RECENT CASES.

CORPORATIONS—ORGANIZATION—STOCK SUBSCRIPTION—WILLIAMS V. CITIZEN ENTERPRISE CO., 57 N. E. 581 (Md.).—Action by a corporation to recover a stock subscription. *Held*, that a subscription to the capital stock of a proposed corporation cannot be enforced in the absence of a *de jure* organization. A *de facto* organization is not sufficient.

The general rule is that a subscriber to the stock of a *de facto* corporation cannot defend, in an action on his subscription, by showing that there is no *de jure* organization. *Buffalo & Allegany R.R. Co.* v. *Cary*, 26 N. Y. 75. To constitute a *de facto* corporation, there must be (1) a charter or general law under which the corporation might have formed; (2) an attempt to form a corporation, and *actual performance of corporate acts pursuant to the charter or law. Morawitz Corp.*, sec. 777. In this case it does not appear whether there was such a performance of corporate acts as is required to constitute a *de facto* corporation, and it may be distinguished from *Buffalo & Allegany R.R. Co.* v. *Cary* supra on this ground.

CRIMINAL LAW—HOUSE OF ILL-FAME—STATE V. CHAUVET, 83 N. W. 717 (Ia.).—The defendant traveled from place to place in a black covered wagon in which prostitution was carried on. *Held*, guilty of keeping a house of ill-fame.

This is the first time that a wagon has been regarded as being within a general law against keeping "houses" of ill-fame, although some cases have held that the term included tents. *Killman* v. *State*, 28 Am. Rep. 432; *Clifton* v. *State*, 53 Ga. 241. A vessel on the Mississippi was held to be within the meaning of the statute. *State* v. *Mullen*, 35 Ia. 199. *State* v. *Powers*, 36 Conn. 77, says that any building, not necessarily a dwelling, kept for immoral purposes, is included by the statute.

EXEMPLARY DAMAGES—CORPORATIONS—AGENCY—BANK V. TEL. CABLE CO., 103 Fed. 841.—An operator employed to transmit money orders between banks sent a forged money-order telegram over the wires. *Held*, the telegraph company is liable for the torts of its agents, but only in compensatory damages.

The early theory was that a corporation was not liable in exemplary damages. But the case of *Lake Shore* v. *Prentice*, 147 U. S. 101, has so far changed this as to permit a recovery when the agent of the corporation has been acting within the scope of his authority. The position of this telegraph operator, accustomed to send money-order telegrams, would seem to be within the rule of this case. But *Railroad Co.* v. *Prentice* lays down a principle that is extremely difficult of application. An agent is hardly ever acting within the scope of his authority when he does a deliberately wrongful act. Consequently, *Railroad Co.* v. *Prentice*, instead of extending, puts satisfactory limits upon the doctrine of exemplary damages, and the present case is an illustration of its limitations.

HIGHWAYS—ABUTTING OWNERS—BICYCLE PATHS—RYAN V. PRESTON, 66 N. Y. Sup. 162.—Action by an abutting owner, holding fee in the highway to its center, to restrain side-path commissioners from constructing and maintaining a bicycle side-path. *Held*, such a side-path could be constructed.

Where land is taken for a country highway, leaving the fee in the abutting owner, it is impliedly dedicated to the use which the public may in the future require. *Palmer* v. *Electric Co.*, 158 N. Y. 231. And that the use of bicycles has become so extensive and almost universal that the public require that a portion of the highway be set aside for their exclusive use.

CONTRIBUTORY NEGLIGENCE—CHILD PLAYING IN STREET—IMPUTED NEGLIGENCE OF PARENT.—66 N. Y. Sup. 280.—Child, three years old, who had been playing on the sidewalk, ran out into the street, and was run over and killed by a truck. *Held*, it was not negligence *per se* on the part of the parents to permit the child to go unattended upon the public street.

This subject is in a very unsatisfactory state, but this decision, concurrently with other recent decisions on the same point, seems to take a more practical and reasonable view than the previous one held by the courts of the same state. See *Birkett* v. *Ice Co.*, 110 N. Y. 504; and, *contra*, *Hartfield* v. *Roper*, 21 Wendell 615. Also, *Cooley on Torts* pp. 680-683, and cases therein cited.

