RECENT CASES

ADMIRALTY—JURISDICTION—WEST V. MARTIN, 92 PAC. (WASH.) 334.—*Held,* that admiralty has jurisdiction of the injury where a pier of a lawfully constructed bridge resting in the bottom of a navigable river is run into by a vessel. Fullerton, J., *dissenting.*

Beginning in 1865, the Supreme Court held that jurisdiction of admiralty was exclusively dependent upon locality of the act, *The Plymouth,* 3 Wallace 20, and that the place or locality of the thing injured, and not of the agent causing the injury, was the real test, *Ex parte Phenix Ins. Co.,* 118 U. S. 610, also that a cause of action not being completely on water, when the thing injured was on land, *Johnson v. Chicago Elevator Co.,* 119 U. S. 388, that injuries to bridges, which are mere prolongations over waters of highways upon land, *City of Milwaukee v. The Curtis,* 37 Fed. Rep. 705, were not within the jurisdiction of admiralty courts, *The John C. Sweeney,* 55 Fed. Rep. 540; but starting with an *obiter dictum* in *The Arkansas,* 17 Fed. Rep. 383, which stated that in such cases there should be a right in admiralty because of the inherent nature of the resulting lien. The Supreme Court finally decided in *The Blackheath,* 195 U. S. 361, that such cases were cognizable in admiralty, thus practically overruling the old test of locality as laid down in *The Plymouth, supra,* and extending jurisdiction to any claim for damages caused by any ship. Some Federal Courts, however, refuse to interpret the above decision as overruling *The Plymouth, supra; The Curtis,* 152 Fed. 588. But the majority follow it as the best rule of law. *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.,* 148 Fed. 290.

BASTARDY—EVIDENCE—ADMISSIBILITY.—LAND V. STATE, 105 S. W. (ARK.) 90.—*Held,* that in bastardy it is not error to allow the child to be exhibited to the jury, the relative improbability of a child having any perceptible resemblance to its parent going to the weight of the evidence only.

Exhibition of the child to allow jury to observe whether it bears any resemblance to the putative father is allowed in some cases on its being, in some respects, the subject-matter of the controversy, *Gilmanton v. Ham,* 38 N. H. 108, or that it is pertinent evidence, *Higley v. Bostick,* 63 Atl. (Conn.) Rep. 786, or on common sense and observation, *State v. Woodruff,* 67 N. C. 89; *Gaunt v. State,* 50 N. J. L. 490, or on the physiological fact that features and personal traits are often transmitted from parent to child, *Finnegan v. Dugan,* 96 Mass. 197, to uphold which theory Lord Mansfield, in the notorious *Douglas Case,* is reported as saying: "That he considered likeness as an argument of a child's being the son of a parent;" cited on authority of *Hanawalt v. State,* 64 Wis. 84, and which follows irrespective of age of child, *Scott v. Donovan,* 153 Mass. 378, to which, however, there is a contrary view, *State v. Danforth,* 48 Iowa 43. The conflicting cases base their arguments on the fact that such resemblance being purely notional or imag-

inary, *Clark v. Bradstreet,* 80 Me. 454, is too vague, uncertain and fanciful, *Rick v. State,* 19 Ind. 152, and would establish a dangerous rule of evidence. *People v. Carney,* 29 Hun. (N. Y.) 47.

BILLS AND NOTES—INTEREST COMPUTATION—COMPOUND INTEREST.—ADAMS V. ILL. LIFE INS. CO., 104 S. W. (KY.) 718.—*Held,* under a note providing for interest at a certain rate per annum, payable semi-annually, until maturity, and thereafter interest at that rate per annum only, the holders were entitled after maturity only to current interest, and not to interest on interest.

General rule is that simple interest only can be recovered, *Force v. City of Elizabeth,* 28 N. J. Eg. 403; *Townsend v. Riley,* 46 N. H. 313, for law does not sanction any implication that interest becomes principal, *Van Husan v. Kanouse,* 13 Mich. 303, so as to carry interest, *Dean v. Williams,* 17 Mass. 417; nor is interest ever a legal incident to non-payment of interest, *Stokely v. Thompson,* 34 Pa. St. 210, although some courts allow it where payment of interest is unjustly neglected or refused. *Aurora City v. West,* 7 Wallace (U. S.) 82. Still interest can bear interest, *Auketel v. Converse,* 17 Ohio St. 11, when such an agreement has been made with the other party to that effect, either by statute or common law, *Stower v. Evans,* 38 Mo. 461, but to be valid must be made after interest has become due, *Young v. Hill,* 67 N. Y. 162, for an original agreement at time of loan allowing interest on interest is unjust, oppressive, harsh and ruinous to debtor, but is not usurious, *Camp v. Bates,* 11 Conn. 488.

BILLS AND NOTES—LIABILITY OF INDORSER OF NON-NEGOTIABLE NOTE.—BANK OF LUVERNE *v.* SHARPE, 44 So. 871 (ALA.).—*Held,* that the indorser of a non-negotiable note is liable to the indorsee to the same extent as the indorser of a negotiable note.

