PROGRESS OF THE LAW.

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

According to a recent decision of the Court of Civil Appeals of Texas, it is the duty of a railroad company to heat its cars in cold weather, in order to provide proper accommodations for its passengers; and therefore it is not necessary for a plaintiff, in order to recover for injuries due to the coldness of the cars, to allege and prove a universal custom on the part of railroad companies to warm their cars: *Ft. Worth & D. C. Ry. Co.* v. *Hyatt*, 34 S. W. Rep. 677.

Carriers, Negligence, Failure of Railroad Company to heat Cars

The Queen's Bench Division of England has recently decided that a regulation of a railway company, that "each passenger shall . . . . when required so to do either deliver up his ticket or pay the fare legally demandable for the distance traveled over by such passenger," enforceable by a penalty, is reasonable; and that a passenger who pays his fare and receives a ticket, and loses it through accident, so that he cannot deliver it when required, but refuses to pay the fare again, is liable to the penalty: *Hawks* v. *Bridgman*, [1896] 1 Q. B. 253; and moreover, that a regulation which provides that each passenger shall show his ticket (if any) when required so to do to the conductor or any duly authorized servant of the company, enforceable by a penalty, is also reasonable; and that if a passenger who has paid his fare and received a ticket refuses to show it when properly required, he is liable: *Lowe* v. *Volp*, [1896] 1 Q. B. 256.

Regulations

The regulation of a railroad company that a commutation ticket shall be surrendered by the passenger to the conductor on the last trip taken during the period for which it is issued, is a reasonable regulation of the company in the conduct of its business as a common carrier of passengers; and if this regulation is indorsed on the ticket, and a passenger who holds such a ticket fails or refuses to

Surrender of Ticket

surrender it on his last trip, or pay his fare to the conductor according to the legally established rates of the company, he can be ejected from the car: *Rogers* v. *Atlantic City R. R. Co.*, (Supreme Court of New Jersey,) 34 Atl. Rep. 11.

Constitutional Law, Cruel and Unusual Punishment

The Supreme Court of Louisiana has refused to adopt the ruling of the Supreme Court of Vermont in the case of *O'Neil* v. *State*, 58 Vt. 140, (which the Supreme Court of the United States shirked so neatly in *O'Neil* v. *Vermont*, 144 U. S. 323,) in regard to the infliction of cumulative fines for the violation of a penal statute. In the case before it, *State* v. *Whitaker*, 19 So. Rep. 457, the record disclosed that the relators had been committed to prison for a period of two thousand one hundred and sixty days in default of the payment of fines aggregating seven hundred and twenty dollars for each, and the costs of prosecution, for the violation of a city ordinance; and that upon what was substantially one complaint they had been found guilty of seventy-two distinct violations of an ordinance within one hour and forty minutes, each of these offences succeeding the other, only a minute and a half intervening between the commission of any two of them. These facts were held to show that the penalty inflicted was an unusual and unreasonable punishment in the sense of the constitutional prohibition.

There is but one exception to be taken to the language used by the court in this case, and that is when it says that the severity and unusualness of the punishment is even more apparent than in the O'Neil case. In this, as has been stated, the offences of which the relators were convicted were seventy-two, the fines and costs something over $720, and the days of imprisonment 2160, while in the O'Neil case the number of distinct offences of which O'Neil was found guilty was three hundred and seven, the fines and costs $6638.72, and the days of imprisonment 19,914, or over fifty-four years. It would be harder to imagine a grosser instance of cruel and unusual punishment. But that case has already been sufficiently criticized in this magazine: 31 AM. L. REG., N. S. 618.

The Supreme Court of the United States, by a bare majority, has decided that the Act of Congress of February 11, 1893, which provides that no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture; but that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before said Commission; is not in conflict with the Fifth Amendment, which declares that no person shall be compelled in any criminal case to be a witness against himself, since the Act completely shields the witness against any criminal prosecution which may be aided, directly or indirectly, by his testimony, and in effect operates as a pardon for the offence to which it relates: that the fact that the pardoning power is vested in the President does not prevent Congress from granting amnesty, either before legal proceedings are taken, during their pendency, or after conviction and judgment: that the constitutional privilege of refusing to give self-incriminating testimony was not intended to shield the witness from the personal disgrace or opprobrium attaching to his case, but only from actual prosecution and punishment: that the protection afforded by the Act extends to any possible prosecution in the State courts, as well as in the Federal courts: that even if there is a bare possibility that by reason of his enforced disclosures, the witness may be prosecuted in a State court, the danger is so remote and improbable, and of so unsubstantial a character, that it is not within the contemplation of the constitutional immunity, and that the fact that the witness may be prosecuted, and put to the annoyance and expense of pleading his Constitutional privilege by way of confession and avoidance, is a detriment which the law does not recognize, and to which the Constitutional provision does not extend: *Brown* v. *Walker*, 16 Sup. Ct. Rep. 644, affirming 70 Fed. Rep. 46.

