ABSTRACTS OF RECENT CASES.

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

BY

HORACE L. CHEYNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY.

ACTION FOR DEATH OF HUSBAND — NEGLIGENCE—PROXIMATE CAUSE.—A statute of Colorado giving a right of action to the husband or wife of a decedent killed by the negligent act of another, provides also "that if there be no husband or wife, or he or she fails to sue within one year after such death, then (suit may be brought) by the heir or heirs of the deceased." Within the year after the death of her husband the plaintiff instituted proceedings against one Anderson and was nonsuited upon the ground that Anderson was not a proper party defendant. Two weeks after the termination of the suit, but nineteen months after her husband's death, the plaintiff began the present action against the defendant. It was held: That since the statute was remedial it was entitled to a liberal construction, and as the wife had *bona fide* began an action within the year, even though against a wrong party, that was sufficient indication of her intention to assert and maintain her statutory right: Hayes *v.* Williams, Supreme Court of Colorado, June 6, 1892, HELM, J. (30 Pacific Rep., 352).—*J. A. McC.*

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.—The insolvency of a banking corporation rendered immediate action necessary in order to preserve the property from destruction and protect creditors. Of the seven directors three were non-residents, and of the latter one had sold his stock and had done nothing with the bank for several years, another was travelling and his whereabouts was unknown; the third lived in another State and was inaccessible for immediate notice. The four remaining directors, being a quorum, called a meeting of the board of directors authorizing the president and secretary of the bank to assign all the property to one Shumway for the benefit of creditors; in pursuance whereof a deed of assignment was executed in due form and properly filed. Subsequently two of the absent directors recognized the validity of the assignment by attending and participating in the election of an assignee as provided by the law. There was no objection either on the part of the bank as a corporation or any director, to the assignment. *Held:* That these circumstances were sufficient to constitute an exception to the positive rule requiring *all* the directors of an insolvent corporation to join in and become parties to an assignment for the benefit of creditors, and that a writ of mandamus would issue to compel Shumway to discharge his duties as assignee: National Bank of Commerce *v.* Shumway, Supreme Court of Kansas, July 8, 1892, HORTON, C. J. (30 Pacific Rep., 411).—*J. A. McC.*

BONDS—CHANGE IN OBLIGATION—RELEASE OF SURETY—DEATH.—The cashier of a bank, who had given bond for the faithful performance of his duties, undertook for an additional compensation to keep the book

known as the "individual ledger." He embezzled the funds of the bank, and in an action brought against the executrix of the surety on the bond, *held:* That the undertaking to perform duties not belonging to the office of cashier did not effect such a change of duties as to discharge the surety from his liability. That the undertaking of the surety "for himself, his heirs, executors and administrator" during the period of the cashier's employment as such was not affected by the death of the surety: Shackamaxon Bank *v.* Tard, Supreme Court of Pennsylvania, July 13, 1892, per WILLIAMS, J. (24 Atl. Rep., 635).—*H. N. S.*

CARRIERS OF PASSENGERS—REASONABLE REGULATIONS—REFUSING TICKET.—Where a ticket was refused by a gateman because its date was illegible, and the holder thereby lost the train, in an action brought against the railroad for damages, *held:* That as the ticket was in the same condition as when purchased from defendant's agent, it was unreasonable that the plaintiff should be compelled to present the ticket to a ticket receiver for endorsement, and the defendant was liable in such damages as were the immediate consequence of its wrongful act: Northern Cent. Ry. Co. *v.* O'Connor, Court of Appeals of Maryland, June 8, 1892, per ROBINSON, J. (24 Atl. Rep., 449).—*H. N. S.*

CARRIERS—EJECTMENT OF PASSENGER.—The plaintiff was ejected from defendant's train for refusing to pay his fare after the ticket which he presented was refused by the conductor because it had expired. *Held:* (1) That the right to eject him for non-payment of fare is in no way affected by any belief he may have had as to his right to ride on the ticket after its expiration; (2) In the absence of any statutory regulation affecting the manner of ejection of a passenger refusing to pay his fare, he may be ejected at any place along the line, provided he be not thereby unreasonably exposed to danger: Rudy *v.* Rio Grande Ry. Co., Supreme Court of Utah, June 17, 1892, ANDERSON, J. (30 Pacific Rep., 366).—*J. A. McC.*

