ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEYNEY. HENRY N. SWALTZ. JOHN A. MCCARTHY.

ADMIRALTY—JOINDER IN LIBEL OF SHIP AND OWNER—RIGHT TO PROCEED IN REM FOR INJURIES RESULTING IN DEATH.—A.'s personal representative libelled a tug for injuries received in a collision by A., a passenger on the tug, from which death resulted in about ten minutes. A local statute gave to the personal representative a cause of action for death caused by negligence, but gave no lien or privilege upon the offending thing. The original libel was amended by proceeding *in personam* against the owners of the tug, as well as *in rem* against the tug. *Held* (affirming the decree below): (1) that the joinder of ship and owner violated Admiralty Rules 12 to 20 inclusive; and that if the amendment was treated as an independent libel *in personam*, it was defective in failing to aver that the respondents were owners; (2) that since the local law gave no lien, a proceeding *in rem* could not be maintained in the Admiralty, and, as there was no averment that sufferings of deceased were not practically contemporaneous with death, it was unnecessary to decide whether or not a right *in rem* as to them passed to the personal representatives under the local statute: The Corsair, Mr. Justice BROWN, May 16, 1892 (145 U. S., 335).—*G. W. P.*

BANK—CREDIT FOR RETURN OF FUNDS WRONGFULLY WITHDRAWN—NOTICE TO CO-DIRECTORS.—A., the cashier and afterward the president of the Albion Bank, engaged in stock speculation, and, for his own purposes, drew in favor of his brokers upon his bank's balance with its New York correspondent. The brokers from time to time returned to the New York bank sums to be credited to the Albion, which deposits were reported in the usual way. Upon the insolvency of the latter, the receiver sued the brokers, who claimed credit for sums returned, although no officer of the Albion Bank (except the defaulter A.) had received actual notice of these deposits. *Held* (reversing the Court below): that it was at least a question for the jury whether A.'s fellow officers, in the exercise of reasonable care, could have ascertained that these deposits had been made to the credit of their bank, and whether they would have accepted them as a return of moneys to it: Kissam *v.* Anderson, Mr. Justice BREWER, May 16, 1892 (145 U. S., 435).—*G. W. P.*

BANK—SPECIAL DEPOSIT—TRUST.—A banker became surety upon an appeal bond in a suit against an accident association. To indemnify him against loss the accident association deposited with him a sum of money, receiving a certificate of deposit stating the object of the deposit. This sum was paid by a check of the association, and with its knowledge the check was collected by the banker and the proceeds were used by him in his business. Upon the insolvency of the banker it was held that the deposit was a general one, and, therefore, no trust was created

which would entitle the association to recover its amount in full in pref erence to claims of other creditors: Mutual Accident Association of the Northwest *v.* Jacobs, Supreme Court of Illinois, May 12, 1892, CRAIG, J. (31 N. E. Rep., 414).—*H. L. C.*

BANKS—DRAFT FOR COLLECTION—INSOLVENCY.—A bank which had received a draft for collection, sent it in town to its correspondent bank at the residence of the drawer, where it was regularly paid when presented. The latter bank had no account with the bank which sent it the draft, but was in the habit of remitting the proceeds of drafts every five days. Before the proceeds of this draft were remitted by the correspondent bank, the first bank became insolvent. It was held that the original owner of the draft could recover the proceeds of the draft in the hands of the correspondent bank: National Exchange Bank of Dallas *v.* Beal, Circuit Court of the United States, District of Massachusetts, May 4, 1892, PUTNAM, J. (50 Fed. Rep., 355).—*H. L. C.*

CARRIERS OF FREIGHT—DISCRIMINATION—CONTRACT IN VIOLATION OF PUBLIC POLICY.—Where a railroad company has a fixed rate or charge for the transportation of property, but it has favored customers for whom it will transport such property at a lower rate, by first charging the full price and afterward when the transaction is completed, paying back a certain proportion thereof as rebate; and the owner of freight procures it, by an agreement with a favored customer, to be transported in the name of such favored customer who afterward receives the rebate. *Held:* in an action by the owner of the property against the favored customer for the recovery of the rebate, that the whole transaction was founded in a violation of public policy and void, and the plaintiff could not recover: Hanley *v.* Texas Coal Co., Supreme Court of Kansas, May 7, 1892 (30 Pacific Rep., 14).—*J. A. McC.*