Incriminating Testimony

Mr. Justice Field dissented, on the grounds that the Fifth

Amendment affords absolute protection to any witness who desires to avail himself of his privilege, not only from giving evidence which might lead to his prosecution, but from giving such as would expose him to disgrace and infamy; and that the granting of a pardon is vested in the president alone, and cannot be exercised by congress. Mr. Justice Shiras, Mr. Justice Gray, and Mr. Justice White also dissented, on the grounds that the Act of February 11, 1893, infringes the Fifth Amendment, not only by subjecting the witness to the hazard of a prosecution for an act concerning which he is compelled to testify, but also by exposing him to the danger of a charge of perjury in giving such testimony, which could never have been brought against him if the privilege of silence were not taken away; that Congress cannot grant immunity from prosecution in the State courts for an offense against the State, though that offense be disclosed by self-incriminating testimony, given as required by this Act in a tribunal of the United States; and that the probability that a witness may be prosecuted in a State court for an offense thus disclosed is not so remote or fanciful as to warrant the court in disregarding it.

Contempt, Refusal of Witness to Answer Incriminating Question on Cross-Examination

It has been lately held by the Supreme Court of Florida, that though a witness may in general refuse to answer a question that tends to incriminate him, yet, if he, being fully aware of his rights, consents to testify about the very matter that may criminate him, without claiming his privilege, he must submit to a full, legitimate cross-examination in reference thereto; and if he refuses to answer incriminating questions put to him on cross-examination, he is guilty of contempt: *Ex parte Senior*, 19 So. Rep. 652.

Habeas Corpus, Effect

According to a recent decision of the Court of Criminal Appeals of Texas, a court which has committed an attorney to prison for contempt cannot require him to purge himself of the contempt as a condition of permitting him to practice before it, when he has been released on bail in *habeas corpus* proceedings to review

the commitment, and such proceedings are still pending in another court: *Ex parte Kearby*, 34 S. W. Rep. 962.

Copyright, Cuts in Trade Catalogue

It has been recently held by the Circuit Court for the Northern District of Illinois, that under the Act of Congress of 1874, which limits the right of copyright to such cuts and prints as are connected with the fine arts, there can be no copyright on cuts contained in a trade catalogue, and not offered for copyright or to the public as works of fine art: *J. L. Mott Iron Works* v. *Clow*, 72 Fed. Rep. 168.

Corporations, Suit Against, Service of Writ

According to a recent decision of the Supreme Court of South Carolina, the service of a summons in an action against a foreign corporation, on an officer thereof who is also the attorney in fact of the plaintiff for the commencement and prosecution of the action, is invalid, and confers no jurisdiction: *George* v. *American Ginning Co.*, 24 S. E. Rep. 41.

Criminal Law, Insanity as Defence, Burden of Proof

The Supreme Court of Georgia has recently reasserted its former ruling that the burden of proving the insanity of a person accused of crime rests on the defence: *Keener* v. *State*, 24 S. E. Rep. 28.

This is directly opposed to the recent ruling of the Supreme Court of the United States, in *Davis* v. *United States*, 16 Sup. Ct. Rep. 353. See 35 AM. L. REG. N. S. 94.

What Constitutes an Arrest

Judge Rose, of the High Court of Justice of the Province of Ontario, has lately defined the facts necessary to constitute an arrest, in *Forsyth* v. *Goden*, 32 Can. L. J. 288. The plaintiff and the defendant had a disagreement, and the defendant telephoned for a policeman, who soon came, and said to the defendant, "Is this the man?" After learning both sides of the dispute, he said to the plaintiff, "You will have to come along with me to the police station." No other words were used, and no resistance made. Plaintiff, defendant and policeman walked to the sta-

tion together, and there talked the matter over with the chief. No information was laid, and the plaintiff was not detained further. The policeman swore that he did not arrest the plaintiff. But the judge ruled that the fact of arrest is a question of law, and that if an officer, known to be such, takes charge of a man, and the man reasonably thinks from the conduct of the officer that he is under arrest, this constitutes an arrest.

