RECENT CASES.

ACTION TO ANNUL MARRIAGE—PHYSICAL EXAMINATION OF HUSBAND.—ANONYMOUS, 69 N. Y. Supp. 547.—This is a motion to compel the defendant to submit to a physical examination before trial. The action is brought by a wife to annul her marriage for fraud in that defendant represented himself to be in good health, when in fact he was sick with a venereal disease. Motion denied.

If necessary a physical examination, in this case, is permissible at the proper time. *McQuigan* v. *Railroad Co.*, 127 N. Y. 50; *People* v. *Roosa*, 60 N. Y. Supp. 244. An examination of this nature is only granted because of absolute necessity where all other means of proof have failed. As the plaintiff did not make it appear that an examination was absolutely necessary and that she could not establish her case in any other way, the motion was rightly denied.

ADVERSE POSSESSION—PUBLIC STREETS.—VILLAGE OF RED JACKET V. PINTON, 85 N. W. 567 (Mich.).—Defendant built a fence around his premises and enclosed therewith a certain portion of public street. In 1890, after an undisturbed possession of 23 years, he erected a building which extended over portion of street thus enclosed. The building was destroyed by fire, and this action is brought to enjoin defendant from re-building. *Held*, the defendant's possession was not adverse as to street, since there was an implied understanding between city authorities and abutter, that upon re-building the correct line would be recognized.

The only evidence to support this conclusion was that the defendant, in 1893, six years after prescriptive period had expired, recognized the street line in constructing other buildings. The court shows a decided tendency to seize upon all available means to avoid the rule laid down in *Big Rapids* v. *Comstock*, 65 Mich. 75, that an individual may acquire title to public street by adverse possession. This would indicate a leaning towards the contrary doctrine, which is supported by the weight of authority. *Dillon Mun. Corp.* Sec. 669, *and cases cited.*

BANKRUPTCY—APPEAL FROM ALLOWANCE OF CLAIMS—RIGHT OF CREDITORS TO APPEAL.—MCDANIEL ET AL V. STROUD, 106 Fed. 486.—An appeal, by creditors, from an order of a bankruptcy court, after the refusal of the trustee to allow the use of his name as taking the appeal should not be dismissed, provided the creditors had no time in which to procure an order requiring such trustee to consent. Purnell, J., dissenting.

The general rule is that any party or person injured by any judgment or decree has the right of appeal therefrom. The determination of the point here at issue depends upon the construction of the revised bankruptcy act of 1898. In *Chatfield* v. *O'Dwyer*, 101 Fed. 797, it was held that under the bankruptcy

act of 1898 an appeal could be taken only by the trustee or by a creditor in the name of the trustee and under permission from the court. The present case takes the contrary view, following *in re Roche*, 101 Fed. 956.

COMMON CARRIERS—DEFECTIVE FREIGHT ELEVATOR—LANDLORD'S LIABILITY.—SPRINGER v. FORD, 59 N. E. Rep. 953 (Ill.).—The owner of a building in which a freight elevator is operated, who permits an employee of his tenant to ride thereon in the discharge of his duties, occupies the relation of a common carrier of passengers for hire towards such employees.

The conflict of the decisions on the *status* of passenger and freight elevators, has been decidedly emphasized during the last few months by two notable decisions taking opposite views on the subject. Upon the heels of the case of *Griffen* v. *Manice*, decided by the New York Court of Appeals and commented upon in the current volume of this Journal, page 287, comes this case which holds the owner of a building in which a freight elevator is operated, liable as a common carrier for hire; the hire being the rent received from the tenant. The New York case, on the contrary, considers such occupation as inadequate to create the relation of carrier and passengers, and makes the passenger, when using the elevator, merely accept an implied invitation to make use of it, when doing business on the premises. Both cases are decided on grounds of what the courts consider public policy, but the weight of prior decisions seems to be decidedly in favor of the Illinois decision. *Deposit Co.* v. *Soblitt*, 172 Ill. 222; *Treadwell* v. *Whittier*, 80 Cal. 574.

