RECENT CASES.

CONTRACTS.

Insurance Policy—Notice of Cancellation—Return of Premium.—Backus et al., v. *Exchange Fire Insurance Co. of City of New York*, 49 N. Y. Supp. 677. By the terms of an insurance policy it was provided that it could be cancelled at any time by the insurance company giving five days' notice of such cancellation, and when so cancelled, if the premium thereon had been paid, the unearned portion would be returned on the surrender of the policy. *Held*, that the payment of such unearned portion was not a prerequisite to the cancellation of the policy, if the insurance company offered to return the same on demand and surrender of policy in its notice of cancellation. *Walthear* v. *Ins. Co.*, 2 App. Div. 330. *Tritch* v. *Ins. Co.*, 152 N. Y. 635 distinguished.

Inn Keepers—Extent of Liability for Lost Goods.—Amey v. *Winchester*, 39 Atl. Rep. (N. H.) 487. Plaintiff attended a banquet at a hotel, where he registered and was assigned a room. Upon leaving the dining-room his hat was missing. *Held*, that the inn keeper was not liable. The mere registration and assignment put him in no different position than if he had registered and obtained a room elsewhere.

Pledge—What Constitutes.—Matthewson v. *Caldwell*, 52 Pac. Rep. (Kan.) 104. Certain collateral notes were set apart from others of a like kind as pledges, were placed in a package indorsed with a memorandum of the terms of the pledge, were pointed out to pledgee, and put in the vault of a bank where the pledgee and her husband, who was also one of the pledgors, had other securities. The deposit of the pledge was made by the husband, to whom it had been delivered as agent of the wife and in her presence, the nature of the transaction having been previously explained to her, and her assent thereto secured. The bank clerk to whom the notes were intrusted was instructed, pledgee assenting, to take special charge of them, and substitute other notes in place of such as might thereafter be paid. *Held*, a valid pledge, there being such a change of possession as to constitute a valid delivery, even though the pledgors had access to the place where the pledge was kept, and could have violated the terms of the pledge. The court attempts to distinguish the case from the very similar one of *Casey* v. *Cavaroc*, 96 U. S. 467, on the ground that in the latter case there was no memorandum or other distinguishing mark on the pledge, nor any such assent by the pledgee as to cause a novation, as in the present case.

Contract—Beneficial Interest of Third Party.—Thomas Mfg. Co. v. *Prather*, 44 S. W. Rep (Ark.) 218. Defendant company had entered into a contract by which it bound itself to furnish medical attendance to one of its employees, in case he should be injured while in its employ. The employee, on being so injured, engaged the services of plaintiff as his physician, with the full knowledge and approval of defendant. *Held*, Bunn, C. J., dissenting,

that plaintiff was not entitled to recover the value of his services from defendant, because of any contract implied from defendant's knowledge, plaintiff having testified that he would have rendered the services regardless of the facts that defendant would have been liable.

EVIDENCE.

Notes—Conditional Delivery—Parol Evidence—Statute of Frauds.—Hurt v. *Ford, et al.*, 44 S. W. Rep. (Mo.) 228. *Held*, where defendant's agent delivered the note of defendant to plaintiff, parol evidence is inadmissible to show that the agent was instructed not to deliver the note until he had procured another signature to it, and that these facts were known to plaintiff. The opinion considers such a transaction as an attempt to deliver the note in escrow; and, whatever may be the law elsewhere, that it is well settled in this State that it cannot be done by delivery to the obligee, but may be to a third party. Barclay, C. J., and Macfarlane, J., dissenting, assert, however, that not only are the opinions in other States conflicting on the point of conditional delivery to the payee, but that there is a want of harmony in the decisions in Missouri. They cite as especial authority for their view of the transaction, *Burke* v. *Delaney*, 153 U. S. 234, 14 Sup. Ct. 816; approved in *Michels* v. *Olmstead*, 157 U. S. 198, 15 Sup. Ct. 580.

Evidence—Privileged Communications.—Morton v. *Smith, et al.*, 44 S. W. Rep. (Tex.) 683. One who is employed as stenographer and clerk in an attorney's office is not prohibited from testifying to statements he overheard made by a party to an action to the attorney. The privilege extends only to the attorney and persons who are the media of communication between client and attorney.

TRIAL.

Abatement—Another Action Pending.—Wilson v. *Milliken*, 44 S. W. Rep. (Ky.) 660. The pendency of an action in a United States court is ground for a plea in abatement in a subsequent action in a State court in the same district, where the parties and subject matter are the same, and the relief sought is also the same. The statements to the contrary in *Gordon* v. *Gilfoil*, 99 U. S. 169; and *Stanton* v. *Embrey*, 93 U. S. 554, are considered by the court as mere dicta, which have been mistakenly followed by such cases as *Pierce* v. *Feagans*, 39 Fed. 587; and *Kilpatrick* v. *Railroad Co.*, 38 Neb. 620, 57 N. W. 664. Du Relle, J., dissenting, denies that these statements are dicta, and asserts that such cases as *Radford* v. *Folsom*, 14 Fed. 97, which is approved by the majority in this case, have since been overruled.