CERTIFIED CHECK—INSOLVENCY OF BANK—DISCHARGE OF DRAWER OF CHECK.—If the payee or holder of a check in his own behalf, or for his own benefit, gets it certified instead of having it paid, then the drawer is discharged from liability on the check if the bank becomes insolvent before it is paid: Minot *v.* Russ, Supreme Judicial Court of Massachusetts, June 20, 1892, FIELD, C. J. (31 N. E. Rep., 406).—*H. L. C.*

COMMON CARRIERS—CONNECTING LINES—LIMITING LIABILITY.—Where a common carrier receives goods for transportation to a p oint beyond its own line, the carrier may by contract protect itself against liability for loss not occurring on its own line: McCam *v.* International & G. N. R. Co., Supreme Court of Texas, April 15, 1892, STAYTON, C. J. (19 S. W. Rep., 547).—*H. L. C.*

CONTRIBUTORY NEGLIGENCE.—CROSSING ACCIDENT—Even though the train which injured the plaintiff was going at a faster rate of speed within the city limits than that allowed by a city ordinance, yet he cannot recover, if it is shown that had he stopped and looked at a point thirty-five feet from the crossing where the accident occurred, he might have avoided the danger: Sala *v.* Chicago R. I. & P. R. R. Co., Supreme Court of Iowa, May 27, 1892, ROBINSON, C. J. (52 Northwestern Reporter 664).—*J. A. McC.*

COUNTIES—LIABILITY FOR NEGLIGENCE.—Counties are involuntary corporations, organized as political subdivisions of the State for governmental purposes, and are not liable any more than the State would be liable for the negligence of its officers or agents, unless made liable by statute: Board of Commissioners of Vigo County, Supreme Court of Indiana, June 7, 1892, MILLER, J. (31 N. E. Rep., 531).—*H. L. C.*

COUNTIES—LIABILITY FOR NEGLIGENCE.—A county is not liable for personal injuries caused by a defective bridge, unless such liability be created by statute, either by express words or by necessary implication: Heigel *v.* Wichita County, Supreme Court of Texas, April 22, 1892, GARRIES, J. (19 S. W. Rep., 562).— *H. L. C.*

DEED—UNDUE INFLUENCE—CONFESSOR AND PENITENT.—When a person is ignorant or mistaken with respect to his existing legal rights, and enters into some transaction, the legal effect of which he correctly apprehends and understands, for the purpose of effecting such assumed rights, equity will grant its relief, defensive or affirmative, treating the mistake as analogous, if not identical, with a mistake of fact. Therefore, where the complainant, thinking a paper showed him by the defendant, his confessor, was a revocation of a will made by the complainant's brother in his favor; and the defendant, knowing the paper had no legal effect, induced the complainant to execute a trust deed over the property in favor of the church of which the defendant was pastor: *Held:* That equity would interfere in favor of the complainant, not only because of the defendant's fraud, but also because of the relation he bore to the complainant: Finegan *v.* Theisen, Supreme Court of Michigan, June 10, 1892 MCGRATH, J. (52 N. W. Reporter, 619).—*J. A. McC.*

DEMURRAGE—BERTH—WHEN TO BE FURNISHED IN ABSENCE OF STIPULATION.—In the absence of any charter stipulation as to time within which a berth shall be provided for a vessel after her arrival, the berth must be provided within a reasonable time, or such time as usage prescribes. By the ordinary usage of the port of New York, twenty-four hours after notice of arrival is allowed for procuring a berth: The "Arthur Holme," District Court of the United States, Southern District of New York, April 26, 1892, BROWN, J. (50 Fed. Rep., 434).—*H. L. C.*

