RECENT CASES.

CONTRACTS—AGAINST PUBLIC POLICY—BRADY V. YOST, 55 Pac. 542 (Idaho).—Plaintiff and defendant entered into a contract whereby plaintiff, among other things, agreed to obtain for the defendant the contract to print certain legal notices for the United States. These legal notices were not required to be published by the lowest bidder, and the price to be paid for them was fixed by the government. The official in charge had a right to publish them in any paper of general circulation in a given territory. Plaintiff used no improper means to obtain the contract, and defendant published a paper of general circulation within the required territory. *Held*, that the contract was not void as against public policy.

CORPORATIONS—LIABILITY FOR CONTEMPT—PUNISHMENT—NEWSPAPER ARTICLE—PROCEDURE—TELEGRAM NEWSPAPER CO. V. COM., ETC., 52 N. E. (Mass.) 445.—A newspaper, owned by a corporation, published an article during a trial of a petition for the assessment of damages against a city for the taking of petitioner's land, to the effect that the city had offered petitioner $80 for the land at the time of taking, but he demanded $250. *Held*, that as this fact, if true, was not admissible in evidence in the case, the article was calculated to prejudice the jury and prevent a fair trial, and was, therefore, a contempt of court.

CRIMINAL LAW—CAPITAL PUNISHMENT—QUALIFICATION OF VERDICT.—WINSTON V. U. S., 19 S. C. 212.—Revised Statutes, Section 5339, declares that every person who commits murder in any place or district under the exclusive jurisdiction of the United States shall suffer death; and Act July 15, 1897,—29 (29 statute 487), provides that, in all cases in which the accused is found guilty of murder under Section 5339, the jury may qualify their verdict by adding thereto "without capital punishment." *Held*, that the latter provision authorized the jury to so limit their verdict in any case, without regard to the existence of mitigating circumstances, and that instructions confining the right to such cases were erroneous. Mr. Justice Brewer and Mr. Justice McKenna dissenting.

CRIMINAL LAW—PRISON DISCIPLINE—RIGHTS OF CONVICTS—EX POST FACTO LAWS.—MURPHY V. COMMONWEALTH, 52 N. E. (Mass.) 505.—A statute (Pub. St. c. 222 § 20) authorized deductions to be made to prisoners convicted of offenses while it was in force for good conduct and permits to be at liberty, on certificate of the prison commissioners. *Held*, the statute was not a mere matter of prison discipline, but a grant to which prisoners were entitled as of right, for faithful observance of the rules, and for not having been subjected to punishment; and this, although the statute allowed the commissioners to revoke the permit without cause shown. And a subsequent statute which in any way interferes with the privilege thus granted is, as to prisoners convicted while the former statute was in force, *ex post facto*, and void.

CRIMINAL PROCEDURE—APPEAL—DISMISSAL—ESCAPE.—PEOPLE V. ELKINS, 55 Pac. 599 (Cal.).—Defendant was convicted of murder and appealed from the

conviction. Pending the hearing of the appeal he escaped. On motion of the Attorney-General an order was issued that the appeal stand dismissed unless the defendant shall within thirty days return to custody.

EVIDENCE—CROSS-EXAMINATION.—DAY v. DONOHUE, 41 Atl. 934 (N. J.).—Defendant, who was a master, being sued for negligence in furnishing material for a scaffold, gave testimony which tended to show he had used ordinary care. On cross-examination he was asked if he was insured against loss in case the verdict went against him. *Held*, that it was within the discretion of the trial court to allow the question. Van Syckel and Depue, J. J., dissented on the ground that such testimony was immaterial and irrelevant.

EVIDENCE—CROSS-EXAMINATION—PEOPLE v. DOLE, 55 Pac. 581 (Cal.).—Defendant on trial for forging a check testified in his own behalf that he won the check in a game of poker. On cross-examination he was asked whether he had stated this to the person who arrested him, or to the officer in whose custody he was placed, or to the person who informed him of the particular charge against him. *Held*, that such question was proper. McFarland, Henshaw and Temple, J. J., dissented on the ground that a man's silence to his jailors can not be used against him.

INSOLVENCY—POWER OF ASSIGNEE—UNRECORDED MORTGAGE—NEWTOWN SAVINGS BANK v. LAWRENCE, ET AL, 41 Atl. 1054 (Conn.).—Under Conn. G. S., § 2961, providing that no conveyance shall be effectual to hold lands against any other person but the grantor and his heirs unless recorded, the assignee in insolvency of the grantor may sell property free from an unrecorded mortgage made by his assignor. Andrews, C. J., and Hammersley, J., dissented.