The general rule is that the indorsement of a non-negotiable note operates only as an assignment and carries no guaranty, *Story v. Lamb,* 52 Mich. 525; *Shaffstall v. McDaniell,* 152 Pa. St. 598; *Kendall v. Parker,* 103 Cal. 319; unless the indorser shows an intention to guarantee the payment of the instrument, *First Nat'l Bank v. Falkenham,* 94 Cal. 141; for instance, by inserting the words, "with recourse," *Klein v. Keiser,* 87 Pa. St. 485; or if he make an express agreement to that effect. *Shaffstall v. McDaniell, supra.* In other states, the liability of an assignor is analogous to that of an irregular indorser of a negotiable instrument. *Prentiss v. Danielson,* 5 Conn. 175; *Sweetser v. French,* 13 Met. (Mass.) 262. Under the N. Y. doctrine it is a positive undertaking and indorser is not entitled to demand and notice of non-payment. *Cromwell v. Hewitt,* 40 N. Y. 491. In Ohio, it is a collateral undertaking between indorser and indorsee and demand and notice is necessary as upon negotiable paper. *Parker v. Riddle,* 11 Ohio 103. Statutes govern in other states. *Nat'l Bank v. Leonard,* 91 Ga. 805; *Samstag et al. v. Conley et al.,* 64 Mo. 476.

CRIMINAL LAW—FORMER JEOPARDY—NEW TRIAL.—HUNTINGTON V. SUP. CT. OF CITY AND CO. OF SAN FRANCISCO, 90 PAC. 141 (CAL.).—*Held,* that where an information charged the accused with the crime of murder and he was convicted of manslaughter and on appeal a new trial was ordered, on the second trial he could only be tried upon the charge of manslaughter, since he had been acquitted of the charge of murder.

In a majority of the states of this country it is held that, when on an indictment for murder, the accused is found guilty of a lesser offense, it is virtually an acquittal of the higher offense. *Hunt v. State,* 25 Miss. 358; *Smith v. State,* 22 Texas App. 316. And the only effect of setting aside the verdict and granting a new trial is to leave undetermined the question whether the accused committed the lesser offense. *State v. Belden,* 33 Wis. 121; *Johnson v. State,* 27 Fla. 245. But there are a number of states in which it is held that the principle that no man can be twice put in jeopardy for the same offense means "without his consent," and he may avail himself of the privilege, or not, as he pleases. *State v. Bradley,* 67 Vt. 465. And the effect of setting aside a verdict, finding the defendant guilty of manslaughter, is to leave at issue and undetermined the fact of the homicide, also the fact whether the defendant committed it if one was committed. *State v. Behrmer,* 20 Ohio St. 572; *State v. Gillis,* 73 S. C. 318. The accused is tried on the original indictment, and the trial proceeds as if no other trial had ever been held. *State v. Morrison,* 67 Kan. 144; *Waller v. State,* 104 Ga. 505.

DAMAGES—GROUNDS—MENTAL SUFFERING.—ST. LOUIS, I. M. & S. RY. CO. V. TAYLOR, 104 S. W. (ARK.) 551.—*Held,* that under the rule that mental suffering alone, without physical injury or other elements of damage, cannot be made the subject of an independent action for damage, even where the act or violation of duty complained of was wilfully committed, a railroad is not liable for damages to a passenger for mental suffering caused by mere verbal abuse of the station agent. Wood and Riddick, J.J., *dissenting.*

General rule is that mental suffering alone gives no right of action, *Lynch v. Knight,* 9 H. L. Cases 577; *Joch v. Dankwordt,* 85 Ill. 331. The cases allowing recovery for it can be grouped into three classes. First, when it is intimately connected with personal injury, *Robertson v. Cornelson,* 34 Fed. Rep. 716; *McMahon v. The Northern C. R. R. Co.,* 39 Md. 438, or when it is natural or proximate consequence of some recognized cause of action, *Gilvey v. Lewis,* 68 Conn. 392; or actionable injury, *Stone v. Heywood,* 7 Allen (Mass.) 118. Second, breach of contract for marriage and in seduction cases, *Southerland Damages,* 732; *Lunt v. Philbrick,* 59 N. H. 59. Third, when a wilful wrong has been committed, *William v. Underhill,* 71 N. Y. Supp. 291; *W. U. Tel. Co. v. Henderson,* 89 Ala. 510, although on this point the authorities are not harmonious. This latter doctrine in some cases is extended to allow recovery for any injury connected with insult or malice, *Schmitz v. The St. L. I. M. & S. Ry. Co.,* 119 Mo. 256, or grief, etc., *Wadsworth v. M. N. Tel. Co.,* 86 Tenn. 695, and this without proof of any pecuniary loss, *Reise v. M. N. Tel. Co.,* 123 Ind. 294, since, the courts say, mind is no less a part of the person than the body, and sufferings of former are sometimes more acute than latter, *Young v. Telegraph Co.,* 107 N. C. 370, and even going so far as to say that wounding a man's feelings is as much actual damage as breaking his limbs, *Herd v. The Georgia R. Co.,* 79 Ga. 358.

DEAD BODIES—POWER TO ORDER EXHUMATION—RIGHTS OF WIDOW.—MUTUAL LIFE INS. CO. OF N. Y. V. GRIESA, ET AL., 156 FED. 398.—*Held,* that a court of law has no power to order the exhumation of a dead body in an action at law to which the widow of the deceased, who has the right to control the body, is not a party.

A dead body is not property in the strict sense of the common law, but it is a quasi property, and those having it in charge hold it as a trust which a Court of Equity will regulate, *Cunningham v. Reardon,* 98 Mass. 538, but there is not any universal rule as to the burial of the dead applicable alike to all cases, and each case must be considered in equity upon its own merits, though the paramount right is in the surviving husband or wife. *Pettigrew v. Pettigrew,* 207 Pa. St. 313. The majority of cases show that the surviving husband or wife has the superior right to the body before or after burial, as in the case of *Durell v. Hayward,* 9 Gray. 248, where the relatives of the deceased placed a tombstone over the grave, without the consent of the surviving husband, and it was held that he could remove it, though this right is subject to statutory provisions in some states, as in the case of *Young v. The School of Physicians and Surgeons,* 81 Md. 358, where, under a local law of Baltimore City, the coroner had power to hold inquests and to order autopsies, and he ordered the autopsy and mutilated the body without the consent of the widow, he was held not liable for the same.

