RECENT CASES.

CONTRACTS.

National Banks—Guaranty.—Commercial National Bank et al. v. *Pirie et al.*, 82 Fed. Rep. 799. A cashier of a national bank, by order of the directors, to secure a personal debt contracted by the president, gave the bank's guarantee. Counsel for the plaintiff contended that this action was within the implied provisions of its charter. *Held*, that a board of directors of a national bank cannot bind it by contracts of suretyship or guaranty which are made for the sole benefit of others, and that the action of the cashier was *ultra vires*. The national banking act confers no such authority in express terms or by fair implication, and the exercise of such power would be detrimental to the interests of the stockholders and depositors. *Norton* v. *Banks*, 61 N. H. App. 52; *Bank* v. *Smith*, 40 U. S. App. 690.

Attorneys—Retainer—Assisting in Prosecutions.—McCurdy v. *N. Y. Life Ins. Co.*, 72 N. W. Rep. (Mich.) 996. 3 How. Ann. St. § 557, prohibits any attorney from prosecuting or aiding in prosecuting "any person for an alleged criminal offense where he is engaged or interested in any civil cause or proceeding depending on the same state of facts against such person directly or indirectly;" and 1 How. Ann. St. § 560, prohibits any prosecuting attorney from having the assistance of any counsel "who has received any compensation from any person * * * interested in prosecuting the person charged with felony." *Held*, that these statutes do not prohibit a lawyer from recovering for professional services rendered to a corporation in the preparation and trial of a criminal case set in motion by the complaint of an officer of said corporation. There is no provision in the statute requiring the prosecuting attorney to appear in examinations in criminal cases in justice court except when requested to do so by the examining magistrate (How. Ann. St. § 552); and if plaintiff appeared in the justice court at defendant's request, there is nothing that will preclude him from recovering for the services rendered.

Husband and Wife—Separation—Grounds.—Fitzpatrick v. *Fitzpatrick*, 47 N. Y. Supp. 737. Under a statute which provides that "cruel and inhuman treatment" shall be ground for separation between husband and wife;" *held*, that proof of angry, contumelious, and degrading reproaches by the husband, applied continuously and without provocation, are sufficient to sustain a decree of separation in favor of the wife without sacrifice of her right of support. That inhumanity may be evinced and cruelty inflicted by verbal outrage as well as by bodily abuse, see *Lutz* v. *Lutz*, 9 N. Y. Supp. 858; *Straus* v. *Straus*, 67 Hun. 491, 492, 22 N. Y. Supp. 567; *Atherton* v. *Atherton*, 82 Hun. 179, 31 N. Y. Supp. 977.

Contracts of Employment—Construction.—Speeder Cycle Co. v. *Terters*, 48 N. E. (Ind.) 595. Defendant corporation agreed to employ plaintiff until its factory was completed, but discharged him before that time. *Held*, that such a contract constituted a hiring at will, determinable at the election of either party. The rule "*certum est quod certum reddi potest*" applies only where there is some means by computation, measurement, etc., that that which is uncertain may be made certain (*Becker* v. *R'y Co.*, 46 N. E. 685).

NEGLIGENCE.

Carrier—Injury to Passenger—Contributory Negligence.—O'Donnell v. *Louisville & N. R. Co.*, 42 S. W. Rep. (Ky.) 846. A person who voluntarily sits by an open window on a moving train cannot recover for an injury sustained from flying cinders on the ground that the window was out of repair and could not be closed, if he knew, or by the exercise of ordinary care, could have known that there were seats with protected windows. But the court was also of the opinion that if the complaint in this case had been that the cinders were thrown from the locomotive when, by the use of proper screens they could have been stopped, a different question would have arisen—it not being negligence *per se* for a passenger to sit by an open window.

Negligence of Fellow Servant—Liability of Master—Notice.—E. T., V. and G. R. Co. v. *Wright*, 42 S. W. Rep. (Tenn.) 1065. Knowledge acquired by a conductor, while in charge of a train, of the recklessness and incompetency of his engineer is notice to the company, and is sufficient to fix the liability of the company for an injury done to a fellow servant through the engineer's recklessness and incompentency. It is not necessary that notice be brought home to one having power to discharge the engineer, but is enough if known by the engineer's immediate superior and the representative of the company in charge of the train (*Railroad* v. *Spence*, 23 S. W. 211).

Action for Wrongful Death—Defense—Contributory Negligence of Sole Next of Kin.—Consolidated Traction Co. v. *Hone*, 38 Atl. Rep. (N. J.) 758. In an action brought to recover damages against a traction company for negligently causing the death of plaintiff's infant son the court were equally divided upon the question (decided in plaintiff's favor in the lower courts) whether the traction company could defeat the action if it could show that the death in question was in part the result of the negligent conduct of the sole next of kin—*i.e.*, the plaintiff in this action, although such negligence is not to be imputed to the infant.

STATUTES.

