PROGRESS OF THE LAW.

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

Justice Mathew, of the Queen's Bench Division of England, has lately held, in accordance with the rule that all the arbitrators must concur in the award, that under an agreement to refer a dispute to arbitration which provided that it should be referred to "the decision of one or of three disinterested arbitrators as mutually agreed," and that if three arbitrators were appointed one should be nominated by each of the parties, and the third by the two thus nominated, an award made by two only of three arbitrators thus appointed was invalid: *United Kingdom Mutual S. S. Assurance Assn.* v. *Houston & Co.*, [1896] 1 Q. B. 567.

Arbitration and Award, Concurrence of Arbitrators

An agreement to submit a matter in dispute to two arbitrators, by whom an umpire is to be chosen, to act only upon matters of difference between the arbitrators, does not authorize one arbitrator and the umpire to return an award conclusive upon the parties concerned, without showing a difference between the arbitrators: *Mfrs'. & Builders' Fire Ins. Co.* v. *Mullen*, (Supreme Court of Nebraska,) 67 N. W. Rep. 445.

According to a recent decision of the Supreme Court of Iowa, when an assignment for the benefit of creditors has been made by a firm, and also by the partners individually, the holder of a note executed by the firm and by the individual members is entitled to have the estates of the partnership and of each partner kept separate, and to receive a dividend from each, though the note was given for a firm liability: *In re Carter*, 67 N. W. Rep. 239.

Assignment for Benefit of Creditors, Partnership, Rights of Creditors of both Firm and Individual Partners

In *Plessy* v. *Ferguson*, 16 Sup. Ct. Rep. 1138, affirming 11 So. Rep. 948, the Supreme Court of the United States has

Constitutional Law, Civil Rights, Negroes, Separate Accommodations

decided, against the vigorous dissent of Mr. Justice Harlan, that a State statute which requires railroad companies to provide separate accommodations for white and colored persons, and makes a passenger who insists on occupying a coach or compartment other than the one set apart for his race liable to fine or imprisonment, does not violate the Thirteenth Amendment, abolishing slavery and involuntary servitude, nor the Fourteenth Amendment, prohibiting any abridgment of the privileges or immunities of the citizens of the United States, or any deprivation of liberty or property without due process of law, or by denying them the equal protection of the laws.

Due Process of Law, Prohibition of Sunday Work by Barbers

According to a recent decision of the Supreme Court of Illinois, *Eden* v. *People*, 43 N. E. Rep. 1108, the act of that State of June 26, 1895, forbidding barbers to keep open their shops or work at their trade on Sunday, is a taking of property without due process of law, within Art. 2, sec. 2, of the Constitution of Illinois, providing that no person shall be deprived of liberty or property without due process of law, since "the common law of England, as adopted in this State as a part of our jurisprudence, does not prohibit the citizen from pursuing his ordinary labor on Sunday."

This argument is not convincing, from the fact that it could be applied equally well to nullify prohibitions of other trades—*e. g.*, liquor-selling; but the second ground on which the act is held unconstitutional deserves more consideration. That ground is, that it is in contravention of Art. 4, sec. 22, of the State Constitution, which provides that no special law shall be enacted when a general law can be made applicable, thus prohibiting the legislature, according to the majority opinion, from singling out one special trade or species of labor for animadversion.

Legislative Apportionment, Enjoining Election

The Supreme Court of Indiana, in *Fesler* v. *Brayton*, 44 N. E. Rep. 37, has lately declared that a suit to enjoin the holding of an election for members of the legislature under an apportionment act, on the ground that it is unconstitu-

tional, should not be entertained, when the act assailed is the only one in force.

Marks, J., dissented with much force; and it is to be feared that the decision of the court was based on expediency rather than on legal principles. But if ever the end justifies the means, this case was certainly an instance.

Women as Notaries, Power of Legislature

The Supreme Judicial Court of Massachusetts still clings tenaciously to the obsolete idea of the inherent disability of women. It recently, in answer to the request of the legislature for its opinion on the point, declared that the Constitution of the State did not, when considered in connection with the history and nature of the office of notary public, and the usages of that and other States with reference thereto at the time of the adoption of the Constitution, authorize the appointment of women as notaries; and that since the Constitution did not authorize the appointment of women to that office, the legislature could not confer power upon the governor and council to appoint them: *In re Opinion of the Justices*, 34 Atl. Rep. 927.