DEEDS—PRESUMPTION AS TO DELIVERY.—CRABTREE V. CRABTREE, 113 N. W. (IOWA) 123.—*Held,* where a deed bears one date and the certificate of acknowledgment a later date, the date of the certificate is presumed to be the time of delivery.

Generally, the date of the deed is presumptively the date of delivery. *Wickham v. Morehouse,* 16 Fed. 324; *Smith v. Porter,* 10 Gray. 66. The burden of proof is on the party alleging the contrary. *Williams v. Armstrong,* 130 Ala. 389. Possession of deed by grantor subsequent to date of deed refutes presumption. *Harris v. Norton,* 16 Barb. 264. By weight of authority this presumption is not overcome by the fact that the certificate of acknowledgment bears a later date. *Biglow v. Biglow,* 56 N. Y. Supp. 794; *Hardin v. Crote,* 78 Ill. 533. Some courts, nevertheless, hold that date of acknowledgment is presumptively the date of delivery. *Atlantic City v. New Auditorium Pier Co.,* 63 N. J. Eq. 644. But in some jurisdictions this is because acknowledgment is necessary to a valid execution of the deed. *Bailey v. Selden,* 124 Ala. 403.

DIVORCE—DECREE—SETTING ASIDE.—WOOD V. WOOD, 113 N. W. (IOWA) 492.—*Held,* that a decree in a divorce suit may be assailed the same as any other judgment where property interests are directly affected, and may be vacated after the death of the parties.

In England, sentences of divorce could not at first be re-examined after death of one of the parties, *Robertson v. Stollage,* Cro. & Jac. 186, but the rule now is that it can be opened when fraud is charged. *Harrison v. Southampton,* 21 Eng. L. Eq. 343. Early American cases recognized the right, but were doubtful as to procedure, *Wren v. Moses,* 7 Ill. 72, but the authorities are practically unanimous now, that, in the absence of statutory qualifications, a decree of divorce may be vacated after death of parties, *Fidelity Ins. Co.'s Appeal,* 93 Pa. St. 242, *Adams v. Adams,* 51 N. H. 388, when obtained by fraud, *Brown v. Grove,* 116 Md. 84; but not for mere gratification of personal feeling, *Nichols v. Nichols,* 25 N. J. Eq. 60, or for purely sentimental reasons, *Lawrence v. Nelson,* 113 Iowa 277; but there must be property rights involved, *Johnson v. Coleman,* 23 Wis. 452, *Bousta v. Johnson,* 38 Minn. 230. Tennessee, Colorado and Washington seem to be the only exceptions. Tennessee Statute provides that the only method of reviewing

a decree of divorce shall be by appeal and time had expired in this case. *Ownes v. Sims,* 3 Caldwell (Tenn.) 544. In the California case the decree of divorce was silent as to property rights. *Kirschmer v. Dietrich,* 110 Cal. 502. The Washington case is really the only one directly in conflict, court holding that parties affected had other avenues for determination of such property rights as were affected. *Nolan v. Duryea,* 1 L. R. A. (Wash.) N. S. 551.

EMINENT DOMAIN—ESTABLISHMENT OF STREET GRADE—SALLDEN V. CITY OF LITTLE FALLS, 113 N. W. (MINN.) 884. Under amendments of state constitution providing that private property shall not be taken or "damaged" for public use without just compensation, *held,* that a property owner in a municipal corporation is entitled to compensation for injuries occasioned to his property by reason of the first establishment of a street grade.

At Common Law a municipality is not liable to property holders for consequential damages from grading, unless the property is actually invaded or the work of improvement negligently done. *Radcliffe Exrs. v. Mayor, etc., of Brooklyn,* 4 N. Y. 195. *Smith v. Washington,* 20 How. 135. A municipality is liable where grade is once established and a subsequent change is made with damage. *City v. Herman,* 72 Miss. 211. However, there is a difference of opinion as to whether there is liability for damages resulting from the first establishment of a grade. The better opinion holds that there is. *Hendrick's Appeal,* 103 Pa. 358. *Eachus v. Los Angeles Consol. R. Co.,* 103 Cal. 614. The recent case of *Manning v. City of Shreveport,* 44 So. 882, discusses the question and adheres to this opinion. A contrary decision was given in the case of *Leiper v. Denver* (Colo.), 7 L. R. A. (N. S.) 108, where Judge Dillon is cited as holding the same doctrine. (See *Dillon's Municipal Corporations,* 4th Ed., Vol. 2, Sec. 995b.)

EQUITY—LACHES—ESSENTIALS OF BAR.—DONCOURT V. DENTON, 105 N. Y. SUPP. 906.—*Held,* that while equity does not favor state claims, it will not condemn a claim because of laches in enforcing it, where defendant has voluntarily conceded its existence.

