PROGRESS OF THE LAW.

As Marked by Decisions selected from the Advance Reports for February.

In *Wallace* v. *Driver*, 33 S. W. Rep. 641, the Supreme Court of Arkansas has re-asserted the rules of the Common Law: (1) That when a part of the land belonging to a riparian owner is washed away by a sudden and perceptible process, new land subsequently formed on the submerged portion belongs to that owner; and (2) That when the land of a riparian owner on a navigable stream is gradually and imperceptibly washed away, and the place where it was remains for many years the bed of the river, the owner does not acquire title by accretion to new land subsequently formed within his original boundaries, unless its formation began at high-water mark.

Accretion

The general employment of an attorney to prosecute an action does not confer on him the power to dismiss it; and the re-instatement of an action thus dismissed without authority rests in the discretion of the trial court: *Rhutasel* v. *Rule*, (Supreme Court of Iowa,) 65 N. W. Rep. 1013.

Attorney, Powers

By analogy with the rule which prevails in the case of coupon tickets issued for passage over the lines of different companies, if a system of railways, owned by one company, or operated under one management, is divided into separate divisions, a valid ticket, with coupons attached to it for each of those divisions, will, in the absence of any specific contract or express restriction upon the ticket to the contrary, entitle the person who has the right to use the ticket to stop over at the end of each division, and then resume his journey on the next coupon of the same ticket, provided that this is done within the final limit fixed by the ticket: *Spencer* v. *Lovejoy*, (Supreme Court of Georgia,) 23 S. E. Rep. 836.

Carriers, Coupon Tickets, Stop-Over

Charitable Corporation, Liability for Negligence of Servants

The Supreme Court of Errors of Connecticut has recently decided, in accordance with the consensus of authority, that a charitable corporation is not liable for the torts of its agents, unless it has been negligent in selecting them; and consequently that a hospital is not liable for injuries to a patient caused by the negligent treatment of the physicians and nurses employed by it, if it has exercised due care in its selection of them: *Hearns* v. *Waterbury Hospital*, 33 Atl. Rep. 595.

It is the generally accepted doctrine, that a charitable institution of whatever kind, hospital, school, or reformatory, whether supported by the state or by private subscriptions and donations, is not liable for the negligence or wilful torts of its employes, so long as it exercises due care in selecting them, on the principle that damages in such case ought to be paid out of the pocket of the wrongdoer, and not from the trust fund, donated and controlled for other purposes: *Williamson* v. *Louisville Industrial School of Reform*, 95 Ky. 251; *Perry* v. *House of Refuge*, 63 Md. 20; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Benton* v. *Trustees*, 140 Mass. 13; *Downes* v. *Harper Hospital*, 101 Mich. 555; *Haas* v. *Missionary Society*, 26 N. Y. Suppl. 868; s. c., 6 Misc. Rep. 281; *Richmond* v. *Long*, 17 Gratt. (Va.) 375. *Contra: Donaldson* v. *Commissioners*, 30 N. B. R. 279; *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411. This rule applies, though those patients who are pecuniarily able are required to pay a fee for treatment in the hospital, proportionate to their circumstances: *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Downes* v. *Harper Hospital*, 101 Mich. 555.

The same principles apply to the case of an employer who maintains a hospital for the care of injured employes, whether he assumes that duty voluntarily, or under statutory compulsion; in either case he will not be liable for the negligence of the physicians, surgeons and attendants, if they are competent: *Union Pacific Ry. Co.* v. *Artist*, 60 Fed. Rep. 365; *Pierce* v. *Union Pacific Ry. Co.*, 66 Fed Rep. 44; *Southern Florida R. R. Co.* v. *Price*, 32 Fla. 46; *Eighmy* v. *Union Pacific Ry. Co.*, (Iowa,) 61 N. W. Rep. 1056; *Atchison*,

Topeka & Santa Fe Ry. Co. v. *Ziegler*, (Kans.) 38 Pac. Rep. 282; *O'Brien* v. *Cunard S. S. Co.*, (Mass.) 28 N. E. Rep. 266; *Laubheiser* v. *De Koninglyke Nederlandsche Stoomboot Maatschappy*, 107 N. Y. 228; *Allen* v. *State S. S. Co.*, (N. Y.) 30 N. E. Rep. 482, reversing 8 N. Y. Suppl. 803. This is true, even though the hospital is supported by forced contributions from the employes, so long as the employer himself derives no profit from it: *Richardson* v. *Carbon Hill Coal Co.*, 10 Wash. 648.