Contempt of Court, Newspaper Publication

On an application recently made to the Queen's Bench Division for an attachment against the publisher of a newspaper, for contempt of court in publishing certain articles relative to a cause then pending, it appeared that the applicant, who had been sub-editor and manager of the paper, had been charged with an attempt to commit arson, and had been remanded for a further hearing. An article was then published in the paper, alluding to the facts that the property of the newspaper company was for sale, that the applicant had been arrested, and that the charge of arson was still pending. That charge was afterwards dismissed, but others were preferred, on two of which the applicant was committed for trial. While he was awaiting trial another article was published, stating that the paper had been purchased by one of the respondents and asking for support, and also alluding to the charges against the applicant; and shortly afterwards a report was published of the proceedings at a meeting of a county council committee, at which a resolu-

tion was carried that the action of the chief constable in obtaining legal assistance for the police in the case of the pending prosecution against the applicant should be confirmed. The application was refused, however, on the ground that it did not appear that the articles referred to in any way tended or were designed to prejudice the fair trial of the charges against the applicant: *Queen* v. *Payne*, [1896] 1 Q. B. 577.

Copyright, Common-law Rights of Author

The Circuit Court of Appeals for the Second Circuit has recently decided, in *Press Publishing Co.* v. *Monroe*, 73 Fed. Rep. 196, that the passage of the copyright statutes has not abrogated the common-law right of an author to his unpublished manuscript. The facts of the case were as follows: The plaintiff wrote a poem, in pursuance of an agreement entered into by her with the managers of the World's Columbian Exposition, and submitted it to them. They accepted it, and paid her the price agreed, and she gave them a receipt "in full payment of ode composed by me," which receipt also provided that the exposition company should have the right to furnish copies to the press for publication, and to publish the poem in the official history of the dedication; subject to which the plaintiff reserved her copyright therein. After this, but before the plaintiff or the company published the poem in any way, the defendant obtained a copy of the poem, and published it in its newspaper, without the consent and against the will of the plaintiff and the company. This was held to be an infringement of the common-law right of the plaintiff to control the publication of her poem, for which she could recover, and that this right was in no way affected or abrogated by the copyright laws; and that the defendant having knowingly and wantonly published the poem against the will of the plaintiff and the exposition company, was liable for exemplary damages.

Corporations, Directors' Meetings, Notice

The Court of Appeal of England has lately ruled, that as the directors of a corporation are the managing body they can at any meeting of the board deal with all the affairs of the company then requiring attention, whether ordinary or not, [provided it be

within their powers,] and that previous notice of the special business transacted is not a prerequisite to the validity of the proceedings: *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788.

Deed, Covenant, Building Restrictions

In the opinion of the Supreme Court of Illinois, a covenant that a house shall be set back twenty feet from a certain line is not violated by the extension of an open porch over that line: *Hawes* v. *Favor*, 43 N. E. Rep. 1076. This is in direct conflict with the rulings of the Supreme Court of Pennsylvania, in *Ogontz Land & Imp. Co.* v. *Johnson*, 31 Atl. Rep. 1008, and of Massachusetts, in *Reardon* v. *Murphy*, 40 N. E. Rep. 854, (34 AM.L. REG. N. S. 428,) but agrees with *Graham* v. *Hite*, 93 Ky. 474.

Descent and Distribution, Murder of Ancestor

The Appellate Division of the Supreme Court of New York, First Department, has reversed the decision of the Special Term for New York County, in *In re Fleming*, 38 N. Y. Suppl. 611, (see 35 AM. L. REG. N. S. 388,) and holds that the mere fact that an indictment is pending against an heir for the murder of his ancestor is no ground for refusing him payment of his share of the estate: *In re Fleming*, 39 N. Y. Suppl. 156.

Elections, Conduct, Regularity, Absence of Officers

According to a recent decision of the Court of Appeals of Kentucky, the fact that part of the election officers absent themselves during part of the election hours, and that during the absence of the clerk one of the judges of election acts in his place, and signs his name on the back of the ballots, does not render the election void: *Major* v. *Barker*, 35 S. W. Rep. 543.