Remarks of Judge—Error Without Prejudice.—Klinker v. *Third Ave. R. Co.*, 49 N. Y. Supp. 793. During the trial of the case defendant's counsel moved for an adjournment, whereupon the court said: "This is simply trying to fool, to hoodwink the jury; that is all." In charging the jury, the court, to rectify the error, said: "Whatever has been said in regard to the matter by counsel on either side, or by myself, is withdrawn entirely from your consideration, including the remark that it was mere hoodwinking the jury." *Held*,

there was no error, as the latter statement operated to remedy the evil occasioned by the objectionable remark of the judge. *Cheesebrough* v. *Conover*, 140 N. Y. 382.

Trial—Failure to Examine Witness—Presumptions—Argument of Counsel.—Western and A. R. Co. v. *Morrison*, 29 S. E. (Ga.) 104. In the trial of an action against a railway company for damages for personal injuries, the evidence was contradictory as to the company's alleged negligence. The company, although it had other witnesses, failed to introduce and examine one employee, a fireman, who was present at the time and place the injuries were sustained, and who was then present in court. *Held*, that it was legitimate for the opposing counsel to argue to the jury that the failure of the company to so introduce and examine the employee was a circumstance from which the jury could draw an inference that if he had been examined, he would have testified as to matter prejudicial to the company. This was held to be so even though the defendant's counsel had caused the employee in question to be present in court that he might be examined by the plaintiff if he so desired, and had so informed the plaintiff's counsel. But the court said the plaintiff could not be then compelled to introduce an adverse witness, and that his failure in this respect was no excuse for the defendant. Simmons, C. J., in a very exhaustive opinion, dissented, mainly upon the ground that as a general rule it is the privilege of a party to rest his case upon such evidence only as he may deem proper and expedient to offer in his behalf; that all the law requires is sufficient proof, *Jackson* v. *State*, 77 Ala., 25; and that no unfavorable inference or presumption could arise from mere failure to examine a witness, and that such failure was not legitimate matter for comment by counsel.

INJUNCTION.

Injunction—Suit by Taxpayer.—Kittinger v. *Buffalo Traction Co.* 49 N. Y. Supp. 713. An action by a taxpayer will not lie to annul the acts of the legislature and of the municipal authorities granting to a corporation the right to construct surface railroads in public streets, and to enjoin the municipal officials and the corporation from proceeding further. Such authority is within the legitimate exercise of the power to regulate public rights for public uses unless fraud existed or unless such acts would cause an injury to municipal property. *Potter* v. *Collis*, 19 App. Div. 392, 46 N. Y. Supp. 471. Ward, J. *dissented*, on the ground that where corrupt, wrongful and illegal action is the basis of the cause of action, it is maintainable.

Receivers—Injunction.—Sternberg et al. v. *Wolff et al.*, 39 Atl. Rep. (N. J.) 396. Plaintiff and wife and defendant and wife formed a corporation for the transaction of the clothing business, the shares being equally divided between the two families. According to the by-laws the whole number of directors was necessary to constitute a quorum and the four persons above named were elected directors. Difficulties and dissensions arising, the management of the business by the board of directors was in a dead-lock, although the company was doing a successful business. A bill was filed by plaintiff to restrain the defendant from exercising the duties of treasurer (no mismanagement however being proved), with a further prayer that, if necessary, a receiver might be

appointed to take charge of said company and manage the same, pending the decision of the suit. *Held*, that an injunction was impracticable and that a receiver *pendente lite* should be appointed.

CARRIERS.

Carriers—Mileage—Issue on Conditions—Consideration of Contract.—Corcoran v. *N. Y. C. & H. R. R. Co.*, 49 N. Y. Supp. 701. The statute provided that railroad companies should issue 1000-mile mileage books at two cents per mile, and declared a forfeiture of $50 to the person to whom a railroad company should refuse to issue such book. The contract which defendant company required purchasers to sign on the mileage books read in part as follows: "It is only good for passage on the train when presented to the conductor with a passage ticket which had been received in exchange for the coupons which have been detached from this book." The passage ticket given in exchange for such coupons is subject to all the conditions in this contract, being good only for one continuous passage within the time named therein, and no stop-over will be allowed." The plaintiff boarded a train of the defendant company without procuring such passage ticket and offered it to the conductor. Upon the latter's refusal to accept it and demand for ticket or price of the same and plaintiff's subsequent refusal, plaintiff was forcibly ejected from the train. In an action to recover under the statute plaintiff contended that by force of the statute the conductor was bound to accept the mileage book, and that the contract was unauthorized by statute. *Held*, one judge dissenting, such contention good, there being no consideration for the contract. The performance of that which a party was under a previous legal, valid obligation to perform is not a sufficient consideration for a new contract. *Vanderbilt* v. *Schreyer*, 91 N. Y. 392, 401.