DISTRIBUTION OF POWERS OF STATE—PROBATE COURT—JURISDICTION—CONSTITUTIONAL LAW—CITY OF JANESVILLE v. TELEGRAPH CO., 59 N. E. 781 (Ohio.).—A law conferring power on the Probate Court to determine the mode of construction of telegraph line along city streets, in case of disagreement between the city and company, is not invalid as vesting legislative powers in a judicial body. Shauck, C. J., and Marshall, J., dissenting.

In a carefully considered opinion the court here squarely reverses its former position, noted 10 YALE LAW JOURNAL 259. The defendant relied upon *Appeal of Norwalk Ry. Co.*, 69 Conn. 576, in which a similar statute was declared unconstitutional, but the court, after an exhaustive review, declines to accept it as binding, following the principle laid down in *Cooper's Case*, 22 N. Y. 84, that when any power is conferred upon a court of justice to be exercised by it as a court, the action of such court is to be regarded as judicial irrespective of the original nature of the power.

ELECTRICITY—NEGLIGENCE—TELEPHONES—DEATH BY LIGHTNING—SAFETY APPLIANCES—DANGEROUS POSITION.—GRIFFITH v. NEW ENGLAND TELEPHONE AND TELEGRAPH CO., 380 Atl. 643 (Vt.).—A., while sitting in his library near a telephone which he had rented of defendant, was killed by lightning which entered over defendant's wires. *Held*, that the question as to whether defendant used proper appliance to avert the danger, and the question of A.'s contributory negligence in not knowing that defendant had not adopted proper appliances to avert such a danger and in sitting near the telephone when a storm was approaching, were for the jury.

It is the duty of electric companies to guard against injuries to person and property by reason of electricity which may be conducted over their lines. *Brown* v. *Illuminating Co.*, 45 Atl. 182; *McKay* v. *Telephone Co.*, 111 Ala. 337; 10 *Am. and Eng. Enc. Law* (second edition) 872. The court intimated that it is the duty of a telephone company to have a lightning arrester or a ground connection on the wire outside each subscriber's house or place of business.

EMINENT DOMAIN—ELECTRIC SUBURBAN RAILWAY—NECESSITY OF TAKING—STATUTES.—IN RE RHODE ISLAND SUBURBAN RY. CO., 48 Atl. 591 (R. I.).—An electric railroad was authorized by statute to condemn land for its "corporate purposes." It filed a petition to condemn a wharf lot for a power house and coal pockets. Said wharf lot was five miles from its tracks. *Held*, that the taking was not for a public use.

The taking of private property for private purposes cannot be authorized by legislature. *In re Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42. The taking of private property for public purposes must be necessary. *Eldridge* v. *Smith*, 35 Vt. 484. The court declares that the use to which the land taken is put, must be essential to the public interest, and not pertain to the private interest of the company in the detail of its business, and that as the primary object in locating its power house and coal pockets on the said wharf lot, five miles from its tracks, was purely one of economy, the taking of that particular lot was not necessary for its "corporate purposes."

FACTORS—USAGE—SALE ON CREDIT.—M. M. WALKER CO. V. DUBUQUE FRUIT AND PRODUCE CO. ET AL, 85 N. W. 614 (Ia.).—Goods were consigned, without instructions, to be sold by a factor on commission. *Held*, that, in the absence of instructions or usage to contrary, factor has implied power to sell goods on reasonable credit.

This question has never before been adjudicated in Iowa, but the present decision is in accord with the great weight of authority. *Roosevelt* v. *Doherty*, 129 Mass. 301; *Edgerton* v. *Michels*, 66 Wis. 124; *Joslin* v. *Cowee*, 52 N. Y. 90. The court distinguishes the case at bar from *Durant* v. *Fish*, 40 Ia. 559, where sales on credit by an agent authorized to sell were held invalid.

FRAUDULENT CONVEYANCE—EVIDENCE.—BLAIR STATE BANK V. BUNN, 85 N. W. 527 (Neb.).—A debtor sold land to one of several creditors for a fair consideration in satisfaction of pre-existing debts. A re-conveyance of this property to the wife of the grantor was later contracted for by the purchaser. *Held*, that this contract could not be presumed to have been entered into for the purpose of defrauding, hindering, or delaying other creditors in the collection of their debts.

