ABSTRACTS OF RECENT DECISIONS

CRIMINAL LAW—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE OBJECTIONABLE.

Requested instruction that where conviction is sought upon circumstantial evidence, either in part or in whole, the facts and circumstances must be absolutely incompatible on any reasonable hypothesis with the innocence of accused held objectionable, both because it did not apply to the evidence and because it would apply to a case where there was direct evidence of guilt with minor facts and circumstances connected therewith. *People v. Kuhn*, 125 N. E. (Ill.) 882.

TAXATION—TRANSFER TO TAKE EFFECT AT GRANTOR'S DEATH SUBJECT TO INHERITANCE TAX.

If the actual intention of the parties to a deed be that the possession and enjoyment of the lands conveyed thereby are to be postponed until the grantor's death, the transfer of such lands is subject to inheritance tax act sec. 1, par. 3, notwithstanding such evidence is not in writing, but can only be shown by Parol. *People v. Shaffer*, 125 N. E. (Ill.) 887.

NEGLIGENCE—RECOVERY MUST BE ON NEGLIGENCE ALLEGED IN COMPLAINT.

Where a complaint alleges that, because of the negligent failure of the manufacturer of a motor car to properly inspect it, plaintiff, a purchaser from a dealer, was injured by the breaking of a wheel, there can be no recovery on the theory that the manufacturer was guilty of fraud in falsely representing that the wheels were of great strength. *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878.

GAS—RATES.

A gas company, operating under two franchises from a city, one of which it acquired by assignment, held bound to charge no more than the lowest maximum rates provided in either franchise. *Gas Co. v. City of Shreveport*, 261 Fed. 771.

HUSBAND AND WIFE—PROPERTY RESULTING FROM WIFE'S BUSINESS NOT SUBJECT TO HUSBAND'S CREDITORS.

Where, after a husband was deeply indebted and insolvent, a wife on her own capital entered business and acquired property, the spouses cannot be treated as partners, and the profits of the business subjected to

claims of the husband's creditors, though he assisted in the business and at times spoke of it as his; the business being that of the wife who furnished the capital. *Rowe v. Drohen,* 262 Fed. 15.

CORPORATIONS—STOCKHOLDER'S SUIT AGAINST MAJORITY STOCKHOLDERS.

While a minority stockholder is entitled to the protection of a court of equity against illegal and fraudulent acts of the majority, the misconduct of the majority must be clearly established to justify the court in such interference, and the fact that, in a suit by a minority stockholder for such relief on behalf of himself and all others desiring to join, no other minority stockholders come in, may properly be considered. *Presidio Mining Co. v. Overton,* 261 Fed. 933.

RAILROADS—RELIANCE ON USUAL WARNINGS WILL NOT RELIEVE FROM CONTRIBUTORY NEGLIGENCE IF INJURED PERSON COULD HAVE AVOIDED ACCIDENT BY ORDINARY CARE.

The reliance of one approaching a railroad crossing upon the giving of the usual warnings of an approaching train will not relieve him from the charge of contributory negligence if, independent of this reliance, he had an opportunity to protect himself by the exercise of reasonable care. *Lanier v. Minneapolis, etc., Ry. Co.,* 176 N. W. (Mich.) 410.

CORPORATIONS—ON SALE OF ITS STOCK CORPORATIONS MAY STIPULATE FOR RIGHT OF RECISSION ON CERTAIN CONDITIONS.

A corporation may, on a sale of its stock, no rights of creditors being involved, stipulate for a right of recission on certain conditions. *Gasser v. Great Northern Ins. Co.,* 176 N. W. (Minn.) 484.

APPEAL AND ERROR—FINDING OF COURT IN EQUITY SUIT DOES NOT HAVE BINDING EFFECT OF VERDICT.

On appeal in an equity case the action is tried de novo, and while the appellate court will give some weight to the fact findings of the trial court, such findings do not have the effect of a verdict, and will not be followed when against the weight of the evidence. *Nelson v. Smith,* 176 N. W. (Ia.) 256.

INSURANCE—FIRE INSURER ESTOPPED TO DENY VALIDITY OF POLICY TO WHICH GENERAL AGENT HAD ADDED RIDER AUTHORIZING ADDITIONAL INSURANCE.

