RECENT CASES.

CARRIER—FARE—TICKETS—OPPORTUNITY TO PROCURE—EJECTION OF PASSENGERS.—PHILLIPS V. SOUTHERN R. R. Co., 40 S. E. Rep. 268 (Ga.).—The defendant's agent refused to sell the plaintiff a ticket, not knowing that the train would stop at the plaintiff's destination. It being customary under like circumstances to charge passengers without tickets no higher fare, the plaintiff refused to pay more, thereupon being ejected from the train. *Held*, the defendant liable.

A common carrier, if they charge passengers without tickets a higher rate, must first give them an opportunity to procure the same. *Railroad Co. v. Rogers*, 38 Ind. 116; *Railroad Co. v. Rinard*, 46 Ind. 293. A common carrier cannot discriminate; *Railroad Co. v. Park*, 83 Ky. 510.

CHINESE EXCLUSION—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.—U. S. V. CHUN HOY, 111 FED. 899 (HAWAII).—Section 3 of the Geary Act places upon a Chinaman arrested for being illegally in this country the burden of proving affirmatively his right to remain. *Held*, an act of Congress raising presumption of guilt is valid, and evidence of Hawaiian birth, insufficient.

This presumption should be viewed under rule of evidence as to facts peculiarly within the knowledge of accused. Its harshness was due less to its intrinsic nature than to penalty of section 4. *Fong Que Ting v. U. S.*, 13 S. Ct. Rep. 1016; *In re Sing Lee*, 54 Fed. 334. Section 4 held unconstitutional. *U. S. v. Wong Dep Ken*, 57 Fed. 206. The mitigation of the penalty has removed objection to the rule.

Evidence of Hawaiian birth must be conclusive. Under 14 Amendment, law excluding immigrants is not applicable to Chinese person born in this country. *Gee Fook Sing v. U. S.*, 49 Fed. 146. *Lee Sing Far v. U. S.*, 94 Fed. 834.

CONSTITUTIONAL LAW—ELECTION BY LEGISLATURE OF ELECTION COMMISSIONERS—POWER TO CREATE BOARD TO TRY ELECTION CONTESTS.—PRATT V. BRECKINRIDGE, 65 S. W. REP. 136 (KY.).—The appellant having been awarded the office of attorney-general by a board of election commissioners, the appellee contested the decision, and the same commissioners, acting as a contest board, decided in his favor. He brought suit to gain possession of office. *Held*, that the legislature had no power to appoint a board of contest. Paynter, C. J., and Hobson and White, J. J., dissenting.

Although in *Stine v. Berry*, 96 Ky. 63, it was held that the statute creating special boards for the determination of contested elections was valid, this court favored the reasoning that a board of contest exercises in all its elements judicial power, and is therefore a court.

The whole judicial power of the State being expressly invested in the courts by the constitution, the exercise of it by the legislature transcends that power, and cannot be legally carried into effect. *James' Heirs v. Perry*, 10 Yerg. 59; 30 Am. Dec. 430.

CONSTITUTIONAL LAW—MINING COAL—PAYMENT BY WEIGHT—RIGHTS OF CORPORATIONS.—WOODSON V. STATE, 65 S. W. 465 (ARK.).—Under the ordinary constitutional provision that the powers granted a corporation may be altered or revoked,

a statute in so far as it requires a coal-mining corporation, where coal is mined and paid for by weight, to weigh the coal before screening, is not unconstitutional, as restricting the rights of corporations to contract.

The power to legislate, founded upon such a reservation in a charter, is not without limit, but is restricted by rights legitimately acquired by virtue of such charter. *Lothrop v. Steadman*, 42 Conn. 490; Fed. Cas. No. 8514; *Miller v. New York*, 15 Wall. 498; 21 L. Ed. 104; *Sheilds v. Ohio*, 95 U. S. 319, 324; 24 L. Ed. 357, 359; *Sinking Fund Cases*, 99 U. S. 721; 25 L. Ed. 502.