Citizenship, Child of Chinese Parents

Judge Morrow, of the District Court of the Northern District of California, has lately held, following *In re Look Tin Sing*, 21 Fed. Rep. 905, and *Gee Fook Sing* v. *United States*, 49 Fed. Rep. 146, that a person born within the limits of the United States, whose father and mother were both persons of Chinese descent, and subjects of the Emperor of China, but were, at the time of the birth, both domiciled residents of the United States, is a citizen of the United States, within the meaning of the Fourteenth Amendment: *In re Wong Kim Ark*, 71 Fed. Rep. 382.

Conflict of Laws, Federal Courts, Following State Decisions

The Circuit Court of Appeals of the Seventh Circuit has lately refused to yield its own opinion to a contrary decision of the Supreme Court of Indiana, rendered on the same transaction after the argument and before the decision of the cause in the Circuit Court of Appeals, since that decision seemed to the latter court to be in plain conflict with the weight of authority on the subject, and distinctly inconsistent with the previous decisions of the State Court, and the question presented seemed to it to be one that was not balanced with doubt, but clearly to require a decision contrary to that of the State Court: *Forsyth* v. *City of Hammond*, 71 Fed. Rep. 443.

The question on which the State and Federal Court differed was the constitutionality of a statute giving an appeal to the courts from the decision by the board of county commissioners of the question of the annexation of territory by a city; the former holding it constitutional, the latter unconstitutional and

void, on the ground that the decision of the question of annexation under the statute involved the exercise of legislative discretion, making its action the performance of a legislative function, which could not be performed by the courts.

In *Burgess* v. *Seligman*, 107 U. S. 20, the Supreme Court of the United States laid down briefly the rules defining the extent to which the Federal courts are bound by State decisions, as follows:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

According to these rules, which have been followed implicitly ever since they were thus promulgated, the Federal

courts decide all questions of general law for themselves, irrespective of the decisions of the State courts on the same questions, giving the latter only so much weight as they choose to allow them. For instance, the question of what is or is not a navigable stream is one of general law, on which the Federal courts may exercise an independent judgment: *Chisolm* v. *Caines*, 67 Fed. Rep. 285. So is the question whether a carrier can stipulate for exemption from liability for its own negligence: *Ellis* v. *St. Louis, Kansas & Northwestern Ry. Co.*, 52 Fed. Rep. 903; and whether two employes of the same master are fellow-servants: *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368. But when the Federal courts are called on to construe the general commercial law of a State, in respect of a question which is new to them, they should give due weight to the prior decisions of the courts of that State, though they are not absolutely bound thereby: *Farmer's Natl. Bk. of Valparaiso* v. *Sutton Mfg. Co.*, 52 Fed. Rep. 191. So, if rights have accrued before the decision of the State courts on a matter of local law, the Federal courts are not bound by the latter, though they are entitled to their consideration: *Enfield* v. *Jordan*, 119 U. S. 680; *Bolles* v. *Brimfield*, 120 U. S. 759; *Barnum* v. *Okolona*, 148 U. S. 393.

On the other hand, questions arising under the local laws of the different States, which are of purely local interest, or which establish a rule of property, are to be decided by the Federal courts in conformity to the State decisions; and this is so, even though the States are at variance among themselves on these points: *Peters* v. *Bain*, 133 U. S. 670; *Randolph* v. *Quidnick Co.*, 135 U. S. 457; *Chicago Union Bk.* v. *Kansas City Bk.*, 136 U. S. 223; *May* v. *Tenney*, 148 U. S. 60. Accordingly, if a statute of one State, which has there received a settled interpretation, is adopted in another State, and there construed differently, the latter construction will be accepted by the Federal courts as the true interpretation for that State: *Chicago, R. I. & P. Ry. Co.* v. *Stahley*, 62 Fed. Rep. 363.

This rule as to comity is so carefully followed, that the Supreme Court of the United States will follow the construc-

tion given to a State statute of limitations by the State courts, even in a case decided the other way by the Circuit Court before the decision of the State court: *Bauserman* v. *Blunt*, 147 U. S. 647; and a lower Federal court will reverse its decision that a State statute is unconstitutional in deference to a subsequent decision of the State supreme court that it is constitutional, if a final decree has not yet been entered in the Federal court: *Western Union Tel. Co.* v. *Poe*, 64 Fed. Rep. 9.