Where the general agent of a fire company knew that a policy-

holder had additional insurance in companies not authorized to do business in the state of Iowa, and with such knowledge added to the policy a rider, authorizing such insurance, the fire company is estopped to assert the invalidity of the policy because of additional insurance at the time the rider was added. *Cooper Wagon & Guggy Co. v. Nat., etc., Ins. Co.,* 176 N. W. (Ia.) 309.

TRIAL—EFFECT OF PRESUMPTION OF INNOCENCE ON RULE AS TO DIRECTION OF VERDICT STATED.

The rule that, when the facts are such that reasonable men can fairly draw but one conclusion therefrom, the court should direct a verdict is not affected by the presumption of innocence, except that it requires stronger proof than would be required if no such presumption existed. *Spaulding v. Mut. Life Ins. Co.,* 109 Atl. (Vt.) 22.

HEALTH—EMPLOYEE HIRED TO PREVENT FIRE BEARS PRIVATE RELATIONSHIP TO THE OWNER.

Where a statute requires a theatre to employ a person to guard against fire, such person to be approved by a board of fire commissioners, the employment remains a private relationship in its legal and constitutional aspects, although the duties of the employee have to do with the public safety. *O'Neil v. Providence Amusement Co.,* 108 Atl. (R. I.) 887.

CORPORATIONS—UNLAWFUL SUBSCRIPTION CONTRACT DOES NOT RELIEVE STOCKHOLDERS FROM LIABILITY TO PAY PAR VALUE.

A court of equity may declare the unlawful subscription contract to be ineffective to relieve the stockholder of the legal duty to pay the par value of the stock, if the interests of the corporation so demand, or it be necessary to do so in order to pay creditors of the company. *Scully v. Automobile Finance Co.,* 109 Atl. (Del.) 49.

TAXATION—ORDER RATIFYING TAX SALE NOT SET ASIDE ON MERE PETITION TO STRIKE OUT.

A court, having ratified and confirmed a tax sale under special authority conferred on it by statute, had no power, sitting in the tax case, after the enrollment of its order, to grant relief under a petition filed by the former owner of the land to strike out the order of ratification. *Reth v. Levinson,* 109 Atl. (Maryland) 76.

CRIMINAL LAW—PENALTY DOES NOT DISTINGUISH FELONY FROM MISDEMEANOR.

The penalty for an offense by itself does not always fix the

character of the offense as between felony and misdemeanor. *State v. Breuer,* 102 S. E. (S. C.) 15.

CONTRACTS—RATIFICATION MUST BE WITH FULL KNOWLEDGE.

The rule that no man will be held bound by a waiver of his rights, unless it plainly appears he had full knowledge of them and a distinct intention to waive them, applies to ratification of a voidable contract, which involves a waiver of objection to that which rendered the contract voidable. *Upton & Walker v. Holloway & Co.,* 102 S. E. (Va.) 54.

PARTNERSHIP—JOINT INTEREST IN PROFITS AND LOSSES CREATES "PARTNERSHIP" AS TO STRANGERS.

A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a "partnership" as to third persons. A common interest in profits alone does not. *Wester v. Everett,* 102 S. E. (Ga.) 159.

WHARVES—DESTRUCTION OF A PORTION OF RENTED WHARF HELD NOT TO RELEASE LESSEE.

The destruction of a portion of rented wharf, making warf useless without repairs, though not the fault of lessee, did not release lessee from lease obligating him "to maintain the said wharf in its present condition during the continuance of this lease. *Chambers v. North River Line,* 102 S. E. (N. C.) 198.

LIENS—CAN ONLY BE CREATED WITH OWNER'S CONSENT.

A lien can only be created with the owner's consent, that is, by a contract express or implied with the owner of the property or with some one by him duly authorized, or without his consent by the operation of some positive rule of law, as by statute. *Harriss v. Parks,* 187 Pac. (Okla.) 470.

MASTER AND SERVANT—REMEDY BY ACTION CUMULATIVE TO ARBITRATION UNDER WORKMEN'S COMPENSATION ACT IN CASE OF EMPLOYER'S REFUSAL TO CONSENT TO ARBITRATION.

