The court holds that the circuit court has jurisdiction of the prosecution in question notwithstanding pendency of appeal on another cause, and that cumulative sentences may be imposed without any statutory authority for so doing. One convicted and sentenced may be tried for another crime as against the contention that he is civilly dead. Writ denied and motion for rehearing overruled.

GRADE CROSSING INJURIES—CARE REQUIRED OF AUTOMOBILE DRIVER IN PERIL.

Norton vs. Davis, 265 S. W. 107. (Mo. App. 1924).

Plaintiff while driving in an automobile was struck by a train of defendant where its tracks cross a public road, the engineer sounding no alarm. Plaintiff's view of the tracks was obscured until she reached a point only about eleven feet from the right of way. The evidence shows the plaintiff to have been running the car at about fifteen miles an hour, that after the brakes were applied the car was stopped within twelve feet but that she had driven twenty-seven feet after first discovery of the train, due to her confusion and fright occasioned by the defendant's failure to sound an alarm. The issue of contributory negligence was decided in favor of the plaintiff by the jury.

The evidence was held not to show the plaintiff's failure to look for the train close to the crossing. The failure of one who has looked and listened for a train, to keep a foot on the brake, was held not negligent in itself. If confusion resulted in an automobile driver from the railroad's negligence, if there was a reasonable apprehension of peril, if the danger appeared so imminent as to preclude deliberation, the driver was not contributorily negligent. This is true even though the automobile could have beeen stopped before reaching the track, and the peril was not actual. It was not necessary for plaintiff to allege due care because that was a matter of defense. Judgment for plaintiff affirmed.

INJUNCTION TO RESTRAIN CONTINUANCE OF A NUISANCE.

Elliott Nursery Co. v. Du Quesne Light Co. (Supreme Court of Pa., July, 1924) 126 Atlantic 345.

Plaintiff operates an extensive nursery adjacent to a tract on which defendant's electric power plant is located. The nursery existed for some

twenty years prior to the building of the power plant. The nuisance complained of is due to the combustion of bituminous coal by the defendant, the consequent emission of ashes, cinders, smoke, soot and sulphur dioxide, all of which are deposited on the plants and shrubs of the plaintiff, to its great injury.

The injuction was denied. The reasons ascribed are, that to grant the relief asked would in effect demand the closing of defendants power house and eliminate the services of light and power to the entire community, and would be fatal in this case to a public service corporation supplying the greater part of two counties.

The chancellor will consider whether greater injury would follow from injunction than to leave the complaining party to his legal remedy.

In the present case the refusal of the injunction, compelling resort to law was deemed the better course.

INTER AND INTRA STATE COMMERCE—MENTAL ANGUISH ALONE AS A CAUSE OF ACTION.

Western Union Telegraph Co. v. Wood. (Court of Civil Appeals of Texas, June, 1924.) 264 S. W. 118.

The plaintiff Wood sued for damages for failure of the company to deliver a telegram sent from Minneola, Texas, to Hedley, Texas, addressed to the plaintiff, in care of another. The message announced the serious illness of plaintiff's sister, who later died. The plaintiff's failure to reach his sister before death was shown to be directly traceable to his failure to receive the message. The issue turns on whether or not the message was interstate or intrastate. If the former, no recovery is permitted for mental anguish alone. If the latter, there may be a recovery. In fact the message was relayed through Oklahoma City to its destination. The character of the contract, says the court, is determined more by the facts existing and in contemplation of the parties, than by what the company may have later done with reference to it. The essential character of the commerce is controlling. The facts here are held to create a presumption that a message between points in the same state was intrastate commerce.

The original judgment for the plaintiff was reversed and new trial ordered because of erroneous admission of evidence, which was held not to have been waived by cross examination of the witness.