ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY

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BANKS—INSOLVENCY—CHECK FOR COLLECTION—RIGHTS OF DEPOSITOR.—Certain checks, marked "for deposit," were deposited with a bank and were regularly credited upon the pass-book of the depositor. There was no agreement that checks when deposited should be considered as cash, or that the depositor could draw on them before collection, but it was the custom of the bank after the close of each day's business to credit all deposits at their face value, and in case a check should be returned from the clearing-house uncollected, to charge the depositor with the check and thus cancel the credit. It was also the practice of the bank to allow depositors to draw against checks deposited before they were actually collected, but this depositor had never done so except in a few special instances, when a special agreement was made by which the bank agreed to advance certain specified sums of money on the depositor's checks in excess of his deposits. It was held that under these facts the title to the checks would have passed to the bank, and the relation of the depositor to it would have been that of creditor, but as the bank was, at the time the deposit was made, insolvent, and its doors were closed fifteen minutes afterward, the title to the checks did not pass from the depositor to the bank: City of Somerville *v.* Beal, Receiver, Circuit Court of the United States, District of Massachusetts, March 14, 1892, COLT, J. (49 Fed. Rep., 791).—*H. L. C.*

CONFLICT OF LAWS—FORMALITIES IN EXECUTION OF CONTRACT—LIMITED PARTNERSHIP.—A contract made in Louisville, between the agent of a limited partnership, organized under the laws of Pennsylvania, and a Kentucky corporation, was not executed with the formalities required by the laws of Pennsylvania in contracts of such partnerships. Held: That the question of the validity was to be determined by the laws of Kentucky, where the contract was made, and not by the laws of Pennsylvania: Park Bros. & Co. *v.* Kelly Axe Manufacturing Company, Circuit Court of Appeals of the United States, Sixth Circuit, January 16, 1892, JACKSON, J. (49 Fed. Rep., 618).—*H. L. C.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—The act of the legislature of a State, regulating the planting and taking of oysters in the waters of the State, and making it unlawful for any person, not a resident of the State, to take or transport oysters from, in or through any of the waters of the State, or for any person, whether a citizen of the State or of any other State or country, to ship beyond the limits of the State any oysters taken from the waters of the State while the same are in shells, is not a violation of the provisions of Const. U. S., Art. 1, § 8, as a regulation of interstate commerce: State *v.* Harrub, Supreme Court of Alabama, April 5, 1892, per COLEMAN, J. (10 So. Rep., 752).—*H. N. S.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TAXATION OF MERCHANDISE BROKERS.—Cap. 96, Sec. 9, of the Tennessee laws of 1881, provides that every person or firm dealing in any article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, shall pay a privilege tax of $50 a year, and in addition ten cents on every hundred dollars of capital invested; but if no capital be invested, then 2½ per cent. of their gross yearly commissions, charges or compensation, for which they shall give bond at the time of taking out the $50 license. The complainants rented a room within the taxing district of Shelby County, where they exhibited samples and carried on correspondence with their respective principals, but handled no goods, doing the same business as commercial drummers, the only difference being they were stationary. They took out a license to do a general merchandise brokerage business, paying the $50 and giving bond to return their gross commissions. All the sales negotiated, however, were exclusively for non-resident firms, and all the merchandise so sold was in other States than Tennessee, where the sales were made, and was shipped into Tennessee. Complainants filed a bill to restrain the collection of the 2½ per cent. tax on their gross commissions, a demurrer to which bill was sustained by the Supreme Court of Tennessee. Held: That under the circumstances the complainants were liable for the tax. What position they would have occupied if they had not undertaken to do a general merchandise business, and had taken out no license therefor, but had simply transacted business for non-resident principals, not decided: Ficklen *v.* Taxing District of Shelby County, Supreme Court of the United States, FULLER, C. J., HARLAN, J., dissenting, April 11, 1892.—*F. C. H.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE REGULATION—INVALIDATION OF CONTRACT.—A company had been formed in Indiana for the purpose of piping natural gas from wells in Indiana to Chicago and other points in Illinois, and had made a contract with a construction company for the erection of the necessary works, consisting of the pipe-line and pumping machinery sufficient to create a pressure of 420 lbs. to the square inch, the pressure necessary to make the gas flow through the entire length of pipe. Before the completion of the works the State of Indiana passed an act making it unlawful to transport natural gas at a greater pressure than 300 lbs. to the square inch. A stockholder of the parent company thereupon filed a bill against both companies to restrain the further execution of the contract between them on account of its illegality, and to restrain the parent company from continuing the transportation of the gas at a pressure exceeding 300 lbs. to the square inch, whereby it was incurring heavy penalties. The decree of the Court below, sustaining a demurrer to the bill, was reversed: Jamieson *v.* Indiana Natural Gas Co., Supreme Court of Indiana, June 22, 1891, ELLIOTT, C. J., OLDS, J., dissenting (3 Interstate Com. Rep., 613).