LIFE INSURANCE—CONTRACTS—FRAUDS—RECISSION—NEGLIGENCE—MCCARTY v. N. Y. LIFE INS. CO., 77 N.W.Rep. 26 (Minn.).—An agent of the insurance company solicited the plaintiff to take out a policy of insurance upon his life, stating the character and terms of the policy. Plaintiff agreed to take one of the kind and terms described by the agent. Thereupon the agent filled out an "application" and presented it to plaintiff for his signature; falsely representing to him that it was an application for a policy of the character and terms which he had described. Plaintiff signed the application without reading it, in reliance upon the representations of the agent, and gave his promissory note in payment of the premium. He did not read the policy for six weeks, when, upon discovering that the terms were materially different from what they had been represented to be by the agent, he immediately returned the policy, requesting that they cancel it and return to him his note. The company refused and transferred the note to an innocent indorsee, who recovered, and the plaintiff thereupon brought suit to recover the value of the note. *Held*, notwithstanding there was a stipulation requiring an alteration of one of their policies to be put in writing, and submitted to the home office to render it valid, plaintiff could recover. *Insurance Co.* v *Fletcher*, 117 U. S. 519, O. Sup. Ct. 837, distinguished. Negligence is not a good defense in an action of fraud between the original parties to the contract. As to the contention that the parties could not be placed in *statu quo*, plaintiff having been insured for six weeks, and that the only remedy was an action for deceit, the court held that where one party has obtained an unconscionable advantage over another by fraud, and a recission would be in furtherance of justice, a recission may still be had,

although the parties cannot in all respects be fully restored to their former condition. *Conlan* v. *Roemer*, 52 N. J. L. 53, 18 Atl. 858; *Hammond* v. *Pennock*, 61 N. Y., 145.

MASTER AND SERVANT—CONTRACTS—AVOIDING LIABILITY FOR NEGLIGENCE—RELEASE—RAILROADS—JOHNSON v. CHARLESTOWN RY. CO., 32 S. E. Rep. 2, (S. C.).—2 Const. 1895, Art. 9, § 15, provides that railroad employés shall have the same rights and remedies for injuries suffered from the acts or omissions of the corporation or certain employés as are allowed by law to persons not employés, and that their representatives shall have the same right of action for their death; that knowledge of any employé of the defective or unsafe condition of ways, etc., shall be no defense to an action for injury caused thereby, except as to conductors and engineers voluntarily operating unsafe cars or engines; and that any contract, expressed or implied, made by any employé, to waive the benefit of the section shall be void. In an action for the death of an employé, the railway company by way of affirmative defense alleged that the plaintiff was a member of the Relief and Hospital department, organized for the purpose of establishing and managing a fund for the payment of definite amounts to employés. Plaintiff had received the benefits of the organization after his injury and before his death, and the company maintained that they were released from any obligation. The court being evenly divided they were forced to affirm the judgment of the court below, not allowing the administratrix to recover. Pope, J., in the main opinion maintained that the contract, because of the constitutional provision, was null and void, and being null and void could not be made valid by receiving any benefits thereunder. *Wallingford* v. *R. R. Co.*, 26 S. C. 258, 2 S. E. 19.

MASTER AND SERVANT—PROXIMATE CAUSE—NEGLIGENCE—MARYLAND STEEL CO. OF SPARROWS POINT v. MARNEY, 42 Atl. 60 (Md.).—Defendant, who was plaintiff's employer, knowingly employed an incompetent workman whose negligent management of certain apparatus brought a number of other workmen into danger. Plaintiff, a skilled workman, whose business was in the use of the same apparatus, attempted to prevent the injury to his fellow servant, and in doing so voluntarily entered into danger. He was injured and sued his employer. *Held*, that the negligence of his fellow servant was the proximate cause of the injury, and that the plaintiff's action in interposing to prevent injury to the other employés was not negligence per se. A judgment in favor of the servant was affirmed.

MORTGAGE—ASSIGNMENT—IMPLIED WARRANTY—WALLER v. STAPLY, 77 N. W. Rep. 570 (Iowa).—An assignment of a mortgage carries with it an implied warranty of the genuineness of the mortgage.