Betting, "Place"

A piece of ground bounded on one side by a hoarding, and on two other sides by stays which supported the hoarding, has been lately held to be a "place" within the meaning of the statute of 16 & 17 Vict. c. 119, which imposes a penalty upon any person, "who, being the owner or occupier of any house, office, room, or other place, or a person using the same," shall use it for the purposes of betting: *Liddell* v. *Lofthouse*, (Queen's Bench Division,) [1896] 1 Q. B. 295.

Deceit, False Representation in Prospectus, Liability to Purchaser of Shares

In *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, the Court of Appeals has decided, distinguishing *Peek* v. *Gurney*, L. R. 6 H. L. 377, (1873,) that when the object with which the prospectus of a company is issued is not merely to induce an application for an allotment of shares, but also to induce persons to whom it is sent to buy shares in the market, its function is not exhausted when the stock of the company has been allotted, and the person who issues the prospectus is responsible for a false representation contained in it, and known to him at the time to be false, to any person to whom the prospectus has been sent, who is thereby induced to buy shares and sustains a loss in consequence thereof; and further, that when a person who has issued the prospectus of a company, containing a representation known to him at the time to be false, subsequently causes to be published a false representation to the same effect as that in the prospectus, with the direct intent of inducing persons to purchase shares in the company, he is responsible for the consequences to any one who, having received a prospectus, purchases shares on the faith of the false representation so published, and thereby suffers loss.

The Court of Civil Appeals of Texas has recently laid down some general rules in relation to the use of the ballots as evidence in an election contest, which present the law in that regard in a very terse and lucid form. It holds (1) That one who has received a certificate of election to office is not estopped in case of contest, from going behind the returns from ballot boxes which were counted without objection by either party, and which formed the basis of the certificate; (2) That in an election contest, the ballots of a certain box, which had been opened before a legislative committee after the election, are admissible when it appears that the opportunity for the ballots to have been tampered with was a mere possibility: and (3) That the fact that a discrepancy exists between the returns of the votes counted from that ballot box and a recount made by the court in an election contest does not indicate that there was any alteration in the ballots after being voted, nor tend to cast suspicion thereon, when the evidence shows that, when the count was concluded by the election officers, there were discrepancies between the tally sheets of the different clerks of the election, which it was attempted to reconcile by guessing at the result, and making changes accordingly: *Henderson* v. *Albright*, 34 S. W. Rep. 992.

Election, Contest, Ballots as Evidence

The Supreme Court of the United States has lately held that the question whether an extraditable offence has been committed is a question of mixed law and fact, but chiefly of fact; and that therefore the judgment of a magistrate, rendered in good faith, that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of the evidence, and is final for the purposes of the preliminary examination, unless palpably erroneous in law: *Ornelas* v. *Ruiz*, 16 Sup. Ct. Rep. 689.

Extradition, Judgment of Committing Magistrate

The Court for Crown Cases Reserved has lately rendered a very interesting decision in a most peculiar case: *The Queen* v. *Riley*, [1896] 1 Q. B. 309. The defendant, who was a clerk in the head post-office at Manchester,

Forgery, Telegram

had obtained from another person permission to make bets in his name with a certain firm of book-makers. On the day of the Newcastle Handicap the defendant sent to the book-makers a telegram placing a bet on a certain horse for that race, which purported to have been handed in at another office before the race was run, and thence transmitted to the head office; but in reality the telegram was not handed in at the other office at all, but was sent by the defendant from the head office after news had been received that the horse on which the bet was placed had won the race. The book-makers, however, not knowing this, credited the third person with the amount won at the current odds.

The defendant was indicted under 24 & 25 Vict. c. 98, § 38, for obtaining certain money by means of "a certain forged instrument, to wit, a telegram;" and a majority of the court held, in spite of the doubts expressed by the Chief Justice and Justice Vaughan Williams, that the telegram was a forged instrument within the meaning of the Act, and that the indictment was good.

Husband and Wife, Contracts between, Enforcement in Equity

It has been recently decided by the Court of Appeals of Kentucky, that when a husband had purchased land for his wife, under an agreement with her that she should give a mortgage to a third person to secure the husband in the repayment of the bond given by him for the price, and so avoid the Common-Law rule prohibiting contracts between husband and wife, equity would give effect to the transaction, so as to enforce the equitable lien of the husband on the land for repayment of the purchase price paid by him: *Eckermeyer* v. *Hoffmeier*, 34 S. W. Rep. 521.