The same Court decided in State *v.* G. & O. O. G. & M. Co., 2 Int. Com., 758, that a State statute which prohibited piping or otherwise conveying natural gas or petroleum out of the State was void.—*F. C. H.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SALE OF OLEOMARGARINE—ORIGINAL PACKAGE.—A State act prohibiting the manufacture and sale of oleomargarine, and declaring that the manufacture, selling, or having in possession with intent to sell, any substance the manufacture of which is hereby prohibited, shall be subject to the penalty of $100, applies to a sale, within the State, of oleomargarine manufactured outside of the State; and such an act is a valid exercise of the police power of the State for the protection of the public health, and is not unconstitutional as an interference with interstate commerce, in so far as it prohibits the sale of oleomargarine in the State from a broken original package brought from another State. Nor is a sale of two pounds from a ten-pound package brought from another State protected as a sale in the original package, as the contents of the ten-pound package, which is broken after having been brought into the State, became, by such breaking, a part of the common mass of property within the State and subject to its laws: Commonwealth, to use of Philadelphia County *et al.*, *v.* Paul *et al.*, Supreme Court of Pennsylvania, April 18, 1892, *per curiam* (24 Atl. Rep., 78).—*H. N. S.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE STATUTE REQUIRING PROMPT SHIPMENTS.—Civil action brought to recover a penalty imposed by Section 1967 of the Code of North Carolina, for neglecting to forward freight for more than five days after delivery for shipment without consent of shipper. The goods had been consigned by a shipper in Wilmington, N. C., to a consignee at a station on defendant's line in South Carolina. The Court below granted a non-suit, holding the act unconstitutional as to interstate shipments. Reversed. Such a statute does not regulate interstate commerce in the constitutional sense and tends to promote rather than burden it: Bagg *v.* W. C. & A. R. R. Co., Supreme Court of North Carolina, AVERY, J. (3 Inter. Com. Rep., 803).—*F. C. H.*

CORPORATIONS—ACTS OF A MAJORITY OF THE STOCKHOLDERS—WHEN REGARDED AS THE ACTS OF THE CORPORATION—ULTRA VIRES—PUBLIC POLICY—"TRUST" COMBINATIONS.—The Standard Oil Co. of Ohio was a corporation whose stock was divided into 35,000 shares. The owners of 34,993 of these shares transferred their stock to certain trustees, in consideration of an agreement made between themselves and the stockholders of other corporations and the members of limited partnerships engaged in the same business as was the Standard Oil Co. In return for the stock the stockholders were to receive from the trustees trust certificates of the same par value as was the stock. The trustees were empowered, under the agreement, as the apparent owners of the stock, to elect directors of the several companies and thereby control their affairs in the interest of the trust, and to receive all dividends made by the several corporations and limited partnerships, from which dividends were to be paid by them to the holders of the trust certificates. The remaining seven shares of stock continued to be held by certain stockholders of the Standard Oil Co. Held: (1) That the fiction that a corporation has a separate entity apart from the existence of the natural

persons composing it, is not to be regarded when an act done by a majority of the stockholders is not within the reason and policy of the corporation; (2) That the agreement in the present case resulted in the creation of a monopoly, that monopolies are opposed to the public policy of the State of Ohio, and that, therefore, in the present case the action of the stockholders was to be regarded as the act of corporation, and *ultra vires* of the corporation, and could be challenged as such by the State in a proceeding in *quo warranto:* State *v.* Standard Oil Co., Supreme Court of Ohio, MINSHALL, J., March 2, 1892 (30 Northeast. Rep., 279).—*W. W. S.*

