ABSTRACTS OF RECENT DECISIONS

ARMY AND NAVY—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

Act Cong., March 8, 1918 (Soldiers' and Sailors' Relief Act), Section 302, prohibiting foreclosure of mortgages against persons in military service, except under order of court, is not limited to owners of record, or to cases where mortgagee in fact knew, or had reason to know, who owner was, including every case where mortgaged property is owned by person in military service, etc. *Hoffman v. Charlestown Five Cents Sav. Bank,* 121 N. E. (Mass.) 15.

BANKS AND BANKING—DEPOSITS—TRUST FUNDS.

Where a bank knowingly placed ward's funds to the individual account of guardian, who checked the money out for her own use, bank was liable to ward, and nothing short of restitution or payment by the guardian constituted a defense, and it was immaterial that no accounting had been made in the probate court and that the guardian and sureties were solvent. (Hart and Smith, JJ., dissenting.) *Blanton v. First Nat. Bank of Forrest City et al.,* 206 S. W. (Ark.) 745.

BANKS AND BANKING—FORGED CHECKS—RIGHTS BETWEEN BANKERS

Where a bank stamped "Paid" on face of check, and on the back thereof, "Pay any bank or banker. All previous endorsements guaranteed," attaching slip reading, "We enclose for collection and return," and sent direct to drawee bank, which paid same, and later, after payment of proceeds to its customer by collecting bank, drawee discovered depositor's signature was forged, both banks were at fault contributing to the loss, and drawee bank could not recover from collecting bank. *Commercial & Savings Bank Co. of Bellefontaine, Ohio, v. Citizens' Nat. Bank of Franklin,* 120 N. E. (Ind.) 670.

CARRIERS—STREET RAILWAY FRANCHISE—CHARGES—REGULATION.

A municipal ordinance, passed under statutory authority, granting a franchise for a stated term to a street railway company, and fixing a rate of fare to endure during that term, when accepted by the company creates a contract mutually binding and unalterable during the term, except by consent of both parties.

The courts cannot relieve a street railroad company from performance of a valid franchise contract by which it agreed to operate its road at a fixed rate of fare, on the ground that because of changed

conditions such operation would be at a loss, and the company would be deprived of its property without due process of law. *Columbus Ry., Power and Light Co. v. City of Columbus, Ohio, et al.*, 253 Fed. (Ohio) 499.

CARRIER OF PASSENGERS—PUBLIC SERVICE COMMISSION.

Where Public Service Commission, in order to provide railway company with funds necessary for continued operation of its lines, made order authorizing a schedule of increased fares, such schedule will be permitted to remain in force, where appeals from order are taken until determination upon merits of the appeals. *Public Utilities Commission v. Rhode Island Co.*, 104 Atl. (R. I.) 690.

CERTIORARI—SUFFICIENCY—OBJECTIONS.

The Seneca Company, Inc., plaintiff in error, brought suit upon an account for $16.56 in the Justice's Court against S. M. Schell, doing business under the name of Phoenix Supply Company. The Justice found for the defendant. Plaintiff applied for a writ of certiorari. The Judge of the Superior Court overruled the certiorari, and plaintiff excepted. Errors complained of in the petition are: *FIRST.* That the judgment is contrary to law and without evidence to support it. *SECOND.* That the judgment is contrary to the evidence. *THIRD.* That the Court erred in refusing to allow the original contract or order given by the Phoenix Supply Company to the Seneca Company for the purchase of the said goods to be introduced in evidence, said contract or order being set out in full in paragraph eight of the petition, as the said contract or order was the best evidence to be had by the said Court in the trial of the said case. *FOURTH.* That the Court erred in allowing the testimony of S. M. Schell and S. E. Maddox to be introduced over the objection of plaintiff.

Counsel for defendant in error insisted that without regard to the merits of the case, inasmuch as the amount involved was under $50.00, and as appeal and not certiorari was the remedy, the judgment of the Judge of the Superior Court in overruling the certiorari was correct.

Held, The record does not show what were the defendant's objections, which were sustained by the trial magistrate, to the admission in evidence of the original order, or what were the plaintiff's objections, which were overruled, to the admission of the testimony complained of. It is, therefore, not made to appear that the Judge

of the Superior Court erred in overruling the third and fourth grounds of the petition for certiorari. No real issue of fact was raised upon the trial of the case; hence certiorari was the proper remedy. However, in the State of the record it does not appear that the Court erred in overruling the certiorari, and the judgment is affirmed. *Seneca Company, Inc., v. Schell* (Georgia), 96 Southeastern Reporter 501.

