V. Ry. Co. v. Simcoe*, 14 Ky. Law Rep. 526. However, hearsay will not be admitted if better evidence is obtainable. *Birney v. Hann*, 10 Ky. 322.

EVIDENCE—INSPECTION BY SMELL AND TASTE.—REED V. TERRITORY, 98 PAC. 583 (OKLA.).—*Held*, that upon a prosecution for selling intoxicating liquor without a license, it was not error to permit the jury to look at and smell the contents of a bottle which had been properly identified and admitted in evidence, and which was alleged to contain whiskey.

Evidence by inspection includes all knowledge that is gained by a tribunal through its senses, either what it sees, hears, tastes or smells. *State v. Linkhaw*, 69 N. C. 214. The court generally has discretion as to what it will allow the jury to see for itself, even when both parties to a cause assent. *Marshall v. Gantt*, 15 Ala. 682. In Maine and Michigan it has been held that the jury may smell and taste liquor to determine the contents of a bottle. *People v. Kinney*, 124 Mich. 486; *State v. McCafferty*, 63 Me. 223. Grave doubts as to the propriety of this, however, have been expressed in Massachusetts and some other jurisdictions. *Commonwealth v. Brelsford*, 161 Mass. 61; *State v. Coggin*, 10 Kans. App. 455. These contrary views seem to be based on the ground that the less expert jurors would receive evidence from the more expert as to the contents of the bottle, in the privacy of the jury room, which would be against the rule that a juror cannot be allowed to give evidence to his fellow jurors without being sworn in. *Wadsworth v. Dunnam*, 117 Ala. 661; *State v. Lindgrove*, 1 Kan. App. 51.

EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—VARYING TERMS OF CONTRACTS.—RUGGERIO V. LEUCHTENBURG, 113 N. Y. SUPP. 616.—*Held*, that where a written contract for the sale of land provided that the price should be a sum certain, but stated no other terms, so that it must be presumed that the amount was payable in cash, parol evidence to show the terms of payment varied the terms of the contract, and its admission was error.

The general rule is, that when a contract is reduced to writing the

contents of such document cannot be contradicted, altered, added to or varied by parol or extrinsic evidence. *Uihlein v. Matthews*, 172 N. Y. 495; *Pike v. McIntosh*, 167 Mass. 309. Such evidence may, however, be admitted when the terms of the contract are ambiguous. *Burton v. O'Neill Mfg. Co.*, 126 Ga. 805; *Hunt v. Gray*, 76 Ia. 268. Also admissible to supply terms as to which a contract is silent, but which are in accordance with previous undisputed custom between the parties. *Texas & P. Ry. Co. v. Coggin & Dunaway*, 99 S. W. 1052 (Tex.). But, courts of equity grant relief in cases of fraud and mistake by carrying the intention of the parties into execution where the written agreement fails to express that intention. *Hunt v. Rousmanier*, 8 Wheat. 211; *Spriggs v. Bank of Mt. Pleasant*, 14 Peters 201; *Ware v. Cowles*, 24 Ala. 446. And where no fraud or mistake in its execution is alleged, the terms of a written contract cannot be varied, even in equity, by proof of a contemporaneous parol agreement. *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877 (Ia.); *Ware v. Cowles*, 24 Ala. 446.

EVIDENCE—WRITTEN INSTRUMENT—CONTEMPORANEOUS VERBAL AGREEMENT.—PAULSON ET AL. V. BOYD ET AL., 118 N. W. 841 (WIS.).—In a suit on a note given for the price of certain mining stock, evidence of a contemporaneous verbal agreement that the payee would renew the note twice for a similar period, and at the end of that time would accept a retransfer of the stock in satisfaction of the note at the maker's election, *held*, admissible to show that the note was never delivered with intent that it should consitute a completed instrument *in praesenti*. Finlin, Marshall, and Kerwin, J. J., *dissenting*.

That parol evidence cannot be admitted to vary the terms of a written contract absolute on its face is a well-settled rule of law. *Brown v. Spoffard*, 95 U. S. 480. Cases of fraud, illegality or want of consideration are exceptions to this rule. *Carrington v. Maff*, 112 N. C. 115. Evidence of an oral agreement that a note is to become void upon the happening of a condition subsequent is inadmissible under the rule. *Potter v. Earnest*, 45 Ind. 418. This rule excluding parol evidence to vary a written instrument presupposes the existence in fact of such agreement; hence, the rule has no application where the writing was not delivered as a present contract but to become binding only upon performance of some condition precedent resting in parol. *McFarland v. Sikes*, 54 Conn. 250; *Reynolds v. Robinson*, 110 N. Y. 654. A note in the hands of a *bona fide* holder for value cannot be affected by such evidence to his prejudice. *Burnes v. Scott*, 117 U. S. 582.