If, however, the rights of a litigant in a Federal court have arisen under decisions of a State court establishing a rule of property, which has been impaired or overthrown since the accrual of those rights by a later decision of the State supreme court, the Federal court will not consider itself bound by the latter decision, but will exercise its own judgment: *Chisolm* v. *Caines*, 67 Fed. Rep. 285.

Constitutional Law, Legislative Apportionment, Power of Court

The Supreme Court of Indiana, in *Denney* v. *State*, 42 N. E. Rep. 929, has recently gone fully over the question of the validity of the legislative apportionment act of that State, and has laid down a number of valuable rules in relation to the general principles involved. It holds, (1) That the question as to the validity of such a law is not a political one, subject only to the discretion of the legislature; but that the courts of law have jurisdiction to determine its constitutionality; (2) That article 4 of the Constitution of that State, which in § 4 requires a sexennial enumeration of the male inhabitants of the State over the age of twenty-one, and in § 5 provides that at the next session after each period of enumeration, the number of senators and representatives shall be apportioned among the several counties, prohibits the legislature, after it has made a valid apportionment of the State after such an enumeration, to reapportion the State during the six years period; and that the legislature is, also, precluded from repealing a valid apportionment law during the enumeration period in which it was passed: (3) That if the first apportionment law is unconstitutional, the legislature may at any time during the same enumeration period pass a second apportionment law, even

before the first one has been declared unconstitutional by a judicial tribunal; (4) That under constitutional provisions that the number of senators and representatives shall be apportioned among the several counties according to the male inhabitants over the age of twenty-one in each, (Const. Ind. Art. 4, § 5,) and that a senatorial or representative district, when more than one county shall constitute a district, shall be composed of contiguous counties, and that no county, for senatorial apportionment, shall ever be divided, (§ 6.) an apportionment act which groups together two or more counties, none of which has a voting population equal to the ratio for a senator or a representative, and gives to the district so formed more than one senator or representative, is unconstitutional, as an abuse of the legislative discretion of approximation, and derogatory to the right of local representation; especially when voters of other counties having the necessary ratio of voters are entitled under the act to vote for but one senator or representative; (5) That, unless it is absolutely necessary, a county which has slightly over the ratio for a representative should not be given one representative and also a voice in the election of another representative, in connection with other counties, while counties with a greater population are given only one representative; (6) That a judgment of the lower court, an appeal from which is dismissed, in an action between two citizens to test the constitutionality of an apportionment law, is not *res judicata*, as to the constitutionality of the act, in a subsequent action by the state; nor will the doctrine of *stare decisis* require that that judgment be followed; and (7) That the fact that an election of members of the legislature has been had under an unconstitutional apportionment act does not estop the state from contesting its constitutionality before the election of the next legislature.

Statutes, Special Laws

The same court has recently decided, that whenever a statute, which purports to be a general law, is by known existing circumstances, of which the court can take judicial notice, (*e. g.*, by the limits of population named therein,) restricted to one particular locality, it becomes *ipso facto* a special law, and is obnox-

ious to the provision of the constitution that the legislature shall not pass special laws on certain subjects: *Mode* v. *Beasley*, 42 N. E. Rep. 727.

Copyright, Design, Infringement

The Court of Appeal of England has recently held, reversing the decision of Kekewich, J., [1895] 2 Ch. 593, that a design for an upright hexagonal metal stove, having on the sides the representation in metal work of a church window, of a particular style of architecture, with tracery above and below, registered as applicable to pattern, shape and configuration, was infringed by the manufacture of an upright hexagonal stove with a design of a church window, of a different style of architecture, and with different tracery, but in its general appearance very similar to that of the plaintiff's: *Harper & Co.* v. *Wright & Butler Lamp Mfg. Co.*, [1896] 1 Ch. 142.

In the same case, the court laid down several general rules in regard to the registration of designs, as follows:

(1) That when a design is registered as applicable to pattern, shape and configuration, the registration applies to the design as a whole; and it is protected, although in all of those particulars it may not be novel;

(2) That the owner of a registered design is not deprived of his right to protection merely because he places on the articles which he sells, besides the registered number of his design, other numbers which ought not to be there;

(3) That when a design is registered, and before the expiration of the term of protection, the same design is registered with an unimportant variation, the original design may be copied as soon as the original term of protection expires, if the variation is not copied.

