RECENT CASES.

Mutual Fire Insurance Companies—Power to Create Guaranty Fund.—The recent case of *Kennan* v. *Rundle et al.*, 51 N. W. Rep. 426 (Wisconsin), contains a clear statement of the law of mutual insurance companies. The plaintiff herein brings suit as receiver of the effects of the Manufacturers Mutual Fire Insurance Company, now insolvent, upon a guaranty bond given by the defendants as policy holders of the insolvent company. The company was duly organized under the laws of Wisconsin as a mutual insurance company, and continued in business till becoming embarrassed, suit was brought to close up its affairs and plaintiff was appointed receiver. Sometime previous to the company's insolvency, its condition was unsatisfactory and discouraging. Many policies were outstanding against it, the amount in the treasury was small and the company was existing under very straightened circumstances; it was then that this bond upon which suit is now brought, was given by all the policy holders of the company as a guaranty fund for the payment of claims held then, or to be held thereafter, by any persons under their contract of insurance. The policy-holders by virtue of this bond promised to and with each other, and with the company, for a valuable consideration to guarantee the payment of any existing and future indebtedness of the company to the exact amount placed opposite their names, and further promised to pay into the treasury of the company the amount by them promised to be paid, upon a call legally made by the directors of the company. The bond was accepted and ratified by the said directors. This action is predicated upon the bond. Upon a demurrer to the complaint and upon its being subsequently overruled, the defendants appeal mainly upon the ground that the bond was *ultra vires* and void. Orton, J., in the course of the opinion, says, that "the question may be twofold: *First*, Was the power to take such an instrument for such a purpose expressly conferred upon the company by the charter? *Second*, Was the taking of such a guaranty obligation the necessary or proper means of executing some power conferred? It is not contended that the guaranty which the plaintiff acquired was expressly authorized by the charter. It certainly could not be contended

that any such express power is conferred. If the power exist at all it must be inferred from the general powers given. The mutuality of liability to assessment and obligation to pay *pro rata* for losses and expenses, are the essential distinguishing characteristics of a mutual insurance company. This company had a very large power to raise capital without resorting to such a guaranty bond, viz.: 'the first premium may be paid in cash,' *secondly*, 'at the time of effecting the insurance, the persons insured shall pay a percentage in cash,' and *thirdly*, 'that such other charges may be made as may be required by the by-laws of the corporation.' If such a foreign resource, as the bond herein, is resorted to to relieve the members partially, or some of them only, of such assessment, to that extent the mutuality principle is destroyed and the nature and legal character of the corporation subverted *pro tanto*, and the company ceases to be such a corporation as the law requires, wholly or partially. It is not simply the substitution of other means that the law provides for the payment of losses and expenses, but it destroys the essential nature and legal character of the corporation as a mutual insurance company. This contract is executory, and the Court is asked to enforce it. There are no equities to palliate such a departure from the powers conferred by the charter, and assumption of powers not only foreign, but which if executed, would subvert the purpose and radically change the nature of the corporation. We therefore hold that the contract is *ultra vires* and void."

Constitutional Law—Post Office—Lotteries.—*Ex parte* Rapier and *Ex parte* Dupre, 12 Sup. Ct. Rep. 374, decided February 1, 1892. These were applications to the U. S. Supreme Court for discharge by writ of *habeas corpus* from arrest for alleged violations of the recent act of Congress excluding lottery matter from the mails. The court denies the writ prayed for, and through Mr. Chief Justice Fuller, reaffirms the principles laid down in *Ex parte* Jackson, 96 U. S. 727, to the effect that the power vested in Congress by the Constitution embraces the regulation of the entire postal system of the country, and that the right to determine what shall be carried in the mails necessarily involves the right to determine what shall be excluded. Congress therefore has the power to forbid the use of the mails to carry matter used in the dissemination of crime or immorality. The opinion proceeds: "The States, before the Union was formed, could establish post offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes

supposed to exert a demoralizing influence upon the people. When the power to establish post offices and post roads was surrendered to the Congress, it was a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality. The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect to other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what are without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress, in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses. We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question ; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people."