If an employer refuse to consent, in writing, to arbitration, the workman is not obliged to resort to action to enforce payment of compensation. In such a case the remedy by action is permissive, and is cumulative to the remedy by arbitration. *Roper v. Hammer,* 187 Pac. (Kan.) 858.

RAILROADS—LAST CLEAR CHANCE RULE INAPPLICABLE TO CROSSING ACCIDENT UNLESS OBSTRUCTION WAS DISCOVERED IN TIME.

The last clear chance rule never applies to cases of injury at a railroad crossing unless there is some evidence that the engineer or motorman actually saw the obstruction in time to have avoided the injury by stopping the train or car. *Griswold v. Pacific Electric Ry. Co.*, 187 Pac. (Cal.) 65.

HUSBAND AND WIFE—EXECUTION OF MORTGAGE BY MINOR HUSBAND, WAS NO DEFENSE TO A FORECLOSURE WHERE LAND WAS OWNED BY WIFE.

Even though a mortgage on land to secure a note, made by husband and wife, was executed by the husband while a minor, that of itself was no defense to the action to foreclose the mortgage, where the land was owned by the wife and was not a homestead, as she could have mortgaged or sold it without his joinder. *Merrit v. Park Nat. Bank of Sulphur*, 187 Pac. (Okla.) 232.

CRIMINAL LAW—WITHOUT OFFER OF PROOF, EXCLUDED EVIDENCE CANNOT BE HELD ERROR.

In a murder prosecution, where objection of state's counsel was sustained to a question asked defendant as to what he knew about deceased's conduct toward men with whom he had had trouble and thereafter no offer was made to prove defendant's knowledge of deceased's prior specific turbulent acts toward third persons, showing what the excluded evidence was, its exclusion cannot be adjudged error. *State v. Roberts*, 217 S. W. (Mo.) 988.

MASTER AND SERVANT—AUTOMOBILE OWNER NOT LIABLE FOR NEGLIGENCE OF DRIVER ENGAGED IN A PERSONAL ERRAND.

Where an automobile accident occurred while the driver was giving a friend a pleasure ride during the evening at a time when he was not engaged in performance of business duties, in direct disobedience of instruction, the employer was not liable. *Kilroy v. Charles L. Crane Agency Co..*, 218 S. W. (Mo.) 425.

ASSOCIATIONS—MAY PRESCRIBE QUALIFICATIONS FOR MEMBERSHIP WITHOUT COURT INTERFERENCE.

A voluntary association has power to enact laws governing the admission of members and to prescribe the necessary qualifications for membership; membership being a privilege which the society may

accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interest. *Harris v. Thomas,* 217 S. W. (Tex.) 1068.

HUSBAND AND WIFE—WIFE NOT MAKING CLAIM NOT ALLOWED TO SUBSEQUENTLY CLAIM PROPERTY IN HANDS OF HUSBAND AS AGAINST CREDITORS.

A wife who allows her husband to use her property for a long time as his own land will not be allowed to claim it as against his creditors. *Irwin v. Dugger,* 218 S. W. (Ark.) 177.

TRADE-MARKS AND TRADE NAMES—RIGHT OF NATURAL PERSON TO USE FAMILY NAME IN CONDUCTING BUSINESS NOT UNLIMITED AND MAY NOT BE USED TO WORK A FRAUD.

The right of a natural person to the use of his family name in conducting any business although such use be detrimental to other individuals of the same name, is not unlimited, and he cannot resort to any artifice or contrivance intended to delude the public as to the identity of his business or products, or combine his name with others to work a fraud. *M. M. Newcomer Co. v. Newcomer's New Store,* 217 S. W. (Tenn.) 822.

CONSTITUTIONAL LAW—MANNER PRESCRIBED FOR AMENDMENT BINDING ON PEOPLE.

While the people have unlimited power to amend the Constitution of the state, they are, nevertheless, bound by requirements in their organic law concrning the method to be pursued in making amendments, and hence art. 12 of the Constitution of 1820, providing the procedure to be followed in amending the constitution, should be construed as a modification of section 2 of the bill of rights in such constitution, which gives the people unlimited power to alter or abolish the constitution. *Erwin v. Nolan,* 217 S. W. 837 (Mo.).