Corporations, Directors, Meetings, Notice

According to a recent decision of the Supreme Court of Pennsylvania, the notice of a meeting of the directors of a corporation, unless there is some by-law or fixed practice in that regard, is insufficient, if not received by the members of the board before the morning of the day on which the meeting is to be, and that a notice of a special meeting of the board, stating that

its purpose was to hear the treasurer's report, and transact any other business that might come before the board, was insufficient, when the business actually transacted at the meeting included a perpetual lease, which involved the practical surrender of the active duties of the corporate trust; especially in view of the fact that successors to the then board were soon to be elected: *Mercantile Library Hall Co.* v. *Pittsburgh Library Assn.*, 33 Atl. Rep. 744.

Stock, Voting, Joint Owners, Proxy

The Supreme Court of New York, Fifth Department, has recently held, that a power of attorney, irrevocable for ten years, executed by joint owners of corporate stock to one of their number to vote on the stock, is not void as against public policy; and that such a power of attorney is not within the Act of 1892, c. 687, § 21, which provides that "every proxy shall be revocable at the pleasure of the person executing it," since it is not of the ordinary character, and none of the joint owners could have voted on the stock without the consent of all the others: *Hey* v. *Dolphin*, 36 N. Y. Suppl. 627.

Criminal Law, Bail, Forfeiture, Lunacy of Defendant

When the facts in an action against the sureties on a bail bond show that the defendant released on bail has been adjudged a lunatic in a proper proceeding for that purpose, and confined in an asylum by the state; that the governor has remitted the forfeiture of the bail bond; and that the defendant was in fact insane;—such facts are a complete defence to any proceeding against the sureties on the bail bond: *Wood* v. *Commonwealth*, (Court of Appeals of Kentucky,) 33 S. W. Rep. 729.

Deed, Construction, Punctuation

The punctuation of an instrument may be considered, in order to solve an ambiguity which was not created by the punctuation: *Olivet* v. *Whitworth*, (Court of Appeals of Maryland,) 33 Atl. Rep. 723.

Elections, Ballots, Marking

The Supreme Court of Pennsylvania has lately held, that a voter cannot mark with a cross the name of a person printed on a ballot, and also insert in the blank space provided for the same office an additional name, even though it be similar to the other; and that a

ballot so marked should be rejected in the count: *Redman's Appeal*, 33 Atl. Rep. 702.

It is unnecessary to comment on this decision further than to say, that if the object of the ballot laws is to further the intention of the voter, as seems to be generally acknowledged, and not to thwart it; and if, as also would seem to be the case, the writing of the name of a person in the blank space provided indicates an intention to vote for him, irrespective of other marks, then this decision is incorrect.

Electric Companies, Negligence

When, in an action against a telegraph company and an electric street-car company for death caused by a shock from a current conducted from the feed-wires of the railway company through a wild wire hanging from the telegraph company's poles, the evidence shows that the wild wire had been hanging across the feedwire for at least two weeks, rubbing against the insulation, and that the rubbing would render the insulation defective, and there is no evidence of any other way in which the wild wire could be charged with electricity other than by the feed-wire, it is proper to refuse to instruct, at the request of either defendant, that there is no evidence that the death was caused by its negligence: *Western Union Tel. Co. of Baltimore City* v. *State*, (Court of Appeals of Maryland,) 33 Atl. Rep. 763.

Equity, Pleading

It has been recently decided, that the proper method of taking advantage of a failure to number the paragraphs of a bill in equity, as required by statute, is by motion in the nature of a *ne recipiatur*, and not by demurrer: *Chew* v. *Glenn*, (Court of Appeals of Maryland,) 33 Atl. Rep. 722.

Execution, Exemption

According to a recent decision of the Court of Civil Appeals of Texas, the business of an insurance agent is a "trade or profession" within the meaning of the laws (Sayles's Tex. Civ. Stat. Art. 2337) providing for exemption from execution; and an iron safe used by him to store his policies, &c., is a "tool" or "apparatus," within the same statute: *Betz* v. *Maier*, 33 S. W. Rep. 710.