Gaming Contracts, Stocks, Differences, Recovery of Margins

The House of Lords, in *Universal Stock Exch., Ltd.*, v. *Strachan* [1896] App. Cas. 166, has held, affirming the decision of the Court of Appeals [1895] 2 Q. B. 329, (see 34 AM. L. REG. N. S. 642,) that when both parties to a contract for the sale and purchase of stocks intend that no stocks shall be delivered, and that "differences" only shall be

accounted for, the mere fact that the contracts provide that either party may require that the purchase be completed and the stocks delivered or received, (as the case may be), does not prevent it from being a gaming contract; but that in such a transaction securities deposited by one of the parties with the other to secure the payment of differences are not deposited "to abide the event," within the meaning of sec. 18 of the Gaming Act of 1845, (8 & 9 Vict. c. 109,) and are recoverable by action.

Gas Works, Breach of Statutory Duty, Remedy

According to a recent decision of the Queen's Bench Division, an action will not lie against a gas company for damages sustained by a consumer by reason of the failure of the company to give him a supply of gas of the amount and purity required by law. His only remedy is that provided by statute: *Clegg, Parkinson & Co.* v. *Earby Gas Co.*, [1896] 1 Q. B. 592.

Highways, Law of the Road, Truck, Bicycles

The Supreme Court of Errors of Connecticut, in *Peltier* v. *Bradley*, 34 Atl. Rep. 712, has lately ruled, that one who drives a truck on the lefthand side of the street, in order to reach his employer's store, which is situated on that side, is only bound to exercise ordinary care to avoid colliding with vehicles approaching from the opposite direction; and that when the driver of a truck drove along the lefthand side of the street, to reach his employer's store, and collided with a bicycle coming from the opposite direction, the rider of which attempted to pass between the truck and the curb in front of the store, the questions of negligence and contributory negligence were questions of fact, on which the findings of the trial court were conclusive.

Infants, Religious Education, Parental Authority

The Court of Appeal of England has recently had before it a very interesting case in reference to parental authority. A Roman Catholic married a Protestant woman by whom he had six children. At the time of the marriage it was agreed that the children should be brought up as Catholics, but the father did not insist upon it, and as long as the mother lived he allowed her

to bring them up in her own faith. The same was done for several years after her death; the father, who had become intemperate, and was several times convicted of disorderly conduct, allowing them to attend Protestant schools and religious services. Four of the children died, and he neglected the two survivors, so that they were found by relatives in a state of destitution, and removed from the father's house. Meanwhile they had been left an annuity by an aunt; and an application was therefore made to the court, which after due notice to the father, and his failure to appear, made an order committing them to the custody of a Protestant clergyman for four years, and providing that they should be placed at a specified Protestant school. About a year later the father petitioned that they might be removed to a Roman Catholic school, alleging that he had reformed, and become a religious man, but after careful consideration Kekewich, J., refused to grant the order asked for, on the ground that the father had by his conduct deprived himself of his right to exercise the parental authority which was otherwise his, and that under the circumstances it would be detrimental to the interest of the children to alter their religious training, after they had been so long educated as Protestants. This decision was affirmed by the Court of Appeal: *In re Newton*, [1896] 1 Ch. 740.

Inheritance Tax, Legacy to United States

The Supreme Court of the United States has lately ruled, affirming 36 N. E. Rep. 505, that as the so-called "inheritance tax" of New York is really a limitation on the power of a testator to bequeath his property, and not a tax on the property itself, it may be legally imposed on a legacy to the United States: *United States* v. *Perkins*, 16 Sup. Ct. Rep. 1073.

Insurance, Casualty, Validity

A contract insuring a carrier of passengers against liability for injuries to its passengers is not void as against public policy on the ground that it relieves the carrier of his duties to the public, or lessens his liability for negligence: *Boston & Albany R. R. Co.* v. *Mercantile Trust & Deposit Co.*, (Court of Appeals of Maryland,) 34 Atl. Rep. 778.