CHATTEL MORTGAGES—INVALIDITY.

Where goods purchased by corporation for its use are delivered to it, but paper title lodged for an instant in name of its agent, his chattel mortgage to vendor, who has knowledge of all the facts, is void as against creditors of corporation as agent never had actual or potential interest in the goods. *Cross v. Printing Corporation,* 104 Atl. (N. J.) 727.

CONSTITUTIONAL LAW—"DUE PROCESS OF LAW"—TAXATION.

Taxation, general or special, is a legisative function, and it is not necessary to "due process of law" that the matter of assessment and levy shall ever come before a court, but it is sufficient that, at some stage of the proceedings, the parties affected shall have an opportunity to be heard. *Chicago, M. & St. P. Ry. Co. v. Drainage District, etc.,* 253 Fed. (Ia.) 491.

CONTRACTS—EXECUTORY CONTRACT.

If one of the parties to an executory contract avowedly and unequivocally repudiates it the other party is not obliged to wait until the time fixed for performance, but may sue to establish his rights as soon as the contract is broken. *Dixon v. Anderson,* 252 Fed. 694.

COURTS—CARRIERS UNDER FEDERAL CONTROL—DISTRICT OF SUIT—STAY OF TRIAL.

Suit against carrier while under Federal control, brought after promulgation of and contrary to General Orders Nos. 18 and 18a of the Director General of Railroads, in a county or district other than where the cause of action arose, or where plaintiff resided when it accrued will be dismissed.

Under General Order No. 26 of Director General of Railroads, as to staying trial, on showing that just interests of Government will be prejudiced by present trial of action against carrier under Federal control pending in a county or district other than where the cause of action then arose or plaintiff then resided, but allowing a new action

in the county or district, stay depends upon the circumstances of each case; the primary consideration being the situation of the Government relative to railroad witnesses leaving their work. *Crocker v. New York, O. W. Ry. Co.,* 253 Fed. (N. Y.) 676.

DIVORCE—CONDONATION.

A husband completely condoned a known alleged adultery by expressly forgiving his wife, telling others they were reconciled, and going with her three miles to their home, although a few minutes thereafter he renounced the reconciliation because of his brother's objection and took her directly to her parents and cohabitation and sexual intercourse were not resumed. *Bush v. Bush,* 205 S. W. (Ark.) 895.

INJUNCTION—NEGOTIATION OF CHECK.

Where the seller of goods to be delivered on payment of the buyer's check indorses and presents the check, and payment is refused, but the buyer is inadvertently allowed to regain possession of the check with seller's indorsement seller may restrain the negotiation of the check pending the final determination of the cause on a showing that the buyer is insolvent. *Bridger v. Brett,* 97 S. E. (N. C.) 32.

INSURANCE—PROCEEDS OF CAPITAL STOCK—INVESTMENT.

Since act of casualty company in investing proceedings of capital stock and securities other than those named in Burns' Ann. St., 1914, Section 4769, is not void, but only voidable, it is not a defense in an action on a note given to a casualty company for such stock, that note was traded by the casualty company to plaintiff bank in exchange for bank's certificate of deposit. *Central Bank of West Lebanon v. Martin,* 121 N. E. (Ind.) 57.

INTOXICATING LIQUORS—RECOVERY OF FORFEITED PROPERTY.

The seller of an automobile, who delivered possession to the buyer but retained title until payment, held not entitled to recover the automobile which had been forfeited under acts 1917, p. 45, Sec. 6, because used by the buyer to unlawfully transport intoxicants into the state, though payment had not been made and the seller understood the car was to be used for an innocent purpose. *H. A. White Auto Co. v. Collins,* 206 S. W. (Ark.) 748.

LANDLORD AND TENANT—COUNTERCLAIM.

When a tenant is sued for rent and counterclaim for damages upon landlord's breach of contract, he may either bring an independent

suit or recoup in the suit for rent, but can only recoup to the amount of the claim for rent. *Selz v. Stafford,* 120 N. E. (Ill.) 462.

LOGS AND LOGGING—STANDING TIMBER—CONVEYANCE.

Under contract of sale of standing timber, giving purchaser liberty to go upon land and remove timber as would be convenient to him, title passed to only so much timber as might be removed within a reasonable time, since removal clauses should not be construed as covenants. *Houston Oil Co. of Texas v. Boykin, et al.,* 206 S. W. (Tex.) 815.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION AGREEMENT—NECESSARY PARTIES.