Indulgence to the homestead rights of the destitute debtor rather than a strict application of established principles of law seems to have produced this decision. This is shown by the language of the judge: "We view it as a laudable effort to preserve the homestead to the use of the family." In the face of *McClellan* v. *Pyeatt*, 4 U. S. App. 319, the decision cannot possibly stand as a rule to be followed in subsequent cases. Such re-conveyance has always been recognized as a badge of fraud; and if the homestead rights of the defendant protect him after the re-conveyance, there was certainly no necessity of the original transfer.

INHERITANCE TAX—DOWER—CONSTRUCTION OF STATUTE.—BILLINGS V. PEOPLE, 59 N. E. 798 (Ill.).—A devise for her benefit was renounced by the testator's widow, who elected to rely upon her common law right to dower. *Held*, that an inheritance tax law imposing a tax on all property passing by will or by the intestate laws of the State includes dowers.

The right of dower rests not upon statute, but on immemorial custom. It is furthermore a principle, admitting of no exception, *Cooley on Taxation*,

p. 244, that there must be a distinct legislative authority for every tax levied. *Litchfield* v. *Vernon*, 41 N. Y. 123. Yet dower is subject to legislative control, for while it is true that the husband cannot deprive his wife of her inchoate right of dower, the State may. *Rand* v. *Keiger*, 23 Wall. 148. Holding therefore, not by contract but by laws which the State may change, the widow's right of dower may be considered a part of the "intestate laws of the State."

INSURANCE—PROOF OF LOSS—TIME OF MAILING.—PEABODY V. SATERLEE, 59 N. E. Rep. 818 (N. Y.).—A condition in a fire insurance policy, requiring the insured to furnish proofs of loss within a certain time, is broken when the insurer does not receive them until after such time, although insured mailed them before the time had expired. O'Brien, Martin and Vann, JJ., dissenting.

Where notice is required to be given and no express method is pr ··r it must be personal notice as required by the common law. *Rathbun* v. *Acker*, 18 Barb. 393. And where in such case notice is sent by mail, there is only a presumption of receipt by the company. *Susquehanna M. F. Ins. Co.* v. *Toy Co.*, 87 Pa. St. 424. Where a policy required that notice of losses be given by mail, the Supreme Court of New York held that the sending of such notice by mail only raised a presumption that it was received. *Hodgkins* v. *Montgomery*, 34 Barb. 213. But the Court of Appeals in the same case (41 N. Y.) held it to be conclusive, which was certainly more in accord with the intent of the parties as evidenced by the express provision of the policy.

INSURANCE—WARRANTY—INTOXICANTS—HABITUAL USE.—SUPREME LODGE, K. OF P. V. FOSTER, 59 N. E. Rep. 876 (Ind.).—To the question, "To what extent do you use intoxicating liquors?" an applicant for life insurance answered: "Not at all." *Held*, to mean not an habitual use.

The language of the application must receive a reasonable construction; one within the contemplation of the parties at the time the contract was consummated. The only purpose of requiring the insured to state in the application to what extent he used alcoholic liquors, was to guard against the risk from insuring the life of one who was in the habit of using them to such an excess as to imperil his health. *Grand Lodge* v. *Belcham*, 145 Ill. 308.

LIABILITY OF LANDLORD—INDEPENDENT CONTRACTOR—INJURY TO TENANT'S GOODS.—PEERLESS MFG. CO. V. BAGLEY ET AL., 85 N. W. 568 (Mich.).—Landlord, in accordance with agreement with tenant, engaged an experienced contractor to put in a fire extinguishing apparatus. Contractor negligently put in a sprinkler which fused at too low a temperature, in consequence of which damage resulted to tenant. *Held*, the landlord was liable.

Defendant relied upon the rule that when one employs a competent, experienced and independent contractor, he is not liable for defects. See *Devlin* v. *Smith*, 89 N. Y. 470; *Miller* v. *Railroad*, 125 N. Y. 1180. This rule, however, is not applicable to case at bar, for the landlord owes an absolute duty to tenant and cannot acquit himself of liability by delegating that duty to an independent contractor. *Wertheimer* v. *Saunders*, 95 Wis. 573; *Sturges* v. *Theological Society*, 130 Mass. 414.