The word "tool" includes any instrument necessary to the successful prosecution of a trade, and, therefore, a lathe and appliances, costing about two hundred and fifty dollars, used for shaping wood or metal, which are necessary to a mechanic and machinist in carrying on his business, is a tool, and may be properly set apart to him as exempt: *In re Robb*, 99 Cal. 202. So, a tailor may claim two sewing machines as exempt, if they are kept and personally used for his trade, and are reasonably necessary therefor: *Cronfeldt* v. *Arrol*, 50 Minn. 327. It is a question for the jury, however, under proper instructions as to the law, whether the manager of a printing establishment, consisting of four printing presses, (three of which are operated by steam,) a miscellaneous assortment of type, a paper-cutting machine, and the general paraphernalia of a printing-office, costing in the aggregate three thousand five hundred dollars, can claim the whole plant as exempt, on the ground that the whole of it is necessary to carry on his trade; and a verdict against such a claim of exemption cannot be disturbed for want of evidence to support it, when there is evidence to show that a practical printer can make a living with one press and five or six hundred dollars worth of type: *In re Mitchell*, 102 Cal. 534.

The word "implements" has a broader meaning than "tools," and includes any instrument needed and used for the purpose of carrying on a trade or business; and, therefore, a jeweler's safe owned and used in the business of a jeweler and watch-repairer is exempt as such: *In re McManus*, 87 Cal. 292.

There is a marked difference of opinion as to what constitutes a trade within the meaning of the exemption statutes. The preferable view is that it includes all the occupations and handicrafts which any one person carries on concurrently: *Howard* v. *Williams*, 2 Pick. 80; *Dowling* v. *Clark*, 1 Allen, 283. *Contra*, *Weis* v. *Levy*, 69 Ala. 209; *Jenkins* v. *McNall*, 27 Kans. 532; *Bevitt* v. *Crandall*, 19 Wis. 581. Accordingly, it has been held that a blacksmith, who occasionally made wagons, could hold the tools used for both purposes as exempt: *Stewart* v. *Welton*, 32 Mich. 59; that one who was

at the same time a painter, harness-maker and carriage-maker, could do the same: *Eager* v. *Taylor*, 9 Allen, 156; that one whose general business was dealing in ice, could hold as exempt his tools for farming or gardening: *Pierce* v. *Gray*, 7 Gray, 67; and that a tinner can claim a cornet as exempt, on the ground that it furnishes him with an additional means of support: *Baker* v. *Willis*, 123 Mass. 194. *A fortiori* the business of saddle and harness-making is one trade, within the exemption statute: *Nichols* v. *Porter*, (Tex.) 26 S. W. Rep. 859.

Husband and Wife, Tenancy by Entireties, Married Women's Property Acts

In *Robinson's Appeal*, 33 Atl. Rep. 652, the Supreme Judicial Court of Maine has held, that the rule of the Common Law, by which a devise or grant to a husband and wife made them tenants by entireties, has been abrogated by the married women's property acts, which provide that a married woman shall take and hold real estate as if sole; and that they now become tenants in common under such a conveyance, as if both were unmarried.

This rule has been adopted in New Hampshire: *Clark* v. *Clark*, 56 N. H. 105; but the weight of authority is overwhelmingly against it: *Pray* v. *Stebbins*, 141 Mass. 219; *Phelps* v. *Simons*, 159 Mass. 415; *Bains* v. *Bullock*, (Mo.) 31 S. W. Rep. 342: *Bertles* v. *Nunan*, 92 N. Y. 152; *Hiles* v. *Fisher*, 144 N. Y. 306; *Noblitt* v. *Beebe*, 23 Oreg. 4; *Bramberry's Appeal*, 156 Pa. 628; *Georgia &c. Ry. Co.* v. *Scott*, 38 S. Car. 34; *McLeod* v. *Tarrant*, (S. Car.) 17 S. E. Rep. 773; *Chambers* v. *Chambers*, 92 Tenn. 707; *Cole Mfg. Co.* v. *Collier*, (Tenn.) 31 S. W. Rep. 1000. But, since the right of the husband to the rents and profits of the wife's lands during their joint lives has been completely taken away by the married women's property acts, he is not exclusively entitled to the usufruct of the lands held by them in entirety, but they are tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits, so long as the question of survivorship remains in abeyance: *Hiles* v. *Fisher*, 144 N. Y. 306; and a wife may, since the passage of those

acts, sue to recover land conveyed to her and her husband in fee, without joining her husband: *Bains* v. *Bullock*, (Mo.) 31 S. W. Rep. 342.