CONTRACTS—ILLEGAL CONDITION—FICTITIOUS SUIT—PUBLIC POLICY.—VAN HORN v. KITTITAS COUNTY, 112 FED. 1 (WASH.)—A county agreed to sell an issue of its bonds to a bidder on condition that he cause a feigned suit to be brought and prosecuted to the supreme court of the state, to determine the validity of the bonds prior to their issuance. Action against the county to recover damages for breach of this contract. *Held*, on demurrer, that the condition precedent is contrary to public policy, and the contract, being indivisible, void.

Not only is such an attempt to secure a judicial opinion upon a question of law by means of a mere colorable dispute, involving no real controversy, a fraud on the court, but a fair and exhaustive consideration of both sides of a question can rarely, if ever, be had when both parties are united in interest. *Lord v. Veazie*, 8 How. 251; *Smith v. Junction Railroad Co.*, 29 Ind. 546. The distinction between such a suit and an "amicable" suit is sharply defined, the friendliness in the latter consisting only in the manner of the proceedings, not in the absence of substantially conflicting interests. 9 Encycl. Pl. & Prac. pg. 720.

CORPORATIONS—INSOLVENCY—PREFERENCE—DIRECTORS.—SWIFT & CO. v. DYER-VEATCH CO., 62 N. E. 70 (IND.).—The Dyer-Veatch Co., a corporation, becoming insolvent, three of its directors who had become sureties on its notes payable to a bank, mortgaged all the property of the corporation to said bank. *Held*, that the transaction is void in the absence of proof authorizing it on the part of a majority of the directors other than those who were sureties, and that the creditors may question the transaction. Wiley and Henley., J. J., dissenting.

The opinion rendered here and in the recent case of *Nappannee Canning Co. v. Reid Murdock & Co.*, 60 N. E. 1068, rejects the principles which have governed the Supreme Courts of nearly all States and the U. S. Supreme Court. *Sanford F. & T. Co. v. Howe, Brown & Co.*, 157 U. S. 312. The weight of authority sustains an assignment by an insolvent corporation for the benefit of creditors even if directors, provided only the debts are bona fide: but *cf. Manufacturing Co. v. Hutchinson*, 63 Fed. 96. It was held in the *Canning Co.* case, that a majority of the directors must be disinterested. But this does not seem to be good law.

CREDITORS—PREFERRED INTEREST ON CLAIM—PEOPLE v. AMERICAN LOAN & TRUST CO., 73 N. Y. SUPP. 584.—After dissolution of defendant company, preferred creditors, who had previously been receiving interest at less than the legal rate, were paid the principal of their claims. They claimed interest at the legal rate from time of dissolution to settlement. *Held*, that they were entitled to the legal rate of interest even though unpreferred creditors were thereby deprived of the principal of their claims.

This case is unusual in that the preferred creditors had been receiving interest at less than the legal rate. It was decided (*In re Fay*, 6 Miss. Rep. 462) that where

preferred creditors had been receiving no interest they were entitled to interest from time of dissolution to time of settlement, in order of preference, although other creditors were thereby entirely cut off. See also *Upton v. Bank*, 13 Hun. 269.

DAMAGES—TELEGRAM—FAILURE TO DELIVER.—BUTLER v. WESTERN UNION TELEGRAPH CO., 40 S. E. Rep. 162 (S. C.).—This is an action brought against the defendant for failure to deliver a telegram sent to a third person for plaintiff's benefit. *Held*, where a telegraph company failed to deliver a telegram sent by the son of plaintiff to a third person for benefit of plaintiff, the latter has a right of action.

Where an agent without disclosing the name of his principal makes a contract with a common carrier to transport the property of principal, the latter may maintain an action in his own name against the carrier to recover damages for the loss of the property. *Elkins v. Boston & Maine R. R. Co.*, 19 N. H. 337.

DIVORCE—JURISDICTION—DOMICILE OF DEFENDANT.—WALLACE v. WALLACE, 50 ATL. REP. 788 (N. J.).—Complainant, deserted in one State moving into another State for the purpose of securing a divorce in such State, acquired no domicile sufficient to give the courts of such State jurisdiction, when no service is had on the defendant in such State.