The matter of laches is left to the sound discretion of the chancellor in each case, *Chapman v. Bank of Cal.,* 97 Cal. 159; nothing can call forth a Court of Equity into activity but conscience, good faith and reasonable diligence. *Golden v. Kimmel,* 99 U. S. 201; *Price's Appeal,* 54 Pa. 472. Courts of Equity act not so much in analogy to, as in obedience to, statutes of limitation of legal actions, because, when the legal remedy is barred, the spirit of the statute bars the equitable remedy also. *Calhoun v. Millard,* 121 N. Y. 69. Some courts have held that even when the Statute of Limitations has run that laches cannot be brought in as bar, *Ruckman v. Cory,* 129 U. S. 387; *Hovey v. Bradbury,* 112 Cal. 620; others, that although a party may bring his suit within the period prescribed by the Statute of Limitations, he may yet be guilty of such laches as will debar his right to relief in strictly equity cases, *Wolf v. Great Falls W. P. P. T. Co.,* 15 Mow. 49; *Delavan v. Duncan,* 49 N. Y. 488; but continued acknowledgment by defendant of plaintiff's right is generally sufficient to account for delay by plaintiff in instituting suit to enforce it. *Higgins v. Lansingle,* 154 Ill. 301; *Robertson v. DuBose,* 76 Tex. 1.

EQUITY—TRADE MARK AND TRADE NAME—FRAUDULENT REPRESENTATIONS.—MEMPHIS KEELEY INSTITUTE V. LESLIE E. KEELEY CO., 155 FED. 964.—Plaintiff brings a bill in equity against defendant, falsely claiming to use

gold in his cure, and making such representations on his labels. *Held,* that where plaintiff falsely represents his goods on his labels, he cannot maintain a suit in equity to protect his business of selling such remedy from invasion and injury by another.

He who comes into equity must come with clean hands. *Bispham on Equity,* Section 42; *Milhous v. Sally,* 43 S. C. 324; *McMullen v. Hoffman,* 174 U. S. 654. There is under this doctrine a distinction between enforcing an illegal contract and getting an accounting of money in the hands of a partner as the result of such a transaction. *Brooks v. Martin,* 2 Wall. 70; *Hardy v. Jones,* 63 Kan. 8. Courts of Equity will not interfere by injunction where there is any lack of truth in plaintiff's case, *i. e.,* where there is any misrepresentation in his trade mark or label. *Browne on Trade Marks,* Section 474, *et seq.; Siegart v. Abbot,* 61 Md. 276; *Clotworthy v. Shepp,* 42 Fed. 62; *Josephs v. Macowsky,* 96 Cal. 518; *Koeler v. Sanders,* 122 N. Y. 65. Nor will Chancery interfere by injunction at the suits of the vendor of one quack patent medicine against another, such controversies having too little merit to be commended on either side. *Heath v. Wright,* Fed. Cas. No. 6310. If the plaintiff has been guilty of unconscientious, inequitable or immoral conduct in or about the same matter, whereof he complains of his adversary, or if his claim to relief grows out of or depends upon, or is inseparably connected with his own wrong, he will be repelled at the threshold of the court. *Simmons Medicine Co. v. Mansfield Drug Co.,* 73 Tenn. 84.

INTERSTATE COMMERCE—POLICE POWER—MUNICIPAL REGULATION.—INTERNATIONAL TEXT-BOOK V. INHABITANTS OF CITY OF AUBURN.—A city ordinance provided that "no person shall distribute in any public street or from any buildings, handbills, cards, circulars or papers of any sort, except newspapers."—*Held,* that such an ordinance is a lawful police regulation, to protect people on the street from annoyance, and not unlawful as an interference with interstate commerce as against a concern doing business in another state, and desiring to distribute on the public street circulars advertising such business.

No state has the power to impose a tax upon the occupation or business of any person or company engaged in carrying on interstate commerce. *Case of State Freight Tax,* 15 Wall. 232; *Osborne v. Florida,* 33 Fla. 162; *Com. v. Smith,* 92 Ky. 38; *Crutcher v. Kentucky,* 92 Ky. 38. A power exercised in good faith for public order and comfort will be recognized by U. S., although it may bear on the agencies of commerce. *Freund on Police Power,* Section 159. The power of the state to protect the lives, health and property of its citizens, and to preserve good order and public morals is a power originally and always belonging to the states, and not surrendered by them to the general government. *Cooley on Const. Law,* 3rd Ed., p. 79; *U. S. v. E. C. Knight Co.,* 156 U. S. 1, 11. The states have full power to regulate within their limits matters of internal police. *Escanaba Co. v. Chicago,* 107 U. S. 683.

JUDGMENTS—DISMISSAL WITHOUT PREJUDICE—ACTIONS AT LAW AND IN EQUITY.—SMITH ET AL. V. COWELL, ET AL., 92 PAC. 20.—*Held,* that a decree of dismissal without prejudice to any "action at law" rendered by a Federal Court or sustaining a demurrer to the complaint in equity on the grounds that the plaintiff was not entitled to the equitable relief prayed for, is a bar

to a subsequent suit in a state court setting up a like equitable cause of action, the quoted words meaning a cause of action at law, notwithstanding the Code abolishes the different forms of action.

In most of the states the distinction between the different forms of action is abolished by statute, and either equitable or legal relief may be sought and obtained, and the rules of either law or equity, or both, enforced in the same court. *Hulbutt v. Spalding Saw Co.*, 93 Cal. 55. But the essential principles of equitable actions and relief, as distinguished from legal actions and remedies, are as clearly marked and defined as before the enactment of such statutes. *Lackland v. Garesche*, 56 Mo. 267. And although there is only one form of action, the character of the action is determinable from the pleadings. *Lerdersdorf v. Flint*, 50 Wis. 401. It is true that an action brought in a state court in the first instance will not be dismissed if the facts set up in the complaint entitled the plaintiff to any relief at all, merely because he has mistaken his remedy or asked for the wrong relief. *White v. Lyons*, 42 Cal. 279. Still, if a Federal Court has jurisdiction of the cause, full faith and credit must be given to its decision, and the plaintiff can no more invoke again the equitable jurisdiction of, and demand equitable relief in a state court, than he can in a United States court. *Knowlton v. Hanbury*, 117 Ill. 471. And although a decree of dismissal from equity "without prejudice to an action at law" would leave the parties free to seek their legal remedy, *Cramer v. Moore*, 36 Ohio St. 347; it would be as effective a bar to a subsequent action setting up a like equitable cause of action as if the quoted words were omitted. *Strang v. Moog*, 72 Ala. 460.