Carrier—Duty to Passenger at Depot.—Wells v. *N. Y. C. & H. R. R. Co.*, 49 N. Y. Supp. 510. In an action to recover damages for the death of plaintiff's intestate, her husband, it appeared that the deceased, upon showing his ticket to the gateman, was told to sit down, and that he would be notified when his train arrived. He therefore took a seat in the waiting room. Soon after it was noticed that he was ill and did not recognize acquaintances. The train had meanwhile arrived and departed without the deceased being notified. When the gateman noticed that he had failed to notify the deceased, and that he was in a sick condition, he instructed the policeman to put him out of the depot. The deceased was taken out, and wandering upon defendant's tracks was killed. *Held*, that the relation of carrier and passenger existed, and that under the circumstances defendant's employees were guilty of such negligence as to render the company liable. The question as to whether the condition of deceased was such that defendant might have refused to receive him as a passenger is not involved, as it did receive him as such. In case he was found, after he became a passenger, to be too ill to travel in safety, it was the duty of the defendant not to undertake to carry him, but to put him in a place of safety.

BANKS AND BANKING.

Banks—Checks—Insane Persons.—American Trust and Banking Co. v. *Boone*, 29 S. E. Rep. (Ga.) 182. The check of a person lawfully adjudged insane *held*, to be absolutely void and that the bank paying it did so at its peril

even though the fact the maker was insane was unknown to the bank at the time of payment, and that he had been adjudged insane by a court of foreign jurisdiction.

Banks and Banking—Failure to Return Draft—Liability of Bank.—Kirkham v. *Bank of America*, 49 N. Y. Supp. 767. Plaintiff, a regular depositor, deposited with defendant a draft on a foreign bank for collection. Defendant forwarded it to its agent where the drawee was located, for collection. The drawee gave as payment a sight draft upon its correspondent in another city. Upon receipt of such information from its agent, defendant credited plaintiff with the proceeds of the draft, and notified him to that effect. On presentation of the sight draft, payment was refused. About a month afterwards, defendant notified plaintiff that the credit given him on the draft was canceled. Plaintiff demanded the return of the draft. *Held*, that defendant was liable upon failure to return the draft, properly protested, or the amount therefor. *Bank* v. *Ashworth*, 16 Atl. Rep. 596. Patterson, J., dissents.

MISCELLANEOUS.

Replevin—Verdict and Judgment—Fixing Value of Each Article—Arrest of Judgment.—Byrne v. *Lynn*, 44 S. W. Rep. (Tex.) 311. In replevin for property described as a bar, counter, and ice chest, of the value of $900, and whiskey, of the value of $108, *held*, defendant was not entitled to have judgment arrested because the jury rendered a verdict which failed to find the separate value of each article, there having been no evidence tending to show such separate value. Compare, however, *Blakely's Adm'r.* v. *Duncan*, 4 Tex. 185; *Hoeser* v. *Kraeka*, 29 Tex. 450; *Cole* v. *Crawford*, 69 Tex. 124, 5 S. W. 646, which the court attempts to distinguish from the present case. See also, *Blake* v. *Powell*, 26 Kan. 320; *Hanf* v. *Ford*, 37 Ark. 545.

Negligence of Parent—When not Imputed to Child.—Kowalski v. *Chicago G. W. Ry. Co.*, 84 Fed. 586. The contributory negligence of a father, as the driver of a wagon, in causing a collision with defendant's train is not imputable to his infant child, who was in the wagon with him at the time, so as to prevent the child from recovering for injuries received. The case of *Thorogood* v. *Bryan*, 8 C. B. 115, and cases in this country based thereon, holding the negligence of the driver to be imputable to the occupants of the vehicle is no longer of force in this country. Since *Little* v. *Hackett*, 116 U. S. 366, 9 Sup. Ct. 391, it has been generally held that there is no legal identity between the driver of the vehicle and those occupying it as passengers or upon invitation of the driver. Upon principle, the fact that the person injured was also the infant child of the driver cannot alter the case.

Wills—Construction—Description of Property—Stock.—Capehart et al., v. *Burrus et al.*, 29 S. E. Rep. (N. C.) 97. A testator, after giving his wife several tracts of land, two horses, two cows, and other personalty, and a tract of land to each of several children, in a separate paragraph of the will, declared that "all my notes, bonds, stock, and money on hand I wish divided between my wife," and children named. *Held*, that the word "stock" should be construed by association with the other words used as meaning bonds and

evidence of shares in corporations, and not live stock; and that the fact the testator had no "stock" securities at the time of making the will, nor at his death, but had a large amount of live stock, could not be considered in determining the meaning of the word "stock" as used, such facts not appearing in the will. Clark, J. (Faircloth, C. J., concurring), dissenting, held that in arriving at the testator's intention it was just and natural to conclude that he intended to divide the kind of stock that he had (*Clark* v. *Atkin*, 90 N. C. 629); and that for this purpose it was also proper to consider the condition of the testator's family and estate, and the kind and extent of property he owned at the time of making the will (*Lassiter* v. *Wood*, 63 N. C. 360).