Insurance, Credit, Guaranty

The Supreme Court of Wisconsin has recently, in *Shakman* v. *United States Credit System Co.*, 66 N. W. Rep. 528, investigated and defined the legal status and incidents of a peculiar form of a contract of assurance, by which the credit of a merchant's customers is assured to him. The contract, called a "certificate of guaranty" was in effect a guaranty of the merchant

against losses from sales on credit reulting from the insolvency of customers, to be determined in a manner specifically described; and was accordingly held to be a contract of insurance, within Rev. Stat. Wis. §§ 1977, 1978, so as to make the agent who solicited it the agent of the insurer to all intents and purposes. It was further held that when the contract provided that the customer must be rated in Dun's, and rated at not less than a specified sum, one who is the agent of the insurer for the purpose of soliciting such insurance, transmitting applications, and collecting premiums, and who receives pay therefor, has power to make an additional agreement providing that if the customer is not rated in Dun's, and is rated in Bradstreet's, the rating in the latter shall be binding on the insurer; and that when the contract provided that in calculating losses there should not be included therein any credit given exceeding a credit of thirty per cent. on the lowest capital rating the customer was rated at in the mercantile reports, if a larger credit than thirty per cent. of the lowest capital rating was given the insured should be allowed a credit of thirty per cent. of that rating, and the excess only should be disallowed.

The Supreme Judicial Court of Massachusetts, in *Claflin* v. *United States Credit System Co.*, 43 N. E. Rep. 293, has also held that a contract of this kind is a contract of insurance, and that it is invalid in that State, as a species of insurance not authorized by its Insurance Act. (Stat. Mass. 1887, c. 214, § 78.)

Insurance, Fidelity

In *American Surety Co.* v. *Pauly*, 72 Fed. Rep. 470, the Circuit Court of Appeals of the Second Circuit has recently passed upon a number of questions arising under a contract of fidelity insurance. The more important of these are as follows:

Notice of Loss, Reasonable Time

(1) The surety company executed and delivered to a bank a bond, insuring the bank against loss by any act of fraud or dishonesty of its cashier in connection with the duties of his office, or the duties to which, in the bank's service, he might be subsequently appointed, which should occur during the continuance of the bond, and be discovered within six months thereafter, and within six

months from the death, dismissal, or retirement of the cashier from the service of the bank. The bond provided that the surety company should be notified of "any act" of the cashier which might involve a loss for which the company would be responsible, "as soon as practicable after the occurrence of such act shall have come to the knowledge" of the bank, and it required proofs of loss to be furnished to the surety company. The bank suspended payment, and passed into the hands of a receiver, who afterward notified the surety company of the discovery of the dishonest acts of the cashier, furnished proofs of loss, and brought suit against the surety company on the bond. The evidence on the trial as to the time when the dishonest acts of the cashier were discovered was conflicting, and it was accordingly held that the question whether the required notice was given with reasonable promptness was for the jury.

(2) The terms of the bond did not require notice of suspicion of dishonest acts to be given.

Notice of Suspicion

(3) The services rendered by the cashier as such to the receiver after the suspension of the bank, were none the less rendered to the bank, and the surety company was not absolved from liability for acts discovered more than six months from the date of suspension, but within six months from the date of his resignation from the service of the receiver.

Acts in Service of Bank

(4) A proof of loss under the bond, which set forth with reasonable plainness, and in a manner by which a person of ordinary intelligence could not be misled, that certain sums of money had been taken from the bank by means of acts of the cashier, described in the proof, was sufficient, though it failed to aver explicitly that a loss had been caused to the bank.

Interpretation of Proofs of Loss

(5) Prior to the issue of the bond sued on, the cashier and president of the bank had conspired to rob it, and had been engaged in fraudulent practices. When application was made for the bond, the surety company required a certificate from the bank of the cashier's good character. This certificate was

Knowledge of Officers of Act of Cashier, Notice to Bank

made by the president without any direct authority, so far as appeared, from the board of directors, or any knowledge by them that such a certificate was made or required. On these facts, it was held that the president's knowledge of the dishonesty of the cashier was not to be imputed to the bank, so as to make it responsible for the misrepresentations contained in the certificate.