DEMURRAGE—LIABILITY OF CONSIGNEE—BILL OF LADING.—In the absence of a stipulation in a bill of lading that the consignee shall be liable for detention of vessel, there is no liability upon his part for detention of the vessel at the port of loading, by the shipper. The latter alone is liable, and this is true, although the contract of affreightment with the master of the vessel may have been made by the consignee: Van Ettere *v.* Newton, Court of Appeals of New York, June 7, 1892, PARKER, J. (31 N. E. Rep., 334).—*H. L. C.*

EJECTMENT—RES JUDICATA—COMITY.—A. sued B. in ejectment in the State Court of Kansas. While this action was pending a foreclosure proceeding was instituted concerning the same subject matter in the United States Circuit Court in which A. and B. were parties defendant. In the foreclosure proceeding B. filed a cross bill setting up title in himself to the same land, with a prayer that his title be quieted. A. appeared

and answered the cross bill, setting up his chain of title. The issue of the cross bill was found in favor of B., and a decree was entered affirming and quieting his title to the land. To the declaration in ejectment in the State Court B. filed a supplemental plea setting up the decree of the Federal Court in bar of the action. *Held:* An effectual bar upon the principle that while the rule founded upon comity, which subsists between judicial tribunals, is that the Court which first acquires jurisdiction of the persons and subject matter of an action will retain the cause until it is finally determined, yet where the parties, while such suit is pending in ejectment, submit the controversy therein involved without objection to another tribunal, having jurisdiction of the subject matter, the judgment pronounced in the latter Court is binding upon the parties: Gregory *v.* Kenyon, Supreme Court of Neb., May 18, 1892 (52 Northwestern Rep., 685).—*J. A. McC.*

ELECTION OF ACTIONS.—Where a contract in writing for the sale of lumber reserves the title to the lumber in the vendor until the purchase money is paid, so as to amount, in effect, to a mortgage, the vendor may elect to sue for the debt, instead of enforcing the mortgage. Munroe *et al. v.* Williams *et al.*, Supreme Court of North Carolina, March 25, 1892 (15 S. E. Rep., 279).—*R. D. S.*

EVIDENCE—RESGESTA OPINION.—A railroad brakeman who was on a platform car was injured while the car was making a running switch. The engineer of the train walked back to the point where the brakeman was, reaching there about two minutes after the accident occurred. The brakeman then made certain statements as to the accident, and the engineer said to him that if the engine had been repaired the night before the accident would not have occurred. It was held that the statements of the brakeman as to matters other than those which occurred prior to the accident were admissible in evidence, but that the statement of the engineer was inadmissible, as it was a mere combination of opinion and a narrative of events which had occurred prior to the accident: Ohio & M. Rwy Co. *v.* Stein, Supreme Court of Indiana, May 14, 1892, ELLICOT, J. (31 N. E. Rep., 181).—*H. L. C.*

INJURIES TO VOLUNTEER—ASSUMPTION OF RISK.—Where the head brakeman of a train called to the plaintiff, a bystander at the station, to assist in the switching, and while the latter was doing so he received injuries caused by the movement of certain car trucks which were loaded on one of the cars, and which were not properly blocked. *Held:* That the plaintiff could not recover since the brakeman had no authority to assist in the switching. The fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; that if any one on the ground had such authority it was the conductor: Church *v.* Chicago and St. P. Rway Co., Supreme Court of Minnesota, June 22, 1892, MITCHELL, J. (52 Northwestern Reporter, 647).—*J. A. McC.*

INTERSTATE COMMERCE — DISCRIMINATION — "PARTY-RATE" TICKETS.—It is provided by Section 1 of the Act of February 4, 1887, that no "unjust and unreasonable charge" shall be made by a common

carrier for the transportation of passengers between States. Section 2 prohibits "unjust discrimination" by the carrier against any individual, and Section 3 makes it unlawful for the carrier to give "any undue or unreasonable preference or advantage to any particular person." A railway company, engaged in interstate business within the terms of the Act, issued "party-rate" tickets for the transportation of ten or more persons between points in different States at a rate lower than that charged an individual for similar transportation on the same trip. *Held:* (1) That the issue of such a ticket did not infringe against any of the sections of the Act above cited; and (2) that Congress, in adopting the language of the English Traffic Act in the Act to regulate commerce, must be taken to have had in contemplation and to have incorporated into the statute the construction put upon that legislation by the English Courts: Interstate Commerce Commission *v.* B. & O. R. R., Mr. Justice BROWN, May 16, 1892 (145 U. S., 263).—*G. W. P.*