CORPORATIONS—ELIGIBILITY OF DIRECTORS—ELECTIONS.—The general corporation laws of Kansas provide that in all elections for directors of a corporation created by or existing under the laws of Kansas, at least three of those chosen must be citizens and residents of Kansas. At an election held by the stockholders of such a corporation, eleven non-resident directors were elected, though three resident stockholders were voted for. The presiding officer of the meeting then declared that, agreeably to the laws of Kansas, the three citizens of Kansas voted for were elected, and that of the other gentlemen voted for, eight of the non-residents voted for were elected. The directors so declared elected duly qualified and entered upon the discharge of their official duties. The three non-resident stockholders, who received a large majority of the votes cast, but had not been declared elected, brought a proceeding in *quo warranto* to obtain possession of the offices held by the three resident directors. It was held they could not maintain the action and were not entitled to the relief they sought: Horton *v.* Wilder, Supreme Court of Kansas, March 5, 1892, JOHNSTON, J. (29 Pacific Reporter, 566).—*J. A. McC.*

CORPORATION—INSOLVENCY—UNPAID SUBSCRIPTION TO STOCK—SET-OFF.—Upon the bankruptcy of a corporation, a stockholder owes to the corporation only such portion of his unpaid subscription as may be necessary, with the other assets of the corporation, to satisfy the claims of its creditors; and the payment of such portion can be enforced only when the amount necessary for the stockholder to pay has been approximately ascertained. Where a stockholder is also a judgment creditor of the corporation, he cannot be compelled to set-off the amount of his unpaid subscription against the amount of his judgment: Gilchrist *v.* Helena, Hotspring and S. W. R. Co., Circuit Court of the United States, District of Montana, February 25, 1892, KNOWLES, J. (49 Fed. Rep., 519).—*H. L. C.*

CORPORATIONS — RECEIVERS — CONFLICTING APPOINTMENTS BY STATE AND FEDERAL COURTS.—In cases of conflicting appointments of receivers of a railway company by State and Federal Courts, the question is to be determined, not by which action was first commenced, but by which Court first acquired jurisdiction over the property. Service of process gives jurisdiction of the person, seizure gives jurisdiction, of the property, and until it is seized the Court does not have jurisdiction.

East Tennessee V. & G. R. Co. *v.* Atlanta and F. R. Co., Circuit Court of the United States, Southern District of Georgia, February 24, 1892, SPEER, J. (49 Fed. Rep., 608).—*H. L. C.*

CORPORATIONS—TRANSFER OF STOCK—NEGLIGENCE.—An executrix held capital stock of a corporation in trust for the children of the testator, with power to sell the same at her discretion. The corporation was the custodian of the stock thus held, and had knowledge of the trust and of the power to sell. The request of the lawfully constituted attorney of the trustee, that part of the said stock should be transferred to a national bank and part to F., "cashier," was granted by the corporation. The transfers were, in fact, by way of pledge to secure the attorney's individual indebtedness, and were made without authority and in fraud of the rights of the *cestui que trust.* The corporation had no knowledge of the attorney's wrongful act. Held: That the corporation was not guilty of any negligence in permitting the transfer, as it had a right to presume that the act of the trustee's attorney was in pursuance of the trustee's right to sell. The fact that the transfers were made to a national bank, which has no power to purchase such stock, or to the cashier of such a bank in his official capacity, cannot be held to put the corporation upon notice of the fraud upon the rights of the *cestui que trust* by the executrix, who had no power under the will to make such pledge, as her duties in administering the estate had ended, and the stock was held by her as trustee: Peck *et al. v.* Providence Gas Co. *et al.*, Supreme Court of Rhode Island, January 23, 1892, per TILLINGHAST, J. (23 Atl. Rep., 967).—*H. N. S.*

ELEVATED RAILROADS—DAMAGES FOR INJURIES TO PROPERTY COMMITTED BY—MEASURE OF INCONVENIENCE CAUSED BY NOISE.—Plaintiff, the owner of property abutting on a street along which an elevated road was built, brought an action for damages against the road for injuries done his property, none of which was taken by the defendant. Held: That in estimating the permanent or fee damage, the plaintiff was entitled to recover for the injury to his easements of light, air and access only, and that the noise of the operation of the road should not be taken into account: American Bank Note Co. *v.* N. Y. El. R. Co., Court of Appeals of N. Y., FINCH, J., RUGER, C. J., and PECKHAM and O'BRIEN, J. J., dissenting, December 15, 1891 (29 Northeast. Rep., 302).—*W. W. S.*

ELEVATED RAILROADS—DAMAGES FOR INJURIES TO PROPERTY COMMITTED BY—MEASURE OF INTERFERENCE WITH PRIVACY—NOISE—INTERCEPTION OF VIEW.—Plaintiff, the owner of property abutting on a street along which an elevated railroad had been built, brought an action against the railroad company for injuries done his property, none of which was taken by the defendant. The structure of the road was illegal. Held: That in estimating the rental value it was proper to take into account the annoyance which plaintiff suffered from interference with his privacy in the occupation of his premises, from the noise of operating the road, and the interception by the road-structure of the view of the premises by persons passing along the other side of the street: Messenger *v.* Manhattan Ry. Co., Court of Appeals of New York, EARL, J., January 20, 1892 (29 Northeast. Rep., 955).—*W. W. S.*