In another suit in the same court between the same parties, 72 Fed. Rep. 484, on a bond insuring the fidelity of the president of the bank, it was held (1) That proofs of loss under a bond of suretyship insuring an employer against loss by the dishonesty of an employe are mercantile documents, and are not to be tested by the same rules of interpretation as an indictment, or even a pleading. They are only required to contain a brief and general statement of the facts with substantial accuracy, truthfully informing the insurer how the loss occurred, and not tending to mislead him either by what they contain or what they omit; and (2) That when such a bond provides that certain statements and accounts shall be "*prima facie* evidence" of a loss, that expression is not necessarily confined to the consideration of a claim by the insurer, before suit; and it is not error to instruct the jury, on the trial of an action on such a bond, that the plaintiff has made out a *prima facie* case by offering in evidence the statements and accounts referred to: See 34 AM. L. REG. & REV. N. S. 560.

Proofs of Loss

Prima Facie Evidence of Loss

In a recent case the Supreme Court of Florida has ruled, that since interest is not the mere incident of a debt, but compensation for the use or detention of money, whenever it is ascertained that money ought to have been paid at a particular time, whether in satisfaction of a debt, or as a compensation for a breach of duty, or for a failure to keep a contract, interest should be allowed thereon; and therefore the modern rule in regard to the allowance of interest on claims for unliquidated damages is, that whenever a verdict liquidates a claim, and fixes it as of a prior date, interest should follow from that date. This

Interest on Unliquidated Damages

makes the running of interest begin at least with the issuing of the writ: *Sullivan* v. *McMillan*, 19 So. Rep. 340.

Interstate Commerce, Game

The Supreme Court of the United States, in an opinion which fails lamentably as an argument, has recently decided that the Interstate Commerce Clause of the Constitution does not affect the right of a State to prohibit the transportation outside of its limits of game killed in the State; that the ownership of the wild game within the limits of a State, so far as it is capable of ownership, is in the State for the benefit of all its people in common; and that therefore the police power residing in a State authorizes it to forbid the killing of game within the State with intention to procure its transportation beyond the State limits: *Geer* v. *Connecticut*, 16 Sup. Ct. Rep. 600.

Mr. Justice FIELD and Mr. Justice HARLAN dissented.

Judgment, Scire Facias to Revive, Effect

In *Owens* v. *McCloskey*, 16 Sup. Ct. Rep. 693, it was lately held by the Supreme Court of the United States, that since in Pennsylvania a *scire facias* to revive a judgment is regarded as a substitute for an action of debt on the judgment, and the judgment rendered thereon is *quod recuperet*, instead of a mere award of execution, a judgment so revived in Pennsylvania, without service or appearance, has no binding force as against a defendant who resides in another State; and that the revival of a judgment by *scire facias*, for purposes of execution, on two returns of *nihil*, operates merely to keep in force the local lien, and does not stop the running of the statute of limitations in another State, where the defendant resides.

Kidnapping, Taking of Child by Father

If a father takes his child of tender years out of the State, with its consent and with the consent of its mother, to whom its custody had been awarded in divorce proceedings, in order that the child may not be present at a criminal trial in which it had been subpœnaed as a witness, he is not guilty of kidnapping: *John* v. *State*, (Supreme Court of Wyoming,) 44 Pac. Rep. 51.

The Supreme Court of Mississippi has recently laid down several interesting rules of law arising from the relation of landlord and tenant, as follows:

Landlord and Tenant, Tax title, Adverse Possession, Dower Interest

(1) That one who enters upon lands as the tenant of the grantee of a dower interest, and agrees to redeem the lands from a prior tax sale to the State, cannot acquire title by purchase from the State, but that such a purchase becomes a redemption in favor of his landlord;

(2) That in such a case the abandonment of the dower interest by the grantee thereof does not operate to make what had been as to her a redemption a purchase by the tenant, and make him an owner thenceforth in adverse possession against the dowress, or her heirs who were owners in fee of the reversion, without notice to them of his claim of title; and

(3) That one who is in possession of lands as tenant of a grantee of a dower interest therein becomes, after the death of the dowress, a tenant at sufferance of the owners of the reversion; and if he allows the lands to be sold for taxes, he cannot afterwards purchase them, and set up the title against the heirs, without notice: *Lyebrook* v. *Hall*, 19 So. Rep. 348.