This point was not decided in the recent Supreme Court decisions on this subject, *181 U. S. 155-187*, although the decision is a natural sequence of those cases. The difficulty arises as to when, under such circumstances as above stated, the domicile relied upon is matrimonial. This case lays down the rule that "necessity" alone is the true ground for jurisdiction in such cases, as suggested in *Bree v. Bree*, 181 U. S. 175, and *Atherton v. Atherton*, 181 U. S. 155. Many western jurisdictions have, of course, taken the opposite view, but this seems to present a just solution of the jurisdiction problem in such cases.

ELECTION OF OFFICERS—CITY COUNCIL—QUORUM—REFUSAL TO VOTE.—SCHMULBACH ET AL. v. SPEIDEL ET AL., 40 S. E. REP. 424 (W. VA.).—The defendants had been elected as members of the board of public works, and had taken forcible possession of the office and books. The plaintiffs, alleging illegality of election, petitioned the court to compel defendants to restore the office and books to them. *Held*, that a quorum of the city council being secured, though by unlawful means, and a majority of those present voting for the persons elected, the election is valid.

Although a quorum was obtained by the aid of the police, yet the session was a legal one, and its acts were valid. The right to compel attendance of absent members is the recognized power of every lawfully organized legislative assembly. *Cush. Law & Prac. Leg. Assem.* 3264.

EQUITY—MORTGAGE FORECLOSURE—SALE TO EXECUTOR AS MORTGAGEE.—FLEMING v. MCCUTCHEON, 88 N. W. 433 (MINN.).—Defendant, owner of a real estate mortgage, was appointed administrator of estate of mortgagor. While administrator he foreclosed the mortgage, purchased the property at the sale, and subsequently sold same at a profit. Action by the heirs-at-law to recover this profit. *Held*, that the administrator had a legal and equitable right to foreclose and purchase, and was not liable for the profits in the transaction. Brown, J., *dissenting*.

This case seems somewhat at variance with the general equitable rule that one standing in a fiduciary relation purchasing at his own sale will be charged as constructive trustee at election of cestui que trust. *Yost v. Crombie*, 8 U. C. C. P.

159. But the court reasons that as the real property passed at once to the heirs-at-law, and could be assets in the hands of the administrator only when taken possession of for the payment of debts, the administrator, therefore, did not occupy a fiduciary relation to the property. *Hill v. Mitchell,* 5 Ark. 608; *Noon* v. *Finnegan,* 29 Minn. 418, 13 N. W. 197; *Sloggy v. Dilworth,* 38 Minn. 179, 36 N. W. 451; 8 Am. St. Rep. 656.

The dissenting opinion protests vigorously against the decision of the court, and holds that the profits of the transaction clearly belonged to the heirs-at-law. And the weight of authority would seem to support this view. *Foster v. Brown,* 3 Rich. L. (S. C.) 254; 11 Am. & Eng. Enc. Law, 1020.

EVIDENCE—HEARSAY—COURT AND JURY.—IVES V. ELLIS ET AL., 62 N. E. 138 (N.Y.), —*Held,* that letters setting forth opinions for or against one of the parties are inadmissible as hearsay evidence, for the charge of the trial judge, that such letters be considered by the jury as merely showing a correspondence between parties and statements therein be disregarded, cannot destroy the prejudice already created. O'Brien and Cullen, J. J., *dissenting.*

This decision is very important, in that it departs from previous rulings of New York courts and strict rules of evidence, and tends towards better and broader principles of law. *Gall. v. Gall,* 114 N. Y. 109; *Holmes v. Moffat,* 120 N. Y. 159; *People v. Priori,* 164 N. Y. 469, hold the opposite view.

GAMING CONTRACT—PURCHASE FOR FUTURE DELIVERY—STATE STATUTE—PUBLIC POLICY.—PARKER ET AL V. MOORE, 111 FED. 470 (S. C.).—A South Carolina statute declares void a contract for future delivery, unless it is the intention of both parties that the article shall be delivered and received at the date specified. *Held,* that a broker advancing margins cannot recover from his principal who testifies that he did not intend an actual delivery, and that a state is final judge of its own public policy.

The purpose of this statute is to destroy utterly dealing in "futures." It goes behind the acts to the sworn intention of the parties.