EMBEZZLEMENT BY SERVANT—WHAT CONSTITUTES—LARCENY.—A man employed to sell liquor in a store placed some money in the drawer of a cash register intending to appropriate it. He placed it in the drawer simply for his own convenience in keeping it. He did not register the sale, and directly took the money out again. Held: That he was guilty of embezzlement and not of larceny. Commonwealth *v.* Ryan, Supreme Judicial Court of Massachusetts, HOLMES, J., February 24, 1892 (30 Northeast. Rep., 364).—*W. W. S.*

HABEAS CORPUS—INTERSTATE EXTRADITION—FEDERAL COURTS.—The issuance of a warrant of rendition by the Executive of a State is *prima facie* evidence only that the person whose surrender is demanded is a fugitive from justice, and the action of the Executive may be reviewed by the Federal courts upon habeas corpus at any time before the removal of the prisoner. The issuance of the warrant of rendition is, however, sufficient to justify removal until the presumption is overthrown by contrary proof. But where the act of rendition has been consummated by the delivery of the prisoner to the demanding State, the Federal process has spent its force; the custody of the prisoner is controlled by the writs of the demanding State, and no Federal question is involved: *In re* Cook, Circuit Court of the United States, Eastern District of Wisconsin, April 4, 1892, JENKINS, J. (49 Fed. Rep., 833).—*H. L. C.*

HOMICIDE—EXPERT TESTIMONY.—On the trial of a defendant for murder it was error to allow a witness, who claimed to be a physician and who had two years' experience in attending to gunshot wounds, to testify that the muzzle of the defendant's pistol was about four feet from the body of the wounded man, so far as the witness could tell from the nature of the wound. A physician is not an expert as to matters of common knowledge or observation. It is of universal knowledge that where the flesh is burned from a pistol wound, that the pistol must have been close to the body: People *v.* Lemperle, Supreme Court of California, March 26, 1892, TEMPLE, C. (29 Pacific Reporter, 709).—*J. A. McC.*

INSURANCE—FORFEITURE OF POLICY.—Though a policy expressly stipulates on its face that it will be forfeited unless payments are made on specified days, nevertheless, if the company, by accepting payments after a specified day has passed, leads the insured to expect that this condition in the policy will not be enforced, it is a waiver of the condition on the part of the company, and the company cannot take advantage of a delay in payment to forfeit the policy: Hartford Life Ann. Ins. Co. *v.* Unsell, April 4, 1892, Mr. Justice HARLAN (143 U. S., 439).—*W. D. L.*

MARITIME LIENS—WAGES—COLLISION—PRIORITY.—A maritime lien, arising out of damage done in a collision caused by negligent navigation, is entitled to priority over the lien of wages of the crew of the offending vessel, accruing prior to the happening of the collision; but wages accruing after that time are entitled to priority, as the service of the crew preserves the *res* for subjection to the lien of the damage claimant. The F. H. Stanwood, Circuit Court of Appeals of the United States, Seventh Circuit, March 8, 1892, JENKINS, J. (49 Fed. Rep., 577).—*H. L. C.*

MARRIED WOMEN—SEPARATE ESTATE—CONSTRUCTION OF TRUST DEED.—A conveyance of property, executed by a husband and wife to a trustee to pay over the rents and profits to the wife for her sole and separate use during her life, contained a provision that if the wife survived the husband, the trustee should, if requested by her after the husband's decease, "and being discovert," transfer the trust property to the wife for her own benefit. The husband died, and the wife requested the trustee to reconvey the trust property to her, which he refused to do, as he alleged he had no direct knowledge of the husband's death. A bill was filed to compel him to convey, and pending the suit the complainant remarried. Held: That the wife was unquestionably entitled to a reconveyance of the trust property discharged of the trust, upon her husband's death; nor was her right defeated by her second marriage. Whether a separate use trust shall continue through several marriages is wholly a matter of intention, to be discovered from the instrument creating the trust. At the time of execution of the instrument in this case, the contingency of a second marriage by the wife was not contemplated; its whole purpose was to protect the wife's estate from the mismanagement of her then husband: Winchester *et al. v.* Machen *et al.*, Court of Appeals of Maryland, March 16, 1892, per MCSHERRY, J. (23 Atl. Rep., 956.)—*H. N. S.*

