RECENT CASES.

CORPORATIONS.

Railroads—Legislative Control—Maximum Rates—Mileage Books.—Smith v. *Lake Shore & M. S. Ry. Co.*, 72 N. W. Rep. 328 (Mich.). The Constitution of Michigan (Art. 19 a. § 1) empowers the legislature to pass laws establishing reasonable maximum rates for the transfer of passengers on the railroads of the State. Having established such maximum rate, the legislature further enacted (Pub. Acts 1891, No. 90) that the railroad companies in the State should be required to issue 1000-mile tickets, at a specified rate, lower than the maximum rate. The majority opinion upholding the constitutionality of this latter enactment, cites especially *Wellman* v. *Ry. Co.*, 83 Mich., at p. 624, to rebut the contention that the section of the constitution (19 a. § 1) is a limitation upon the authority of the legislature, and that the power of fixing rates is exhausted when the maximum rates have been established. See also *In re Thirty-Fourth St. R. Co.*, 102 N. Y. 343. Such subsequent fixing of different rates does not result in unjust discrimination. *Interstate Commerce Commission* v. *Balt. & O. R. Co.*, 145 U. S. 263. Grant and Hooker, J. J., dissent. The affirmative grant of power to fix a maximum rate implies an exclusion of all other powers of this nature. Story Const. § 448. It lies within the police power to protect the general public by fixing a maximum rate which such quasi-public corporations may charge (*Munn* v. *Illinois*, 94 U. S. 113); but to enforce the issuance of mileage tickets at certain figures on the ground that a quantity of commodity is contracted for, is a plain abuse of the police power, and unjust discrimination in favor of those who have the means and opportunity of purchasing in quantity. It would be anomalous to call this class the "general public." The argument of counsel in this case leads to the conclusion also that the legislature may manage and control the business of the railroads of a State just as fully and completely as it could if the State owned them. The interstate commerce act seems to have been designed to prevent the very thing that this law would require.

Injunction—Restraining Brokerage in Railway Tickets—Jurisdiction—Amount in Dispute—Principles Governing Remedy—Novel Use of Writ.—Nashville C. & St. L. Ry. Co. v. *McConnell et al.*, etc., 82 Fed. Rep. 65. In order to aid in the success of the Tennessee Centennial Exposition at Nashville, its managers induced the leading railroads to issue at one-third the regular rates a special contract round-trip ticket, to be used only during the period of the Exposition, which by its terms was non-transferable, and should become void in the hands of any third party acquiring it in violation of the agreement. Defendants, who were "ticket scalpers" were in the habit of buying and selling the return portions of these tickets, and a bill was brought to restrain them from further prosecuting this particular branch of the brokers' business. *Held*, that plaintiffs are entitled to an injunction to so restrain defendants. The injury sustained by the railroads because of the violation of these contracts is irreparable, for the multitude of suits necessary for redress at law would bring absolutely no substantial result to complainants. See *Wahle* v. *Reinbach*, 76 Ill. 322; *Parker* v. *Woolen Co.*, 2 Black 551; *Wylie* v. *Coxe*, 13 How. 415; *Sanford* v. *Poe*, 37 U. S. App. 378. The case is not one

for the recovery of damages for the numerous breaches of contract, but protection of the business of complainants from loss suffered and to be suffered by frauds committed and to be committed. The court therefore entertained no doubt of its jurisdiction, as the amount involved is the continuing loss to be prevented from the fraudulent use of these void papers. *Railway Co.* v. *Kuteman*, 54 Fed. 552; *Scott* v. *Donald*, 165 U. S. 107. A close analogy is furnished in trade-mark and patent cases. The "age-worn" objection of novelty is urged against the serving of the writ of injunction in this case also. A similar objection was overruled in *Toledo, A. A. & N. M. Ry. Co.* v. *Penn. Co.*, 54 Fed. 751, also in the famous Strike Cases, arising out of the contempt proceedings in *U. S.* v. *Debs*, 64 Fed. 724. See also *In re Debs*, 158 U. S. 565; *Shoe Co.* v. *Saxey*, 131 Mo. 212; *Scott* v. *Donald*, supra; *Arthur* v. *Oakes*, 63 Fed. 310; *Davis* v. *Zimmerman*, 36 N. Y. Supp. 303, and *Lumley* v. *Wagner*, 6 Eng. Ruling Cas. 652.