MUNICIPAL CORPORATIONS—APPROPRIATIONS—CHARITIES—STATE EX. REL. ORR v. CITY OF NEW ORLEANS ET AL. (PROTESTANT ORPHANS' HOME ET AL. INTERVENERS) 24 South. R. 666 (La.).—Constitution of the State of Louisiana declares that "no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect," etc. *Held*, this refers to public treasury of the state, and not to appropriations made by Common Councils of cities, or to money taken from city treasuries. Breaux and Muller, J. J., dissenting.

MUNICIPAL CORPORATIONS—BONDS FOR LOCATION OF COUNTY SEAT—CURATIVE ACT—VALIDITY—SCHNECK v. CITY OF JEFFERSONVILLE, 52 N. E. (Ind.)

212.—The Common Council of defendant city on August 8, 1876, passed an ordinance authorizing the issuing of twenty year negotiable bonds to fund an indebtedness created by the city, arising out of expenses incident to procuring the removal of a county seat and its location in the municipality, and of the necessary public buildings. By the decision rendered in June, 1896, in *Myers* v. *City of Jeffersonville*, 145 Ind. 431, the validity of these bonds and an attempt of the city to refund them, under the law then existing, was denied, although the power of the Legislature to levy a special tax on the municipality to pay all the cost of the location was affirmed, on the ground that the municipality receives a special benefit from the location of the county seat within its limits. The Const. Art. 13, § 1, as amended March 14, 1881, prohibits the creation of city debts beyond a certain amount. A certain act was passed after the adoption of the constitution legalizing the above bonds issued before the adoption of the constitution. *Held*, valid, no vested rights having intervened, although the city indebtedness, with such bonds, exceeds the constitutional limit. Although the location of the county seat and erection of the necessary buildings are not "public improvements or public works" within the meaning of the statute authorizing the city to donate money or bonds, yet they are of a nature affording such color of authority that the Common Council in issuing them will be presumed to have acted under the supposed authority of the statute and its requirements. The curative act, passed after the decision (supra) holding the bonds invalid, is not an attempt by the Legislature to exercise judicial power in violation of Const. Art. 7, § 1. One judge dissenting.

MUNICIPAL CORPORATIONS—CITY ORDINANCE—WATERING STREET CAR TRACKS—STATE v. CANAL & C. R. R. Co., 24 South. R. 265 (La.).—A city ordinance of New Orleans requires corporations operating street electric cars within the city limits, upon tracks laid down in public streets, to water their tracks so as to effectually lay the dust within their tracks. *Held*, that such an ordinance is a valid one, as being a legal exercise of the police power of the city. It is not unreasonable, as it tends to promote the comfort and convenience of passengers, as well as of inhabitants of the city.

MUNICIPAL CORPORATIONS—CONTRACT FOR REPAIRS—CITY OF KANSAS CITY v. HANSON ET AL., 55 Pac. 513 (Kan.).—One of the provisions in a contract made by a city for the pavement of a street was that the contractor should give a bond to keep the pavement in good order for five years. The city assessed the abutting owners to obtain the money to pay the contractor. *Held*, that the assessment could not be enforced. As the contractor must have charged a higher price because of his agreement to keep the pavement in good order, this was an attempt to charge the abutting proprietors for the repair of the pavement of a street. This cannot be done. When the street is once paved the duty of repairing the same is thrown on the city at large.

MUNICIPAL CORPORATIONS—REGULATION OF HACKS—REASONABLENESS OF ORDINANCES—EX-PARTE BATTIS—48 S. W. Rep. 513 (Tex.).—An ordinance making it misdemeanor to "stop, stand or detain" any carriage or vehicle used in carrying passengers or freight on certain named streets, or in front of public hotels, except when actually engaged in loading or unloading passengers or or freight. *Held*, unreasonable and void.

MUNICIPAL CORPORATIONS—VALIDITY OF APPROPRIATIONS—ORDINANCES—CONCLUSIVENESS—CITY OF CHICAGO ET AL. v. NICHOLS, 52 N. E. (Ill.) 359.—An order was issued for the expenditure of a further sum for lighting the streets, after the City Council had appropriated a certain sum for lighting the city. By Rev. St. c. 24 § 90, no expense can be incurred by the city for any purpose in excess of the amount provided therefor in the annual appropriation bill, unless warranted by some "casualty" or "accident." *Held*, that the construction of elevated railroads and depots in the streets, whereby the streets were darkened, and the combination, though unlawful, of electric and gas lighting companies, whereby the prices of lighting were raised, is not such "casualty" or "accident," nor is the declaration of the City Council that it is such conclusive in a court of law.