MANDAMUS—WHEN GRANTED—HUGHES V. NORTH CLINTON BAPTIST CHURCH OF EAST ORANGE, 67 ATL. 66 (N. J.).—*Held*, that mandamus is a proper remedy to secure the reinstatement of one who has been unlawfully deposed from membership in a church without cause, without charges, and without opportunity for hearing.

The New Jersey courts alone seem to have held this point; the courts of the other states have refused mandamus on grounds that mandamus will not lie to restore to membership in a church when no temporal rights are involved. *Hundley v. Collins*, 131 Ala. 234; *People v. Ger. A. Ev. Ch.*, 53 N. Y. 103. The rights of a person who has been expelled from a religious society are to be determined by the constitution of the society, *Grosvenor v. Un. Soc. of Believers*, 118 Mass. 78; *Merster v. Ansher Chised Congregation*, 37 Mich. 542; an expulsion by the church is not a corporate act and does not affect any property interest or other valuable civil right of the expelled member. *Sales v. Baptist Church*, 62 Iowa 26; *Soares v. Hebrew Congregation*, 31 La. Ann. 205. In cases of voluntary incorporated societies the courts will grant mandamus to settle controversies when the facts are important on public grounds, but first of all there must be a penal decision by the proper authorities in the society. *Lamphere v. United Workmen*, 47 Mich. 429; *McNeill v. Bibb St. Church*, 84 Ala. 23.

PARTITION—DECREE—CONCLUSIVENESS.—SCHULER V. MURPHY, 44 So. (MISS.) 810.—*Held*, where in partition no issue was raised between defendants as to the interest of one previously conveyed to the others, and a *pro confesso* was taken against all of them, the decrees do not preclude defendants, to whom their co-defendant's interest was conveyed, from asserting

their title to the proceeds of that interest as against him or his garnishing creditor.

Partition was at first considered a mere possessory action which left the title as it found it. *Pierce v. Oliver,* 13 Mass. 211; *Gourdie v. Northampton Water Co.,* 7 Pa. St. 238, and would not bar maintenance of writ of right between same parties. *Waller v. Foxcroft,* 1 Story's C. C. 475, but in most of the states it has come to involve the right as well as possession. *Whittemore v. Shaw,* 8 N. H. 397, and a decree is binding as to all the rights which the parties had in the premises at the time of partition, *Shaw v. Prettyman,* 1 Houston (Del.) 334; *Christy v. Spring Valley Water Works,* 68 Cal. 73, based on the theory of estoppel, *Kane v. The Rock River Canal Co.,* 15 Wis. 205; but this does not follow unless questions of title were put in issue. *Finley v. Cathcart,* 149 Md. 470. One exception seems to be Missouri, where judgment of partition is conclusive as to the title of the land which is the subject of the suit, *Ferder v. Davis,* 38 Mo. 115; but this is based on statutory requirements, compelling all titles to be set forth and requiring the court to declare interests of defendants as well as petitioners.

PRINCIPAL AND AGENT—RATIFICATION—PREJUDICE.—NORDEN V. DUKE, 104 N. Y. SUPP. 854.—*Held,* that where the unauthorized contract made by an agent in the name of his principal had been fully executed before the principal learned of the transaction, his failure to notify the parties who contracted with his agent that the transaction was unauthorized, did not render him liable, upon the theory of ratification, since they had not been prejudiced by his silence.

Where the act of the agent is unauthorized, the principal must acquiesce to be bound, *Ward v. Williams,* 26 Ill. 447; in order to raise the inference of acquiescence from silence of the alleged principal, it is necessary that he should be fully informed of the unauthorized transaction. *Un. G. M. Cr. v. Rocky Mt. Nat. Bank,* 2 Col. 565. On the subject, when silence will constitute a ratification, the courts are divided; some hold that the mere silence of a principal may, under some circumstances, be deemed a ratification of the acts of a pretended agent, yet a mere failure to disavow such acts instantly upon being approved of them, will not, *ipso facto,* be a ratification, *Swartwout v. Evans,* 37 Ill. 442; *Miller v. Excelsior Stone Co.,* 1 Ill. App. 273; but, others hold, that repudiation must be at once on receiving knowledge. *Kehlor, Updike & Co. v. Kemble,* 26 La. Ann. 713; *Bredin v. Dubarry,* 14 Serg. P. R. 27 (Pa.). A few courts have held that where the agent exceeds his authority, the principal to avoid the act is not obliged to give notice by repudiation, *Powell's Adm'r v. Henry,* 27 Ala. 612; but the better opinion is, that the principal must repudiate the unauthorized acts of his agent within a reasonable time after he has knowledge of them, or he will become bound. *Abbe & Colt v. Rood & Rood,* 6 McLean 106.

RAILROADS—ACCIDENTS—DUTY TO LOOK AND LISTEN.—ELGIN, J. & E. RY. CO. V. LAWLOR, 82 N. E. (ILL.) 407.—*Held,* that the failure of one driving across railroad tracks to look and listen is not negligence as a matter of law, as there may be circumstances excusing such failure.