GIFTS—UNDUE INFLUENCE—BURDEN OF PROOF.—GILMORE V. LEE, 86 N. E. 568 (ILL.).—*Held*, that the relation of priest or spiritual adviser and parishoner is one of confidence, and a gift *causa morris* by a parishoner to her priest is in and of itself *prima facie* void, and the burden of proof rests on such priest to show that the gift was freely and voluntarily made, and that it was not the result of undue influence. Scott, J., *dissenting*.

Freedom of will and good faith are as essential to the validity of a gift as in other contracts; *Ferguson v. Lowery*, 54 Ala. 510; *Garvin v. Williams*, 44 Mo. 465; and burden of proof is thrown on the donee to

show that the gift was the free and voluntary act of the donor. *Whipple v. Barton*, 63 N. H. 613; *Parker v. Parker* (N. J.), 16 Atl. 537. It is not necessary to show by absolute evidence that undue influence was exerted by donee at the time gift was made. *Sears v. Shafer*, 2 Selden (N. Y.) 268. And a donee before accepting a gift must satisfy himself that donor had no family ties or that he was determined to disregard them. *Ford v. Hennessy*, 70 Mo. 580. But some cases hold gifts by fraud or imposition are voidable only, and by one specially injured. *Norris v. Norris*, 3 Ind. App. 500.

HUSBAND AND WIFE—WIFE'S SERVICES—RIGHT OF HUSBAND TO RECOVER.—GORMAN V. N. Y. C. & ST. L. R. CO., 113 N. Y. SUPP.—*Held*, that in an action for injury to his son, plaintiff can recover the value of his wife's services in nursing the son. Williams, J., *dissenting*.

The prevailing rule seems to be that where plaintiff is nursed by members of his own family no action will lie for recovery of damages for the value of the services thus rendered. *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500. A case upholding this rule is where services rendered plaintiff by her daughter who made no charge for such services, could not be brought in as ground for damages when said plaintiff was suing a railroad company for an injury to herself. *Chicago, B. & Q. R. Co. v. Johnson*, 24 Ill. App. 468. It has been held, however, that in an action for damages resulting from personal injuries, a defendant is liable for the reasonable value of medical attendance, care and nursing made necessary by the accident, although not actually paid. *Gries v. Zeck*, 24 Ohio St. 329; and also though such services may, as between the plaintiff and the person rendering them have been gratuitous. *Varnham v. City of Council Bluffs*, 52 Ia. 698.

INFANTS—SALE OF PERSONAL PROPERTY—AVOIDANCE—RETURN OF CONSIDERATION.—HUGHES V. MURPHY, 63 S. E. 1248 (GA.).—*Held*, that the rule which requires the restitution of the consideration in order to disaffirm an infant's contract applies only to the right of the infant himself after he becomes of age and elects to disaffirm a contract made by him during his minority, and that a guardian bringing a suit to recover the possession of personal property which his ward has sold, is not required to return the consideration received by the ward.

At common law to give effect to an infant's disaffirmance of his contract, it is not necessary that the other party should be placed *in statu quo*. *Carpenter v. Carpenter*, 45 Ind. 142; *Ruchmzky v. DeHaven*, 97 Pa. 202. But it has been held in a few cases, that an infant vendor to recover back his property must refund what he has received, and there can be no right of recovery so long as any part of the consideration is withheld. *Stout v. Merrill*, 35 Ia. 227; *Chambers v. Jones*, 72 Ill. 275. But the general rule of law is that when disaffirming a deed because of infancy when made, the party must return so much of the consideration received as remains in his possession at the time of election, but he is not required to return an equivalent for such part as may have been disposed of during minority. *Bloomer v. Nolan*, 36 Neb. 51; *Jenkins v. Jenkins*, 12 Ia. 195; *Reynolds v. McCurry*, 100 Ill. 356. In accord with the case at hand it is

held, that the guardian of an adult may avoid any conveyance of property executed by his ward while a minor, which might be avoided by the ward himself if capable of exercising the right, and if money paid to the minor as consideration for his conveyance of real estate has been wasted or spent by him during his minority, payment of the amount is not necessary to enable his guardian to avoid the conveyance. *Chandler v. Simmons*, 97 Mass. 508.