CHARTER PARTY—"RESTRAINT OF RULERS," ETC.—QUARANTINE REGULATIONS—DUTY OF VESSEL.—A vessel, agreed by charter, party to be at a certain port, and, in all respects, ready to load under the charter on or before October 1, "restraint of princes or rulers of people" being excepted. By reason of quarantine regulations of the port the vessel could not go there until November 1, when the quarantine was raised. It was *held* that detention, by quarantine, was included in the scope of the clause, "restraint of rulers," etc., but that it was the duty of the vessel to have been at the port of loading within a reasonable time after the quarantine was raised: The Progreso, Circuit Court of Appeals of the United States, Third Circuit, May 24, 1892, GREEN, J. (50 Fed. Rep., 835).—*H. L. C.*

CONFLICT OF LAWS—MARRIED WOMEN—CONTRACTS—PLACE OF PERFORMANCE AND EXECUTION.—B., a married woman, signed and sealed in Pennsylvania a bond and mortgage to secure the purchase money of land in Delaware. This was delivered in Delaware by her husband as her agent. The land was sold subject to the mortgage, and as a

subsequent foreclosure sale did not realize the mortgage debt, judgment was entered on the bond in order to collect from B. in Pennsylvania the balance due. Her application to open judgment was granted, on the ground that the bond was a Pennsylvania contract, and it could not be enforced against her except as to the land. On appeal, *held:* That the laws of Delaware under which a married woman is personally liable on such a bond should be enforced, as being the law of the place where the contract was not only to be performed, but was executed; the place where a contract was executed being determinable from the place where it is delivered, regardless of where it is prepared and signed: Baum *v.* Birchall, *et ux.*, Supreme Court of Pennsylvania, July 13, 1892, WILLIAMS, J. (24 Atl. Rep., 620).—*H. N. S.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE POWER.—Article XXXIV of the Maryland code provides that "All persons claiming logs cast by wind and tide upon any shore bordering upon the Chesapeake Bay and its tributaries, are hereby prohibited from removing the same without payment to the owner of the said shore the sum of twenty-five cents for each log so removed." This statute is valid and constitutional as an exercise of the police power of the State; although the logs may have carried away from a point without the boundaries of the State: Henry *v.* Roberts, Circuit Court of the United States, District of Maryland, May 16, 1892, MORRIS, J. (50 Fed. Rep., 903).—*H. L. C.*

CONSTITUTIONAL LAW—INSPECTION OF PRIVATE PAPERS.—The president of an insolvent national bank, who was charged with a violation of the national banking laws, filed a bill in equity against the receiver of the bank, praying that the latter be compelled to deliver to the complainant a certain trunk which was deposited in the vaults of the bank at the time of the appointment of the receiver, and which the bill alleged contained certain private papers of the complainant. Upon hearing the Court appointed a master to privately examine the contents of said trunk, with directions to deliver to the complainant such papers as belonged to him, to deliver to the receiver any papers belonging to the bank which did not concern the prosecution of the president, and to hold until further orders such papers as related to the business of the bank, and which were material in the prosecution of the president of the bank. It was *held* that this order was a violation of the constitutional and fundamental right of the litigant as to the method of trial: Potter *v.* Beal, Circuit Court of Appeals of the United States, First Circuit, June 11, 1892, PUTNAM, J. (50 Fed. Rep., 860).—*H. L. C.*

CONTRACTS—ILLEGAL AGREEMENT.—Where the plaintiff leased premises for the keeping of liquor for sale, the landlord agreeing to supply ice to keep the premises cool, if the sale of such liquor is in violation of a State statute and illegal, the tenant cannot recover for damage to the liquor caused by failure of the landlord to supply ice as agreed: Kelly *v.* Courter, Supreme Court of Oklahoma, July 1, 1892, CLARK, J. (30 Pacific Rep., 372).—*J. A. McC.*

CRIMINAL LAW—EVIDENCE—VOLUNTARY CONFESSION.—The accused in an indictment for murder said to the sheriff, "I have sent for you to tell you about my case," to which the sheriff replied, "If you are going to tell the truth I will listen to it and want to hear it; if you are not going to tell the truth I don't want to hear it." The declarations of the accused testified to by the sheriff being admitted in evidence, and excepted to, on appeal *held:* That the confession made to the sheriff was voluntary and admissible: Haul *v.* State, Supreme Court of Alabama, May 26, 1892, per COLEMAN, J. (11 So. Rep., 218).—*H. N. S.*