The Circuit Court of Appeals for the Second Circuit has lately held, that the contract by which a corporation undertakes, in consideration of premiums paid, to indemnify the other party to the contract against losses by uncollectible debts, is not a contract of suretyship, but of insurance, in spite of the fact that the corporation calls itself a "guarantee" or "surety" company; and as such is subject to the rule that any ambiguities in the policy drawn up by the insurer, who makes his own conditions, are to be resolved against the draftsman: and accordingly that in a policy by which the company agrees to purchase from the insured an amount of uncollectible debts not exceeding $15,000 in excess of one-half of one per cent. of their total gross sales and deliveries, a provision that "the contract is issued on the basis that the yearly sales and deliveries of the insured are between $1,800,000 and $2,500,000," was not a stipulation that the total sales and deliveries, on which the one-half of one per cent. is to be computed, must amount to at least $1,800,000, but that the insured might recover from the insurer his losses, not exceeding $15,000, in excess of one-half of one per cent. on his actual total of sales and deliveries during the year: *Tebbets* v. *Mercantile Credit Guarantee Co. of N. Y.*, 73 Fed. Rep. 95.

Credit Insurance, Conditions, Interpretation

A fire in a chimney, caused by the accidental ignition of soot, or the smoke issuing from such a fire, is within a policy of fire insurance on goods contained in the building, which purports to cover all loss or damage by fire: *Way* v. *Abington Mut. Fire Ins. Co.*, (Supreme Judicial Court of Massachusetts,) 43 N. E. Rep. 1032.

Fire Insurance, Ignition of Soot in Chimney

Judge Clark, of the Middle District of Tennessee, in a long and carefully considered opinion, has recently examined and summarized with great thoroughness the powers and duties of the Interstate Commerce Commission, and has laid down the broad lines on which that body ought to proceed in settling the question as to the legality of rates. He holds: (1) That the report of the commission in a given case should show

Interstate Commerce, Powers of Commission, Competitive Rates

what the issues in the case are, and what facts it finds in regard to such issues; that it should not state mere conclusions of law or fact, but should make a suitable reference to the evidence when there is a conflict in the proof, and show how the commission settles the disputed fact, or if the evidence is undisputed, should so state; that whenever it is the duty of the commission to receive and pass upon evidence of certain facts, its failure to do so is error of law, as is its failure to dispose of an issue of fact raised before it; and that it has no power to fix rates; (agreeing on this latter point with *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 16 Sup. Ct. Rep. 700;) (2) That since the carrier's business of transporting goods involves the rights and interests of three parties—the seller at the point of departure, the carrier itself, and the trader or consumer at the point of delivery—all these must be duly considered in passing upon the reasonableness of a given rate; and, therefore, there must be taken into account, besides the mere difference in charges, the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers, with reference to each other, as competitive or otherwise: and (3) That when traffic from a distance can compete with traffic nearer the market, the public interests demand that the more distant traffic shall be carried at rates that will permit it to compete with the nearer traffic; that the position of a trader who can use two competing routes calls for consideration as much as the geographical position of another trader who, though having no competing route, is situated nearer the market; that the fact that a lower rate is charged from a more distant point because of a competing route should be taken into account; that mileage, while always a factor in the case, is by no means the controlling one, or the most important; and that lower rates, if offered in good faith to all upon equal terms, may lawfully be charged in summer on certain classes of freight: *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 73 Fed. Rep. 409.

In *Ill. Cent. R. R. Co.* v. *State of Illinois*, 16 Sup. Ct. Rep. 1096, the Supreme Court of the United States has recently reversed the decision of the Supreme Court of Illinois, (33 N. E. Rep. 173,) under the statute of that State, (Rev. Stat. Ill. 1889, c. 114, § 88,) providing that all regular passenger trains shall stop a sufficient length of time at the railroad stations and county seats to receive and let off passengers with safety, which compelled a fast mail train, carrying interstate passengers and the United States mail from Chicago to places south of the Ohio River, over an interstate highway established by authority of Congress, to turn aside from the direct interstate route, and run to the station in Cairo, three and a-half miles away from that route, and back again, in order to receive and discharge passengers at that station, though the company had provided other and ample accommodation for interstate travel to and from that station; reversing it on the ground that the statute, so construed, was an unconstitutional obstruction of interstate commerce, and of the passage of the mails, and could not be considered as a valid police regulation.