LEASE—IMPLIED COVENANT—PROPERTY AT SUMMER RESORT.—In a lease of a completely-furnished dwelling-house at a summer resort for a single season there is an implied covenant that the house is in a fit condition for immediate habitation: Ingalls *v.* Hobbs, Supreme Judicial Court of Massachusetts, May 9, 1892, KNOWLTON, J. (31 N. E. Rep., 286). —*H. L. C.*

LIQUOR LAW—SALE IN VIOLATION OF ORDINANCE—SUIT BY VENDOR TO RECOVER PRICE—FEDERAL COURTS AND LOCAL LAW.—The City of Chicago passed an ordinance making it penal to sell liquor without a license. A., in violation of the ordinance, sold liquor to B., and subsequently brought suit in the Federal Courts for the price. After the sale, the Supreme Court of Illinois had occasion in another case to consider for the first time the validity of this ordinance and they decided in favor of its validity. B. pleaded the ordinance; A. demurred, and the Circuit Court having sustained the demurrer, it was *held* (reversing the Court below): (1) that since this was a local question, affecting solely the internal policy of the State and involving no Federal question or principle of general commercial law, the decision of the Supreme Court of Illinois in favor of the ordinance should control; (2) that the contract of sale, made in violation of a valid ordinance, was void and fell under the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce: Miller *v.* Ammon, Mr. Justice BREWER, May 16, 1892 (145 U. S., 421).—*G. W. P.*

LIVERY STABLE—LIEN FOR BOARD OF HORSE.—Where a horse is left at a livery stable by a bailee who has no authority from the owner of the horse to place it in such stable, the keeper of the latter acquires no statutory lien on the animal for the keeping. It is not a question of notice but a matter of property right, in which the doctrine of *caveat emptor* applies: Domnan *v.* Green, Court of Appeals of Texas, June 25, 1892, DAVIDSON, J. (19 S. W. Rep., 909).—*H. L. C.*

NEGLIGENCE—SALE OF DEFECTIVE MACHINERY—INJURY TO ONE NOT A PARTY TO THE CONTRACT.—The vendor of defective machinery

is not liable for an injury sustained by a servant of the vendor unless there is evidence to show that the vendor had knowledge of its defective character: Heizer *v.* Kingsland & Douglass Manufacturing Company, Supreme Court of Missouri, May 23, 1892, BLACK, J. (19 S. W. Rep., 630).—*H. L. C.*

NEGOTIABLE INSTRUMENTS—ENDORSEMENT AFTER MATURITY—RIGHTS OF ENDORSEE.—When a negotiable instrument is endorsed after maturity by one to whom it was transferred before maturity, the endorsee after maturity occupies the same position as was occupied by his endorser, and no defence which could not have been made against the note in the hands of the latter can be made against it in a suit by the endorsee after maturity: Matson *v.* Alley, Supreme Court of Illinois, May 12, 1892, SCHOFIELD, J. (31 N. E. Rep., 419.)—*H. C. L.*

PARTNERSHIP—EFFECT OF AGREEMENT TO SHARE PROFITS.—A. loaned money to a firm under an agreement by which he was to receive, in addition to interest, one-tenth of the net profits of the firm over and above a certain sum. A. received annual accounts of profit and loss, and actually participated in profits. A. died, and a firm-creditor sued his executor on a partnership note. At the trial the Court below granted a non-suit. *Held:* that those persons only are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions; that in this case a jury would not have been justified in inferring on the part of A. either "actual participation in the profits as principal," or that he authorized the business to be carried on in part for him or on his behalf; and that, therefore, the Court below committed no error in non-suiting the plaintiff: Meehan *v.* Valentine, Mr. Justice GRAY, May 16, 1892 (145 U. S., 611.)—*G. W. P.*