Taxation—Exemption.—Ætna Ins. Co. v. *Mayor, etc., of City of New York*, 47 N. E. Rep. 593 (N. Y.). Laws 1886 (N. Y.) whereby certain property of insurance companies is exempted from taxation, held not to apply in that year, the taxes having already been assessed but not actually levied. This is so upon authority of *In re American Fine Arts Society*, 151 N. Y. 621, where the act took effect on May 3d, and the assessment was made on May 1st, but not actually levied. Also in *Assn. for Benefit of Colored Orphans* v. *Mayor, etc., of New York*, 104 N. Y. 581, the same doctrine is applied where the plaintiff became the owner of the property after May 1st, and before the tax was actually imposed.

Foreign Corporations—Compliance with Statute.—New York Nat. Building & Loan Ass'n, v. *Connor*, 41 S. W. 1054 (Tenn.). Prior to the passage of a statute describing the terms upon which a foreign corporation could do business within the State, the defendant became a stockholder in the plaintiff company, a foreign building and loan association, and applied for a loan therein. After the passage of such a statute and before the plaintiff had complied with its terms, the loan was made and a mortgage taken as security. *Held*, that the mortgage was illegal and unenforceable, even though the borrower may have acquired a vested right to the loan and the association under obligation to make it. The making of the loan and giving the mortgage were not merely the winding up of unfinished business.

Water Companies—Condition of Furnishing Water.—Crumley v. *Watauga Water Co.*, 41 S. W. Rep. 1058 (Tenn.). A water company, duly organized and chartered under a general State law and clothed with the power of condemnation, is a quasi-public corporation and must furnish water to all who apply therefor and tender the legal rates. Such a corporation cannot justify its action in refusing to furnish one water on his refusal to pay a duebill for water furnished a year or two previously. The company had given him its credit by accepting a duebill and could not thereafter coerce payment by denying a present legal right.

Statutes—Special Acts—Constitutional Law—Legislative Control of Cities.—Restrictions on Use of Property, City of St. Louis v. *Dorr*, 41 S. W. Rep. 1095 (Mo.). An act of the legislature of Missouri prescribed that "all cities in the state having a population of three hundred thousand or more * * * are hereby authorized to establish boulevards and provide for maintaining the same * * * and may exclude the institution and

maintenance of any business avocation on the property fronting on said boulevard." Pursuant to this authority the municipal assembly of St. Louis enacted an ordinance establishing certain boulevards and forbade thereon the following of any business avocation whatever. *Held*, that while such act of the legislature was not a special act it was nevertheless in violation of the Constitution, Art. 2 § 30, declaring that no person shall be deprived of property without due process of law. *City of St. Louis* v. *Hill*, 116 Mo. 527, 22 S. W. Rep. 861.

Contributory Negligence—Financial Condition of Parents—Charge to the Jury.—Fox v. *Oakland Consol. St. Ry.*, 50 Pac. Rep. 25 (Cal.). In an action against a street railway company for negligently causing the death of a child, the judge of the lower court charged the jury as follows: "The fact that plaintiff is a poor man, if that be true, constitutes no ground why he is entitled to a verdict, but is a matter to be considered by you in determining whether or not he has been guilty of contributory negligence." *Held*, erroneous. The courts have held differently in regard to this question, but to quote from *Mayhew* v. *Burns*, 113 Ind. 339, 340: "Whether one was negligent or not in a given case must be determined by considering his or her conduct as it related to the particular circumstances of the occasion or affair out of which the case arises." In the case at bar, the contention seemed to be that plaintiff's poverty affected his ability to have the child properly cared for.

