RECENT CASES.

When does notice to an officer of one company received as officer of another estopp the first? — Decision on bill of intervention gives Cir. Ct. of Appeals jurisdiction.—Trust Co. v. *R. R. Co.*, 48 Fed. Rep. 850. A railroad was built, equipped, and bonds were issued in payment therefor on the faith of the road and equipment. The contractor was at the same time general manager and principal stockholder of the railroad company. He was also president of an improvement company which furnished the equipment and rolling stock without payment and without any oral or written contract of sale. Certificates of completion upon faith of which the bonds were issued stated that "there had been delivered in good working order upon said railroad" a proportional amount "of rolling stock and equipment," but did not state that the railroad bought or owned it. And it was not by the contract the duty of the contractor to furnish the same. The mortgagees brought proceedings of foreclosure. The assignee of the improvement company brought a bill of intervention praying that the receiver of the road might be ordered to pay said assignee for the equipment and rolling stock on the ground that no title had ever passed to the railroad company. The master's report held that the legal effect of this state of facts was to create the relation of bailer and bailee between the improvement and the railroad companies. That the improvement company was not estopped from setting up title because its president was the contractor to build and general manager of the railroad upon whose certificates of construction and equipments bonds were issued whose proceeds he received. The court, in 48 Fed. Rep. 32, adopted this report and ordered the receiver to pay the interveners accordingly. This appeal was taken to the circuit court of appeals from the decree on the bill of intervention. Was such decision on bill of intervention such a "final decision" as gave the court jurisdiction? Upon this the court say: "The decision in the court below on the intervention of the Hiawassee Co. was a final decision upon the matter distinct from the general subject in litigation." * * "While perhaps the court may, for its own protection, hereafter be compelled to insist that causes pending in the circuit and district courts shall

not be brought to this court for review piecemeal, we are not inclined to enforce such a rule in this case, even if we have authority so to do."

Upon the main question of estoppel the decision of the lower court was reversed as follows: "The case does not require that we should find that there was an actual sale of the rolling stock to the railway company. Under the circumstances, as to the placing of the rolling stock on the railway for use by the railway company apparently as owner, the issuance of bonds by the trust company on certificates, in accordance with the contract, based upon this rolling stock and the beneficiary result thereof to Eager, (the contractor), both Eager and the improvement company are estopped in equity from attacking the railway company's title to the rolling stock in question as against the interest of the bondholders. As to Eager, this estoppel ought not to be questioned, and we are of opinion that it is equally clear as to the improvement company, for it was charged with full notice of all the circumstances as fully as Eager himself was informed, and yet, as a volunteer, aided Eager in obtaining the rolling stock, and in delivering it upon the railroad, which otherwise he might not have been able to do, and thereby obtained the issuance of bonds based on delivery of the rolling stock on the railroad in good working order, etc. The improvement company occupies the same position as the owner who stands by in silence while another sells his property. It is considered that the intervener stands in the shoes of the improvement company, so far as the rolling stock is concerned, and can assert no better title thereto than the improvement company could have asserted had no transfer been made."

Passengers' Knowledge of Regulations of Railroad Companies — Admissibility of Parol Evidence to Vary Contract. — In *New York L. E. & W. R. Co.* v. *Winters' Adm'r.*, 12 Sup. Ct. Rep. 356, decided in February 1892, Winters purchased of defendant's ticket agent in Boston an unlimited ticket for Chicago, paying an extra compensation for a stop-over privilege at Olean, N. Y., and receiving the agent's assurance that the ticket sold him would allow him to stop over at Olean "by speaking to the conductor." He told the conductor of his wish to stop over at Olean, who said that he would "fix him all right," and punched his ticket but gave him no stop-over check. On his resuming his ride from Olean he was ejected for refusing to pay his fare, as the conductor would not accept his cancelled ticket, and he had no stop-over check, which the rules of the company required a passenger intending to stop over to