Sale—Insolvency of Purchaser—Rights of Seller.—In *Diem* v. *Koblitz et al.*, 29 N. E. Rep. 1124 (Ohio), the question of stoppage *in transitu* and a subsequent re-sale before the expiration of a term of credit, receives an exhaustive treatment. It seems that a seller is not bound to deliver goods to an insolvent buyer, even though holding the vendee's note or bill for the price, payable at the expiration of a term of credit, it being held that a party to a contract of sale cannot sue for its breach, unless he is himself able to perform on his part. After a citation of conflicting authorities concerning the right of the vendee to maintain an action, though himself unable to perform, and also in regard to the effect of insolvency upon such inability, the Court said: "Insolvency is incapacity. * * * When the sale is upon credit it is one of the implied conditions of the contract that the vendee shall keep

his credit good; his promise to pay at a future day involving an engagement on his part that he will remain, and then be, able to pay, which engagement is broken when he becomes insolvent and unable to pay, and the right of the vendor to stop performance of the contract on his part. Nor is the rule varied by the fact that the vendee has given a note or bill for the price, payable when the credit expires." The insolvency of the vendee is sufficient to justify the vendor for refusing to continue the delivery unless the payment be made in cash. (*Mining Co.* v. *Brown*, 124 U. S. 385.) Even admitting the right to refuse delivery, however, it was contended that the vendor was obliged to keep the property ready for delivery until the time of credit expired, and that a re-sale prior to that time would be a breach of the contract. The court denies this, saying: "The right of the vendee is to receive the goods at the time the vendor contracts to deliver them. * * * The breach therefore, if there be one, consists in his failure to deliver the goods according to the contract, and occurs at that time and not upon a sale subsequently made; the vendee's cause of action arises, if at all, upon the failure to deliver and not on the re-sale. * * * The right of re-sale grows out of the failure of the vendee to keep his engagement. Not that the contract is thereby rescinded, for that would defeat the vendor's remedy for damages upon resale after due notice, but that he may elect to treat the agreement for the credit as at an end, on account of the vendee's default."

Principal and Surety—Discharge of Surety.—Saint v. *Wheeler & Wilson Manufg. Co.*, 10 South. Rep. 539 (Ala). In this case a bond was executed by Saint, as principal, and four others, as sureties, for the faithful performance by Saint of the duties of a collector. Certain funds collected were retained or embezzled by him, and action was brought against him and his sureties to recover the amount so embezzled. The evidence showed that Saint was required to sell and discount notes and to take up and re-sell sewing machines, exercising his discretion, in addition to his work as a collector, which his sureties claimed increased the risk. On this point the Court held that Saint's sureties were sureties for his honesty, and that no modification of his duties could affect their liability or save them from making good his defaults, unless the imposition of such new duties or their performance rendered impossible, or materially hindered or impeded, the proper performance of the service originally undertaken. On the other hand it appears that Walls, an agent of the company having gen-

eral supervision over Saint, knowing of Saint's defalcation, did not give notice to his sureties, but continued him in the service of the company, entrusted more funds to his hands and extended time of payment. After criticizing a number of cases to the effect that the failure of one officer or agent of a corporation to give notice of another agent's dishonesty to the sureties of such agent, does not release such sureties, the Court said: "No doctrine of the law is more familiar than that notice to an agent, within the scope of his agency, is notice to the principal; and the doctrine has in no connection been applied more frequently and uniformly than to corporations and their agents. Indeed there is an absolute necessity in all cases for its application to corporations, since they act and can be dealt with only through agents. * * * If Walls, while acting for the corporation and in the capacity of its agent with respect to the matters and things involved in Saint's contract, received notice of such a conversion of its funds as amounted to embezzlement or involved dishonesty, and without imparting this knowledge to the sureties and receiving their assent thereto, continued him in the service, the sureties are not liable for Saint's subsequent defaults."