CONTRACTS.

Implied Contracts—Statute of Frauds—Rescission.—Miller v. *Roberts*, 47 N. E. Rep. 585 (Mass.). Plaintiff conveyed his farm at the request of the defendant to a third person in consideration of defendant's oral promise to convey to him another farm. Defendant, without plaintiff's consent, sold and conveyed the farm he had agreed to convey to plaintiff to another person, thus making it impossible for him to perform his agreement. *Held*, that defendant was liable for the property conveyed by the plaintiff for his benefit, notwithstanding the agreement by which he received it could not have been enforced by reason of the Statute of Frauds. Where one receives money or property on an executory contract which cannot be enforced by reason of the Statute of Frauds, and he then refuses to perform the contract, he is liable on an implied promise to return the money or pay for the property. *Dix* v. *Marcy*, 116 Mass. 416; *Root* v. *Burt*, 118 Mass. 521.

Delivery—What Constitutes.—People's Nat. Bank v. *Freeman's Nat. Bank*, 47 N. E. Rep. 588 (Mass.). Where a sealed package of papers was sent to a collector with a draft attached for collection and with instructions to deliver papers only upon payment of draft, a temporary surrender of the package to the drawee for examination was not a "delivery" within the instructions. The delivery contemplated by the letter of instructions was an absolute one, and could be no other than that which was necessary to be made upon payment of the draft, *i.e.*, a surrender of the package to the drawee as his own property.

Life Insurance—Wager Policy.—Givens v. *Veeder*, 50 Pac. Rep. 316 (N. M.). A assigns to B a life insurance policy for $5,000 to secure a debt of $2,000, and B afterwards pays semi-annual premiums, interest, etc., amounting to $4,500 at the time of the insured's death. A second creditor, C, to whom A had assigned his title in the insurance policy, which he did not possess because

of previous assignment, brings an action to compel B to pay the debt due to him, C. *Held*, that the unconditional assignment of the policy by A to B did not constitute a "wager policy" or "speculative risk." This is not contrary to *Cammack* v. *Lewis*, 15 Wallace 643, as in that case the amounts of the debt and the assignment were disproportionate.

Rights and Liabilities of Co-Sureties.—Pile v. *McCoy*, 41 S. W. Rep. 1052 (Tenn.). Where one of the sureties of a guardian's bond receives the ward's money from the guardian for his own use, in consequence of which the guardian defaults, he is liable to this co-surety for the entire amount defaulted, especially if he has indemnified himself. This is true although the co-surety may have known and acquiesced in his receiving the money.

MINES.

Mining Claims—Location by Aliens—Subsequent Declaration of Intention.—Lone Jack Min. Co. v. *Megginson*, 82 Fed. Rep. 89. The declaration of an intention to become a citizen by an alien who has located a mining claim on public lands of the United States, made subsequent to his location of the claim, relates back to the time of such location and validates it, in the absence of intermediate adverse claims. Sec. 2319, Rev. St. declares that the mineral lands belonging to the United States shall be open to "occupation and purchase by citizens of the United States and those who have declared their intention to become such." But it has been held that an alien who locates a mining claim on public lands may hold his interest as against all the world, except the United States. *Billings* v. *Smelting Co.*, 51 Fed. 338. In *Manuel* v. *Wulff*, 125 U. S. 505, the conveyance of a claim by a qualified locator to an alien operated to transfer the claim to the grantee, "subject to question in regard to his citizenship by the government only." This case cited with approval the ruling *In re Krogstad*, 4 Land Dec. Dep. Int. 564, in which it was held that an alien having made homestead entry, and subsequently declared his intention to become a citizen, the alienage at time of entry would not, in the absence of an adverse claim, defeat the right of purchase. See also *Governeur's Heirs* v. *Robertson*, 11 Wheat. 332, and *Osterman* v. *Baldwin*, 6 Wall. 116, and the leading article on Mining Law in this issue of the YALE LAW JOURNAL.