EXPERT EVIDENCE.—In an action against a railroad company for an injury to the plaintiff sustained by a train running into a snowbank, the question at issue was whether the train was running at a dangeous rate of speed at the time. *Held:* That neither the engineer nor conductor could be called as experts to testify as to that fact: Fisher *v.* Oregon S. L. and U. N. Ry. Co., Supreme Court of Oregon, June 21, 1892, FORD, J. (30 Pacific Rep., 425).—*J. A. McC.*

FELLOW SERVANTS—INJURY TO SERVANT.—The plaintiff, a brakeman in defendant company's employ, was injured while coupling flat cars, because of insufficient room between one of the cars and the lumber on the other, which was so loaded as to project beyond the end of the car. *Held:* That inasmuch as it was the duty of the company to furnish a safe place for coupling, it was not excused by having furnished an inspector to whose omission the accident was due; his negligence not being that of a fellow servant: Dewey *v.* Detroit G. H. & M. Ry. Co., Supreme Court of Michigan, July 28, 1892, MCGRATH, J., MONTGOMERY and GRANT, J.J., dissent (52 Northwestern Rep., 942).—*J. A. McC.*

FIRE INSURANCE—CONSTRUCTION OF POLICY—HAZARDOUS USE OF PREMISES.—The printed part of a policy of insurance, issued at a time when the insured premises were unoccupied, provided that it should become void if benzine, gasoline, etc., or other explosives should be kept or used on the premises. These were the only uses prohibited by the policy as hazardous. A written slip attached to and made part of the policy, provided that the premises were "privileged to be occupied for hazardous or extrahazardous purposes." *Held:* That inasmuch as there was a glaring inconsistency between the printed and written part of the policy, that which is written must prevail; also that the use of the premises as a paint factory in which benzine and gasoline were kept and used in the manufacture of paints, was permissible by the written part of the policy: Russell *v.* Manufacturers and Builders' Fire Insurance Co. of New York, Supreme Court of Minnesota, July 7, 1892, MITCHELL, J. (52 Northwestern Rep., 906).—*J. A. McC.*

FOREIGN CORPORATIONS ACTING WITHOUT AUTHORITY OF STATE—QUO WARRANTO—Although the courts of a State other than that in which a corporation is created, have no power to oust such corporation of its right to be a corporation, or to interfere in any manner with the exercise of the rights and franchises conferred upon it by the State where incorporated, yet where such corporation is found transacting business in

another State and exercising the franchises conferred upon its corporations, without any authority, the courts of the latter State may by a proceeding in *quo warranto* oust the corporation from the exercise of such franchises: State *v.* The Fidelity and Casualty Company, Supreme Court of Ohio, June 24, 1892, MARSHALL, J. (31 N. E. Rep., 658). - *H. L. C.*

FOURTEENTH AMENDMENT—CIVIL RIGHTS—THEATRES—COLORED PERSONS.—In the absence of a State "civil rights statute," a rule of a theatre prohibiting colored persons from occupying seats in certain portions of it, may be enforced, as such rule is not a violation of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States . . nor deny to any person the equal protection of the laws: Younger *v.* Judah, Supreme Court of Missouri, July 2, 1892, BLACK, J. (19 S. W. Rep., 1109). —*H. L. C.*

JUDICIAL SALE—TITLE OF PURCHASER.—The reversal for errors or irregularities of a decree ordering a sale of land will not affect a purchaser in good faith, providing the Court had jurisdiction to pass the decree, and all necessary parties were before the court: Benson, *et. al.*, *v.* Yellott, *et. al.*, Court of Appeals of Maryland, June 7, 1892, per FOWLER, J. (24 Atl. Rep., 451).—*H. N. S.*

JUROR—COMPETENCY—OPINION AS TO GUILT OR INNOCENCE.—A juror who states upon his *voir dire* that he has formed an opinion as to the guilt or innocence of the accused, which will require evidence to remove, is incompetent, although he may state that he can discard the opinion that he has formed, and give the defendant as fair and impartial a trial as though he had never heard of the case: Vance *v.* State, Supreme Court of Arkansas, June 25, 1892, HUGHES, J. (19 S. W. Rep., 10-6).—*H. L. C.*

MARRIAGE—MINOR—RIGHT TO EARNINGS.—The marriage of a minor son, even without the consent of his father, effects an emancipation, and the son is entitled to his wages, in so far as they are necessary for the support of himself and family, in preference to his father: Commonwealth *v.* Graham, Supreme Judicial Court of Massachusetts, June 24, 1892, FIELD, C. J. (31 N. E. Rep., 766).—*H. L. C.*