In determining what is public policy as regards the restraints of trade the court limits itself to the constitution, laws, and judicial decisions of the State itself. Safety in this pursuit lies only in avoiding general considerations, personal views of political faith or religious dogma and following closely concrete opinion as formulated in public law. *Vidal v. Girard's Ex's.,* 2 How. 197; *Swann v. Swann,* 21 Fed. 299.

INSURANCE—CONDITIONS OF POLICY—SUICIDE.—LATIMER V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, 40 S. E. Rep. 155 (S. C.).—A benefit certificate was issued by the defendant in favor of the plaintiff upon the life of her husband who died while a member of said order. The conditions of said policy having a direct bearing on the facts in issue are, * * * (3) "death by the hand or act of the assured, whether sane or insane; (4) death by the hand of the beneficiary, except by accident." The question presented for the consideration of the court was, whether such policy with said condition was void as against public policy.

Held, a clause in a benefit certificate excepting insurer from liability where insured's death was caused by "his own hand or act whether sane or insane" is not void as against public policy. McIver, C. J., and Gary, A. J., dissenting.

Such a condition in a policy of life insurance is valid. If the assured commits suicide, although at the time utterly bereft of reason, it is death by his own hand or act within the meaning of the condition, and the policy is forfeited. *De Gogorza v. The Knickerbocker Life Ins. Co.*, 65 N. Y. 232.

INSURANCE—LIFE—GIFT—CIRCUMSTANTIAL EVIDENCE.—LORD v. NEW YORK LIFE INS. CO. ET AL., 65 S. W. 699 (Texas).—A brother made repeated statements to the effect that he had provided for his sister in event of his death, by a life insurance policy, and said that a certain policy, payable to his estate, belonged to her. On one occasion he gave a friend some papers in a sealed envelope, requesting that they be kept in a place of safety for him, and said that the envelope contained a policy for his sister. Later the papers were taken away and put in the care of his bankers. *Held*, that the evidence was sufficient to warrant a finding that he had given the policy to his sister. Pleasants, J., dissenting.

Any act on the part of the owner of a chose in action, showing not only a persistent intention to transfer, but that he regarded himself as having carried such intention into effect, is sufficient, and no written evidence of the transaction is required. *Malone's Appeal*, 38 Leg. Int. 303.

INSURANCE—RAILROAD INJURIES—INDEMNITY—CONTRACT—CONSTRUCTION — INSTANTANEOUS DEATH.—WORCESTER & S. ST. R. R. CO. v. TRAVELERS INS. CO., 62 N. E. Rep. 365.—A policy of insurance providing protection to railroad against its common law or statutory liability to any person accidentally injured while traveling on same, was *held*, not to include liability for instantaneous death of passenger. Morton and Barker, J. J., dissenting.

The court had no authorities to follow where a similar policy of insurance had been construed. It is well recognized that there is a right of action for death from accident. *Adm's v. The S. N. E. Tel. Co.*, 72 Conn. 617. The court, however, decided that this policy, while allowing compensation for injury which injured person could have recovered himself, was not sufficiently broad to cover case of instantaneous death.

MANDAMUS—JURISDICTION OF SUPREME COURT—FEE OF STREETS.—PEOPLE EX. REL. KOCOUREK v. CITY OF CHICAGO ET AL., 62 N. E. 179 (Ill.).—*Held*, that original jurisdiction of Supreme Court does not include mandamus suits seeking to compel a city to remove a superstructure over a public alley, for a city, as a municipality, does not hold the fee of the streets in trust for the people of the State at large. Magruder, J., dissenting.

This decision is a direct departure from previous decisions of this court. In *McCartney v. Railroad Co.*, 112 Ill. 611; *Smith v. McDowell*, 148 Ill. 51; *Byrne v. Railway Co.*, 169 Ill. 75, it was held that city holds fee of public streets in trust for people of State at large. But the above decision seems to be founded upon sounder law, following the line laid down in *Hagaman v. Moore*, 84 Ind. 496; *State v. Newell*, 90 N. C. 705; *Phillips v. Dunkirk, W. and P. R. Co.*, 78 Pa. 177.