obtain from the conductor. Held, that the R. R. Co. was liable in damages for this wrong. The court said: "Passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of conductors or other employees of railroad companies as to the internal affairs of the company, nor are they required to know them. In this case there is no evidence that notice or knowledge of the existence of the rules of the defendant company, or what they were with respect to stop-over regulations, was brought home to the plaintiff at the time he purchased his ticket or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca after stopping off at the former place. It is shown by the evidence that Olean was a station at which stop-over privileges were allowed. Under such circumstances it was entirely proper for the passenger to make inquiries of the ticket agent and to rely upon what the latter told him with respect to his stopping over at Olean. * * * The reason of such rule is to be found in the principle that when a party does all that he is required to do under the terms of a contract into which he has entered and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract." With regard to the admission of parol evidence to vary the contract between the parties constituted by the ticket and the regulation of the company, the language of the court is as follows: "While it may be admitted as a general rule that the contract between the passenger and the railroad company is made up of the ticket which he purchased and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller, from whom he purchased his ticket at the time of such purchase, is inadmissible as going to make up the contract of carriage and forming part of it."

Injunction — Removal of School House — Rights of a Tax Payer.— In *Graves* v. *Jasper School Township*, 50 N. W. Rep. 904, the Supreme Court of South Dakota has decided a very novel and interesting case. It regards the rights of an elector and property owner in determining the situation of the school-house for the district in which he resides, and the manner of asserting such rights. The school board of Jasper township attempted to remove the school-house of sub-district No. 1 to sub-district No. 5, and to pre-

vent this the plaintiff sued out an injunction against the board. He objected to such removal on the grounds that his children would be obliged to go two and three-quarters miles to school instead of a half mile, as formerly; and that it would necessitate the imposition of an extra tax upon his property. The action turned upon two points, viz.: (1) The right of the plaintiff in such case to invoke equity on his behalf, and (2) The right of tax-payers in regard to the location of school-houses. As to the first, the court held that while ordinarily it is the duty of a public corporation to bring a suitable action against any of its officers who are acting fraudulently or beyond the scope of their powers, yet if such corporation does not or will not bring such action, anyone immediately affected by the abuse may proceed to vindicate his rights. Also that there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. (Dillon on Municipal Corporations, and *Crampton* v. *Zabriskie*, 101 U. S. 601.) Then too the plaintiff's interest was not joint and common with that of the other tax-payers of his sub-district, but his injury was an individual one, inasmuch as it imposed an equal tax upon him, who would be injured, and upon others, who would be benefited, by the proposed removal. Therefore he had in such case abundant right to invoke equity to restrain such action. As to the second question, it was decided that when a school-house has once been legally located, it can be removed only by competent authority ; and such competent authority rests not in the township school board, but in the will of the majority of the voters resident in the subdistrict, as expressed in a public election. "It is not in the power of a township school board, or of any number of citizens of a sub-district, to make such removal without that vote being taken and so declared, and any attempt to do so is without the solemn sanction of the electors, and is illegal and void." As it had appeared in evidence that the board had acted on its own reponsibility, and that no vote of the electors had been taken on the matter, it was held that the proposed removal could not be made.

Constitutional Law — Inter-State Commerce — License. — The case of *Harmon* v. *City of Chicago*, 29 N. E. 732 (Ill.) considers at length one phase of the much mooted inter-State commerce question. The facts are briefly these. The plaintiff, Harmon, owned twelve steam tugs, plying in waters around the city of Chicago, and licensed by the United States to engage in inter-State com-

merce. The Chicago City Council passed an ordinance taxing tugs, etc., twenty-five dollars each. Harmon paid the license tax under protest, and immediately brought proceedings in assumpsit, resting on the general proposition that the city of Chicago had no right to exact a license fee from boats engaged in inter-State commerce, on the ground that such an ordinance was unconstitutional, conflicting with the congressional power of regulating commerce. The defendant sought first to sustain the validity of the city ordinance on the ground that its enforcement was an exercise of police power. The court having decided this proposition untenable, the defendant contended, on rehearing, that the harbor being dredged and kept in general repair at the expense of the city of Chicago, the license fee charged vessels should be regarded merely as a proper compensation for the use of the water course and not as a tax upon the commerce in which such vessels were engaged. Having admitted that if the ordinance was in any proper sense a regulation of inter-State commerce, so far as it was so, it was repugnant to that provision of the constitution granting to congress the power to regulate commerce among the several States, and therefore void, the court said that it was equally clear that the city of Chicago, under statutory authority having improved the harbor and river at its own expense, could exact from vessels using the water course a reasonable compensation for the improvements thus furnished. This clause of the constitution and also that forbidding any State to levy imports or tonnage duties has reference in any given case only to the use of the highways, whether on land or water, *in their natural state.* "It did not contemplate that such highways could not be improved by artificial means, and for outlays caused by such work the State may exact reasonable tolls," (*Huse* v. *Glover*, 119 U. S. 543). As to whether such tolls could legally take the form of a license upon the tugs which navigated the river the court held that such was a proper mode of exacting compensation for the benefits conferred.