NEGLIGENCE—TENEMENT HOUSES—LIABILITY OF LANDLORD TO THIRD PERSONS.—The owner of a tenement house is not liable for injuries sustained by a person caused by the defective condition of the steps leading to the different parts thereof, where the injuries were received while the plaintiff was coming from a wake held in the house, to which she had neither an express invitation nor one by implication as being a relative or friend of the deceased: Hart *v.* Cole, Supreme Judicial Court of Massachusetts, June 22, 1892, KNOWLTON, J. (31 N. E. Rep., 644). —*H. L. C.*

PERSONAL INJURY—UNAUTHORIZED DISPLAY OF FIRE WORKS.—A person who is a voluntary spectator of a display of fire works in a public highway, cannot recover damages for injuries sustained by an explosion of the fire works, if such explosion occurred without negligence, even if the display is without legal authority: Scanlon *v.* Wedger, Supreme Judicial Court of Massachusetts, June 21, 1892, ALLEN, J. (31 N. E. Rep., 642).—*H. L. C.*

PLEADING—INSURANCE—CONDITIONS OF POLICY—DEPARTURE.—A clause of the policy of fire insurance upon which suit was brought, provided for the selection of appraisers and an award in case the parties differed as to the amount of the loss. *Held* (1) that compliance with the provision was a condition precedent to the maintenance of an action by the assured and a failure to allege in the complaint the appointment of appraisers, and an award was fatal to the plaintiff's case; (2) that plaintiff could not cure the defect in his complaint by relying upon the answer of the defendant which did allege the appointment and award, especially when by certain averments in his replication he put in issue the very allegations in the answer upon which he relied to cure the defect; (3) that it could not be contended that there was a departure because the replication admitted the award, but alleged fraud in the procurement of it, since the plaintiff could not quit or depart from a case made in the complaint, when none had been made: Monsess *v.* German-American Insurance Co., Supreme Court of Minnesota, July 1, 1892, COLLINS, J. (52 Northwestern Rep., 932).—*J. A. McC.*

POWERS—EXECUTION—CONFLICT OF LAWS.—Testatrix, domiciled in R. I., bequeathed one-sixth of her residuary estate in trust for the benefit of her grandson during his life, and at his death to those whom he should appoint by will, and in default of such appointment, then to her heirs-at-law. The grandson died in New York without issue, leaving a will in which he did not mention the fund in question nor execute the power given him. By New York law a general bequest passes property over which the testator has a power of appointment, unless a contrary intention appears. In R. I., an intent to execute a power must appear affirmatively. Upon issue, raised by a bill in equity, whether there had been an execution of the power by the residuary clause of the will. *Held:* That where the execution of a power is in question, the law of the domicile of the donor governs, and not that of the domicile of the donee. That an intent to execute the power could not be inferred where the will contained no reference thereto; though the relations of the donee to the donor were so intimate as to raise a presumption that he knew of the contents of the donor's will, and, though the donee in his will, made bequests exceeding the amount of his estate: Cotting *v.* De Sartiges, *et. al.*, Supreme Court of Rhode Island, March 28, 1892, per STINESS, J. (24 Atl. Rep., 530).—*H. N. S.*

RESCISSION OF SALE—EFFECT OF A FAILURE TO CALL A MATERIAL WITNESS.—Where a defendant resists the foreclosure of a purchase money mortgage of a mine upon the ground that the purchase was induced by the fraudulent misrepresentations of the plaintiffs, it is abso-

lutely essential to his success that such misrepresentations were the proximate inducement to the purchase. But where the evidence disclosed that before the purchase defendant in company with an experienced miner examined the mine for several days; that afterward defendant was enthusiastic about the purchase and told several witnesses that he bought the property on his own judgment and the judgment of the expert; that after the purchase he surveyed and worked the mine for nearly two years before executing the notes and mortgage in suit, and made no complaint of the mine until plaintiffs threatened to bring the action. *Held* (1) that the evidence justified the finding that defendant did not make the purchase, relying on plaintiff's representations; (2) that the failure of the defendant to secure the testimony of a person present when the alleged misrepresentations were made without explaining why such person was not called, authorized the inference that the testimony if produced would be averse to the defendant: Wimer *v.* Smith, Supreme Court of Oregon, July 2, 1892, LORD, J. (30 Pacific Rep., 416).—*J. A. McC.*