MUNICIPAL CORPORATIONS—SEWERS—OBSTRUCTIONS—INJURIES TO ABUTTING OWNER—NEGLIGENCE.—TALCOTT V. CITY OF NEW YORK, 69 N. Y. Supp. 360.—Action to recover damages sustained by the plaintiff in consequence of an obstruction in a public sewer, occasioned by no other cause, except the or-

dinary use to which it put. *Held*, that where a sewer under the control of a city becomes obstructed by ordinary use, and an abutting owner's property is injured thereby, a presumption of negligence arises calling upon the defendant for an explanation, and upon failure to show that watchfulness and care had been exercised to keep the sewer in proper condition, a finding of negligence would be sustained.

This case is in accord with the majority of decisions which hold that when a sewer has been determined upon and is constructed, the duties of constructing it properly and keeping it in good condition and repair are maintained, and that negligence in the performance of those duties will render the city liable for damages resulting therefrom. *Mills* v. *City of Brooklyn*, 32 N. Y. 489; *Boston* v. *City of Syracuse*, 37 N. Y. 54; *Mayor* v. *Furze*, 3 Hill 612; *Horn* v. *Burnhoof*, Ct. Ap. Conn.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONSTITUTIONALITY—ZELURDER V. BARBER ASPHALT PAVING CO., 106 Fed. 103.—A statute, whereby municipal corporations are given the right to assess abutting property owners for the total cost of street improvements without any opportunity first being given for an examination into the question of benefits, is unconstitutional.

It has long been settled that municipalities may have the legal power conferred upon them to assess the cost of street improvements against the property located in the neighborhood of such improvements. *Ill. C. R. R. Co.* v. *Decatur*, 147 U. S. 190; *Banman* v. *Ross*, 167 U. S. 548. Though such assessments are a form of taxation, yet even there the power of the legislature is not extended so far that it may authorize the taking of property without benefit being conferred on those assessed. The present case follows closely and relies almost absolutely on *Village of Norwood* v. *Baker*, 172 U. S. 269.

NEGLIGENCE—DEATH OF HORSE—FRIGHT.—LEE V. CITY OF BURLINGTON, 85 N. W. 618 (Ia.).—The negligent operation of a street roller so frightened a horse that it dropped dead. *Held*, no recovery from the city.

This is an unusual case and involves a very nice point of law. It is a settled rule, as to human beings, that no recovery can be had for injuries resulting from fright, where no immediate personal injury is received. *Ewing* v. *Railroad Co.* (Pa. Sup.), 23 Atl. 340; *Spade* v. *Railroad Co.* (Mass.), 47 N. E. 88. The court considers the same rule to be applicable to animals.

RAILROADS—FIRES—BURDEN OF PROOF—IMPROVED APPLIANCES.—WHITE V. NEW YORK, P. & N. R. Co., 38 S. E. 180.—*Held*, when a fire is caused by sparks thrown from a locomotive, that if it appears that the company owning the locomotive has discharged its duty by providing and keeping in repair the most approved appliances for preventing the throwing of sparks, there could be no recovery for damages caused thereby.

Fire caused by sparks from a locomotive is *prima facie* evidence of negligence. *R. R.* v. *Rogers*, 76 Va. 457. The using and keeping in repair of approved appliances is sufficient to rebut the presumption of negligence. *Kimball* v. *Borden*, 44 S. E. 45.

WATERS AND WATER COURSES—DAMS—OVERFLOW—PRESCRIPTIVE RIGHT. —CHARNEY V. SHAWNO WATER POWER, &c., Co., 85 N. W. 507 (Wis.).—

Defendant bought a mill dam which had been constructed forty-eight years before. Plaintiff asks that damages caused to his land by flowing of the dam be assessed. *Held*, that though the dam was constructed across a navigable stream without authority from the legislature, a prescriptive right might have been acquired as against private owners, but since the injury done to the land of the plaintiff had not been as great during the entire prescriptive period as at the time the action was brought, no such prescriptive right had been acquired.

If this is law there are very few good prescriptive rights in existence. A nuisance arising from the pollution of a stream, in order to acquire a prescriptive right, would have to be maintained every day of the week and at all hours of night and day for the requisite period. We conceive the law to be that a nuisance acquires a prescriptive right against individuals when it has been brought about for the requisite period by a business operated in the *natural* and *usual* way to accomplish the ends for which it was established. If the twentieth season after the building of the dam was a dry one, this does not destroy the greater prescriptive right acquired during the first season, which may have been a wet one. Indeed, the substantial increase of injury may be actionable, but it does not take away the previously acquired right. See *Sherlock* v. *Louisville, &c., R. R. Co.*, 115 Ind. 22.