Mineral Lands—Trespass.—Lincoln Lucky Min. Co. v. *Hendry*, 50 Pac. Rep. 330 (N. M.). The principle, "*Cujus est solum, hujus est usque ad cœlum*," applies to land in general, and it cannot be contended that the rule is different when the lands in controversy are mineral in character, and that while a trespasser may have such possession of the surface of the earth as would enable him to maintain ejectment against a subsequent intruder who entered upon the surface and ousted him, yet that such possession may be insufficient to enable him to maintain ejectment against the same intruder if he enter beneath the surface upon a vein of mineral—and this without reference to the mining laws.

EVIDENCE.

Newly Discovered Evidence—Discovery of Lost Writing.—Mercer v. *King*, 42 S. W. Rep. 106 (Ky.). The finding of a lost writing after an action thereon, in which it was attempted to be proved by secondary evidence and there was a conflict of testimony as to some of its provisions, will entitle the unsuccessful party to a new trial on the ground of newly discovered evidence.

Homicide—Evidence—Testimony on Former Trial.—State v. *Smith*, 72 N. W. Rep. 279 (Ia.). After the shooting of S., one T. was accused of the crime, and had a preliminary examination before a justice of the peace, at which S. testified for the State, and identified a person other than his own wife as his assailant. In an action against the wife for the subsequent murder of S., it was competent for her to bring in against the State the testimony of S. at the examination of T. Although present defendant was not a party to the proceedings in which the testimony of her husband was given, yet S. was a witness for present plaintiff, and the admissibility of the testimony of a deceased witness depends in a large measure upon the right which the person against whom it is sought to be used had to appear in the proceeding in which it was given and cross-examine the witness. *Harrison* v. *Charton*, 42 Ia. 574; 1 Greenl. Ev. § 164.

Witnesses—Impeachment.—State v. *Slack*, 38 Atl. Rep. 311 (Vt.). *Held*, that in criminal cases a State may impeach its own witnesses. The public, in whose interest crimes are prosecuted, are as much concerned that the innocent should be acquitted as that the guilty should be convicted. Thus it is the duty of the State to produce and use all witnesses within reach of process, whose testimony will throw light upon the transaction under investigation, and aid the jury in arriving at the truth, whether it makes for or against the accused. *State* v. *Magoon*, 50 Vt. 333; *State* v. *Harrison*, 66 Vt. 523, 29 Art. 803. *Cf.* also case preceding.

MISCELLANEOUS.

Interstate Commerce—Original Package—Liquors.—Guckenheimer et al. v. *Sellers*, 81 Fed. Rep. 997 (S. C.). An original package, within the meaning of the Interstate Commerce Act, is an unbroken package in precisely the same condition and shape in which it was delivered to the transportation company for carriage, whether bottle, box, barrel or crate. The barrels and boxes, and not the bottles are the original packages, even where the bottles are separately wrapped and marked "original package," but put in barrels and boxes and shipped (*Keith* v. *State*, 91 Ala. 2). But a single bottle, however small, if packed separately and shipped singly, may be an original package and will receive the protection of the courts (*In re Beine*, 42 Fed. 546). This latter case is at variance with *Com.* v. *Paul*, 170 Pa. St. 284, and *Com.* v. *Schallenberger*, 156 Pa. St. 201, but is considered the better law.