Railroad Companies — Accidents at Crossings — Trespasses — Contributory Negligence. — In the case of *Fehnrich* v. *Mich. Cent. R. R. Co.*, 49 N. W. Rep. 890 (Mich.), it was held that where a boy of fourteen years, in attempting to cross a track upon which an engine was standing in plain sight, and in so doing, instead of squarely crossing, turns his back upon the engine and walks along the track for a short distance, and in consequence thereof is struck and injured, it is not *per se* negligence, but is a question of fact for a jury; and

furthermore that when one in using a street for the purpose of travel comes to a railroad-crossing, he not only has a right to cross, but to walk upon it in order to get to a more direct route, and while so doing is not a trespasser so long as the track continues along the street, distinguishing case of *Kelly* v. *Railroad Co.*, 65 Mich. 186.

Estoppel—Proof of Handwriting.—In *Tunstall* v. *Cobb*, 14 S. E. Rep. 28 (N. Car.), B. conveyed land to the plaintiff by a deed which was duly registered. Afterwards an indorsement was made on the deed, purporting to be signed by the plaintiff, and relinquishing all his right to the deed. B. moved back upon the land and was permitted to occupy it until his death without paying rent. He paid the taxes, and the plaintiff several times declared that he had no claim to the land. B. died, devising the land to one of the defendants. The court held that the indorsement did not operate as a reconveyance of the land, nor was the plaintiff estopped by his conduct from claiming the land, although the defendant, in a court of equity, might enforce the endorsement as a contract to reconvey, if a valuable consideration could be shown to have passed. The genuineness of the plaintiff's signature to the endorsement was disputed, and, to prove it genuine, the defendant produced a paper, which was not connected with the case, bearing the plaintiff's signature, which a witness testified to be genuine. An expert was called to compare the two signatures. The court held, Clark, J., dissenting, that it was an error to allow the comparison, and said: "In North Carolina it seems to be settled law that an expert, in the presence of the jury, may be allowed to compare the disputed paper with other papers in the case whose genuineness is not denied, and also with such papers as the party whose handwriting gives rise to the controversy is estopped to deny the genuineness of, or concedes to be genuine; but no comparison by the jury is permitted." The decisions of the American courts on this subject have not been harmonious. See 1 Greenl. Ev. §§578–581 and 1 Whart. Ev. §713.

License—Revocation.—*Croasdale* v. *Lannigan*, 29 N. E. Rep. 824, decided that a mere verbal license given to an adjoining owner to erect a retaining wall on the licensor's land is revocable after the erection of such wall. The court said: "There has been much contrariety of decision in the courts of different States and jurisdictions, but the courts in this State have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the

licensee before revocation, is nevertheless revocable at the option of the licensor; and this although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the licensor. This we believe is the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable. But to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite a different matter." It was better, the court said, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant depending upon what, in his view, might be considered equity in a given case.

Agency — Unauthorized Sale by a Drummer of His Samples. — *Savage* v. *Pelton et al.*, 27 Pac. Rep. 948 (Col.), was a case where a travelling salesman employed to sell goods from samples which he carried in trunks furnished for that purpose, sold his trunks and their contents. In deciding that such sale was beyond the agent's authority and therefore void, and that the power to sell was not to be implied from the character of the agency, nor from the ordinary methods used in its execution, the court say: "The law is clear that the limits of an agent's authority are to be found in the instructions of his principal. This general rule is necessarily subject to the modification that the agent is entitled to employ all the necessary and usual means of executing the principal's authority, and that this implied power is frequently modified by his right to use all the ordinary means justified by the usages of the trade in which he is engaged. Neither of these principles is broad enough to confer upon an agent, employed to solicit orders for goods upon the strength of samples furnished him, authority to sell those things which are essentially necessary to the performance of his duties."