Stoppage of Railroad Trains

The Chief Justice of England has lately held that the proprietor of a house licensed to sell intoxicating liquors is guilty of an offence under the licensing act, in his servant, during his absence, and against his orders, sells to a drunken person; since the act of the servant is within the general scope of his employment: *Commissioners of Police* v. *Cartman*, [1896] 1 Q. B. 655.

Intoxicating Liquors, Illegal Sale by Servant Against Master's Orders, Liability of Master

This decision is in accord with the weight of authority in the United States: *Edgar* v. *State*, 45 Ark. 356, 1885; *Mogler* v. *State*, 47 Ark. 110, 1886; *Loeb* v. *State*, 75 Ga. 258, 1885; *Boatright* v. *State*, 77 Ga. 717, 1886; *Snider* v. *State*, 81 Ga. 753, 1888; *McCutchen* v. *Peo.*, 69 Ill. 601, 1873; *Noecker* v. *Peo.*, 91 Ill. 494, 1879; *Fahey* v. *State*, 62 Miss. 402, 1884; *Teasdale* v. *State*, (Miss.) 3 So. Rep. 245, 1887; *State* v. *Kittelle*, (N. C.) 15 S. E. Rep. 103, 1892; *State* v. *Denoon*, 31 W. Va. 122, 1888; *Contra*, *Barnes* v. *State*, 19

Conn. 398, 1849; *State* v. *McCance*, 110 Mo. 398, 1892; *State* v. *Weber*, 111 Mo. 204, 1892; *Anderson* v. *State*, 22 Ohio St. 305, 1892. The futility of the reasoning on which this depends is well exposed in *State* v. *McCance*, 110 Mo. 398, 1892; and the whole subject is discussed in 14 Crim. L. Mag. 859. It may be added, however, to what is there said, that the contention of the Chief Justice in this case, that the act is within the scope of the servant's employment, means, if it means anything, that the servant is employed to sell illegally—a conclusion which he had no right to draw. On the other hand, if this is not the case, then the master was not guilty. The ruling is indefensible on any ground.

Landlord and Tenant, Apartment House, Duty to Visitors

The Supreme Court of New Jersey has lately held, that the landlord of a building divided into apartments, access to which is had by a common passage, owes to those who visit his tenants on lawful occasions the same duty that he owes to the tenants themselves; that this duty requires him to take reasonable care to have the common halls and stairways reasonably fit for use for the passage of the tenants, but not to furnish means for their safe use, and therefore not to furnish light at night, (unless by special contract,) even though light is necessary for their safe use; and that a visitor of a tenant, who passed down a stairway, with which she was not familiar, in the dark, without waiting for a companion who was familiar with it, or asking a light from her friend, and using no precautions for safety but by feeling with her hands and feet, did not act as a reasonably prudent person, and contributed by her own negligence to injuries which she received by falling down stairs: *Gleason* v. *Boehm*, 34 Atl. Rep. 886.

Libel, Privilege, Malice, Comment on Suit

The Supreme Court of Errors of Connecticut has recently passed upon a question of great importance concerning the law of libel. The defendant, a publishing company, having published in its newspaper an article charging the plaintiff with breach of trust as a public officer, he began at once an action of libel against it, whereupon it proceeded to publish an article

representing the suit as vexatious and malicious, and impugning the private character of the plaintiff, for the purpose of prejudicing the public against him. With regard to the first of these articles, the court held that though a publication charging a public officer with breach of trust might be privileged, if the publisher believed it true, yet if accompanied by comments that showed it to have been made maliciously, it would be libelous *per se;* and with regard to the second, that it was libelous on its face: *Atwater* v. *Morning News Co.*, 34 Atl. Rep. 865.

Malicious Prosecution, Probable Cause, Advice of Counsel

In *Billingsley* v. *Maas*, 67 N. W. Rep. 49, the Supreme Court of Wisconsin recently held, that while a full and complete statement of the facts to a reputable attorney, and the filing of a criminal charge on his advice, in good faith and without any ulterior motive, constitute a complete defence to an action for malicious prosecution, yet though the other facts may be established beyond doubt, the question of good faith is for the jury, when different minds might draw different conclusions from the evidence.