HOMICIDE—RIGHT TO COLORED MAN ON JURY—BULLOCK V. STATE, 47 Atl. 63 (N. J.).—The accused, a colored man, was convicted of murder. At the return of the panel, the defendant's counsel challenged the array, on the ground that no colored man was returned on the panel. Challenge overruled and exception taken. *Held*, that unless return was made designedly it did not deprive him of the rights granted by the Fourteenth amendment.

This is certainly the law. But if colored men had been wilfully excluded in the selection of the jury, it would have been a violation of the Act of Congress of 1878, forbidding such discrimination. *Strauder* v. *West Virginia*, 100 U. S. 303.

INJUNCTION—THREATENING SUITS FOR INFRINGEMENT OF PATENTS—DAVIDSON ET AL V. NATIONAL HARROW CO., 103 Fed. 360.—Defendant sent circulars threatening the customers of the complainant with infringement suits. *Held*, on motion for an injunction, that it would not be granted as long as the propriety of granting it is doubtful and all allegations of fraud, notice and bad faith are absent.

The decision in this case is one of a number that have appeared since *Kidd* v. *Horry*, 28 Fed. 773. It shows more clearly than any other what the attitude of the court will be hereafter. The fact that the plaintiff may have an adequate remedy at law makes the granting of injunctions in such cases as these a doubtful matter, consequently the court is rightly conservative in refusing to grant an injunction except on the clearest case of provocation. See *A. B. Farquahar Co. Ltd.* v. *National Harrow Co.*, 99 Fed. 160. 9 *Yale Law Journal* 333.

INSOLVENT CORPORATIONS—CLAIMS FOR SERVICES—LENOIR ET AL V. LUIVILLE IMPROVEMENT CO., 36 S. E. 185.—A corporation having gone into insolvency, a receiver was duly appointed. The president and secretary of the corporation sued for the balance of their salaries due while the corporation was in the hands of the receiver. *Held*, they could not recover, as there was no breach of a contract.

Two views have been put forth on this question: The New Jersey court, in *Spader* v. *Manufacturing Co.*, 20 Atl. 378, held that claims for damages arising from breaches of contract for services, caused by the insolvency of the defendant corporation, are entitled to be paid *pro rata* out of the funds in the

hands of the receiver. In New York, in *People* v. *Insurance Co.*, 91 N. Y. 174 the following view, adopted in this court, is taken: That the state by its actions had so paralyzed the acts of both contracting parties that performance by either party was made impossible. In the case before us, the receiver, by order of the court, had taken control of the property of the company; any interference, therefore, with his duties by the plaintiffs would have been punishable as a contempt of court. During the receivership, therefore, being unable to perform and not performing their duties, they have not earned any salary for that period, and cannot recover damages for a breach of contract when the defendant had been guilty of no breach.

JOINT NEGLIGENCE—PROXIMATE CAUSE—ORDINARY CARE—WHEELER V. GIBBON, 36 S. E. 277.—The plaintiff, in attempting to cross a city street in a violent storm, held his umbrella at his side, pointing down the street in the direction from which the storm was coming, thereby obscuring his view in that direction. He was knocked down and injured by the defendant, who was driving rapidly up the street with his oilcloth up in front of his buggy. The jury in the trial court found joint negligence, rendering a verdict for the plaintiff. *Held* on appeal that a finding for the plaintiff cannot be reviewed.

In the present case, both plaintiff and defendant were negligent, but the effect of plaintiff's negligence could have been avoided by the exercise of ordinary care on the part of defendant, which fact, the court holds, entitles plaintiff to a judgment, even though plaintiff's negligence contributed to the injury, opposing the doctrine maintained by many courts that if plaintiff's negligence contributed to the injury he is not entitled to recover. See *Railway Co.* v. *Ives*, 144 U. S., 408, and also *Neal* v. *Gilbert*, 23 Conn., 437.

MUTUAL BENEFIT INSURANCE—BENEFICIARIES—MURDER OF ASSURED—LIABILITIES OF COMPANY—SCHMIDT V. NORTHERN LIFE ASSN., 83 N. W. 800 (Ia.). —Beneficiary in a certificate of insurance murdered the assured. *Held*, that she thereby forfeited all rights under the certificate, but the company was not relieved of responsibility.