PROPERTY—EASEMENTS—MOON v. MILLS, 77 N. W. 926 (Mich.).—The owner of property abutting on an alley twelve feet wide had a perpetual right of way over it, in common with other abutters, and maintained an outside stairway and platform over the alley, thirty-five inches wide, which did not incommode the other abutters. The alley was never dedicated to the public by any fiat. *Held*, that he could not be compelled to remove the obstructions. One of the owners in common of a way, who erects an obstruction on his part, beneficial to himself, and which does not tend to incommode one who has an equal right, cannot be compelled to remove such obstruction.

PROPERTY—GIFT CAUSA MORTIS—DELIVERY—CAYLOR v. CAYLOR'S ESTATE, 52 N. E. (Ind.) 465.—Deceased, an hour before her death, called for her nephew, and being told he was not present, directed her husband to deliver certain personal property of hers which he had then in his possession to her nephew, to whom she declared she wished to give all her property; and the husband promised to carry out her request. *Held*, sufficient to establish a *donatio causa mortis* in favor of the nephew, although there was no manual delivery of the property either to him or to deceased's husband. Compare with *Liebe* v. *Battman*, 54 Pac. 179, YALE LAW JOURNAL, vol. VIII, p. 102, where, under the circumstances of the case, the court held there was no gift.

PROPERTY—MECHANICS' LIENS—PRIORITY OF VENDORS' LIENS—COOLEY ET AL. v. BLACK, 48 S. W. Rep. 1075 (Kent.).—A statute providing that one who performs labor and furnishes materials in the erection of a building "shall have a lien thereon, and on the land upon which such improvements may have been made, or on any interest the owner has in the same, to secure the amount thereof." *Held*, that the lien of a vendor of the land, which extends to buildings subsequently erected thereon, is superior to mechanics' lien as given in above statute. Guffy, J., dissenting.

PROPERTY—REPLEVIN OF PROPERTY EXEMPT FROM EXECUTION—PRESCOTT v. STARKEY ET AL., 41 Atl. 1021 (Vt.).—Vermont statutes provide that when goods are unlawfully taken or detained, or when goods which are attached or taken in execution are claimed by a person other than the defendant in the suit or debtor in execution, they may be replevied. Goods of a defendant that were exempt from attachment or execution were attached. *Held*, that these goods could not be replevied by the defendant. Tyler and Thompson, J. J., dissented on the ground that exempt property taken by an officer on attachment is wrongfully taken and is not taken under the attachment.

REVENUE ACT—TELEGRAMS—DUTY TO STAMP—KIRK v. WESTERN TEL. CO., 90 Fed. Rep. 809.—Under act of Congress of June 18, 1898, § 18, providing that a Telegraph Co. shall incur a penalty for transmitting a message not stamped as required therein; and § 7, providing that one who shall "make, sign, or issue" an instrument not properly stamped, shall be subject to a fine. *Held*, that it is the duty of the maker or signer of the message offered for transmission to affix the stamp.

SURETY—EXTENSION OF TIME—KAUFFMAN v. ROWAN ET UX., 42 Atl. 25 (Pa.).—The man primarily liable on a debt secured by a mortgage on his wife's lands, contracted in writing with the mortgagees to make certain payments. They on their part agreed on such payments being made that the time of the maturity of the mortgage should be extended one year. The mortgagees expressly stipulated that in no way should their rights for the enforcement of the mortgage be relinquished or prejudiced. The money was not paid. *Held*, that even though the wife be considered a surety for her husband's debt, she is not released by such extension of time.