INDIANS—ACTIONS—JURISDICTION OF STATE.—DERAGON V. SERO, 118 N. W. 839 (WIS.).—*Held*, the laws of the state for the peace and good order of people within its boundaries extend over Indian reservations, and apply to infractions of such laws, whether by Indians or others.

The general rule is that the federal courts have jurisdiction over all Indians, for, regarding them as ward of the nation, the United States has full power to pass such laws as may be necessary to their full protection and may punish all offences committed against them or by them within the reservation. *U. S. v. Thomas*, 151 U. S. 577. And it is held that the state courts have no jurisdiction in such cases. *State v. Kagarua*, 23 Cent. L. J. 420; *In re Cross*, 20 Neb. 417; *State v. McKenney*, 18 Nev. 182. But when an Indian has severed his tribal relations he may be prosecuted in the courts of the state whether the crime is committed within or without the reservation. *State v. Williams*, 13 Wash. 335. And if the crime is not by an Indian against an Indian whether on or off the reservation, the state courts have jurisdiction. *Marion v. State*, 16 Neb. 349.

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—MISCONDUCT OF SERVANT.—HOGLE V. H. H. FRANKLIN MFG. CO., 112 N. Y. SUPP. 881.—*Held*, that the general rule that a master is not liable for a malicious act of his servant, not done within the scope of his employment, does not relieve the master from his own neglect to use reasonable means to prevent a dangerous practise carried on by workman under his control and on his premises. McLennan, P. J., *dissenting*.

The master is usually not liable for the wilful and malicious acts of his servant done outside of the course and scope of the employment. *Collins v. Alabama Great Southern Ry. Co.*, 104 Ala. 390. The liability of the master is determined by the doctrine of *respondeat superior*, which is founded on the power of control and direction which the superior has a right to exercise and which for the safety of other persons he is bound to exercise over the acts of his subordinates. 1 *Blackstone Comm.*, 431. A man can only use his property in such a manner as constitutes a reasonable exercise of dominion, having regard to all interests affected and having also in view public policy. *Booth v. Rome, etc., Ry. Co.*, 140 N. Y. 267. But the mere fact that a wrongful act occurred upon his property will not make the doctrine of *respondeat superior* apply. *Herbstritt v. Lacka. Lumber Co.*, 212 Pa. St. 495. Where, however, the master has notice of a dangerous practise being carried on by his employees and he does not take reasonable care to prevent it, he will be liable, regardless of whether it was malicious or in the scope of employment. *Snow v. Fitchburg Railroad*, 136 Mass. 552. Under such circumstances the master's permission is implied. *Brannock v. Elmore*, 114 Mo. 55.

MASTER AND SERVANT—INJURIES TO SERVANT—ACCIDENTAL OR IMPROBABLE INJURY.—NELSON-BETHEL CLOTHING CO. v. PITTS, 114 S. W. 331 (KY.).—*Held,* that a manufacturing company operating a number of sewing machines, the belts of which were passed over a shaft, was not bound to anticipate that an operator of a machine would get her hair caught in the shaft while stooping down to connect the belt of her machine with the shaft.

The prevailing American doctrine is that, for an injury which results from pure accident, or from causes which could not reasonably be anticipated, unaccompanied by want or ordinary care on the part of the master, he is not liable. *Earnshaw v. Western Stone Co.,* 200 Ill. 220; *McKee v. Chicago, etc., R. Co.,* 83 Ia. 616; *Moncuso v. Cataract Constr. Co.,* 34 N. Y. Supp. 273. The master must use ordinary diligence in providing safe machinery and secure places of employment for his servants; *Frank v. Otis,* 15 N. Y. St. Rep. 681; *Hallower v. Henley,* 6 Cal. 209; but the duty resting upon the master does not go to the extent of requiring him to make accidental injuries impossible. *Richards v. Rough,* 53 Mich. 212; *Siogren v. Hall,* 53 Mich. 274. If a servant knows, or by the exercise of ordinary care, might know, of the danger, continuance in service without objection results in a waiver and assumption of the risk; *Hoben v. Burlington & M. River R. Co.,* 20 Ia. 562; *Muldowney v. Ill. Central R. Co.,* Ia. 615; and some courts have gone so far as to hold that a servant assumes the risk when he is under virtual compulsion. *Mahoney v. Dore,* 155 Mass. 513; *Samson v. Am. Axe & Tool Co.,* 177 Mass. 144.