The nearest American cases in point are those where an assured has improperly designated a beneficiary, which event does not make the policy void, but the insurance becomes payable to those who would have taken it in the absence of any appointment. *Shea* v. *Assn.*, 160 Mass. 289; *Burns* v. *Grand Lodge*, 26 N. E. 443; *Britton* v. *Supreme Council*, 46 N. J. Eq. 102. The court followed the celebrated English case of *Cleaver* v. *Assn.*, (1892) 1 Q. B. Div. 17, which was much like the case at bar, and accordingly held that the certificate reverted to and became a part of the assured's estate.

NEW TRIAL—MISCONDUCT OF JUROR—BARKER ET AL V. STEWART, 36 S. E. 238.—The attorney for one of the parties, while on the street, seeing one of the jurors suffering from an ailment, suggested a certain remedy as likely to benefit him. They both entered a drug store, and the attorney paid for and procured the medicine. The attorney did not know that the man was on the jury, and the juror intended to pay for it himself. Verdict was obtained by the attorney's client, and this appeal taken to set it aside. *Held*, that, under the circumstances, the conduct of counsel and juror did not militate against the purity of jury trial, and therefore the verdict of the trial court should not be disturbed.

It was similarly held in *Railroad* v. *Wiggins*, 18 S. E. 187. Here, the plaintiff, in a suit for damages from spinal injuries, was assisted downstairs by one of the jurors during a recess of the court, after trial had begun. Such acts of courtesy and civility are but the common expression of human kindness, and should be favored rather than discountenanced.

RAILROADS—CONSTRUCTION IN STREETS—CONSENT OF MUNICIPALITY—PRESUMPTION OF GRANT—TOWN OF NEWCASTLE v. LAKE ERIE & W. R.R., 57 N. E. 516 (Ind.).—Action to compel a railroad company to remove its tracks from the streets of a municipality. *Held*, in this state municipalities have authority, under their *general powers*, to grant railroad companies the right to lay tracks longitudinally upon the streets, provided this use does not impair the use of the street as a highway by the general public.

The general rule is that power to authorize the laying of tracks in streets must be *expressly* delegated to municipalities. "The usual and ordinary powers of municipalities to regulate streets and keep them free from obstructions are not sufficient, it is believed, to empower them to authorize the use thereof for the purpose of constructing and operating thereon a steam railroad, at least between different towns in the state, since such powers are not to be enlarged by construction and were not conferred for this purpose." *Dillon Mun. Corp.*, sec. 705. In Kentucky, Iowa and Indiana, this power is implied and need not be expressly delegated. *Des Moines* v. *Val. R.R.*, 29 Iowa 148; *Kistner* v. *Indianapolis*, 100 Ind. 210; *R.R. Co.* v. *Applegate & Dana* (Ky.) 289; *Wolfe* v. *R.R. Co.*, 15 Munroe (Ky.) 404.

STREET RAILWAYS—ADDITIONAL BURDEN—NEW USE OF STREET—TROLLEY LINE—LACROSSE CITY RY. CO. v. HIGBEE, 83 N. W. 70 (Wis.).—Action to enjoin defendant from cutting down an electric street railroad pole, which, having been erected at the outer edge of his sidewalk, he claimed imposed an additional burden. On appeal, the defendant was enjoined.

Hobart v. *Railroad Co.*, 27 Wis. 194, held, that a street railway, if it did not materially interfere with travel or ingress and egress rights of adjoining property owners, did not impose an additional burden on the fee of the street, as it was but an improved method of using the street. The defendant relied on *Krueger* v. *Telephone Co.*, 81 N. W. 1041, which held, that telephone poles were an additional burden. The court distinguished these two doctrines by saying that the latter was a new use of the street, while the former was but a new mode of devoting the street to public travel, its original purpose. The poles were a necessary accompaniment of the electric road, and the defendant was therefore enjoined from cutting them down.

WAIVER OF CONDITION BY AGENT—AUTHORITY OF AGENT—POLICY OF INSURANCE AS EVIDENCE OF AGENT'S AUTHORITY—UNITED STATES LIFE INS. CO. v. LESSER, 28 Sou. Rep. 646 (Ala.).—The policy contained a provision that only the president, secretary and actuary of the company could make or alter contracts or waive forfeitures. *Held*, this condition was not binding on the insured unless the insurance company strictly enforced it and abided by it on their part, and parol testimony was admissible to show that this limitation on agent's authority had been removed by the ratification of acts done by the agent in excess of the limitation.