MASTER AND SERVANT—INJURY TO INTOXICATED EMPLOYEE DOES NOT "ARISE OUTOF AND IN COURSE OF EMPLOYMENT" WITHIN WORKMEN'S COMPENSATION ACT.

Where a chauffeur was so intoxicated that he could not follow his employment and was taken to the entrance of his employer's garage and told to go home, was later found in an elevator in the garage building fatally injured, the accident did not "arise out of and in course of the

employment." *Emery Motor Livery Co. v. Industrial Commission,* 126 N. E. (Ill.) 143.

FRAUD—REPRESENTATIONS OF PROMISSORY CHARACTER NOT FRAUD.

Fraud cannot be predicated upon representations, however false, which are of a promissory character, or having reference to a future intention of the party making them, or of possible future facts, but only upon false representations of an existing fact either past or present. *Records v. Smith,* 126 N. E. (Ind.) 335.

TAXATION—MEMBERSHIP IN NEW YORK STOCK EXCHANGE OWNED AND EXERCISED BY A RESIDENT OF THE STATE IS "PERSONAL PROPERTY" HAVING A TAXABLE SITUS IN STATE OF DOMICILE.

A membership in the New York stock exchange owned by a resident of Ohio, a partner in a brokerage firm, and which afforded him increased facilities for doing business and gave him certain contractual rights, and had a market value, though transferable only according to regulations of the exchange, which owned the entire capital stock of the Exchange Building Company, which owned the property in which the business of the exchange was conducted, is "personal property" having a taxable situs at the domicile of the owner within general code, sec's 5325, 5328, and in view of const. art. 12, sec. 2. *Anderson v. Durr,* 126 N. E. (Ohio) 57.

MUNICIPAL CORPORATIONS—CITY IS LIABLE FOR WRONGFUL INJURIOUS ACTS OF SERVANTS OR AGENTS IN THE PERFORMANCE OF A MINISTERIAL ACT.

But where a wrongful act which has caused injury was done by the servants or agents of a municipality in the performance of a purely ministerial act, which was the proximate cause of the injury, without fault on the part of the injured person, respondent superior applies and the municipality is liable. *Fowler v. City of Cleveland,* 126 N. E. (Ohio) 72.

INJUNCTION—NOT GRANTED IF IT WORKS GREATER INJURY THAN THE WRONG TO BE RESTRAINED.

An injunction will not be granted, if it will work greater injury than the wrong which is asked to be restrained, and the comparative convenience or inconvenience of the parties from granting or withholding an injunction should be considered, and none should be granted if it would operate oppressively or inequitably, or contrary to the real

justice of the case, and all equities should be considered including delay and laches. *Fesler v. Bosson,* 126 N. E. (Ind.) 20.

CORPORATIONS—REASONABLENESS AND PURPOSE OF STOCKHOLDER'S DESIRE TO EXAMINE BOOKS WILL BE DETERMINED.

At common-law the Court will determine if a stockholder's desire to examine the stock and transfer books of the company not only is reasonable, but has reference to the interests of the company and his personal interest as a stockholder. *Shea v. Parker,* 126 N. E. (Mass.) 47.

GAS—NO RETURN ON GREATLY INCREASED VALUE TO FIX JUST RATE.

Where the property of a public utility, as a gas company, has increased so enormously in value since its acquisition as to render a rate permitting a reasonable return on such increased value unjust to the public, such a rate will not be fixed or permitted. *Utilities Commission ex rel City of Springfield v. Springfield Gas & Electric Co.,* 125 N. E. (Ill.) 891.

CRIMINAL LAW—WITNESS NEED NOT QUALIFY AS EXPERT TO TESTIFY THAT LIQUOR SMELLED WAS WHISKEY.

In a prosecution for violation of a prohibition law, it was not error to permit an officer to testify that the contents of bottles found in defendant's car was whiskey, when the bottles were not introduced in evidence, when he testified that one of the bottles fell and broke, spilling the contents, and that he knew from the smell that it was whiskey, since it was unnecessary that he qualify as an expert to make his testimony competent. *Zoeller v. State,* 126 N. E. (Ind.) 1.