RECENT CASES.

Aerolite—Ownership—Appropriation by Finder.—Goodard v. *Winchell*, 52 N. W. Rep. 1124 (Iowa).—Action in replevin. The subject of the controversy was an aerolite, which falling from the sky was imbedded in the soil to a depth of three feet. It was held to be the property of the owner of the land on which it falls, rather than the one who finds it and digs it up, and that the rule that the owner of lost goods is entitled thereto, except as against the true owner, is not applicable in such a case. On appeal to the Supreme Court the decision of the District Court was affirmed. In this case the appellant insisted that the enlightened demands of the times in which we live call for, if not a modification, a liberal construction of the ancient rule "that whatever is affixed to the soil belongs to the soil" referring to Blackstone that "occupancy is the taking of those things which before belonged to nobody" and "whatever movables are found upon the surface of the earth * * * and are unclaimed by any owner are supposed to be abandoned by the last proprietor and as such are returned into the common stock and mass of things, and therefore they belong as in a state of nature to the first occupant or finder." But the court, by Mr. Justice Granger, held that it had none of the characteristics of the property contemplated by this rule—that the rule sought to be avoided has reference to what becomes a part of the soil and not to an acquisition of property existing independent of other property. The term "movables" must not be construed to mean that which can be moved but means such things as are not parts of the earth naturally but exist on it. Animals exist on the earth but are not in a proper sense part of it. "To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of vegetable or mineral

matter, is to take a part of the earth and not movables." If meteors are exchanged who can say what part of the earth belongs to the "unowned things" and thus the property of the finder instead of the land owner? The rule of the finder of lost property in this case is doubtful. The aerolite was never lost or abandoned. Whence it came is not known but it became a part of the earth and should be taken as such.

Damages — Consequential Injury to Business. — *Swain* v. *Schieffelin et al.*, 21 N. E. Rep. 1025 (New York). The defendants sold a bottle of "carlet red" of their own manufacture to the plaintiff, representing it to be absolutely pure and harmless. Defendants knew that plaintiff was a manufacturer of ice-cream and ices, and that the "carlet red" was to be used to give color to these products. The coloring matter was used, the ice-cream sold to customers, and, in some cases, eaten. The result was illness in some forty families, an analysis of the coloring matter and the discovery that it contained arsenic. The court held that recovery could be had for the loss of cream which was destroyed when the nature of the "carlet red" became known, and also for injury to business through a loss of trade resulting from the use of the poisonous coloring matter. The case is valuable owing to the careful manner in which the rule of consequential damages is enunciated. The court approves *Wakeman* v. *Manufacturing Co.*, 101 New York 205, where it is said: "A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage." The following quotations will tend to show the rules applied by the court in the case before it: "When one violates his contract or his duty to another, the theory of the law is that compensation shall be made for the injury directly and proximately caused by the breach of contract or duty. * * * In case a manufacturer of goods sells them to a purchaser to be used for a particular purpose, which is known by the vendor at the time of the sale, a more liberal rule prevails than in cases where like articles are sold as merchandise, for general purposes. In the former case profits lost and expenses incurred may be recovered. This broader rule rests on the theory that the vendor, having sold the articles with the knowledge that they were purchased for a particular purpose, should be held liable for such damages as naturally flow from the breach of his

contract, and which he or any reasonable man might apprehend would follow from the breach.

Corporations—Railroad Companies—Consolidation—Municipal Aid—Contract of Subscription—When Completed.—Pope v. *Board of Com'rs et al.*, 51 Fed. Rep. 769.—This was a suit in equity before the U. S. Circuit Court involving a sum of money which had been voted by two townships in Lake County, Indiana, to aid railroad enterprises in that locality. The rights and relations of the various parties to the suit are somewhat complicated, but the essential facts are these: The board of county commissioners determined to take stock in the Chicago & Indianapolis Air Line Railroad according to the express wish of the tax-payers of the townships, and in their behalf. This railroad company never issued any stock, but the next year became consolidated with another organization known as the Louisville, New Albany & Chicago Railroad Company, which also failed to tender its stock to the county commissioners. The consolidation was made without the knowledge or consent of the tax-payers, and took place before the money in the controversy was collected. There was a State statute in force at the time the aid was voted, authorizing the consolidation of railroad companies, and expressly providing that the new company should acquire all the rights, property and functions of the constituent companies, and be subject to their liabilities. Whatever claim Pope, as receiver of a third company, had to the fund in controversy grew out of the rights of the companies named. The court held that under such a statute any one subscribing to a railroad corporation does so with the knowledge that a consolidation may occur, and impliedly authorizes the railroad company for whose stock he has subscribed to consolidate with any other railroad corporation. He is brought into the same contractual relations with the new company as he held with the original. The law enters as a silent factor into every contract. The general rule that the subscriber to the stock of a railroad company is released from his obligation to pay for stock by a fundamental change in the charter cannot be invoked in this case, for the change was made by the subscriber's implied consent. *Volenti non fit injuria* applies. *Board Com'rs Hamilton Co.* v. *State*, 4 N. E. Rep. 589, and 17 N. E. Rep. 855, which had been pressed upon the court as holding a contrary doctrine is referred to and explained. The case, however, was decided on another principle, and in favor of the tax-payers, it being well-settled in Indiana that a mere vote by a township of a sum to aid a railroad enter-

prise gives the company no legal right to or interest in the tax, until the tax has been collected, and a valid contract of subscription made in behalf of the township. Even if a railroad company after its consolidation has a contingent interest in a fund raised by municipal aid, it cannot assert any claim to the fund when it has not tendered its stock and has none that can be legally tendered.