In the absence of a rule of the industrial board to the contrary, insurance carrier is not a necessary party to a compensation agreement under Workmen's Compensation Act, Section 57, as amended by Acts, 1917, C. 81, Sec. 4, nor to a proceeding looking to its approval by the board, but where insurance carrier for sufficient causes seasonably petitions to be admitted as a party, it should be admitted and heard. *Aetna Life Ins. Co. v. Shievely et al.,* 121 N. E. (Ind.) 50.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"OUT OF AND IN COURSE OF EMPLOYMENT."

Where beam tender of tire fabric company whose business it was to see that yarn was wound around revolving cylinder, was killed when he fell on machine, so that his neck was torn open and cartoid artery cut, injury arose "out of and in course of employment" within Workmen's Compensation Act. *Dow's Case, In re American Mut. Liability Ins. Co.,* 121 N. E. (Mass.) 19.

Where a flour salesman was injured while crossing a street on his way to board a car to return to his home, from which it was customary for him to telephone orders for goods to his employer, the injury arose out of and in the course of his employment. *Bachman* v. Waterman, 121 N. E. (Ind.) 8.

MONOPOLIES—COMBINATION IN RESTRAINT OF TRADE—ANTI-TRUST ACT.

A manufacturer of products shipped in interstate trade is not subject to criminal prosecution, under Sherman Anti-Trust Act, July 2, 1890 (Comp. St. 1916, Sec. 8820 et seq.), for entering into a combination in restraint of such trade, because he agrees with his custom-

ers upon prices claimed by them to be fair and reasonable, at which the products may be resold, and declines to sell to those who will not so agree. *United States v. Colgate & Co.,* 253 Fed. (Va.) 522.

MUNICIPAL CORPORATIONS—ABATEMENT OF NUISANCE—POWERS OF CITY.

If a nuisance arises from improper use of building and is not inherent in the structure, the city may regulate the use, but cannot destroy the building and if the offense is inherent in the structure, a demolition may not be resorted to if prior to the exercise of municipal authority the objectionable features have been removed. *Town of Bloomfield v. West et al,* 121 N. E. (Ind.) 4.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

While a lady was crossing a side track and the main track of the defendant's railroad at its West Union station in the customary and designed method of reaching the platform from which she intended to board one of defendant's trains, after having purchased a ticket entitling her to carriage on said train, the station and platform being on opposite sides of the tracks, the train came in at a comparatively low rate of speed and would have run her down and probably killed her, but for the assistance rendered her by the plaintiff, according to the testimony of himself and other witnesses. He says he stepped down on the track, grabbed her, and threw her toward the platform, and was then struck by the pilot beam of the engine.

Held, The overwhelming weight of authority denies that voluntary incurrence of risk in effecting a rescue from danger occasioned by negligence amounts to contributory negligence, unless the act of intervention was performed under such circumstances as would make it rash or reckless in the estimation of ordinarily prudent persons (citing authorities). These authorities hold that contributory negligence on the part of the person rescued does not preclude right of recovery on the part of the rescuer. If however, the latter has himself brought about the danger to the person rescued, or the negligence of such person is imputable to him, he cannot recover. A person exercising this right of rescue is generally confronted by an emergency born of the negligence of the defendant in the action and suffers injury from the same cause. Here, as in other cases, allowance is made for erroneous judgment under circumstances excluding time and opportunity for reflection, and recovery is permitted if the act of intervention was not rash or impudent. Judgment in favor of the plaintiff

affirmed. *Bond v. B. & O. R. Co.* (West Virginia), 96 Southeastern Reporter, 932.

PLEADING—MATTERS OF PRESUMPTION.

Where a master in the first instance furnished a defective tail chain and an unfit mule for servant's use in removing coal from a mine, he is presumed to know of such defects or unfitness, and the servant's complaint need not aver master's knowledge and time to replace or repair. *Jackson Hill Coal and Coke Co. v. Van Hentenryck,* 120 N. E. (Ind.) 664.

TRUSTS—PERSONAL PROFIT BY TRUSTEE.

Though a trustee was entitled to be repaid with interest for disbursements, it was a breach of trust for him to attempt to make a personal profit by discounting claim against the trust fund, and then collecting it in full. *Atty General ex rel Methodist Religious Society in Boston et al v. Armstrong et al,* 120 N. E. (Mass.) 678.