The Circuit Court of Appeals, Seventh Circuit, has lately held, that it is not error to charge the jury, in an action for a libel published in a newspaper, that the greater extent of circulation makes the libel of a journalist more damaging, and imposes special duties as to care to prevent the risk of such mischief, proportionate to the peril: *Enquirer Co.* v. *Johnston*, 72 Fed. Rep. 443.

Libel, Newspapers, Degree of Care

The Circuit Court of Appeals, Fifth Circuit, has recently decided a novel question, in the law of libel. It holds that since a cause of action for libel, founded upon publications made in the course of judicial proceedings, does not accrue until the final determination, in favor of the party libeled, of the proceedings in which the publication is made, the statute of limitations does not begin to run against that cause of action until then: *Masterson* v. *Brown*, 72 Fed. Rep. 136.

Statements in Judicial Proceedings, Limitation

Municipal Corporations, Ordinances, Reasonableness

An ordinance of a municipal corporation, which provided that "no person shall on any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language," was recently held by the Queen's Bench Division to be invalid, since, even if the words "or on land adjacent thereto," which were clearly too wide, were stricken out, it would still be unreasonable because it did not contain any words importing that the act must be done so as to cause annoyance: *Strickland* v. *Hayes*, [1896] 1 Q. B. 290.

There is good reason to suppose that if the case rested wholly on the latter ground, it would be reversed by the Court of Appeal, if carried there; for, despite the rejection of that claim by the judges who heard the appeal from the justices, there would seem to be no question but that the use of profane or obscene language necessarily implies annoyance.

Parliamentary Law, Refusal of Chairman to put Motion, Power of Meeting

According to a recent decision of the Supreme Court of North Dakota, when a valid motion is made and seconded at a meeting of a board at which all the members are present, but the chairman refuses to put it, on the ground that it is illegal, it may be put by the one who made the motion; and if it receives the vote of a majority of those present, it will be properly carried, whether the others vote or not. Accordingly, motions to remove an officer, to appoint another, and to approve the bond of the latter, made, put and carried in this way, will be effectual, if the power of doing the acts moved resides in the board: *State* v. *Archibald*, 66 N. W. Rep. 234.

Partnership, Action for Account, Illegal Business, Bookmaking

In *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496, Justice Chitty, of the Chancery Division of England, has lately held, that since the fact that one partner has been guilty of illegal acts in the conduct of the partnership business is no defence to an action for account by the other partner, when the objects of the partnership were not illegal, and the innocent partner intended at the time of entering into the partnership that it

should be carried on lawfully; and since a bookmaking and betting business can be carried on without contravening the Betting Act of 1853 (16 & 17 Vict. c. 119,) and the plaintiff, who was a partner in such a business, contemplated at the time he entered into the partnership that it would be carried on in the usual way; the fact that the defendant acted illegally was immaterial, and the plaintiff was entitled to an account.

Pleading, Demurrer

The Supreme Court of Georgia has recently ruled, that since the office of a demurrer is to test the legal sufficiency of a declaration upon the facts as alleged therein, its scope cannot be so extended by an agreed statement of facts which neither amends nor purports to amend the declaration, as to cover questions that might arise upon a motion for nonsuit upon a state of facts appearing otherwise than by the declaration: *Constitution Publishing Co.* v. *Stegall*, 24 S. E. Rep. 33.

Practice, Trial, Demurrer to Evidence, Constitutional Law

It is not a violation of a constitutional provision (Const. Tenn. Art. 1, § 6,) that the right of trial by jury shall remain inviolate, to compel the plaintiff, in a suit for damages for the death of his intestate, to join in a demurrer to the evidence, when the evidence is conceded to be true, and all legitimate and reasonable inferences that may be drawn from it are admitted; and further, such action is not in violation of a provision (Const. Tenn. Art. 6, § 9,) that judges shall not charge juries with respect to matters of fact: *Hopkins* v. *Nashville, C. & St. L. Ry.*, 34 S. W. Rep. 1029.

Principal and Agent, Independent Contractor, Liability for Breach of Duty

According to a recent decision of the Court of Appeal of England, a municipal corporation owes to the public a duty to so construct its sewers as not to injure the gas-mains or other underground conveniences; that it will be responsible to any one injured in consequence of a breach of this duty, though the performance of it has been delegated to an independent contractor; and consequently that if a gas-main is broken by the negligence of the contractor in executing the work, and

an explosion takes place in a private house, because of the escape of the gas from the broken main, the municipality will be liable, the damages not being too remote: *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335.