Collision in Detroit River—Canadian Statute—Change of Course.—Union Steamboat Co. v. *Erie Co.*, 82 Fed. Rep. 817. An action was brought by the owners of a vessel for damages from a collision with another vessel occurring on the Canadian side of the Detroit River. It appeared that claimant vessel gave the proper signals and that the defendant vessel, after acting accordingly for a time, finally disregarded them and gave no signals herself. *Held*, following *The North Star*, 22 U. S. App. 242, 10 C. C. A. 262, that in the absence of proof of the statute and that the captains of each vessel acted thereon, the contention that the Canadian statute of navigation should govern was unfounded, and that the proper rules of navigation were those of the Revised Statutes of the U. S. Also, the fact that the plaintiff vessel, whose duty it was to hold her course, temporarily abandoned it to avoid obstructions known to the other vessel, did not violate her duty so as to prevent her recovery.

Statutes—Construction—Railroads—Actions Against Receivers.—Ware v. *Platt*, 48 N. E. Rep. (Mass.) 270. An action was brought for damage resulting from fire caused by the railroad for which the defendants were receivers. The statute applying in this case read as follows: "Every railroad corporation and street railway company shall be responsible in damages to a

person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route, for which it may be so held responsible, and may procure insurance thereon in its own behalf." The respondents defended on the ground that the statute did not apply to them as receivers, but that the corporation itself was liable. *Held*, that the statute was remedial and applied in this case. Remedial statutes are to be construed liberally, and so as to advance the remedy and carry out the object in view in their enactment. Cases may come so obviously within the equity of a statute that it would be unreasonable to suppose that they were not intended by the legislature to be embraced within it, though the literal sense of the language used might not include them.

Municipal Corporations—Power to Prohibit Liquor Traffic—Repeal of Statutes.—Bailey Liquor Co. v. *Austin*, 82 Fed. Rep. 785. An act of the legislature and an ordinance of the town council of G—— forbade the sale of intoxicating liquors within the limits of the town. State constables and others acting under the authority of the town council seized a quantity of wine, whiskey, and beer offered for sale in original packages. *Held*, that they acted within their power and that such act and ordinance were a valid exercise of the police power. The above act and ordinance were not repealed by the "Dispensary Law." Repeals of statute by implication are not favored and can never be admitted when the former can stand with the new act. *Chew Heong* v. *U. S.*, 112 U. S. 536, 5 Sup. Ct. 255.

Assignment for Benefit of Creditors—Constitutional Law—Impairing Contracts—Judgment by Warrant of Authority.—Second Ward Sav. Bank of Milwaukee v. *Schrauck*, 73 N. W. Rep. (Wis.) 31. Ch. 334, Laws 1897, relating to voluntary assignments, provide that all attachments, levies, garnishments, or other processes against an insolvent debtor, within ten days prior to an assignment for the benefit of creditors, made by such debtor, shall be dissolved and the property attached or levied upon be turned over to the assignee. *Held*, void, as impairing the obligation of contracts, in so far as it applies to notes and warrants of attorney, and judgments and valid executions to enforce the same. Such statute, though acting on the remedy alone, is as void as if it affected the obligation of the contract, as in effect it substantially impairs the obligation of the contract itself. *Edwards* v. *Kearney*, 96 U. S. 600; *Green* v. *Biddle*, 8 Wheat. 1; *State of Tennessee* v. *Sneed*, 96 U. S. 69, etc. Cassody, C. J., dissenting, held that the act was such an insolvent law as the State legislatures were held to be empowered to pass in *Ogden* v. *Saunders*, 12 Wheat. 213–219. State statutes may impair the remedy on an existing contract, without necessarily impairing the contract itself. *Von Baumbach* v. *Bode*, 9 Wis. 569; *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Morely* v. *R'y Co.*, 146 U. S. 162, 13 Sup. Ct. 54. The act in question does not undertake to discharge the insolvent debtor, but merely to prevent preferences out of such of the insolvent's estate as existed at the time of making the assignment.

MISCELLANEOUS.

Wills—Rights of Life Tenants—Stock Dividends—Income.—McLouth v. *Hunt*, 48 N. E. (N. Y.) 548. An action was brought to procure a judicial construction of a will providing that the estate be divided into three parts and that the same should be held for the benefit of the testatrix's three grandchil-

dren who, after majority, were to receive "the full income" annually until thirty-five years of age, when they were to receive the principal. In case of death of either grandson under thirty-five leaving issue, his share was to be paid to such issue. A part of the estate consisted of United States bonds commanding a premium at the testator's death of 28% and another part consisted of stock in a corporation which after the creation of the trust estates declared a stock dividend. *Held:* (1) that no part of the income of the former could be set apart to secure the remainder sum against loss caused by depreciation in the value of the bonds as they approached maturity; (2) that "the full income" included stock dividends. Cases contrary to the first holding are *Trust Co.* v. *Eaton*, 140 Mass. 532; *Reynal* v. *Theband*, 23 N. Y. Supp. 615; but the right of authority is that the intention of the testatrix, as expressed in the will, must govern. *Hite* v. *Hite*, 93 Ky. 257, 20 S. W. 778; *Peckham* v. *Newton*, 15 R. I. 322. In respect to stock dividends many authorities are to be found on each side. Contrary to the above decision are *Minot* v. *Paine*, 99 Mass. 101; *Gibbons* v. *Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, and many of the old English cases. The English and Massachusetts doctrine, however, has been repudiated in *In re Kernochan*, 104 N. Y. 615; *Monson* v. *Trust Co.*, 140 N. Y. 498, 35 N. E. 945.