SATISFACTION OF JUDGMENT—AUTHORITY OF ATTORNEY.—A recovered a judgment of $1,000 against B in an action of slander. There was some doubt as to the correctness of the judgment, and before an appeal was taken the attorneys of both parties agreed upon a compromise that B should pay A $600 in full satisfaction, which sum was paid and the judgment satisfied of record. Two years later a motion on the part of A to strike off the satisfaction, upon the ground that his attorney had no authority to effect the same, was sustained. B then filed a petition praying the Court to enjoin the collection of the excess of $600, alleging that A owned but one-half of the judgment, and that his attorney who effected the compromise owned the other half. *Held:* that B was entitled to equitable relief. NOWAL, J., dissented upon the ground that the order vacating the entry of satisfaction was *res adjudicata* as to all matters which could have been litigated at the hearing, among which were the facts contended for in the plaintiff's petition: Phillips *v.* Kuhn, Supreme Court of Nebraska, July 2, 1892, MAXWELL, C. J. (52 Northwestern Rep., 881).—*J. A. McC.*

SERVICE OF WRITS—AMENDMENT OF RETURN—POWERS OF EX-SHERIFF.—After a sheriff or deputy sheriff has gone out of office, he cannot, without some order of the Court giving direction in the matter, amend an incomplete or defective return of service made by him while in office: Beutell *v.* Oliver, *et al.*, Supreme Court of Georgia, April 28, 1892 (15 S. E. Rep., 307).—*R. D. S.*

SLANDER—EXEMPLARY DAMAGES—MALICE.—Exemplary damages can only be awarded in an action of slander where the defendant was actuated by malice toward the plaintiff. The law implies malice where the words spoken impute a crime to the plaintiff, and the defendant asserts their truth in his answer and reiterates the same upon the witness stand at the trial, it having been shown they were false: Walker *v.* Wickens, Supreme Court of Kansas, June 11, 1892, *per. cur.* (30 Pacific Reporter, 181).—*J. A. McC.*

STOREKEEPERS—CARE OF CUSTOMERS' PROPERTY—BAILMENT.—Where one entered a store for the purchase of clothing, and deposited his watch for safe-keeping in a drawer, designated by the salesman, and after his purchase the watch could not be found, in an action brought to recover the value of the watch. *Held:* That as such deposit was a necessary incident of defendant's business, he was a bailee for hire, and as such bound to exercise ordinary diligence, and only in the absence of such diligence would he be liable if the watch was stolen: Woodruff *v.* Painter, *et. al.*, Supreme Court of Penna., July 13, 1892, per HEYDRICK, J. (24 Atl. Rep., 620).—*H. N. S.*

TENANT IN COMMON—PAROL PARTITION—EJECTMENT.—Where a parol partition of lands is made by tenants in common, and the premises are occupied according to the partition by the respective parties, the partition will be valid, and such partition may be set up as a defence should an action be brought to recover the possession, in violation of the parol partition, and a bill in equity may be maintained to compel the delivery of a deed. But ejectment will not lie to recover possession of a part allotted by such parol partition, as in ejectment the plaintiff must recover upon a legal title and not upon an equity, and the parol partition may not be treated as a deed: Sontag *v.* Bigelow, Supreme Court of Illinois, June 18, 1892, CRAIG, J. (31 N. E. Rep., 674).—*H. L. C.*

TRADEMARKS—LABELS COUNTERFEITING.—The law protects labels for the same reasons that it protects trademarks, and where labels are so successfully counterfeited that ordinary purchasers, buying with the degree of care usual in purchases of the article, are deceived, the complaining party is entitled to protection: Wirtz *v.* Eagle Bottling Co., Court of Chancery of New Jersey, July 18, 1892, per VAN FLEET, V.C. (24 Atl. Rep., 658).—*H. N. S.*

"THE ADOPTION OF A UNIFORM BILL OF LADING IN INTERNATIONAL COMMERCE."

The October Number of the AMERICAN LAW REGISTER AND REVIEW will contain an article on the Adoption of a Standard Bill of Lading in International Commerce, by the distinguished admiralty lawyer MORTON P. HENRY, Esq. In view of the fact that legislation on this subject will occupy the attention of Congress at the coming session, the topic is a peculiarly timely one; and those of our readers who agree with Mr. HENRY'S views should not fail to put a copy of the October number into the hands of their representatives at Washington.