Recission of Deed—Fraud of Agent.—In *Schultz et al.* v. *McLean et al.*, 28 Pac. Rep. 105, (California), the plaintiffs were owners of a tract of land on which there was a mortgage for about half its value. The mortgagee had obtained a decree of foreclosure and was about to sell the land in satisfaction of the same. To avoid this the plaintiffs, upon the representations of one Robinson, an attorney, that he could procure money on the land by loan, sufficient to avert the sale, from a certain person (McLean) who would deal only with him (Robinson), placed the title to the land in Robinson's hands to use in effecting the proposed loan, directing him to deliver the deed to McLean to hold subject to the terms of an agreement for the loan which Robinson professed to have in his possession. The facts were that McLean had never entered into any such agreement, and understood that he took with the deed a perfect title to the land as held by plaintiffs. This action was brought upon defendants' taking possession and asserting title, to rescind the deed on the ground of fraud. The court held, one justice dissenting, that as both parties to the transaction were innocent, and the fraud had been practiced by the agent of the grantor, the relief prayed for would not be granted. The Court says: "In this case plaintiffs and defendants were both innocent. Neither knew that the fraud was being practiced, but if that fraud

is productive of injury, the injury must result to the plaintiffs; for they placed it in the power of the wrong-doer to perpetrate the fraud. The vendee will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness because of a fraud practiced upon the vendors by their own agent. Under such circumstances they must bear the consequences, for the loss is chargeable to the trust reposed in said agent." This is but a just extension of the well settled general rule that a grantor cannot question his own conveyance upon the ground that a third party practiced a fraud upon him, not known to or participated in by the grantee.

Boundaries on Streams — Accretion and Avulsion — Missouri River — Costs.— A very interesting discussion may be found in the recent case of *State of Nebraska* v. *State of Iowa*, 12 Sup. Ct. Rep. 396, which was an original suit brought before the U. S. Supreme Court to determine the boundary line between those two States. The principal question at issue was whether the law of accretion or the law of avulsion applied to the rapidly changing channel of the Missouri river. The Court decided that the law of accretion must govern. It was also held that the costs of the suit should be divided between the two States, since the question was of a governmental nature, in which each had a vital, though not a litigious interest. Mr. Justice Brewer, in delivering the opinion, cited many English, Latin, French and Spanish authorities which will be of special interest to the historical student in tracing the development of the law of accretion and avulsion.

Right of State to Take an Appeal in a Criminal Case.— *U. S.* v. *Tanges et al.*, U. S. Sup. Ct., April 4, 1892. By the Judiciary Act of 1891 the Supreme Court was given appellate jurisdiction "in any case that involves the construction or application of the Constitution of the United States," and in this case the Court holds that that act did not give the Supreme Court jurisdiction in a *criminal* case of an appeal or writ of error taken by the United States from an original judgment in favor of the defendant. In the opinion of Mr. Justice Gray is an interesting *resumè* of the different State authorities on this point, viz.: the right of the State to sue out a writ of error in a criminal case. A few States, Arkansas, Texas, California, and Michigan deny this right to the State for the reason that it violates constitutional provisions, but a larger number of States reaching the same conclusion base it on the broader ground of the fundamental rule of the common law,

Nemo debet bis vexari pro una et eadem causa. In North Carolina, Maryland, Louisiana and Pennsylvania the State is allowed, in the absence of any statute giving it the right to bring error or appeal after judgment for defendant, and in each case the question seems to have become settled in the State by early practice before it was contested. In general, however, the decisions "conclusively show that under the common law as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government."

Subscription by Corporation — Ultra Vires.— Richelieu Hotel Co. v. *Encampment Co.*, 29 N. E. Rep. 1047 (Ill). The appellant corporation had subscribed $1000 to the encampment company for the purpose of holding a military encampment at Chicago, and when sued upon its subscription sought to avoid upon the ground that it was *ultra vires.* The court held, however, that it was not beyond the proper exercise of corporate powers. The holding at Chicago of an International encampment would naturally bring many visitors to the city who would require hotel accommodations and largely increase the patronage of the hotels. Power to carry on a hotel business carries with it as a necessary incident the power to engage in any reasonable plan to increase the number of patrons, and donations of money to enterprises calculated to bring to the city large numbers of visitors, the Court said, fell within such power. This case seems to be in direct conflict with the doctrine laid down in *Davis* v. *Old Colony R. R.*, 131 Mass. 258, and quoted in 1 *Morawetz on Corporations*, 337, where it was held that a railroad had no right to guarantee the expenses of a musical festival in anticipation of great profits to be earned by the increase of traffic caused thereby.