A person about to cross a railroad track, to be free from negligence, must take such precautions as could be reasonably expected of an ordinarily prudent man, under like circumstances. *Chicago, etc., Co. v. Hedges, Admr.,* 105 Ind. 398. The failure of a person approaching a railroad track to look

and listen for an approaching train does not necessarily, or as a matter of law, constitute negligence. This is the general rule. *Topeka, etc., Co. v. Cline,* 135 Ill. 41; *Eilert v. Green Bay, etc., Co.,* 48 Wis. 606; *Davis v. N. Y., etc., Co.,* 47 N. Y. 400. Quite a number of the states, however, hold that a failure to look and listen is negligence, *per se. Denver, etc., Co. v. Ryan,* 17 Colo. 98; *Phila., etc., Co. v. Hogeland,* 66 Md. 149; *Smith v. P. & R. Ry. Co.,* 160 Pa. St. 117; *McBride v. Northern Pacific Ry. Co.,* 19 Ore. 64; *The C. H. & I. Ry. Co. v. Duncan,* Admr., 143 Ind. 524; *Ga. Pac. Ry. Co. v. Lee,* 92 Ala. 262; *Johnson v. Chicago, etc., Co.,* 91 Io. 248. One Pennsylvania case went so far as to hold that, where a traveler approaching the tracks with a team, if unable to see them, he must get out and lead his team across. *Pa. Ry. Co. v. Beale,* 73 Pa. St. 509. Even in those states which consider a failure to stop, look and listen, contributory negligence, there are a number of things which excuse such failure. For example: where the party is thrown off his guard by some act of the company. *Grand Rapids, etc., Co. v. Cox,* 8 Ind. App. 29. When smoke and dust would prevent a view. *Chicago & Northwestern Ry. Co. v. Hansen,* 166 Ill. 623. Where snow, gale and wind prevent seeing. *Atchison, etc., Co. v. Morgan,* 43 Kan. 1. If fences and buildings are in the way of sight. *Randall v. Conn. River Ry. Co.,* 132 Mass. 269. In case a gateman is stationed at the track to warn people, in such case it is not contributory negligence to approach track with a team, and drive over in a trot. *Railroad Co. v. Schneider,* 45 Oh. St. 678.

SLANDER—PRIVILEGED COMMUNICATIONS—COMMON INTEREST.—ROSENBAUM V. ROCHE, 101 S. W. 1164 (TEX.).—*Held,* where an employer is requested by the father of a discharged employee, who, though of age, is living with her father as a member of his family, and under his care and protection, to state the reason why his daughter was discharged, the reply of the employer would be privileged; but if the employer voluntarily states to the father the reason why the discharge was made, the statement would not be privileged.

When the communication is made in good faith, without malice, in honest belief of truth, it would be privileged, *Fresh v. Cutter,* 73 Md. 91, but it must be shown that the words were spoken at such a time, and under such circumstances as to negative the supposition of malice, and plaintiff must prove the existence of malice as the real motive of defendant's language. *Buler v. Jackson,* 64 Mo. 589. When slanderous words are spoken with malice, they are not privileged. *Preston v. Frey,* 91 Cal. 107; but if, in answer to a request of the mother in regard to misconduct of a minor daughter, it is privileged, *Long v. Peters,* 47 Ia. 239, or if made voluntarily to one who has an interest in it, or one that has a reasonable duty to receive such information, *Erber v. Dun,* 12 Fed. 526, and if a statement is made in the discharge of a public or private duty, whether legal or moral, it is also privileged. *Moore v. Butter,* 48 N. H. 165.

STREET RAILROADS—ACCIDENT—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED BY THE COMPANY.—HARRIS V. LINCOLN TRACTION CO., 111 N. W. 580 (NEB.).—*Held,* that the mere fact that the car was running at a rate of speed prohibited by the ordinance of the city does not of itself entitle plaintiff to recover.

It has been held in a number of states that an injury caused by a street car running at a greater rate of speed than that prescribed by the ordinance of the city establishes negligence *per se*. *Kan. City Sub. Belt. Ry. Co. v. Herman,* 62 Pac. 543; *Moore v. St. Louis Transit Co.,* 194 Mo. 1. But it seems, in many courts, that whether the lawful rate of speed be considered as negligence *per se* or not, the proximate cause of the accident must have been the excessive rate of speed. *Memphis St. Ry. Co. v. Haynes,* 112 Tenn. 712; *Bresse v. Los Angeles Traction Co.,* 85 Pac. 152. Some courts have said that the mere violation of a city ordinance regulating the rate of speed within its corporate limits will not render a railroad liable for personal injury, unless the disobedience was an appreciable agency in producing the injury. *B. & P. Ry. Co. v. Golway,* 6 App. Div. D. C. 143; *Stahl v. Lake Shore & M. S. Ry. Co.,* 117 Mich. 273. And it has even been held that as it is always a question for the jury to determine, whether a car was traveling at a dangerous rate of speed or not, what was the lawful rate is not admissible for any purpose. *Ford v. Paducah City Ry. Co.,* 99 S. W. 355 (Ky.). However, in a majority of the states, although it is recognized that the fact that the car was being driven at an unlawful rate of speed would not alone give the injured a right of action, yet this fact is admissible and may be taken into consideration on the question of negligence. *Hanlon v. So. Boston H. Ry. Co.,* 129 Mass. 310; *Wall v. Helena St. Ry. Co.,* 12 Mont. 45.