Married Woman's Separate Estate, Restraint on Anticipation, Arrears of Income, Liability

The House of Lords has lately ruled, reversing *Hood Barrs* v. *Heriot*, [1895] 2 Q. B. 212, and overruling, *pro tanto*, *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, that when a married woman is entitled to property for her separate use without power of anticipation, the restraint on anticipation does not apply to income accrued due; so that a judgment creditor may enforce the judgment against income which has accrued due at or before the date of the judgment: *Hood Barrs* v. *Heriot*, [1896] App. Cas. 174.

Master and Servant, Liability for Larceny by Servant

In a recent case decided by the Supreme Court of New Hampshire, the defendants, who were decorators employed in decorating an office building, hired two persons to assist them. The plaintiff having gone away, leaving his room locked, the defendants, in order to promote their work, ordered one of their

assistants to enter the room through the window. He did so, and admitted the other by the door. They remained there for an hour or so, during which time one of them stole a diamond ring. Neither of the defendants entered or went near the room. The plaintiff sued to recover the value of the ring; but the court held, that though trespass *q. c. f.* would lie for nominal damages and for any actual and consequential damages naturally caused by the breaking and entering under the defendants' orders, trespass *de bonis asportatis* would not lie for the ring, as the larceny of it was not an act within the scope of the assistants' employment: *Searle* v. *Parke*, 34 Atl. Rep. 744.

Master and Servant, Fellow-Servant

In the opinion of the Supreme Court of Nebraska, the foreman of a section crew and an engineer in charge of a locomotive drawing a train not connected with the work of the section men are not fellow-servants within the meaning of the rule forbidding a recovery for injuries caused by the negligence of a fellow-servant: *Omaha & R. V. R. R. Co.* v. *Krayenbuhl*, 67 N. W. Rep. 447.

Mortgage, Consolidation, Redemption

In *Pledge* v. *White* [1896], App. Cas. 187, the House of Lords, affirming [1895] 1 Ch. 51, which affirmed [1894] 2 Ch. 328, has lately held, that when the owner of different properties mortgages them to different persons, and the mortgages afterward become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mortgagor, but also as against a person in whom the equities of redemption of all the properties have been vested by one deed, whether from the mortgagor or mesne assignee, although the assignment is made before the mortgages become united in title.

A city ordinance which may be reasonable and valid as

applied to one set of facts and circumstances, may be unreasonable and invalid when applied to facts and circumstances of a different character; and accordingly an ordinance which prohibits driving upon the streets of a city at a greater rate than six miles an hour, without any exceptions, is unreasonable and void when applied to the case of members of a salvage corps or fire patrol, responding to an alarm of fire sent to their station from the headquarters of the city fire department: *State* v. *Sheppard*, (Supreme Court of Minnesota,) 67 N. W. Rep. 62.

Municipal Corporation, Ordinance, Construction

According to a recent decision of the Supreme Court of Nebraska, a company that maintains a bathing resort, and lets out its privileges to the public for hire, is bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances, and whether or not proper precautions have been taken is ordinarily a question for the jury; and consequently, when such a company was notified of the disappearance of a bather so soon after he had been seen as to warrant the inference that an immediate search in the water would have resulted in his rescue before death, and the company had no one present to watch bathers and rescue those in danger, and such agents of the company as were present failed to make any search in the water for the missing man, it is error to instruct the jury to return a verdict for the company in an action for the recovery of damages for his death: *Brotherton* v. *Manhattan Beach Imp. Co.*, 67 N. W. Rep. 479.

Negligence, Proprietor of Bathing Resort, Failure to use Proper Precautions for Safety of Patrons

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In *Wiborg* v. *United States*, 16 Sup. Ct. Rep. 1127, affirming 73 Fed. Rep. 159, the Supreme Court of the United States has for the first time passed upon any of the numerous questions arising out of the expeditions in aid of Cuba equipped within and sent from the United States. The court held:

(1) That Rev. Stat. U. S. § 5286, which makes it a

Neutrality Law, Violation

criminal offence to provide or prepare the means for a military expedition or enterprise against a people with whom the United States are at peace, applies to the providing or preparing of means of transportation for such an expedition or enterprise;