Where the doctrine of joint tenancy and tenancy by entirety has never been adopted: *Whittlesey* v. *Fuller*, 11 Conn. 337; or where it has been abolished by statute: *Oglesby* v. *Bingham*, 69 Miss. 795; or by judicial decision: *Hoffman* v. *Stigers*, 28 Iowa, 302; *Wilson* v. *Fleming*, 13 Ohio, 68; the married women's acts have, of course, made no difference in the estate created by a conveyance to husband and wife.

In consequence of the disfavor with which all joint tenancies, including tenancies by entirety, are held, it is now the prevailing doctrine in the United States that a divorce will resolve a tenancy by entirety into a tenancy in common, so that partition may be had between the tenants: *Harrer* v. *Wallner*, 80 Ill. 197; *Enyeart* v. *Kepler*, 118 Ind. 36; *Russell* v. *Russell*, (Mo.) 26 S. W. Rep. 677; *Hopson* v. *Fowlkes*, (Tenn.) 23 S. W. Rep. 55; *Kirkwood* v. *Domnan*, 80 Tex. 645.

Injunction, Boycott

The Court of Appeals of Colorado has recently held, that a corporation is not entitled to an injunction against persons or organizations, on the ground that they have conspired to exterminate it by compelling its members to leave it: *Silver State Council No. 1 of American Order of Steam Engineers* v. *Rhodes*, 43 Pac. Rep. 451.

Insurance, Marine, Total Loss

The Court of Appeal of England in *Asfar* v. *Blundell*, [1896] 1 Q. B. 123, has affirmed the decision of Mathew, J., [1895] 2 Q. B. 196; see 32 AM. L. REG. & REV. (N.S.) 562. A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were shipped on board under bills of lading, at freights which in the total exceeded the charter freight. The charterers insured their profit on charter by a policy which contained a warranty against average. On the arrival of the ship, part of the cargo was delivered, and freight was accordingly payable under the bills of lading for that portion; but owing to sea damage, the rest of the cargo had lost its merchantable char-

acter, and freight was not payable in respect of it; the result being that the total amount of the freights payable under the bills of lading was less than the charter freights and the chartered profit was, consequently, lost. Under these circumstances it was held that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty.

Libel and Slander, Liability of Editor of Newspaper

The Supreme Court of Wisconsin has adopted the rule laid down by all authorities, that the managing editor of a newspaper, whether published by a corporation or by an individual proprietor, is equally liable with the proprietor and publisher, in a civil action, for the consequences of the publication of a libelous article; and this liability is not affected by the fact that he does not know of the publication of the article, for it is his business to know, and mere want of knowledge is no defense: *Smith* v. *Utley*, 65 N. W. Rep. 744.

Life Estate, Payment of Charge by Life Tenant, Effect

According to a recent decision of the Court of Appeal of England, the presumption that a tenant for life, who pays off a charge upon the inheritance, intends to keep the charge alive for his own benefit, is not rebutted by the mere fact that the relation of parent and child exists between the tenant for life and the remainderman: *In re Harvey*, [1896] 1 Ch. 137.

Municipal Corporations, Ordinance Creating and Resolution Abolishing Office, Effect

Though, in general, a city council may enact a valid regulation by resolution as well as by ordinance, yet, if the charter requires an ordinance to be in a specified form, such ordinances are of greater weight than a mere resolution, and cannot be repealed by a resolution, since a legislative act can only be repealed by one of equal authority; and, therefore, if the council attempts by resolution to abolish an office created by ordinance, in the manner prescribed by its charter, the incumbent of that office remains an officer *de jure* until his term expires; and if he offers to perform the duties of his office, he is entitled to his salary, though he does not in fact

perform them: *City of San Antonio* v. *Micklejohn*, (Supreme Court of Texas,) 33 S. W. Rep. 735.

