RECENT CASES.

CARRIERS—LIABILITY—INJURY TO PASSENGER—PHYSICAL CONDITION OF PASSENGER—CONTRIBUTORY NEGLIGENCE.—ST. LOUIS S. W. RY. CO. OF TEXAS V. FERGUSON, 64 S. W. Rep. 797 (Texas).—The railroad company allowed a car to collide with the train in which the appellee and his wife were seated. The collision was accompanied with such force that it partially knocked the appellee's wife from her seat and greatly shocked her, producing within a few days a premature birth, whereby she was permanently injured in health. *Held,* that the company was liable.

The company claimed that the collision would not have injured an ordinary passenger, and the company or its agents had no knowledge of the passenger's condition. Among other cases it cited *Car Co.* v. *Barker,* 4 Colo. 344, 34 Am. Rep. 89, a very similar case, in which the injury was held the remote result of the negligence. The court expressed its disapproval of this case, and followed *Brown* v. *Railway Co.,* 54 Wis. 360, 41 Am. Rep. 51; and *Car Co.* v. *Dupre,* 4 C. C. A. 540, 21 L. R. A. 289. A railway company owes a duty to persons other than those of ordinary physical condition. They are presumed to know that persons, old, decrepit, and infirm travel on their trains, and they must exercise care accordingly, *Railway Co.* v. *Rushing,* 69 Texas 306.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—NEBRASKA STATUTE REGULATING INSURANCE—ANTI-TRUST ACT.—NIAGARA FIRE INSURANCE CO. V. CORNELL, 110 Fed. Rep. 816 (Neb.).—The statute defining trusts, declaring them illegal, and all agreements in relation thereto void, in order to prevent combinations between fire insurance companies, declared void all agreements by or between insurance companies relating to the amount of commissions to be allowed agents, or the names of transacting the business of fire insurance. It expressly excepted from its provisions all associations of workingmen. *Held,* that the statute was unconstitutional.

This statute deprived persons of their liberty in violation of the federal constitution, which guarantees not merely liberty of the person, but also liberty to make and enforce contracts. In excepting labor unions, it denied the equal protection of the laws to all persons not members of such organizations. The *Railroad Traffic Association Case,* 166 W. S. 290, 17 Sup. Ct. 540, was strongly urged by the defendant as upholding the doctrine of the statute. The court held that it did not, for the reason that the statute under consideration in that case was an act of Congress, and upheld by reason of the commerce clause of the constitution, while the statute in this case was a state statute.

CONTRACTS — PARTIES — KNOWLEDGE — MISREPRESENTATION.— BARCUS V. DORRIES, 71 N. Y., Supp. 695.—Plaintiff, under the name of Committee on Distribution, through agent, obtained defendant's order for books by falsely representing that the seller was a committee of Congress and that the books

could be obtained only on the recommendation of a congressman. *Held,* that defendant was not obliged to take the books, even though they were as good as represented. Williams, J., *dissenting.*

This question does not seem to have been decided by the New York courts before, but there are many cases in other jurisdictions sustaining this decision. The controlling principle is stated in *Smelting Co.* v. *Mining Co.,* 127 U. S. 387, that every one has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. See also *Ice Co.* v. *Potter,* 123 Mass. 28.

CONTRACTS—PUBLIC POLICY—PROVISION IN NOTE.—UNION CENTRAL LIFE INS CO. v. CHAMPLIN ET AL., 65 Pac. 836 (Okla.).—A stipulation in a note, which forbids the maker's discharging his obligation by borrowing money from anyone except the payee, is contrary to public policy and hence null and void.

No hard and fast rule may be laid down in determining what contracts are contrary to public policy. Mr. Story says in his work on Conflict of Laws, Sec. 546: "Whenever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy." The test is the evil tendency of the contract and not its actual injury to the public in a particular instance. *Brown* v. *Columbus National Bank,* 137 Ind. 655; *Atcheson* v. *Mallon,* 43 N. Y. 147; *Firemen's Association* v. *Berghaus,* 13 La. Ann. 209.

COUNTIES—BOARD OF SUPERVISORS—ORDINANCES—SUBMISSION TO VOTERS EX-PARTE ANDERSON, 66 Pac. 194 (Cal.).—In accordance with the directions of the state constitution, the statutes of 1897, Section 2, declares that the powers of a county can only be exercised by the board of supervisors or their agents. *Held,* that Section 13, which provides that any ordinance submitted by a certain number of legal voters and adopted at the polls shall have the same force as though ordained by the supervisors, is void. Beatty, C. J., *dissenting.*

The practical effect of the provisions in question would be to establish two equal, co-ordinate, law-making powers, each existing without any restrictions on the other. This would not only be an absurdity and a source of endless confusion, but plainly inconsistent with our accepted forms of government.

FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—CORPORATIONS—UNITED STATES v. S. P. SCHOTLER, 110 Fed. 1.—Under act of Congress, March 3, 1887, as amended by Act of Congress, August 13, 1888, providing that no civil suit may be brought against any person outside of the district of which he is an inhabitant or a resident, a corporation of one state may not be sued in the Federal Courts of another state, in which it has an usual place of business.

The Judicary Act of 1875 provided that a person must be sued in the district in which he resided or might "be found" at the time of service of process. Under this act it was generally held that a corporation of one state, having a place of business and an agent in another state might be sued in the latter state. *Railroad Co.* v. *Harris,* 12 Wall 65; *Insurance Co.* v. *French,* 18

Howard 404; *Boston Electric Co.* v. *Electric Gas Lighting Co.*, 23 Fed. 839; *U. S.* v. *American Bell Tel. Co.*, 29 Fed. 17. Under the act of 1887, however, the Supreme Court holds in *Shaw* v. *Mining Co.*, 145 U. S. 444, on which the present decision is based, that a corporation of one state is not an inhabitant or resident of another state in which it has a usual place of business. A contrary view is taken in *U. S.* v. *Southern Pac. R. Co.* (C. C.) 49 Fed. 297.

EQUITY—RIGHT TO INVOKE JURISDICTION—PROTECTION OF CONTRACTS ARISING OUT OF UNLAWFUL COMBINATION.—DELAWARE L. & W. R. Co. v. FRANK, 110 Fed. 689 (N. Y.).—The plaintiff asked for an injunction to enjoin ticket brokers from dealing in special tickets which were untransferable. It appeared that the plaintiff was a member of a combination formed by a number of railroads for the purpose of preventing competition, the passenger receipts of all such railroads being pooled and divided on an agreed basis. *Held*, that complainant was not entitled to equitable relief.

The combination formed by the railroads, being in violation of the federal anti-trust law, was illegal. A federal tribunal cannot be invoked to protect the issuance of a ticket which is the evidence of an agreement between railroad corporations specifically forbidden by an act of Congress, which has been sustained by the Supreme Court. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540; *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25. The complainant contended that the unlawful acts charged by the defendant did not relate to the subject matter. The court, however, held that the wrongdoing of the complainant was not remote, in that it had given birth to the combination whose tickets were wrongfully diverted by the defendant.

FOREIGN DIVORCE—SUBSTITUTED SERVICE—DOWER—BAR.—STARBUCK v. STARBUCK ET AL., 71 N. Y. Sup. 194.—Plaintiff, a resident of Massachusetts, obtained in that state a divorce from her husband, a resident of New York, who was served personally but who did not appear in the action. Although the husband married a second time, at his death in 1896, plaintiff brought action for dower. *Held*, that the Massachusetts decree was not binding on plaintiff in New York and hence did not bar her right to dower in husband's lands in that state.

This decision follows naturally from the strict attitude of the New York courts upon the question of foreign divorces. *Todd* v. *Kerr*, 42 Barb. 317; *Van Cleaf* v. *Burns*, 133 N. Y. 540; *In re Kimball*, 155 N. Y. 62. The court holds that the plaintiff by this action of dower, strictly speaking, does not question the validity of her divorce, but only maintains that its validity is confined to the jurisdiction granting it. This conclusion, however, is just the reverse of that reached in *In re Swales Estate*, 70 N.Y. Supp. 220, that where a party has invoked and submitted himself to the jurisdiction of any court, he cannot therefore be heard to question such jurisdiction. The weight of authority in this country is that such a decree dissolves the marriage relation and bars the right to dower. *Atherton* v. *Atherton*, 181 U. S. 155.

FRAUDULENT CONVEYANCES—PROMISE IN CONSIDERATION OF MARRIAGE—MARTIAL RIGHTS.—BRINKLEY v. BRINKLEY ET AL., 39 S. E., 38 (N. C.).—Where the defendant agreed to deed land to the plaintiff if she would marry

him, and after her promise to do so, but before marriage conveyed the land without consideration to his children by a former wife, such conveyance, though recorded before the marriage, was fraudulent and void as against a deed to plaintiff, made sixteen years subsequently. Clark, J., *dissenting*.