Appealable Judgment — State Supreme Court.— Meagher et al. v. *Minn. Thresher Mfg. Co.*, 12 Sup. Ct. Rep. 879.—An appeal was taken to the U. S. Supreme Court on a judgment of the Supreme Court of Minnesota, affirming an interlocutory order overruling a demurrer, which judgment was apparently decisive of the merits of the case. The court held that this was not such a final judgment as to be subject to review by it no matter how decisive of the merits it might appear to be, and the writ of error was dismissed.

Remedy by Mandamus — Certificates of Indebtedness.— Hopper v. *Inhabitants of Union Township*, 24 Atl. Rep. 387.—This is a New Jersey case which, while founded on a local statute, has a general interest on account of the form of action which the court decided arose on that statute. The facts in the case are these: A private act of the legislature authorized the appointment of a board of commissioners to make local improvements in the Township of Union, especially in the way of grading, extending, and in other ways bettering the condition of a certain highway. This committee was, by the act, empowered to assess benefits and damages arising from its action in the matter, and if the benefits were found to be less in amount than the damages the deficiency was to be made up by the municipality. Such was the case. They accordingly issued, as they were authorized to do, certificates of indebtedness against the township to those to whom damages had been awarded. It was upon one of these certificates that the plaintiff sued. The court held that the proper form of remedy in this case was not by action at law, but in equity; saying, "The scheme of improvement projected by the act was a legislative scheme independent of the township authorities, prosecuted in the interest of, and at the expense of, the owners of the land fronting on the improvement. Nor did the supplement of 1875 make the certificates of indebtedness debts or obligations of the township on which an action at law will lie. 'A suit at law * * * would be a violation of the intent of the statute. * * * The remedy of persons interested is not by action but by *mandamus*."

Mechanic's Lien—Liability of Joint Contractors.—Pell et al. v. *Baur*, 31 N. E. Rep. 224 (N. Y.).—Defendant contracted for the masonry on a house to be constructed. One Thornton also independently contracted for the carpenter work. When the contracts were drawn, Thornton and defendant requested that both agreements (for convenience) be merged into one joint contract, although they did not intend to become partners thereby in the work. This could be done; *vide Alger* v. *Raymond*, 7 Bosw. 418. Plaintiff sold Thornton lumber for the building trusting him individually. This was never paid for, and on completion of the house they filed a lien, as sub-contractors, for materials furnished. This lien, if paid by the owner, not only exhausted the amount owed Thornton, but seriously diminished the sum due the defendant. He, therefore, resisted the foreclosure, claiming that he was not bound to make good Thornton's contract. Finch, J., says: "The U. S. statute requires for the establishment of a lienor's right, that the material furnished shall be with the consent of owner and contractors. In this case since the defendant knew that the lumber was supplied, saw it used without objection, availed himself of it in earning the contract price, and took the benefit which it conferred, his consent must be presumed, which, coupled with the owner's, brings it within the statute. Having, therefore, placed himself in the position of a joint-contractor, his unpaid portion of the contract price is subject to any lien incurred by his co-contractor in completing the contract."

Negligence—Proximate and Remote Cause.—Barton v. *Pepin County Agricultural Society*, 52 N. W. Rep. 1129 (Wis.).—An agricultural society permitted private teams to be driven around the race course after the races had been run. While exercising this privilege a driver of a span of four-year-old colts whipped them after they had broken into a run, when he lost all control of them, and running off the track injured a visitor. Held, that the proximate cause of the injury was the whipping of the horses causing them to run away, the wrongful act of the driver; that it was the only cause of the injury, the custom or by the tacit permission of the society's officers for teams to be driven around the race course having no connection with the injury; nor did they cause the injury in not preventing the driver from driving around the track for the injury was not the natural or direct consequence of his merely driving around it and keeping within it, but was caused by his leaving the track, and the running away itself was caused by the driver, not by the officers of the society. Hence the society is not liable.

Postal Cards—Non-mailable Matter.—In *United States* v. *Elliott*, 51 Fed. Rep. 807 (Ky.), the defendant had sent a postal card through the mail giving notice that rent was due and unpaid, and if not paid by a certain date that the "matter would be placed in the hands of an officer." The law claimed to have been violated was the act of September, 1888, which declares as non-mailable any postal card of a "threatening character, or calculated by the terms, manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of another." The United States district judge declared that the act was highly penal and should be strictly construed, but that there was nothing in the language there used, or in the general law which prohibits the use of postal cards for the simple purpose of asking payment of a past-due debt, or of notifying a debtor that if not paid legal steps will be taken for its collection. The language used on the postal card was rather a notification than a threat. This case distinguished from *United States* v. *Brown*, 43 Fed. Rep. 135, where a collecting agency had its cards and envelopes printed in such a way as to make a display to attract attention, and from *United States* v. *Bayle*, 40 Fed. Rep. 664, the reasoning of the court in the latter case not being approved.

Telephone Companies—Common Carriers—Patented Instruments.—In *Delaware and A. Teleg. and Telep. Co.* v. *Delaware*, 50 Fed. Rep. 677, (Delaware) the Circuit Court of Appeals decided that a telephone company was a common carrier, and as such could not discriminate between individuals of classes which it undertook to serve. While the question has not been directly before the U. S. Supreme Court, cases in which it has been so determined have been cited approvingly by that Court, in *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468. In the present case the point was raised that the telephone was protected by patents, and was therefore exempt from the rules which govern common carriers. The court, however, held otherwise and said: "When one engages in such public business it is of no consequence whether the means or instruments whereby it is conducted are patented or not. It is the *business* that is regulated. A patent secures title to the thing patented and its use, just as the law secures title to other descriptions of property. The owner need not apply his property of either description to such public employment, but if he does the employment itself will be subjected to the rules which the law has prescribed for its government without respect to the means or instrument by which it is conducted."