STREET RAILROADS—REGULATION—SEATS FOR PASSENGERS—NORTH JERSEY ST. RY. CO. V. JERSEY CITY, 67 ATL. (N. J.) 1072.—*Held,* that an ordinance requiring trolley corporations to run a sufficient number of cars during evening rush hours to provide with a seat every passenger from whom a fare is demanded and to keep no one waiting more than five minutes, not appearing to be unreasonable as to one terminal and not under all circumstances unreasonable as to other, will not be set aside in *toto.*

Public convenience is the main consideration of such a question. *Loader v. Brooklyn Hg'ts R. Co.,* 35 N. Y. Supp. 996. Though the ownership of such a company is private, the use is public. *Olcott v. The Supervisors,* 16 Wall. 695. The reasonableness of an ordinance is to be regarded. *Mayor, etc., of New York v. N. Y. & H. R. Co.,* 31 N. Y. Supp. 147. If the power to legislate is possessed, there is a presumption as to the reasonableness of the legislation, and, unless clearly shown otherwise, courts will not interfere. *Paxson v. Sweet,* 1 Cr. (N. J.) 196. Loss of profits or incurring great expense does not control the situation. *Mayor, etc., v. D. D., E. B. & B. R. R. Co.,* 133 N. Y. 113. If an ordinance is efficacious in one locality, it need not be an entire nullity. *Penna. R. R. Co. v. Jersey City,* 18 Vroom. 286. For cases regulating the running of cars, see *Mayor, etc., v. D. D., E. B. & B. R. R. Co., ut supra; City of N. Y. v. N. Y. & H. R. Co., supra.*

TAXATION—MUNICIPAL PROPERTY—ELECTRIC LIGHT PLANT.—COM. V. CITY OF PADUCAH, 102 S. W. 882 (KEN.).—*Held,* a city's electric light plant is not liable for state and county taxes. O'Rear, C. J., and Nunn and Carroll, J.J., *dissenting.*

The law in regard to electric light plants is analogous to that of city water and gas works, upon which the courts are not agreed. Whatever property is necessary to the administration of the city is exempt, but where it is used

by city for its own profit, it is not exempt, *City of Louisville v. Com.*, 62 Ky. 295, and it must be used for public purposes, *Newark v. Township of Clinton*, 49 N. J. L. 370. Waterworks and gasworks are property for public purposes, *Dillon Mun. Corps.*, 3rd Ed., Sec. 508; while in *Board of Trustees v. Atlanta*, 113 Ga. 883, public property was said to embrace only such property as is owned by the state and title to which is vested directly in it. Tangible property used for waterworks is subject to taxation, and must be treated as property of a private corporation, *City of Newport v. Com.*, 106 Ky. 434, as contracts for furnishing gas to inhabitants are not made by virtue of its power of local sovereignty, but in the capacity of a private corporation. *Western Saving Fund Society v. City of Phila.*, 31 Pa. St. 175. The majority of cases seem to consider it exempt, saying that the business of conducting a waterworks is a business of public nature, *Rochester v. Rush*, 80 N. Y. 302, being matters within the scope of functions that are attributed to governments, *State v. Toledo*, 48 Ohio St. 112, and buildings and other property owned by municipal corporations and appropriated to public uses are exempt. *Camden v. Village Corporations*, 77 Me. 530. Municipal corporations running waterworks for public purposes exclusively are exempt, but not if run for pecuniary gain, *City of Nashville v. Smith*, 86 Tenn. 213, but the fact that the city charged residents within its corporate limits for water furnished, and thereby realized a considerable revenue, does not defeat the implied exemption from taxation, *Smith v. Nashville*, 88 Tenn. 464; *Summer County v. Wallington*, 66 Kan. 590; *Town of West Hartford v. Board of Water Coms.*, 44 Conn. 360, as the imposition of water rents is only a mode of taxation for raising revenue to carry on the work of government. *Springfield H. & M. Ins. Co. v. Keeseville*, 148 N. Y. 467.

THEATER TICKETS—REFUSAL OF ADMISSION—DAMAGES.—PEOPLE EX REL. BURNHAM V. FLYNN, 82 N. E. 169.—*Held*, that the holder of a ticket of admission to a place of amusement is, on being refused admission, entitled to recover the amount paid therefor and the necessary expenses incurred to attend.

The courts of this country generally hold that a ticket of admission to a public performance is merely a revocable license to witness the performance, the revocation of which entitles the holder to damages as for the breach of a simple contract. *Burton v. Scherff*, 1 Allen 133; *Collister v. Haymen*, 183 N. Y. 250. In some of the earlier cases it has been said that the action is analogous to that of a passenger for the illegal removal from a passenger train, in which case damage for the injury to the plaintiff's feelings and his wounded pride is allowed. *Smith v. Leo*, 92 Hun. 242. But the duties and obligations of common carriers, as distinguished from theater managers, are clearly marked and defined and their liability rests on different grounds. *Horney v. Nixon*, 213 Pa. 20. And although a revocation without just cause, accompanied by a rude ejection, will give rise to an action *ex delicto*, *Joseph v. Bidwell*, 28 La. Ann. 382; *Drew v. Peer*, 93 Pa. 234; and punitive damages may be allowed to be recovered where the statutes of the state make it unlawful to refuse admission to anyone presenting a ticket, *Greenberg v. Western Turf Ass'n*, 140 Cal. 357, the rule generally recognized is that if, in revoking the license, the defendant violated his contract, he is liable for any damages sustained by reason of such breach. *Johnson v. Wilkinson*, 139 Mass. 3.

WATERS—GREAT PONDS—POWERS OF STATE.—AMERICAN WOOLEN CO. v. KENNEBEC WATER DIST., 66 ATL. 316 (ME.).—*Held,* that lakes and ponds of more than ten acres in extent are known as "great ponds" and are under the ownership and control of the state for the benefit of the public. The state can, at its discretion, authorize the diversion of their waters for public purposes, without providing compensation to riparian owners upon the ponds or their outlets.