REIMBURSEMENT OF EXECUTORS.—IN RE MCKAY'S ESTATE, 68 N. Y. Sup. 925.—Executors in good faith paid off a mortgage when, by 1 *Rev. St.* p. 749, sec. 4, the land should have passed to the legatees subject to the incumbrance. *Held*, that the executors were entitled to reimbursement out of any funds held by them or the testamentary trustees, for the benefit of the residuary legatee.

This seems to be the first case on this point of law under the statute.

NEW TRIAL—JUDGMENT BY DEFAULT—MERITORIOUS DEFENSE—NEGLIGENCE OF COUNSEL.—DENSERAW V. SAILLANT, 48 Atl. 668 (R. I.).—Defendant showed by affidavit that he had a probable defense, but that through the negligence of his counsel in failing to appear, judgment by default was rendered against him. *Held*, defendant was entitled to a new trial.

It is not the policy of courts to grant a new trial under such circumstances. *Donnelly* v. *McAdams*, 13 Atl. 108. In New Jersey by statute (2 *Gen. St.*, p. 2597, sec. 324) a judgment will be opened where injury results to one through the neglect or mistake of his attorney in failing to file a plea.

NEWSPAPERS—REFUSAL TO SELL TO DEALERS—RIGHT OF ACTION.—COLLINS V. AMERICAN NEWS CO., 63 N. Y. Supp. 638.—A complaint in an action by a newsdealer, alleging that an association of publishers of certain New York papers had agreed to cut off his supply unless he desisted from distributing, with the newspapers, circulars calculated to make him a competitor with the newspapers in the business of advertising, does not constitute a cause of action.

From the evidence it would seem that defendants do not propose to interfere with plaintiff's business, but merely refuse to aid him in injuring their own advertising business. No one can be compelled to sell his goods or labor to one with whom he does not wish to deal, merely because his refusal to do so may cause loss to him who wants them. *Allen* v. *Flood* (1898), App. Cas. 1; *Reynolds* v. *Associations*, 63 N. Y. Supp. 303.

MUNICIPALITIES—LIMITATION ON INDEBTEDNESS—ASSESSED VALUATION.—CITY OF CHICAGO v. FISHBURN, 59 N. E. 791 (Ill.).—Whenever a city is prohibited by law from becoming indebted exceeding 5 per cent. of the value of the taxable property, this amount is to be computed, not upon the full value, but upon the assessed value, although both values are recorded.

The point raised in this case appears to be new, at least to the Illinois courts, and the importance of the restriction is further increased by the magnitude of the expenditures of great cities to-day, and by the frequency of similar restrictions limiting taxation. When the legislature does prescribe such a limit, it must be observed, unless it is a total prohibition of all taxation. *Beck* v. *Allen*, 58 Miss. 143. The court is materially assisted to its conclusion by the fact, of which it takes judicial notice, that even where the statute requires that taxes be assessed on the full value, the action is universal of listing property at part only of its actual value.

PUBLIC CONTRACTS—MATERIAL—INTERSTATE COMMERCE.—PEOPLE EX REL TREAT V. COLER, 59 N. E. 776 (N. Y.).—The New York Labor Law of 1897 provided that no stone should be used on any municipal work unless prepared for use within the State. *Held*, in contravention of the interstate commerce clause of the Federal Constitution. Parker, C.J., dissenting.

This decision advances the position of the New York courts as regards the Labor Law of 1897, one step further than that taken in *People ex rel Rodgers* v. *Coler*, 59 N. E. 716, where the power of the legislature to enact such a restricting law is denied. Under the Constitution of the United States the citizens of each State have the right to resort to the markets of every other for the sale of their products, and business may not be hampered by State boundary lines. *People* v. *Hawkins*, 157 N. Y. 1. It is strongly argued in the dissenting opinion that the agreement in the contract in question to use only stone prepared in the State was binding between the parties, but the court holds that when the contractor's agreement rests upon the statute, it must fall with it.