Principal and Surety Several Bond, Actions, Parties, Contribution

The nature and incidents of the liability of the several sureties upon an aggregate bond, *i. e.*, one in which the principal is bound in a sum, for portions of which only the several sureties are separately bound, has lately been investigated by the Supreme Court of New York, at Special Term for New York County, in *Toucey* v. *Schell*, 37 N. Y. Suppl. 879. It decided

(1) That a separate action may be maintained against each of the sureties on such a bond on his separate liability, without joining the other sureties as defendants;

(2) That the recovery against a surety on such a bond is not limited to a proportionate amount of the total default, but to the penal sum for which he binds himself; and

(3) That a surety who is compelled to pay more than his just proportion of the default is entitled to contribution from the others.

Public Officer, Liability for Official Acts

The Supreme Court of the United States, in *Spalding* v. *Vilas*, 16 Sup. Ct. Rep. 631, has passed upon the question of the liability of a public officer for acts maliciously done in the discharge of the duties of his office. The plaintiff alleged that Mr. Vilas, then Postmaster-General, had acted maliciously in sending warrants for claims put in his hands for collection to the claimants themselves, instead of paying them to him in order that he might deduct his fees therefrom; in consequence of which many of these fees were not received by him. The court held that he could not recover, since the rule which exonerates a judicial officer from liability for official acts extends by analogy to the acts of all public officers. This is tersely put by Mr. Justice Harlan:

"We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done

by them in the course of the performance of their judicial functions apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an Act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster-General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law."

Railroads, Mail Car, Invitation to Post Letters, Licensee

According to a recent decision of the High Court of Justice of the Province of Ontario, a person who posts a letter on a mail car attached to a train about to start, although the car is furnished under instructions from the post-office department, with a slit for posting letters, is a mere licensee, the invitation to post, if any, being the invitation of the post-office department, and not of the railroad company; and therefore one who, in

attempting to post a letter on a moving train, trips over a peg placed in the ground by the company, and is injured, cannot recover: *Spencer* v. *Grand Trunk Ry. Co.*, 32 Can. L. J. 235.

Religious Societies, Property Rights, Injunction

The Supreme Court of Missouri, Division No. 1, has held, in a recent case, (1) That when there is a dispute over the rights of contending factions of an unincorporated church to the use of the church property, an injunction will lie at the suit of the faction entitled to the property to restrain trespasses thereon by the other faction; (2) That the deacons or trustees of an unincorporated church, governed wholly through its congregation, who are authorized as the constituted authority of the church to control the use of its property, conveyed to trustees in trust for the church, have authority to exclude those members who refuse to recognize the authority of the regular organization; and (3) That if members of the congregation are improperly excluded by the deacons from the use of the church property, they must apply to the courts for redress, or appeal to the congregation. They cannot resort to acts of trespass to gain entrance to the church: *Fulbright* v. *Higginbotham*, 34 S. W. Rep. 875.

Street Railroads, Crossings, Stop, Look and Listen, Alighting Passengers

In *Cincinnati St. Ry. Co.* v. *Snell*, 43 N. E. Rep. 207, the Supreme Court of Ohio has very clearly defined the respective rights and duties of vehicles and foot-passengers at a street crossing. In that case the plaintiff, after properly alighting from an east-bound car on the off side, which made it necessary for him to cross both tracks in order to reach his destination, started to cross them just behind the car from which he had alighted, and, as he stepped on the other track, was struck and injured by a west-bound car, which was running at an improper rate of speed, and came up without warning. The various principles applicable to these facts were fully discussed by the court, and laid down as follows:

(1) The introduction of new forms of vehicles and of new motive power on street railways has not impaired the right of

foot passengers to safe passage at street crossings. It is the duty of drivers of vehicles of all sorts, whether wagons, bicycles, or cars, to so regulate their speed, and give such warning of their approach, at whatever cost of pains and trouble on their part, as that foot passengers, using ordinary care, may, in the absence of unavoidable accident, cross in safety;

(2) That a person about to cross the track of a street railway at a street crossing is bound to exercise a degree of care proportioned to the danger to be avoided, and the consequences which may result from the want of it, according to the particular circumstances; but ordinary care does not require that he should anticipate negligence on the part of those who operate the railway, nor that he should always look in both directions for the approach of a car; for whether or not a failure to look is negligence depends entirely on the attendant circumstances; and

(3) That when a street-railway company operating a double line of track discharges a passenger at a street crossing, having reason to know that that passenger must cross its tracks in order to reach his destination, it is the duty of the company to pay due regard to the rights of the passenger while on the crossing, and to so regulate the speed of its cars, and give such warning of their approach, as will reasonably protect the passenger from injury. An omission to do this is negligence, and a person injured by reason thereof has a cause of action against the company, unless barred by contributory negligence.