The above decision is rendered on the grounds that after an agreement to marry, a secret voluntary conveyance by one party is void, being in fraud of martial rights. *Poston* v. *Gillespie*, 58 N. C. 258; *Brown* v. *Bronson*, 35 Mich. 415; *Palmer* v. *Neave*, 11 Ves. 165. The minority opinion, however, is well supported by authorities. It seems well settled that a postnuptial settlement in pursuance of an antinuptial parol agreement is a voluntary conveyance. *Warden* v. *Jones*, 23 Beav. 487; *Trowell* v. *Shenton*, 8 Ch. Div. 318 (Eng.); *Reade* v. *Livingstone*, 3 Johnson Ch. (N. Y.) 481; *Smith* v. *Greer*, 3 Humphrey (Tenn.) 118. Decisions in the United States go still further, and are almost unanimous in holding that a voluntary conveyance is valid as against subsequent purchasers with notice. *Chaffin* v. *Kimball*, 23 Ill. 36; *Jackson* v. *Tower*, 4 Cow. (N. Y.) 599; *Lancaster* v. *Dolan*, 1 Rawle (Pa.) 231.

INSURANCE—POLICY—CONSTRUCTION—TOTAL LOSS.—DEVITT V. PROVIDENCE-WASHINGTON INS. CO., 70 N. Y. Supp. 654.—Defendant insured a cargo of produce "free of particular average." The boat was sunk, but part of cargo was saved and sent to port of destination in a damaged condition where, on sale, it brought only one-fourth of whole value when insured. *Held*, to be a constructive total loss for which insurer was liable.

The tendency of both American and English courts seems to be away from the theory that there must be a physical destruction or loss of identity of memorandum articles to constitute a total loss. The modern English rule reversing the position of the early case of *Cocking* v. *Frazer*, 4 Doug. 259, holds insurers liable for a total loss of value although articles remain in specie. *Rosetto* v. *Gurney*, 11 C. B. 186. The principal case following *Wallerstein* v. *Ins. Co.*, 44 N. Y. 204, goes even further by holding that the American rule that a damage exceeding fifty per cent. constitutes a constructive total loss, applies to memorandum articles. In *Kettle* v. *Ins. Co.*, 10 Gray 144, the Massachusetts court refused to decide the point, although expressing its opinion that the fifty per cent. rule ought to apply. To the same conclusion is *Poole* v. *Ins. Co.*, 14 Conn. 47. Yet the ruling of *Wallerstein* v. *Ins. Co.* was hardly in line with the early New York decisions; *Leroy* v. *Gouvernuer*, 1 Johns. 226; *DePeyster* v. *Ins. Co.*, 19 N. Y. 272; and does not seem since to have been regarded as controlling. *Carr* v. *Ins. Co.*, 109 N. Y. 504. The U. S. Supreme Court in a recent case holds a contrary rule that the exception of particular average upon memorandum articles excludes a constructive total loss. *Washburn Mfg. Co.* v. *Ins. Co.*, 179 U. S. 1.

INTERSTATE COMMERCE — STATE LEGISLATION, AFFECTING — PROHIBITING SALE OF GAME OR FISH.—IN RE DEININGER, 108 Fed. 623.—Game laws of Oregon make it a penal offense for a person to have trout in his possession for sale. *Held*, to be a valid police regulation and not an unlawful interference with interstate commerce, although such trout are brought from another state, where they are lawfully caught.

The right of a state to forbid the sale of game killed within its borders is unquestioned. *Magner* v. *People,* 97 Ill. 331; but the state courts, and by this decision the Circuit Courts also, are divided as to whether sale of game brought into the state can be prohibited. *Com.* v. *Wilkinson,* 139 Pa. St. 298; *Ex-parte Maier,* 103 Cal. 476; *State* v. *Rodman,* 58 Minn. 393. In *Geer* v. *Conn.,* 161 U. S. 519, the right to take game out of the state for sale, contrary to statute, was denied on the ground that game is not property. The principal case upon the same ground denies the right to bring it within the state for sale contrary to statute. Game coming within the state is to be regarded as becoming at once game of that state. The ruling is further justified in that the enforcement of local game laws is rendered practicable by making every possession unlawful. An opposite conclusion is reached by *In re Davenport,* 104 Fed. 540, which holds that the prohibition is a mere rule of convenience and not a legitimate exercise of the state's police power, and consequently an interference with inter-state commerce.

LANDLORD AND TENANT—VAULTS UNDER SIDEWALKS—PERMISSION OF CITY—ORDINARY CARE—LIABILITY OF TENANT.—WEST CHICAGO MASONIC ASSOCIATION v. COHN, 61 N. E. 439 (Ill.).—A portion of certain premises was leased, the tenant to keep the demised premises and appurtenances in good repair. This portion contained a vault under the sidewalk, from which a coal hole opened, these having been constructed with the permission of the city. The vault had no connection with any part of the building not leased to this tenant and the latter was entitled, as against the owner, to the exclusive control and possession of this portion. *Held,* that the tenant and not the owner of the premises, was liable to a foot passenger for injuries received on the sidewalk in consequence of failure to properly cover the coal hole.