MURDER—EVIDENCE.—PEOPLE v. GOVERNALE, 86 N. E. 554 (N. Y.).—Where an officer was shot while attempting to arrest the accused, who had shot another person, *held,* that evidence of the latter shooting is inadmissible in a prosecution for the former, to prove the accused guilty of the crime charged.

Evidence tending to prove a similar but distinct offence from that for which the accused is being tried is not admissible for the purpose of raising an inference that he committed the crime of which he is accused. *Bishop v. People,* 194 Ill. 365. Evidence tending to prove other criminal acts, in order to support the probabilities of the evidence that the accused committed the particular act charged, is incompetent. *People v. Wilson,* 141 N. Y. 185; *Boyd v. U. S.,* 142 U. S. 450. Evidence of a distinct, independent, substantive offence cannot be admitted at the trial for another and different offence. But whether the facts amount to proof of a crime other than that charged, and there is ground to believe that the crime charged grew out of it, such facts may be proved to show the *quo animo* of the accused. *Farris v. People,* 129 Ill. 521; *Commonwealth v. Ferrigan,* 44 Pa. St. 386; *State v. Lapage,* 57 N. H. 245; *Mayer v. People,* 80 N. Y. 364. And, evidence of other transactions, otherwise material and relevant, is not inadmissible merely because it tends to prove another crime. *People v. Van Tassel,* 156 N. Y. 561; *Hope v. People,* 83 N. Y. 418. Evidence tending to prove material facts is admissible, although it may also tend to prove the commission of another offence. *Rice on Evidence,* Vol. III, § 155; *Starkie on Evidence,* Vol. II, § 380.

NEGLIGENCE—IMPUTED NEGLIGENCE—GUEST OF AUTOMOBILE DRIVER.—CHADBOURNE V. SPRINGFIELD ST. RY. CO., 85 N. E. 737 (MASS.).—*Held*, where plaintiff, who was inexperienced in the operation of an automobile, was injured while riding as the guest of an experienced driver, in a collision between the automobile and a street car, there being no mutuality in a common enterprise between them, the driver's negligence, if any, was not imputable to plaintiff.

The negligence of the driver of a wagon wherein plaintiff was a passenger by invitation precluded plaintiff from recovering of a railroad company for injuries from a collision at a crossing. *Payne v. C., R. I. & Pac. R. R. Co.*, 39 Ia. 52; *Slater v. B. C. R. & B. Ry. Co.*, 71 Ia. 209; *Whittaker v. City of Helena*, 14 Mont. 124; *Omaha & R. V. Ry. Co. v. Talbot*, 48 Neb. 627. The weight of authority, however, holds that where the plaintiff rides in the vehicle of another, neither exercising nor assuming any control over the movements of the team, the driver does not become the agent of the plaintiff so that negligence contributing to an injury can be attributed. *U. P. Co. v. Lapsley*, 51 Fed. 174; *Strauss v. Newburgh Ry.*, 39 N. Y. Supp. 998.

PARENT AND CHILD—CUSTODY AND CONTROL OF CHILD—RIGHT OF FATHER OF CHILD.—SUARENS ET AL. V. SUARENS, 97 PAC. 968.—*Held*, that where a father was a well-to-do farmer, and was an educated man, and had no immoral habits, and his second wife was well educated and of good character, the court properly awarded to him the custody of a child by his first wife, though the home furnished by the grand-parents of the child was in some respects better than the home of the father.

The old common law rule gave the custody of children to the father as against the mother, and especially as against third persons. *Johnson v. Terry*, 34 Conn. 395. Yet the father may deprive himself of this right by unfitness or voluntary transfer of his right to custody. *Bently v. Terry*, 59 Ga. 555. And unless a sufficient reason is shown, the transfer is irrevocable. *James v. Cleghorn*, 54 Ga. 9; *State v. Barney*, 14 R. I. 62. The child will never be restored unless for its own benefit. *People v. Lohman*, 17 Att. Prac. 395. And the state can take the child from the father, if he is an unfit person. *Reynolds v. Howe*, 51 Conn. 472; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197. But the father cannot be deprived of access to his child. *Matter of Jacquest*, 46 N. Y. Misc. 575. And always the welfare of the child is the principal factor in determining its custody. *U. S. v. Green*, 3 Mass. 482; *Kelsey v. Green*, 69 Conn. 291.