MUNICIPAL CORPORATIONS—BOND ISSUE—CONSTRUCTION.—LETOURNEAU v. CITY OF DULUTH, 88 N. W. 529 (Minn.).—Chap. 351, Laws of Minn. provides that no city council of any city shall issue bonds for any purpose, amounting to $100,000 or over until such proposition to issue above that amount shall be approved by a majority of the legal voters. Charter of the city of Duluth contains similar provision. City

council issued improvement bonds amounting to $99,000. Action brought to restrain council from further issue of bonds to the amount of $60,000 with approval of voters. *Held,* that statute and charter allows council to issue bonds to any amount, less than $100,000 for any particular purpose, although the aggregate issue of city bonds exceeds $100,000. Collins and Brown, J. J., dissenting.

The court in construing this statute draws a very close distinction, which appears to be contrary to the wording of the statute as set forth by the opinion of the dissenting judges, but it is in line with the decision of the U. S. court. *Chicot Co. v. Lewis,* 103 U. S. 495.

NUISANCE—CONTRACTORS—PUBLIC WORK—DAMAGES.—BATES V. HOLBROOK ET AL., 73 N. Y. Supp. 417.—Defendants, being engaged on public work, placed their machinery, without objection from the city authorities, on a park opposite plaintiff's hotel, thereby greatly damaging him. *Held,* that contractors on public work should not unnecessarily create a nuisance to neighboring property holders. Patterson, J., dissenting.

Official sanction of a nuisance must be express to justify an injury to private property and special damage caused is actionable. *Cogswell v. R. R.,* 103, N. Y. 10; *R. R. v. Church,* 108 U. S. 317. *Contra,* a properly authorized act, done carefully, does not render the doer liable for the consequences. *Exr's v. Mayor,* 4 N. Y. 195. And damage resulting from a permanent nuisance, operating under proper authority, may be recovered. *Morton v. Mayor,* 65 Hun. 32.

RAILROADS IN STREET—CHANGE OF GRADE—LIABILITY TO ABUTTERS.—FRIES V. N. Y. & H. R. Co., 68 N. Y. Supp. 670.—Railroad Company was compelled by law to erect and run cars over steel superstructure. *Held,* company was not liable to abutting owners for injury to easements of light, etc., in absence of wording in statute to that effect. Bartlett, Vann and Cullen, J. J., dissenting.

In ruling contrary to the recent case of *Lewis v. N. Y. & H. R. Co.* 162 N. Y. 202, the court seems to have gone against the weight of authority as also the case of *Story v. Railroad Co.* 90 N. Y. 122, and *Lehr v. Met. El. R. Co.* 104 N. Y. 291. An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, and if they can be taken away and directed to inconsistent uses by legislative authority, it seems as though it inaugurates a system more nearly resembling legalized robbery than any other form of acquiring property. *Barnett v. Johnson,* 15 N. J. Eq. 481; *Codman v. Evans,* 5 Allen, Mass., 311.

REPLEVIN—AFFIDAVIT—APPEAL.—GERMAN NAT. BANK V. AULTMAN, MILLER & Co., 88 N. W. 479 (Neb.).—In appeal of replevin suit to District Court, plaintiff had filed a second affidavit enlarging on the first. Court, regarding this as superfluous, and different from that filed first, struck it out. Plaintiff withdrew suit; but later, moved for a new trial. Overruled, he asked for review on error. *Held,* that order of district court striking out said affidavit was erroneous. Sullivan, J., dissenting.

The dissenting view is of some moment. At most, the District Court's ruling was a harmless error, as said affidavit should have been regarded as an amendment. *Bank v. Ketcham,* 46 Neb. 568. After pleadings had been filed in District Court, it was too late for defendant to take advantage of any defects. 18 *Enc. Pl. and Prac.* 517; *McKee v. Metraw,* 31 Minn. 429. But plaintiff voluntarily refused to proceed. Hence, it seems lacking in propriety to send him back to District Court to fortify a probably impregnable position.