The coal hole was not a nuisance, since permission for its construction had been given by the city. The theory that where such a license is obtained from the city, the liability for all injuries received therefrom continues with the owner on the ground of public policy until he has given up control of the entire building is denied. A similar view is taken in *Boston* v. *Grey et al.,* 144 Mass. 53. On the other hand, the New York court holds that in such a case, the landlord is not relieved of liability by a lease of anything less than the entire premises; the lease of a part, even though the structure in question is for the sole benefit of that part, is not sufficient. *Trustees* v. *Foster,* 165 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575.

MINES AND MINING—FINDING GOLD—MASTER AND SERVANT.—BURNS v. CLARK ET AL., 66 Pac. 12 (Cal.).—The plaintiff, while working for the defendants in digging and leveling off a grade for a mill site on government land, discovered and took possession of some gold: defendants took the same from the plaintiff. The occupancy of this mill site by defendants was not with the intent to acquire the ownership of the land. *Held,* that the gold did not belong to the defendants.

The relation of master and servant in nowise affects the rights of the finder of lost property. *Bowen* v. *Sullivan,* 62 Ind. 281; *Tatum* v. *Sharpless,* 6 Phile. 20; *Ellery v. Cunningham,* 1 Met. 112. As affecting the finding itself, the place of finding is entirely immaterial. *Bowen* v. *Sullivan,* 62 Ind. 281; *Bridges* v. *Hawkesworth,* 15 Jur. 1079. By analogy the same rules seem to

be applied to the finding of gold, which is not "lost" property, when such gold was found not by virtue of the servant's employment but by mere accident.

MUNICIPAL CORPORATIONS—POLICE POWERS—DISORDERLY HOUSES—MISDEMEANOR—TRIAL BY JURY.—OGDEN v. CITY OF MADISON, 87 N. W. 568 (Wis.).—Francis Ogden was convicted of keeping a disorderly house in violation of an ordinance of the City of Madison. He was tried in the municipal court without jury, in accordance with the ordinance, and from this he appealed. *Held,* that such trial was not in violation of the state and United States Constitution.

The court reasons that the offense here charged is entirely distinct from the common law misdemeanor of keeping a disorderly house, which is an offense against a different sovereignty and it is for this latter alone that the state guarantees a trial by jury. This doctrine is by no means settled, many courts holding that where there is both a state and a municipal law as to the same thing, conviction under one would be a bar to the other, and if this theory, which certainly seems sound, is to be accepted, it follows that the constitution applies to both. *State* v. *Cowan,* 29 Mo. 330; *State* v. *Municipal Court,* 89 Wis. 358, 61 N. W. 1100.

NEGLIGENCE—CHILDREN—TRESPASSERS—LICENSE OR INVITATION—ATTRACTIVE MACHINERY.—RYAN v. TOWAR, 87 N. W. (Mich.) 644.—Action for personal injuries. Judgment for defendant. Appeal. Affirmed. The plaintiff, a girl between 12 and 13 years old, and her younger sister went onto the land of the defendant. On the premises was a house containing a disused overshot wheel. Plaintiff's little sister, while playing with the wheel, got caught between the wheel and the wheel pit, and the plaintiff while rescuing her, became injured. Defendants had never taken any particular steps to stop children from coming onto their premises. *Held,* since plaintiff was a trespasser. defendant owed no duty to her and trial court was correct in directing a verdict for the defendant. Montgomery, C. J., and Moore, J., *dissenting.*

This question has not been decided before in Michigan. The rule was laid down in the Turn Table Cases (*Ry.* v. *Stout,* 17 Wal. 657) by the United States Court, that where one leaves a dangerous machine exposed so as to tempt children to play with it, it is an implied invitation and owner is liable, has in the present case been repudiated.

Michigan is not alone in taking the other view, in fact several states have refused to follow it. But *Powers* v. *Harlow,* 53 Mich. 507, cited the Stout Case, *supra,* and strongly hinted that should the question arise it would follow the federal doctrine. The opinion is an excellent digest of the law on the subject.

NUISANCE—COMMON NUISANCE—ABATEMENT.—STATE v. STARK, 66 Pac. 243 (Kan.).—On Feb. 17, 1901, in the city of Topeka, the appellant, with Carrie Nation and six others, broke into and injured a billiard hall in connection with which intoxicating liquors were sold. By statute, all places where intoxicating liquors are sold or kept for sale are declared to be common nuisances. The court *held,* however, that this fact does not justify their abatement by any person or persons without process of law.