POLICY OF INSURANCE—BENEFICIARIES—CHILDREN.—When a policy of insurance upon the life of a man is made for the sole use of his wife, if living, in conformity with the statute, and if not living then to her children or their guardians, if one of the children and the wife successively die during the life time of the insured, upon his death the entire amount of the insurance is to be paid to the children who survive the insured; the representatives of the deceased daughter take nothing, as her interest under the policy is contingent upon her surviving the insured: Walsh *v.* Mutual Life Insurance Co., Court of Appeals of New York, May 24, 1892, GRAY, J. (31 N. E. Rep., 228.)—*H. L. C.*

RAILROAD MORTGAGE—DISTRIBUTION UPON FORECLOSURE—JUDGMENT FOR LAND TAKEN—PRIORITY.—A railroad company, whose line was partly constructed, issued certain bonds which were secured by a mortgage upon its line. Subsequent to the creation of this mortgage and the sale of the bonds, the company constructed another portion of contemplated line. Certain owners of land abutting upon this portion of the line brought suit against the company for consequential damages arising out of the construction and operation of the line. It was held that judgments upon these suits were entitled to priority of payment

over the bondholders: Penn Mutual Life Insurance Company *v.* Heiss, Supreme Court of Illinois, May 9, 1892, SHOPE, J. (31 N. E. Rep., 138).—*H. L. C.*

REFORMATION OF NOTE.—Plaintiff held a note, signed "Herndon Natural Gas Co. F. A. Percival, President; A. Hastie, Secretary," given for the exclusive benefit of the company. In executing it P. and H. intended to bind the company only, and the plaintiff had no reason to believe otherwise. *Held:* in an action against P. and H., the defendants were entitled to have the note reformed to express the true contract of the parties, and parol evidence was admissible to establish such contract: Lee *v.* Percival, *et al.*, Supreme Court of Iowa, May 26, 1692, ROBINSON, C. J. (52 N. W. Rep., 543).—*J. A. McC.*

RECISION OF CONTRACT OF SALE—TENDER OF PURCHASE MONEY. A suit for a recision of contract of sale on the ground of fraud on the part of the purchaser cannot be maintained where the purchase money paid has not been returned nor a tender made, although the vendor may have expended the amount received prior to the discovery of the fraud, and is unable to raise the amount necessary to make the tender. This defect is not cured by an allegation that if the contract should be rescinded that defendant will have in his hands property of the plaintiff largely exceeding in value the amount of the purchase money: Rigdon *v.* Walcott, Supreme Court of Illinois, May 12, 1892, BAILY, J. (31 N. E. Rep.).—*H. L. C.*

REMARKS OF COUNSEL.—When the prosecuting attorney, during the trial of a criminal proceeding, challenges the counsel for the defendant to explain the evidence upon any other reasonable hypothesis than that of guilt, and makes use of the latter's failure to do so in argument before the jury, such conduct cannot be objected to as tending to shift the burden of proving innocence on the defendant: People *v.* Hall, Supreme Court of California, May 28, 1892, *per curiam* (30 Pacific Reporter, 1). —*J. A. McC.*

WRIT OF PROHIBITION—DISCRETION OF COURT—WHEN EXERCISED. —In this country the writ of prohibition is not granted in any case *ex debito justitiae*, but rests in the sound discretion of the Court, to be favorably exercised only when the ordinary forms of relief are insufficient, and never if the complaining party has another adequate remedy at law. The only inquiries permitted upon prohibition are whether the inferior tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction over the subject-matter, has exceeded its legitimate powers. But an ordinance which provides that the license and the money paid therefor shall be and remain forfeited, although an acquittal should take place upon appeal and trial *de novo*, and prescribes both fine and imprisonment as penalties for its violation, is void, as being oppressive and unreasonable, and in excess of the statutory power to enforce ordinances "by a proper fine, imprisonment, or other penalties;" and it is therefore proper to award a writ of prohibition to prevent a Court from proceeding to enforce it: McInerney *v.* City of Denver, *et al.*, Supreme Court of Colorado, February 15, 1892 (29 Pac. Rep., 516).—*R. D. S.*