Railroads—Who are Passengers.—Missouri K. & T. Ry. Co. of Texas v. *Williams*, 42 S. W. Rep (Texas) 855. The defendant in error, with the *bona fide* intention of becoming a passenger on a train and not having time to purchase a ticket, jumped on the train while it was in motion and at the most convenient place, which was the front end of the baggage car. The fireman, seeing him there and thinking him a trespasser, threw hot water on him, forcing him to jump off, whereby he broke his leg. In an action for damages it was *held* he could not recover. In order to raise an implied contract of carriage the person desiring to be carried must board the train with the *bona fide* intention of becoming a passenger; be ready and willing to pay his fare when called upon; and also take passage upon the part of the train provided for carrying passengers (*Merrill* v. *Railroad Co.*, 139 Mass. 238).

Order to Produce Receipts—Noncompliance.—Flemming v. *Lawless et al.* 38 Atl. Rep. (N. J.) 864. Upon a motion in behalf of defendants to open a final decree, the petition therefor was based upon the discovery by the defendants of a certain receipt alleged to have been made by complainant's agent, and not in possession or control of defendants when the cause was tried. Objection to the motion was made on the ground that defendant having pleaded payments and alleged that they had "vouchers ready to be produced and proved," complainant, being ignorant of such vouchers, had procured an order in accordance with Sec. 157 of the common law practice act, requiring defendant to produce "the receipts, vouchers, and other evidence in writing of the payment" of the sums as set forth in the answer. Defendant, at the time of the order, had in his possession separate receipts (one of which is the one lately discovered, and the foundation of this petition), but produced instead of these a consolidated receipt, purporting to be for all the payments. *Held*, that defendant cannot now produce the separate receipt, in view of the practice act above mentioned (sec. 157), providing that a paper shall not be given in evidence where a party has refused to comply with the order to produce it.

Voting Precincts—Establishment—Indians—Citizenship.—State ex rel. Tompton et al. v. *Denoyer et al., County Com'rs*, 72 N. W. Rep. (N. D.) 1014. Indians and persons of Indian descent, residing on lands allotted to them in severalty, and upon which preliminary patents have been issued, in accordance with the "Dawes Bill" passed by Congress in 1887, are citizens of the United States and qualified electors of the State, and it was the duty of the county commissioners of the county in which such lands are situated to establish a voting precinct within and for said lands. The "Dawes Bill" declares that such Indians "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside." For a similar case see *State* v. *Norris*, 55 N. W. (Neb.) 1086.

Towns—Orders—Validity—Power of Boards.—Goodwin v. *Town of East Hartford et al.*, 38 Atl. Rep. (Conn.) 877. The board "for the care, maintenance and control" of a highway across a river, provided for by Act May 19, 1887, was to consist of the first selectmen of the towns designated as specifically benefitted by the highway; was authorized to apportion among the towns the expense of repairing and maintaining the same, as well as any damages resulting from its defective condition; and was declared by the act to be, for the purposes thereof, a body politic and corporate. *Held*, such board has no implied power to employ agents to procure legislation whereby the act of 1887 sbould be repealed, the State to assume the duty of repairing and maintaining the highway; nor has it power to issue orders binding on the towns for the expenses of such agents. This is true whether the board be considered as a municipal corporation, or simply as a device to enable the representatives of the towns to perform a municipal duty imposed on the towns jointly. In *Farrell* v. *Town of Derby*, 58 Conn. 234, 20 Atl. 460, it was held that a town may lawfully expend money it has raised by taxation to protect its corporate integrity, etc., from adverse legislation. But the doctrine of this case must not be stretched into an authority justifying a town to embark in legislative attacks on other corporations, because the town might think itself benefitted thereby.

Criminal Law—Instructions—Error—Reasonable Doubt.—Hoffman v. *State*, 73 N. W. Rep. (Wis.) 51. *Held*, error to define "reasonable doubt," in instructing a jury in a murder trial, as an "intelligent opinion or conviction that the guilt of defendant has not been satisfactorily proven." Such instruction is vicious in that it seems to minimize the significance of a mere doubt by saying that, in order to be reasonable, the doubt must rise above the condition of a mere doubt into a realm of certainty and conviction.

Nuisance—Liability of Tenant—Lease for Years.—Meyer v. *Harris et al.*, 38 Atl. Report (N. J.) 690. The lessee of a term for years is not liable to third persons for damages caused by his maintaining upon the demised premises in the condition in which it was at the beginning of the term a structure which is a nuisance. The remedy is against the owner. But where the tenant is a lessee for a term of 999 years he is, for all practical purposes (*Black* v. *Canal Co.*, 24 N. J. Eq. 465), the owner thereof, and third persons may have their remedy against him for maintaining such nuisance.