As a general rule, when the charter of a municipal corporation commits the decision of any matter to the council, and is silent as to the mode of decision, it may be decided by resolution, and not necessarily by an ordinance: *Atchison Board of Education* v. *De Kay*, 148 U. S. 591; *Arkadelphia Lumber Co.* v. *Arkadelphia*, 56 Ark. 370; *Gas Company* v. *San Francisco*, 6 Cal. 190; *Crawfordsville* v. *Braden*, 130 Ind. 149; *Bath Wire Co.* v. *Chicago, Burlington & Quincy Ry. Co.*, 70 Iowa, 105; *First Municipality* v. *Cutting*, 4 La. An. 335; *McGavock* v. *Omaha*, 40 Neb. 64; *State* v. *Jersey City*, 27 N. J. L. 493; *Butler* v. *Passaic*, 44 N. J. L. 171; *State* v. *Board of Health*, 54 N. J. L. 325; *Brady* v. *Bayonne*, (N. J.) 30 Atl. Rep. 968; *Sower* v. *Philadelphia*, 35 Pa. 231; *Green Bay* v. *Brauns*, 50 Wis. 204. But, if the charter expressly requires action by ordinance, a resolution is unavailing: *Newman* v. *Emporia*, 32 Kans. 456; *State* v. *Bayonne*, 35 N. J. L. 335; *State* v. *Bayonne*, 54 N. J. L. 474; *Avis* v. *Vineland*, 55 N. J. L. 285; and even if action might have been taken, in the first instance, by resolution, a resolution will not avail to repeal an ordinance passed with all due formalities: *Ryce* v. *Osage*, 88 Iowa, 558. Further, if the charter requires all ordinances to be submitted to the mayor for approval, a resolution not presented to him cannot in any case have the effect of an ordinance: *Eichenlaub* v. *St. Joseph*, 113 Mo. 395; but even when the charter expressly states that the council may act by ordinance, an act, though termed a resolution, will be valid, if adopted and approved by the mayor, with all the formalities required in the enactment of an ordinance: *Springfield* v. *Knott*, 49 Mo. App. 612.

Nuisance, Crime, Injunction

A nuisance, such as the pollution of a stream, though declared a crime by statute, may be enjoined, if its result would be irreparable injury to the persons or property of others: *Barrett* v. *Mt. Greenwood Cemetery Assn.*, (Supreme Court of Illinois,) 42 N. E. Rep. 891.

The Supreme Court of New Jersey has recently defined in a very lucid manner the functions of proceedings to test the title of a public officer by *quo warranto* and *certiorari*. It holds, (1) That though collateral questions regarding the legality of an election to office may be raised and decided by *certiorari*, in testing the validity of laws, or the ordinances and resolutions of municipal bodies, yet, if the purpose of the writ is clearly to try the title to a public office, and the proceeding of the municipal body brought up by the writ consists only of the resolution or other action electing a person to the office in question, the writ will be dismissed, because *quo warranto*, or an information in nature thereof, is the only proceeding by which the title of the person so elected and claiming the office can be attacked; and (2) That the incumbent of an office cannot proceed by *quo warranto*, or information in the nature thereof, against one who, though he claims title to the office, has not been in possession and user of it. He must first await the attack of his adversary. But, if the claimant succeeds in obtaining possession and user of the office, otherwise than by suit, as by color of an election or appointment, then the only remedy of the prior incumbent is by *quo warranto*, or information in the nature thereof: *State* v. *Mayor, &c., of City of Bayonne*, 33 Atl. Rep. 734; *State* v. *Board of Chosen Freeholders of Cumberland Co.*, 33 Atl. Rep. 737.

Public Officer, Title to Office, Review, Quo Warranto, Certiorari

On the other hand, the appointment of a minor official, who is not a public officer in the legal signification of that term, can be reviewed by *certiorari*; and, therefore, *certiorari* will lie to review the legality of proceedings for the removal of one who holds the position of janitor of a county courthouse under an appointment of the board of chosen freeholders, and for filling the position by another appointment: *State* v. *Board of Chosen Freeholders of County of Essex*, (Supreme Court of New Jersey,) 33 Atl. Rep. 739.

If a lot owner is allowed by a borough to plant shade trees between the line of the pavement and the driveway, which are

Streets, Change of Grade, Damages, Trees

cared for by him for a number of years, so that they may add value to his property, and is also permitted to erect a porch over part of the pavement, the destruction of the trees and injury to the porch may be considered in determining how far the market value of the property is affected by a change of grade in the street, though no damages can be expressly allowed on either ground: *Seaman* v. *Borough of Washington*, (Supreme Court of Pennsylvania,) 33 Atl. Rep. 756.

Witness, Competency, Transaction with Decedent

When a stockholder of a corporation did not act as its agent in negotiating a contract on which it sues, he is not an incompetent witness, as a party to the contract, within the statutes providing that a party in interest shall be incompetent, if one of the original parties to the contract in issue is dead: *Wilcoxson* v. *Rood*, (Supreme Court of Missouri, Division No. 1,) 33 S. W. Rep. 816.

Ardemus Stewart.