STREET ASSESSMENT—INVALIDITY—RECOVERY BY TAXPAYER—DURESS—KNOWLEDGE OF ILLEGALITY.—HAVEN ET AL V. MAYOR, ETC., 73 N. Y. Supp. 678.—The plaintiff with knowledge of invalidity of a street assessment paid the same under protest, and then sought to recover on grounds of duress and illegality. *Held,* that benefit by improvement does not exclude right, but knowledge of illegality at time of payment, though made under protest, prevents recovery.

A tax assessment has been regarded as similar to a judgment, the execution of which could not be resisted, and should, therefore, be paid and if illegal be appealed from and reversal obtained for error. *Peyser v. Mayor, etc.,* 70 N. Y. 497. The court now seems to regard this as true only where the taxpayer at the time of paying is ignorant of the facts establishing illegality.

TAXATION—BANK CAPITAL—EXEMPTION IN CHARTER—RES ADJUDICATA.—UNION AND PLANTERS' BANK V. CITY OF MEMPHIS, 111 Fed. 561 (Tenn.).—Its charter provided bank should pay the State "an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes." In former suit between same parties on like subject matter Supreme Court of Tenn. held bank liable only for stipulated tax on its shares of stock. This decision was pleaded in estoppel to suit for enjoining collection of taxes by city. *Held,* bank was not exempt from *ad valorem* tax on its capital, and former decision, no bar.

Shares in hands of stockholders are exempt—divided court. *Farrington v. Tenn.,* 95 U. S. 679; and also corporate capital, *Memphis v. Hernando Ins. Co.,* 6 Bax. 527; *contra Bk. of Com. v. Tenn.,* 104 U. S. 493; *Shelby Co. v. U. and P. Bk.,* 161 U. S. 149. Bank building alone is exempt, not collateral holdings of real estate, surplus profit, nor corporate capital.

The adverse adjudication of demand for a tax is an estoppel to demand for same tax for other years. *So. Pac. R. Co. v. U. S.,* 168 U. S. 1. Such estoppel not allowed by usage of Tenn., hence held no bar, as U. S. court gives a judgment no greater efficacy than State court allows. This precise question seems not to have arisen heretofore.

TAXATION—FRANCHISE TAX—PATENT RIGHTS.—PEOPLE EX REL U. S. ALUMINUM PRINTING CO. V. KNIGHT, 73 N. Y. Supp. 745. The comptroller, in determining the franchise tax of a corporation, included in the appraised capital the value of certain patent rights owned by them. *Held,* that patent rights, being non-taxable, are excluded from such assessment. Smith, J., dissenting.

This is exactly contrary to the decisions of the same court in *People v. Wemple,* 61 Hun. 53 and *People v. Campbell,* 138 N. Y. 543, which on the authority of *People v. Insurance Co.,* 92 N. Y. 328, held that patent rights could be included in capital stock for assessment purposes, on the ground that the franchise tax was upon the franchise alone and not upon the investment. But there is a tendency to disregard this distinction in the later cases of *People v. Assessors,* 156 N. Y. 417, and *Johnson Co. v. Roberts,* 159 N. Y. 70, and to hold federal grants of privileges exempt from any assessment.

WARRANTY—HEARSAY.—IVES V. ELLIS, 62 N. E. 138 (N. Y.).—An action for the breach of an express warranty in the sale of an alleged ancient document. The defendant offered in evidence a letter written by him to the plaintiff, containing the opinion of experts, which plaintiff had requested fifteen months after purchase, as to the genuineness of said document. *Held,* there was error in admitting it. O'Brien & Cullen, J. J., dissenting.

The diversity of opinion regarding the admissibility of this letter, is due to the obvious distinction between its contents and the relevancy of its writing to the issue of warranty. Though admitted to show compliance with the plaintiff's request, and though the jury was charged to disregard its contents, Parker, C. J., held that the error was not cured, citing *People v. Schooley,* 43 N. E. 536; *Holmes v. Moffat,* 24 N. E. 275. O'Brien, J., dissenting, held the seeking of expert opinion to be irreconcilable with the claim of a warranty, and that the error was cured. Landon, J., concurring, held the claim of a warranty and the seeking of expert opinion, not to be inconsistent.