MASTER AND SERVANT—EVIDENCE.—In an action against a railroad company for the negligent killing of an employee, it is competent for the defendant to offer in evidence that it was the custom to run its switch engines at a rate faster than that allowed by a city statute, and that deceased knew it, as bearing on the extent of the risk which decedent voluntarily assumed by remaining in its employ, with knowledge of the fact that switch engines were run at an illegal rate of speed: Abbot *v.* McCadden, Supreme Court of Wisconsin, March 22, 1892, WINSLOW, J. (51 Northwest. Reporter, 1081).—*J. A. McC.*

MECHANICS' LIENS—RIGHTS OF SUB-CONTRACTORS.—A contractor agreed in his contract that the building should be built and delivered free of all liens and incumbrances. On a *sci. fa. sur* mechanics' lien, filed by a sub-contractor against the property, held, that he could have no such lien, as he presumed to have notice of the terms of the original contract and is bound thereby: Bolton *v.* Hey *et al.*, Supreme Court of Pennsylvania, March 28, 1892, *per curiam* (23 Atl. Rep., 973).—*H. N. S.*

MORTGAGEE IN POSSESSION—FOR WHAT ACCOUNTABLE.—While a mortgagee who enters into possession of the mortgaged premises is accountable to the mortgagor for the profits derived therefrom, he cannot be held liable for profits which a shrewder business man might have made. Therefore, when the defendant entered into possession of a hotel on which he held a mortgage, and leased it to a third person, he cannot be held liable, because he might have leased it for saloon purposes and thereby derived a larger income, it having been shown that he acted in good faith: Sheldon *v.* Curtis, Supreme Court of Michigan, April 22, 1882, GRANT, J. (51 Northwest. Reporter, 1057).—*J. A. McC.*

NEGLIGENCE—INJURY TO EMPLOYEE—FELLOW-SERVANT.—Plaintiff was employed by a stevedore hired to unload defendant's vessel, defendant furnishing steam-power and a man to run the winch. The latter failed to obey an order of the plaintiff while hoisting out the cargo, in consequence of which plaintiff was injured. Held: That the defendant was liable, as the winchman, though receiving from the plaintiff orders when to hoist and when to lower, was not a fellow-servant: Johnson *v.* Netherlands American Steam Nav. Co., Court of Appeals of New York, HAIGHT, J., FOLLETT, C. J., PARKER and LAUDON, J. J., dissenting, March 22, 1892 (30 Northeast Rep., 505).— *W. W. S.*

NEGLIGENCE—WHEN QUESTION OF FOR JURY.—The terms "ordinary care," "reasonable prudence," and similar terms, have a relative significance, depending upon the special circumstances and surroundings of the particular case. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court. The running of a railroad train within the limits of a city at a greater speed than is permitted by the city ordinances is a circumstance from which negligence may be inferred in case an injury is inflicted upon a person by the train. In an action against a railroad company to recover for injuries caused by the negligence of its servants, the determination of the fact of whether the person injured was guilty of contributory negligence is a question of fact for the jury. No conclusive presumption of law that the defendant railroad company is not guilty of negligence can be drawn from the circumstance that the railroad commission which had authority to require the railroad company to erect gates at grade-crossings had not required the company to erect gates at the crossing where the plaintiff's intestate was killed: Grand Trunk Ry. Co. *v.* Ives, Mr. Justice LAMAR, April 4, 1892 (144 U. S., 408).

PARTNERSHIP—WHAT CONSTITUTES.—Where three or more persons sign, acknowledge and file articles of incorporation under the general laws of Oregon, for the formation of corporations, and do nothing toward completing the organization, they cannot be held liable as partners, because one of their number, independently of the others, engages in the corporate business alone, under the corporate name, and who fails to comply with material conditions annexed by said law to the management of corporations. In order to be constituted partners such persons must engage actively in the business management of the concern, or allow their name to be used as partners or managers in the business. But it is a primary condition to their being partners at all, that the organization of the corporation be defective. Rutherford *v.* Hill *et al.*, Supreme Court of Oregon, April 5, 1892, STRAHAN, C. J. (29 Pacific Reporter, 546). —*J. A. McC.*

PROMISSORY NOTE—ORDER ON EXECUTORS—WHEN A PROMISSORY NOTE RATHER THAN A TESTAMENTARY PAPER.—A debtor executed and