Contributory Negligence — Question for Court. — *Emry* v. *Raleigh & G. R. Co.*, 14 S. E. Rep. 352 (N. C.), was a case involving contributory negligence, and was brought up on error of the lower court in failing to charge the jury as to what constituted such negli-

gence. In remanding the case the court said, in substance: It is not the province of the jury to ascertain and determine what is negligence or what is reasonable diligence. When, however, the facts are to be found by the jury from conflicting evidence upon issues of fact, the court should submit the evidence to them with appropriate instructions as to the varying aspects of the evidence. It should carefully instruct them that, if they found one state of facts, then there is negligence; if a second, then there is no negligence; if a third, then there is or is not, as the case may be. It is not sufficient or proper to instruct the jury to consider and determine whether "a prudent man" would or would not do the things in question, and to be governed by their best judgment in that respect. This would practically leave it to them to decide what did or did not constitute negligence or reasonable diligence in the case before them, whereas they should receive the law from the court, and finding the facts, apply them to the instructions they so received, and not otherwise. The jury cannot decide that there is or is not negligence in view of the evidence and facts before them, by deciding what in their judgment, "a prudent man" would think of the facts, and how he would probably act upon them.

Taxation of Leased Rolling Stock—Interstate Commerce.—Denver & Rio Grande Railway Co. v. *Church, County Treasurer*, 28 Pacific Rep. 468 (Colorado.) Plaintiff railway company had in its possession and was operating certain cars, owned by and leased from the Pullman Car Co., which was located and had its domicile in another State, and in operating the road these cars frequently passed by connecting lines into the adjoining States. The State Board of Equalization assessed these cars for taxation and the plaintiff brought this action to enjoin the defendant from collecting the taxes thereon. The plaintiff claimed that the State had no right to tax these cars since they were the property of a foreign corporation, and that because these cars frequently ran on connecting lines and passed into other States, they were employed in interstate commerce and, therefore, this taxation was a violation of that clause of the Federal Constitution which gives Congress power "to regulate commerce * * * among the several States." The court held, relying upon *Car Co.* v. *Commissioners*, 11 Sup. Court Rep. 876, that, since these cars were operated by the Denver & Rio Grande Railway Co., and in their possession and leased to them under contract with the Pullman Car Co., the State had the right to tax them; and that the

clause of the Constitution above referred to does in no way inhibit this taxation, although these cars pass into adjoining States and Territories.

Conveyance Absolute in Form — Evidence to Adjudge the Same as Mortgage.—Perot v. *Cooper*, 28 Pac. Rep. 391 (Colorado.) Defendant gave plaintiff three promissory notes, in consideration of a loan. On the same day that the loan was made, the defendant entered into an "agreement" or contract with the plaintiff by which "in consideration of one dollar and other good and valuable considerations," he covenanted and agreed "to transfer and convey to said Perot certain interests in certain stocks, bonds, lands, letters patent, etc." In this action, the defendant claimed that the above contract was collateral to and intended to secure the payment of aforesaid promissory notes. The court held in reference to the claim of the defendant as follows: "A conveyance absolute in form may be found and adjudged to be a mortgage in fact, when it is shown by evidence, clear, certain, unequivocal and trustworthy, that such instrument was executed, delivered, accepted, and intended by the parties merely as collateral to secure the payment of a debt. * * We are not prepared to say that an instruction as to the quantum of proof in cases of this kind must necessarily contain the words 'beyond a reasonable doubt' borrowed from the criminal law. * * But where there is a substantial conflict in the evidence, a mere preponderance is not sufficient to warrant a change in the character of a deed or other solemn instrument of writing."