This is opposed to the rule that parol testimony is not admissible to vary the terms of a written contract, but the court ruled that agency is a fact; if the written statement expresses the fact it is binding; if it does not, the insurance company ought not to derive the benefit of an actual extended authority while it takes refuge behind the barrier of a limited written one when a question of liability arises. This view is supported by *Norton* v. *Insurance Co.*, 96 U. S. 234, and *Wyman* v. *Insurance Co.*, 119 N. Y. 274. The contrary view is taken by *Kyte* v. *Insurance*, 149 Mass. 114, where it is said, "No waiver of forfeiture for condition broken will be effectual except the waiver is made in the manner prescribed in the policy."

WILLS—DISPOSAL OF TRUST ESTATE—HUMPHREY v. CAMPBELL, 37 S. E. 26 (S. C.)—*Held*, where a trust deed directed the trustee to pay the income of the estate to the testatrix for life, and provided that she should have power to dispose of the estate by will, and testatrix by will gave the estate to certain persons, the appointees not being those who would have inherited by the laws of descent, the trust estate on the death of the testatrix was not subject to the payment of her debts.

This case follows certain old South Carolina cases, *Bentham* v. *Smith*, Cheves Eq. 33; *Wilson* v. *Gaines*, 9 Rich. Eq. 420; but is opposed to the well-recognized rule that where a person has a general power of appointment, either by will or deed, and executes it, the property is deemed part of the assets and is subject to creditors. *Am. Eng. Ency. of Law*, 18-986; *Brandies* v. *Cochrane*, 112 U. S. 352; *Clapp* v. *Ingraham*, 126 Mass. 210.

WILLS—CONSTRUCTION—CREATION OF TRUST—ENFORCEMENT OF PROVISIONS IN EQUITY—COLLISTER v. FASSITT (N. Y.), 57 N. E. Rep. 490.—The fourth paragraph of the testator's will was as follows: "I direct my wife, out of the property hereinafter given and bequeathed to her, by this will, to use so much thereof for the support and benefit of my niece [the plaintiff] as my said wife shall from time to time *in her discretion* think best to do." Upon suit being brought by the niece to enforce the trust, the court below decreed that the testator's wife should pay her $1000 a year. *Affirmed*. Three of the judges dissent on the ground that, independent of the question whether a trust was created by this clause, it was clear that the amount, if any, to be paid, was left entirely to the discretion of the wife.

The majority opinion is in accordance with the view of the United States Supreme Court in the case of *Colton* v. *Colton*, 127 U. S. 300, where the provision was, "I recommend to her [the defendant] the care and protection of my mother and sister and request her to make such gift and provision for them as in her judgment will be best." It was there held that a trust was created and that it was the duty of the court to ascertain what provision would be suitable.

CONSTITUTIONAL LAW (MICH.)—LICENSE—CLASS LEGISLATION—VALENTINE v. BERRIEN CIRCUIT JUDGE, 83 N. W. 594 (Mich.).—Party was arrested for non-compliance with law requiring merchants, who sell produce upon commission, to execute a bond, in the penal sum of $5000, conditioned for faithful performance of their contract and payment of licenses. *Held*, that the law was unconstitutional.

This act was not aimed at brokers or commission merchants generally, but solely at dishonest sellers who pack their produce in such a manner as to deceive. The regulation did not fall within the police power of the state, as the business, properly conducted, was in no way detrimental to the health, morals or peace of the community, and the law afforded ample remedy for cheating. The justices accordingly held the law unconstitutional on the ground of its being class legislation and an unjustifiable interference with the right of citizens to carry on legitimate business.

CONTRACTS—DELAY—DAMAGES—REMOTENESS—ATLANTIC & D. RY. CO. v. DELAWARE CONS. CO. ET AL, 37 S. E. 13 (Va.).—Contractors agreed to do certain work within a certain time and failed to complete it within that time. The railroad was compelled to decline a shipment of goods upon this account, and claimed damages for loss of profit from this shipment. *Held*, that such profits were too remote and speculative.

This case is probably in line with the weight of authority, as it is said that it is wholly uncertain whether any profit would have resulted from the shipment. *Burruss* v. *Hines*, 94 Va. 413, 26 S. E. 875; *Central Trust Co. of N. Y.* v. *Clark*, 92 F. 293, 34 C. C. A. 354; *Taylor Manufacturing Co.* v. *Hatcher & Co.*, 3 L. R. A. 587. But damages are given for loss of rental where house had not been rented and it is not known that it would have been. *Covode* v. *Principaal*, 68 N. W. 987.