TORTS—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE AFTER KNOWLEDGE OF PLAINTIFF'S PERIL—GENERAL AND SPECIAL FINDINGS—KREUZER v. PITTSBURGH, C. C. & ST. L. RY. CO., 52 N. E. (Ind.) 220.—Where a child of seven and a half years fell asleep at a crossing and was run over by a railroad train, the jury found that it was daylight, in a populous city, approaching a crossing, where children were liable to be, and that the sleeping child was in plain view from the engine for 300 feet from the crossing, so that the fireman and engineer could have seen him had they looked. It was also found that the child knew that trains were run thereon, and had capacity sufficient to understand that, if he remained on the track, he was liable to be run over. *Held*, sufficient to show contributory negligence so conclusively as to prevail over a general verdict for plaintiff; also, that the rule that a person, placed in peril by his own negligence, can nevertheless recover if the person inflicting the injury could have prevented it by ordinary care after discovering the situation, does not apply, although the train was proceeding negligently at an excessive rate of speed and the bell was not rung. McCabe, J., dissenting, holds that it was not a matter of law, but a question for the jury to decide what amount of intelligence is comprised in the "ordinary" intelligence of any boy seven and a half years old. Also, since the negligence of the boy was found to be antecedent to that of the trainmen, and that the latter, if they had used ordinary care, could have seen him in time to avoid running over him, their negligence, and not his, was the proximate cause of the injury. That the rule in Indiana, and most of the states, is different, he strenuously denies, after an exhaustive review of the cases. For a very similar case, agreeing with this dissent, see *Pickett* v. *R. R.*, 117 N. C., 616, 53 Am. St. R. 611.

LOSS OF VESSEL—NEGLIGENCE OF OFFICERS.—WILLIAMS v. HAYS, 52 N. E. (N. Y.) 589.—The rule that a person of unsound mind is responsible for his torts the same as if he were of sound mind, *held*, not to apply to a case where a vessel was lost by the negligence of her master, who had become temporarily insane through exhaustion caused by his efforts to save her during a storm. The court considered it a case for applying the maxims, "The law intends what is agreeable to reason; in does not suffer an absurdity," and "Impossiblity is an excuse in law, and there is no obligation to perform impossible things." Bartlett, J., dissenting.

TORTS—RAILROADS—COLLISIONS AT CROSSING—EVIDENCE—CONNOLLY v. N. Y. CEN. & H. R. R. Co., 55 N. Y. Supp. 118.—Plaintiff claimed that decedent was killed by the negligence of a railroad's employees in starting a train over a street railway crossing when the car which decedent was driving was about twenty-five feet from the railroad track. To rebut the charge of negligence and to show contributory negligence on plaintiff's part a contract between the railroad and the street car company, over whose tracks decedent was driving, and requiring street cars to come to a full stop not less than ten feet from the track and the conductor of the car to go on the track to look for approaching trains, was sought to be put in evidence, but was excluded in plaintiff's objecting. *Held*, two judges dissenting, error, since it gives the engineer of the railroad the right to assume that the car would come to a full stop before reaching the track; and this, although defendant offered no evidence to show what connection decedent's company had with the street car company that was party to the contract.

TRADE MARKS—LABOR UNIONS—SMALZ v. WOOLEY ET AL., 41 Atl. 939 (N. J.). Reversing 39 Atl. 539.—Bill to enjoin the use of a trade mark and label imitating and counterfeiting a trade mark and label adopted and filed by the Union Hat Makers' Association of Newark, in accordance with New Jersey statutes. Statute held constitutional and the suit thereon maintainable. The court also held that on general principles the bill was sufficient. The grounds of decision in *Weener* v. *Brayton*, 152 Mass. 101, 25 N. E. 46, discussed and criticised. The New Jersey court held that it is not necessary that the person or association claiming a trade mark should itself own or sell the articles to which it is applied. Neither is it necessary that the trade mark should indicate the particular person or persons from whom the article to which it is applied gets the quality it marks. For a Kentucky case to the same effect see *Hetterman et al.* v. *Powers et al.*, 43 S. W. 180, YALE LAW JOURNAL, Vol. VII, 239.

TRUSTEES—COUNTY JUDGES—LIABILITY FOR PRIVATE TRUST FUNDS—ANDERSON ET AL. v. ROBERTS ET AL., 487 S. W. Rep. 847 (Mo.).—A certain fund was directed by a testator to be paid to the judges of the County Court, to be vested in said court as a permanent "fund" for certain charitable uses. *Held*, that the County Court as such was the real trustee, and hence when the judges of said court turned over the fund to the county treasurer they placed the fund in the only proper repository for funds that the County Court had the management of, and had thus fulfilled their duty and were not responsible for the misappropriation by the treasurer. Gantt and Robinson, J. J., dissented on the ground that the County Court, as such, could not be trustee, but only the judges as individuals, and hence the judges were responsible for greater diligence than the mere turning over of the fund to the treasurer.