Common Carriers — Limiting Common Law Liability.— Atchison, Topeka and Santa Fe R. R. Co. v. *Dill*, 29 Pacific Reporter 148. Another Supreme Court, whose decisions are always received with profound respect by the profession, has spoken, and with no

uncertain sound on the question: Can a carrier limit its common law liability by special contract with the shipper? Dill shipped live-stock from Cedar Rapids, Iowa, to Estudge, Kansas, on written contract with the Chicago, Rock Island & Pacific R. R. Co. for a through rate. At Atchison, where the C., R. I. and P. R. R. connected with the A., T. and S. F. R. R., the agent of the latter road refused to allow the stock to proceed on the old contract and demanded as a condition precedent to the forwarding, Dill's signature to a new contract which was given hurriedly and without reading, and under pressure. Said contract was a limitation of the carrier's common law liability. The Court says: "A common carrier cannot limit his common law liability by a special contract in writing with the shipper, unless it is freely and fairly made, and the carrier cannot exact as a condition precedent for carrying that the shipper must sign a contract in writing, limiting or changing the common law liability. If the carrier has two rates or charges for carrying stock or goods — one, if carried under the old common law liability, and the other, if carried under a special contract,— the shipper must have real freedom of choice in making his selection."

Accident Insurance — Intoxication.— In *Standard Life and Acc. Ins. Co.* v. *Jones*, 10 South. Rep. 530 (Ala.), the Court makes a distinction between the popular and legal meanings of the phrase, "under the influence of intoxicating drinks." In common parlance, and hence as it would impress a jury, the expression "under the influence of intoxicating drinks," means a different condition from that expressed by the word "intoxicated;" the latter indicating a condition of temporary impairment of the capacity to think and act correctly and efficiently, while the former may mean effects produced by intoxicants so slight as not to impair any mental or physical faculty. But the phrase, "under the influence of intoxicating drinks," as used in insurance policies, and other documents of a similar character, has a legal significance differing from the popular one, and implying such influence as in reality amounts to intoxication.

Statute af Frauds — Original Undertaking.— *Mackey* v. *Smith et al.*, 28 Pac. Rep. 974 (Ore). Defendants were railroad contractors, and one Malone was a sub-contractor to whom plaintiff was furnishing supplies. Plaintiff doubting Malone's ability to pay, refused to continue furnishing supplies unless payment should be guaranteed by defendants, whereupon defendants agreed by oral

promise to pay for whatever stock should thenceforth be furnished to Malone. Upon an action by plaintiff for the price of stock so furnished, it was held that defendant's promise was an original undertaking, and not within the statute, and the fact that the goods were charged on plaintiff's books to Malone, was not conclusive that he was the party to whom credit was given. In the course of the opinion the Court states the law concisely as follows: "If credit was given entirely to defendants, and it was agreed that they alone should be responsible, and in fact the sale was made to them, though the goods were delivered to and for the use of another person, the statute does not apply, and the defendants are liable on their parol agreement." And further, in view of the privity of interest arising from the contract relations of defendants with said Malone, the Court remarks, that if the main purpose of defendants in making the parol promise thus to become liable for the debt of another, was to serve their own purpose or interest, it is valid against them though not in writing.

Telegraph Poles on a Public Highway — Compensation therefor to Adjacent Owners.— Pacific Postal Tel. Cable Co. v. *Irvine et al.*, 49 Fed. Rep. 113. The disputed question as to whether telegraph poles and wires erected on a public highway, the fee of which remains in the adjacent owners constitute an additional burden to such owners, for which compensation may be obtained, has been recently decided in the affirmative in the U. S. Circuit Court for Southern California, on a motion for an injunction. The poles and wires were erected by the complainants under a grant from the board of supervisors but against the consent of the defendants. Ross, J., says, "where the fee of the highway is vested in the public, there can be no valid legal objection to a grant by the public of a right to erect poles and wires, without regard to adjacent property owners. But where the fee is in such owners, every use of the road not in the line of public travel is an additional burden for which the proprietor is entitled to an additional compensation, and which cannot be constitutionally taken from him without his consent, except by the proper legal proceedings."