Sunday Laws, Social Club

The Supreme Court of Louisiana has recently held, that a social club comes within the prohibition of its Sunday law, requiring that stores, shops, groceries and saloons be closed on Sunday: *State* v. *Gelpi*, 19 So. Rep. 468.

Telegraph Companies, Regulations

A regulation of a telegraph company that its messenger boy, sent to receive a telegram for transmission, shall be deemed the agent of the sender, is invalid; and even if valid, it is waived by the company when, on receiving a telegram requesting an answer, it

directs the messenger boy who delivers the telegram to wait for a reply: *Wills* v. *Postal Telegraph Cable Co.*, (Supreme Court of New York, Appellate Division, Fourth Department,) 37 N. Y. Suppl. 933.

Tort, Inducing Breach of Contract, Damages

In an action for damages for maliciously inducing persons to break their business contracts with the plaintiff, the latter is not required to prove specific damage; it is enough if he proves facts from which it may be properly inferred that some damage must result to the plaintiff from the defendant's wrongful acts: *Exchange Telegraph Co., Ltd.* v. *Gregory & Co.*, [1896] 1 Q. B. 147.

Voluntary Association, Membership, Resignation

The Court of Appeal of England has lately passed upon an interesting question of law in regard to the effect of the resignation of a member of a voluntary association. A voluntary trade protection society had been formed, whose members became such by election, and paid an annual subscription, in return for which they were entitled to legal assistance for the purposes of their trade, and to some other benefits. By the rules the members incurred no obligations beyond the payment of their subscriptions. These rules contained no provision as to the retirement or expulsion of members. The plaintiff, one of the members, after being such for over a year, wrote a letter to the governing body of the society, stating that he desired to withdraw his name as a member. No reply was sent him, and a month later, having changed his mind and desiring to continue as a member, he wrote to the chairman of the society, requesting him to withdraw his resignation. In reply to this the secretary of the society wrote him that the committee had unanimously resolved to accept his resignation. After further correspondence, the plaintiff brought suit to enjoin the committee from excluding him from membership.

The court held, reversing the decision of Justice Kekewich, that in such a society a member could retire at any time without the consent of the others; that the plaintiff ceased to be a member so soon as the society received the letter stating

his wish to retire, without the necessity of an acceptance of his resignation by the society; that he could not withdraw his resignation before acceptance; and that he could not become a member of the society again without a re-election; *Finch* v. *Oake*, [1896] 1 Ch. 409.

Will, Attestation, Signing of Witness's Name by Another

The Supreme Court of South Carolina has recently rendered a very sensible decision to the effect that if the name of a witness is signed to the execution of a will by another, at the witness's request, and in her presence and that of the testator, the attestation is sufficient, though the person whose name is signed as a witness does not touch the pen; provided that the witness, though able to write, is temporarily so far incapacitated that she writes with difficulty, and is in the habit of using an amanuensis: *In re Crawford's Will*, 24 S. E. Rep. 69.

Construction, Exercise of Power

A devise to the testator's wife of all his property, to be disposed of by her among his children as she may think best, vests a life estate in her, with power to divide the land between his children as she thinks best; but, as a power of appointment must be exercised for the benefit of the parties entitled thereto, and not with a view of benefiting the donee of the power, the widow cannot in such a case convey to one of the children a portion greater than those granted to the other children, on condition that that child should assume the payment of her debts, and provide for her and her second husband during their lives: *Degman* v. *Degman*, (Court of Appeals of Kentucky,) 34 S. W. Rep. 523.

Construction, Legacy

According to a recent decision of Justice North, of the Chancery Division, a clause in a will that directs the trustees to pay "to each man who shall have been in my employ over ten years," a certain sum for each year's service beyond the ten years, applies to one who had been in the employ of the testator for fifteen years, but had left it before the date of the will, and was not in his employ at the time of his death: *In re Sharland*, [1896] 1 Ch. 517.

Ardemus Stewart.