(2) That when a body of men went on board a tug loaded with boxes of arms, and were taken by it thirty or forty miles out to sea, where, by prior arrangement, they met a steamer outside the three-mile limit, boarded her, embarked the boxes, opened them, distributed the arms among themselves, drilled on board, to some extent at least, being apparently officered, and, as prearranged, disembarked near the coast of Cuba, presumably to effect an armed landing thereon—that from all this the jury might find that it was a military expedition or enterprise, within the meaning of the Revised Statutes;

(3) That it was proper for the court to charge that any combination of men organized in the United States to go to Cuba, to make war upon its government, provided with arms and ammunition, constituted a military expedition; and that it was not necessary that the men should be drilled, put in uniform, nor prepared for efficient service; but that it was enough if they had combined and organized in the United States to go to Cuba and make war on a foreign government, and had provided themselves with the means of doing so;

(4) That if the officers of a foreign vessel, sailing from a United States port, which, after passing the three-mile limit, took aboard men and arms for an expedition in violation of the neutrality law, had prepared for sailing, and had taken aboard extra boats while in port, with knowledge of the proposed expedition, they were guilty of the crime in the district from which they sailed;

(5) But if mates of a foreign vessel, sailing from a United States port, did not know at the time of sailing that the vessel was to carry an expedition in violation of the neutrality law, and did not learn that fact until they met, beyond the three-mile limit, another vessel that carried men and arms, which were transferred to their vessel, they were not guilty of an offence against the Revised Statutes.

Public Contracts, Bids, Deposit, Penalty

The Court of Appeals of Maryland has lately held, that the deposit made with the proposal for the execution of a public contract is in the nature of a penalty, and that it can be enforced only to the extent of the actual loss resulting from a failure to complete the contract: *Willson* v. *Mayor, &c., of Baltimore*, 34 Atl. Rep. 774.

Sale of Food, Wholesomeness, Implied Warranty

When a dealer sells to a consumer food sealed in a can, and the buyer knows that the seller has not prepared nor inspected it, and is ignorant of its contents, except so far as the fact that he has purchased it from others goes, there is no implied warranty on the part of the seller that it is wholesome and fit for use: *Julian* v. *Laubenberger*, (Supreme Court of New York, Trial Term, Kings Co.,) 38 N. Y. Suppl. 1052.

Shipping, Charter Party, Safe Port.

In a recent English case, *Reynolds* v. *Tomlinson*, [1896] 1 Q. B. 586, a ship was chartered to proceed with a cargo of grain to a port of call "for orders to discharge at a safe port." It was also provided in the charter party that discharge should be according to the customs of the port of discharge and all at one port; that the charterers should have the privilege of naming the discharging dock; and that the dock should be one into which the vessel could at once safely enter and lie afloat at all times. She was ordered to discharge at Gloucester, the basin at which is approached by a canal seventeen miles long. On arriving at Sharpness, which is at the entrance of the canal, it was found that the vessel was of too great a draught to proceed up the canal. The charterers then requested the master to discharge a sufficient part of the cargo at Sharpness to allow her to navigate the canal, and to proceed to Gloucester with the rest; but the master refused to do so, and discharged the whole at Sharpness, which, for commercial purposes, is a different port from Gloucester. The charterers then brought action for breach of the charter party. The county court permitted them to recover, but on appeal it was held, that the port of Gloucester was not a safe port within the meaning of the

charter party, since the vessel could not reach it safely with a full cargo; and that evidence of a custom of the port for vessels carrying grain to be lightened at Sharpness in order to allow them to proceed up the canal to Gloucester was inadmissible, being inconsistent with the clause of the charter party which provided that the vessel should be discharged "at a safe port."

The case of *The Alhambra*, 6 P. D. 68, 1881, was very like the present one. There the discharge, which was to be at a safe port, was ordered to be at Lowestoft. On arriving there, it was found that the ship drew too much water to get into the harbor; and the master, instead of lightening her at Lowestoft Roads, and then going into the harbor, as requested, went on to Harwich, and there discharged. The court held that he was justified in so doing, because Lowestoft was not a "safe port," and evidence of a custom to lighten the ships in the roads before going into the harbor was not admissible, as being inconsistent with the charter party.