Maine and Massachusetts are the only states which hold that ponds of ten acres and over are public property; this came from the Colonial Ordinance of 1641-1647. *Mansur v. Blake,* 62 Me. 38; *Hittinger v. Eames,* 121 Mass. 539. In the other states, only the great inland lakes which are navigable, and highways of inland communication and trade are public property, while in the small, unnavigable ponds, the riparian bound is the center. *Fletcher v. Phelps,* 28 Vt. 257; *Edwards v. Ogle,* 76 Ind. 302. These courts hold that the state, as proprietor, has no greater right than any other proprietor would have, as against the owners upon the streams from ponds, on the grounds that a permanent deprivation means the loss of a constitutional right, *i. e.,* the protection of property, *Cowles v. Kidder,* 24 N. H. 364; that damages must be given for injuries sustained because of another exercising his rights under a statute, *G. R. Booming Co. v. Jarvis,* 30 Mich. 308; that no riparian proprietor has a right to use the waters of a stream to the prejudice of other proprietors above or below, *Clinton v. Myers,* 46 N. Y. 511; that the legislature cannot authorize the infliction of such an injury without making provisions for compensation. *Eaton v. B. C. P. M. R. R.,* 51 N. H. 504.

WILLS—CONSTRUCTION—PAROL EVIDENCE.—PEET v. PEET, 82 N. E. (ILL.) 376.—Testator made a will leaving all his property to his wife, making no references to his children. Eighteen months thereafter a child was born. A state statute provided that a child born to any testator after the making of his will shall not be disinherited unless it shall appear from the will that it was the intention of the testator to disinherit such child. *Held,* that parol evidence was admissible to enable the court to see and determine that such was the testator's intention. Cartwright, Farmer, and Dunn, J.J., *dissenting.*

A will is at common law revoked by subsequent marriage and birth of issue. *1 Redfield on Wills,* Ch. VII. Neither one alone is enough to revoke a will. *Brush v. Wilkins,* 4 Johns. Ch. 506. Birth of a child alone will effect a revocation of a will. *McCullum v. McKenzie,* 26 Ia. 510. Parol evidence of testator's intention is admissible to explain latent ambiguities. *1 Jarman on Wills,* Section 402, *et seq.; Trustees v. Peasely,* 15 N. H. 317. That testator did not intend the person to have any part of the estate must be ascertained from the proper meaning of the words of the will and not from extrinsic testimony. *Chenault's Guardian v. Chenault's Exec.,* 88 Ky. 83. Extrinsic testimony is admissible of circumstances relating to the testator, individually, and his affairs, to enable the court to discover the meaning attached by the testator to the words used in the will, and apply them to the particular facts in the case. *Peet v. Railway,* 70 Tex. 522. Under statute similar to one in this case, extrinsic testimony showing an intention to disinherit child was held admissible. *Willson v. Fosket,* 6 Metc. 440; *Lorieux v. Keller,* 510, 196; *Coulan v. Doull, Estate of Garraud,* 35 Cal. 336; *Hill v. Hill,* 4 Utah 267. *Contra,* 7 Wash. 409.

WITNESSES—PRIVILEGED COMMUNICATIONS TO PHYSICIANS—WAIVER.—NOELLE V. HOQUIAM LUMBER AND SHINGLE CO., 92 PAC. (WASH.) 372.—Plaintiff in an action for personal injuries testified as to the character and extent of his injuries. *Held,* that he did not thereby waive the privilege granted him by statute, which enjoins secrecy upon attending physicians, unless they have the consent of their patients to be examined. Hadley, C. J., and Root, J., *dissenting.*

These statutes commonly provide that physicians cannot testify to the result of examinations and observations made by them upon the person of a patient, unless the patient consents, or in some way waives his privilege. *Williams v. Johnson,* 112 Ind. 273; *Davis v. Supreme Lodge,* 165 N. Y. 159. He may do so by calling physician to testify in his behalf, or by a clause in a contract. *Adreveno v. Mutual, etc., Assn.,* 34 Fed. 870. But he need not, when he calls his physician to testify, specifically state his intention to make such waiver. *Holcomb v. Harris,* 166 N. Y. 257. Where a patient goes on the stand and testifies to what the physician said and found, he thereby waives his privilege under the statute and the physician may testify. *Highfill v. Mo. Pac. Ry. Co.,* 93 Mo. App. 219. But where she has testified as to her general health, that does not permit her physician to be called in order to contradict her, wherein he relates confidential communications made by her to him. *McConnell v. City of Osage,* 80 Ia. 293. A client does not consent that attorney shall testify to privileged communication made by him, by himself testifying to the action generally, but he does if he discloses the confidential communication. *Oliver v. Pate,* 43 Ind. 132. Patient by calling on his physician to testify does not thereby waive his right to object to other physicians who have treated him, testifying on the same subject. *Mellor v. Mo. Pac. Ry. Co.,* 105 Mo. 455; *Baxter v. Grand Rapids,* 103 Ia. 599. The rule of evidence which excludes the communication between physician and patient must be evoked by an objection at the time the evidence of the witness is given. *Lissar v. Crocker Estate Co.,* 119 Cal. 442; *Hoyt v. Hoyt,* 112 N. Y. 514. Under a statute practically the same as the one in this case a physician who attended a party was not allowed to testify to her condition and symptoms, as disclosed by his examination and observation, even though she had testified in her own behalf in respect thereto. *Green v. Nebagamani,* 113 Wis. 508.