Riparian Rights—Navigable Waters—Trespass—Rights of Hunters.—Hall v. *Alford*, 72 N. W. Rep. 137 (Mich.). In an action for trespass for shooting ducks by means of decoys near an island and within the channel of the river the court *held* that the defendant had the right to use the waters for the purpose of a public highway, but that he had no right to interfere with the plaintiff's use thereof for hunting, which belonged to him as riparian owner. As the defendant was not using the waters for the purpose of navigation and as the rights of the riparian owner are subject only to the public use for the purpose of navigation (*Browning Co.* v. *Jarvis*, 30 Mich. 308), the actions of the defendant constituted a trespass. *Sterling* v. *Jackson*, 69 Mich. 488, 37 N. W. Rep. 845.

Grand Juries—Secrecy of Proceedings.—State v. *Bowman*, 38 Atl. Rep. 331 (Me.). *Held*, that an indictment is invalidated by the presence of an official stenographer during the testimony of witnesses before a grand jury,

notwithstanding he was not present at its deliberations. The investigations and deliberations of a grand jury should be in secret, in order to secure the utmost freedom of deliberation, expression of opinion and action among the members. Hence the oath established by common-law usage: "The State's counsel, your fellows' and your own you shall keep secret." The injunction applies as well to secrets of the State, the persons accused and the witnesses who testify to facts brought out during the examination. This, however, is contrary to *U. S.* v. *Simmons*, 46 Fed. 65. See also *Courtney* v. *State*, 5 Ind. App. 356, 32 N. E. 335.

Wills—Validity—Provision.—Cruger v. *Phelps*, 47 N. Y. Supp. 61. A condition in the will of an American citizen residing abroad, by which testator's daughter forfeits her right to the income of the residuary estate, in case she resides or travels outside the continent of Europe, which condition is expressly limited to the life-time of the husband, or "until she shall be divorced from him *a vinculo matrimonii*, and remain so divorced from him," is a direct inducement to the daughter to procure such divorce, and is void as against public policy and good morals. *White* v. *Snyder*, 8 N. Y. Supp. 119; *Potter* v. *McAlpine*, 3 Dem. Sen. 108.

Contempt—What Constitutes—Newspaper Articles—Reflections on Judge.—State ex rel. Attorney General v. *Circuit Court of Eau Claire County et al.*, 72 N. W. Rep. 193 (Wis.). Articles written by a lawyer and charging a judge of the circuit court, who was a candidate for re-election with dishonesty and partiality in the trial of cases already disposed of were published in a newspaper which opposed the judge's candidacy for re-election. These articles were widely circulated and delivered by various parties to the officers and jurors of the court over which the judge presided while it was in session. The judge instituted proceedings against the author and publisher and was about to have them committed for contempt. During these proceedings an affidavit was filed alleging the truth of the articles, which affidavit was claimed by the judge to constitute a new and independent contempt, committed in the actual presence of the court. In an action on a writ of prohibition to restrain the judge from carrying out his threat of commitment, *held*, that neither the original articles nor the affidavit constituted a contempt, either at common law, or under the State statute (Rev. St. § 2565). If any contempt was committed it is what is known as a constructive contempt, and the cases cited to support the contention that the present is such contempt, do so upon the principle that libelous publications have a tendency to prejudice the course of justice in the particular case then pending. *Sturoc's Case*, 48 N. H. 428; *State* v. *Frew*, 24 W. Va. 416; *People* v. *Wilson*, 64 Ill. 195; *In re Cheeseman* (N. J. Sup.), 6 Atl. 513. But several cases hold directly that such articles, even when referring to acts of court in actions already ended, constitute contempt. *State* v. *Morrill*, 16 Ark. 384; *Dandridge's Case*, 2 Va. Cas. 409; *In re Chadwick* (Mich.), 67 N. W. 1071. In England the mere writing contemptuously of a superior court or judge has been declared a constructive contempt at common law, 4 Bl. Comm. 285; but such power in a court has never been adopted as part of the common law of Wisconsin. As the original publication was not a contempt, the attempt to punish it was an excess of jurisdiction of the court, and the defendants had a right, when summoned into court, to allege its truth. In no sense could they be held to have committed a new contempt in so doing.