Specific Performance, Contract for Supplying Electric Motive Power

In *Electric Lighting Co. of Mobile* v. *Mobile & S. H. Ry. Co.*, 19 So. Rep. 721, the Supreme Court of Alabama has affirmed the decision of the Chancery Court of Mobile County, refusing to decree the specific performance of a contract for an unexpired term of years which imposed on the complainant the performance of continuous mechanical services (in the generation of electricity) demanding the highest degree of skill, and on the defendant the duty of maintaining costly machinery, and the daily use of cars moved by electricity on the line of its railway.

Strike, "Picketing," Injunction

The Court of Appeal of England has recently passed upon a new phase of the pernicious activity of the trades unions, in *J. Lyons & Sons* v. *Wilkins*, [1896] 1 Ch. 811. The defendants, who were officers of a trades union, ordered a strike against the plaintiffs, who were manufacturers, and also against one Scott, who made goods for the plaintiffs only; and by their direction their

pickets watched and beset the works of the plaintiffs and Scott for the purpose of persuading workpeople to abstain from working for the plaintiffs. This was held by the Court of Appeal, affirming the decision of North, J., to be within the provisions of sec. 7, subsec. 4, of the Conspiracy and Protection of Trade Act, 1875, (38 & 39 Vict. c. 86,) which denounces a penalty against "every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority . . . watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place," but further provides that "attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section;" and accordingly granted an injunction to restrain the defendants and their agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information; and also to restrain the defendants from preventing Scott or any other persons from working for the plaintiffs by withdrawing his or their workmen from their employment.

Trade Name, Descriptive Words, Imitation, Tendency to Deceive

In *Reddaway* v. *Banham*, [1896] App. Cas. 199, the House of Lords has decided, reversing [1895] 1 Q. B. 286, (see 34 AM. L. REG. N. S. 167,) that a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers, whether buying directly from himself, or from others, into the belief that they are buying the goods of the other trader, although the name used is primarily merely a true description of the goods; and accordingly that when the plaintiff had for years made belting and sold it as "Camel's Hair Belting," so

that the name had come to mean in the trade the plaintiff's belting and nothing else, and the defendant began to sell belting made of camel's hair yarn, and stamped it "Camel's Hair Belting," so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, thus endeavoring to pass off his goods as the plaintiff's, the latter was entitled to an injunction to restrain the defendant from using the word "Camel's Hair" as descriptive of or in connection with belting made or sold or offered for sale by him and not manufactured by the plaintiff, without clearly distinguishing that from the plaintiff's belting, or from describing his belting so as to represent that it was the plaintiff's belting, or to induce such a belief.

Trustee, Breach of Trust, Liability of Co-Trustee, Contribution

In *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, the plaintiff and defendant, who were trustees of a will, invested trust funds, part of the trust estate, in securities authorized by the will. While thus a trustee, the plaintiff became also entitled to a share of the trust estate as a beneficiary. The investments, some of which were made before and some after the plaintiff became a beneficiary, turned out insufficient, and the plaintiff and defendant were declared jointly and severally liable to make good the loss. The whole of it was made good out of the plaintiff's share of the trust estate, which share exceeded the loss; and he then applied for contribution from the defendant. But the Court of Appeal held, affirming the decision of North, J., that the plaintiff had no right of contribution such as ordinarily exists between co-trustees for losses to the trust estate due to a breach of trust for which both are equally to blame; for that rule does not apply when one of the trustees is also a beneficiary. In such a case, the rule is that the share of a *cestui que trust* who has assented to and profited by a breach of trust must bear the whole loss; and consequently a trustee beneficiary who has joined in a breach of trust must indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received.

Witness Detained for Failure to Give Bail, Fees

One who is committed to custody by an examining magistrate in a criminal proceeding for failure to give security for his appearance as a witness for the prosecution, will be considered as in attendance on the court, if his failure to give security is not due to contumacy or bad character, but solely through inability to do so without fault on his part, and he will be entitled to his *per diem* fees as a witness for the term of his detention: *Hall* v. *Commissioners of Somerset County*, (Court of Appeals of Maryland,) 34 Atl. Rep. 771.

Ardemus Stewart.