PAROL LICENSES—REVOCATION.—YEAGER V. TUNING, 86 N. E. 657 (OHIO).—The plaintiff and the defendant agreed orally to construct a telephone line over and across their respective lands, to enable them to have telephonic communication with each other, and with persons on other lines. The line, as agreed upon, was built, was of a permanent nature, and of the value of $250.00. The defendant three years afterward, cut the wire and rendered the line useless. *Held*, that such an agreement created merely a parol license, revocable at will. Davis, J., *dissenting*.

Many of the authorities hold that a parol license cannot be revoked, after the licensee relying thereon has made expenditures. *Smith v. Green*, 109 Cal. 228. Even though there be no consideration given for the privilege. *School Dist. v. Lindsey*, 47 Mo. App. 134. Some of the courts hold that the doctrine of estoppel prevents the licensor from revoking in such instances. *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490. Others, however, hold that the license may be revoked after a reasonable opportunity has been given to remove improvements made. *Kivett v. McKeittian*, 90 N. C. 106. But in many instances, the question of expenditure, consideration and notice has been disregarded, and it is held that the licensor may revoke at will. *Thoemke v. Fielder*, 91 Wis. 386.

RAILROADS—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.—KURT V. LAKE SHORE & M. S. RY. CO., 111 N. Y. SUPP. 859.—*Held*, that a person, going before daylight around a train obstructing a crossing, is not guilty of contributory negligence as a matter of law in failing to see a train on another track, backing at great speed without signals or other warning and without lights except such as are usually placed at the back end of trains. McLennan, P. J. and Spring, J., *dissenting*.

To be innocent of contributory negligence in such cases, the injured must have exercised that degree of care which the danger of the particular crossing requires of an ordinarily prudent person. *Fitzhugh v. Boston & Maine R. R. Co.*, 80 N. E. 792. The almost universal rule is that one must both look and listen vigilantly; *Salter v. Utica & B. R. Co.*, 75 N. Y. 273; and continuously until out of danger. *Thompson v. N. Y. Cent. R. Co.*, 33 Hun. 16. One is not bound, however, to see or hear the danger; *Greany v. L. I. R. Co.*, 101 N. Y. 419, and a pedestrian who had looked and listened and who was struck in the night time by a train backing rapidly without lights or signals, was held not to be guilty of contributory negligence. *Garran v. Mich. Cent. R. Co.*, 144 Mich. 26. Leaving a street crossing in order to pass a train which is blocking the same, does not constitute contributory negligence. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409.

RAILROADS—INJURIES TO A TRESPASSER.—MORRIS V. GEORGIA R. & BANKING CO., 62 S. E. 579 (GA.).—Plaintiff was riding on the engine of a passenger train by invitation of the conductor, engineer and fireman, and without paying or intending to pay any fare. It did not appear that there was any custom permitting persons to so ride. *Held*, that plaintiff was a trespasser, and that his widow had no cause of action against the company.

A master is liable for the acts of his servants, done in the course of their employment, although they are done in disobedience of the master's orders. *Philadelphia & Reading R. R. Co. v. Derby*, 55 U. S. 468; *Wood on Railroads*, p. 1382. But most of the authorities say that a conductor is not authorized to invite a person to ride without paying a fare. And it is not within the scope of his employment to invite a person to ride on the engine. *Files v. Boston & Albany R. R.*, 149 Mass. 204. Accordingly, there is no liability on the company in such an instance. *Railway Co. v. Cox*, 66 Ohio St. 276. Especially, if defendant knew that the rules of the

company forbade anyone riding on the engine. *Virginia Midland R. R. Co. v. Roach,* 83 Va. 375. However, in one instance, it was held that an engineer had no authority to permit a person to ride on the engine against the rules of the company but if the conductor permitted him to ride there, his consent would be considered as that of the company. *C. & A. R. R. Co. v. Michie,* 83 Ill. 427.