When can Self Criminating Testimony given in a previous proceeding be admitted in a subsequent criminal proceeding?—U. S. v. *Smith*, 47 Fed. Rep. 501. The respondent was indicted for forgery. He had voluntarily testified before the Grand Jury to shift and fix the criminality on another. This testimony he sought to contradict at his trial. To the receipt of the testimony given before the Grand Jury objection was made based upon Sec. 860 R. S., which provides among other things, that: "No * * * discovery or evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him * * * in court of the U. S. in any criminal proceeding." The objection was overruled as follows: "The object" of this statute "was to remove the personal privilege, so that evidence against others might be compulsorily obtained. * * * This statute was not designed to protect a party from the

consequence of making inconsistent statements for the purpose of wrongfully fixing crime upon another, and thereby shielding himself, but rather to protect from prosecutions based upon affirmative evidence as to transactions which involve the witness with others in questionable proceedings." The lack of the element of compulsion is to be remarked in this case as distinguishing it from apparently antagonistic cases.

Banks — Damages for a Refusal, Through Mistake, to Cash a Check.— Schaffner v. *Ehrman*, 28 N. E. 917 (Ill). Through a cashier's mistake the appellee's deposit at appellant's bank appeared to be less than it was, and in consequence four of the appellee's checks were returned through the clearing house marked, "Refused for want of funds." No actual malice or fraud on the part of the bank, or special injury to appellee was shown, but the court, citing *Prelin* v. *Bank*, L. R. 5 Exch. 92, and *Patterson* v. *Bank*, 130 Pa. St. 419, was of the opinion that the case contained the elements of slander, viz.: (1) a tendency to bring the appellee into disrepute, and (2) malice. The returning of the marked checks would naturally tend to bring a trader into disrepute and materially damage his credit, and the fact that he is a trader takes the place of special damages. All the elements of legal malice were present, the refusal was intentional and without just excuse. The court therefore held that there was no error in the award of substantial damages. There was, however, one dissenting vote, Craig, J., holding that the action, though in form tort, was founded upon a contract and therefore the plaintiff was only entitled to recover such damage as the evidence might show he had sustained.

Construction of Wills—Amount of Legacy.—Bush v. *Couchman*, 17 S. W. Rep. 1020 (Ky.) was an action by the widow of a testator to recover rent for certain land, under the following codicil: "I desire my said wife, in addition to the $3,000 given to her in my will, to have a sum equivalent to the rent of the land derived by her from her father's estate, and which I have used or received rent from ever since it became her property." The main difficulty was to determine the meaning of the word rent and whether the recovery should be confined to the amount due up to the date of the will or to the death of the testator. The executor interpreted the word rent to include only net rent, viz.: the amount left after deducting the expense of repairs, taxes, etc. The court held that she was not seeking to recover the amount of rent due to her

from the testator for the use of the land by him—for to this she had no legal right—but a bequest of a sum of money equivalent to that rent, and she was in consequence entitled to the whole rental value of the land. "As the will takes effect at the death of the testator, and not at the date of the will, unless it appears that it was so intended—and as it does not so appear in this case—it was right to estimate the rent to the time of the death of the testator."

Torts of Employees—Liability of Principal.—In *Gillingham* v. *Ohio River Railroad Co.* 14 S. E. Rep. 243 (W. Va.), the conductor of the defendant's train caused the arrest of the plaintiff, who at the time of arrest was an orderly and well behaved passenger. The arrest was made by a police officer upon the request and under the directions of the conductor, who was mistaken in supposing the plaintiff to be the person who a short time before had made an assault upon him. The arrest was insisted upon by the conductor, although the plaintiff and a fellow passenger stated that he (the plaintiff) was not the person who had made the assault. Both the assault and the arrest were made at a time when the conductor was not required or expected by the defendant to perform duties as a conductor, but he was on and about the train acting in that capacity. The conductor testified at the trial that the act of pointing out the plaintiff to the officer who made the arrest was a personal one, and that the arrest was made while he was off duty as a conductor. However, it was held that, he being on the train, and acting and speaking as one in charge, receiving passengers and making reading to start, the defendant was responsible for his acts consistent with his duties as a conductor.