PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTACHMENT.

The proper practice, where a levy has been made upon the bankrupt's property under an attachment, granted within the four months period, is for the trustee to move in the state court for an order discharging the attachment and releasing the property from the levy; the sheriff should not be required to assume the responsibility of releasing the levy. *Hardt* v. *Schuylkill, etc. Co.*, 74 N. Y. Supp. 549.

Discharge

BANKRUPTCY.

The Supreme Court of Wisconsin has held that the complaint in an action by a trustee in bankruptcy to set aside transfers of property by the bankrupt, on the ground that they are fraudulent as to creditors, must show that the plaintiff has not sufficient assets in his hands belonging to the estate to satisfy the claims of the creditors. *Mueller* v. *Bruss*, 112 Wis. 406.

Setting Aside Transfer

It is also held in the same case that a judgment and return of an execution unsatisfied are not necessary to enable a trustee in bankruptcy to maintain an action in equity to set aside transfers of property by the bankrupt in fraud of creditors, since under the Bankrupt Act neither the trustee nor creditors whom he represents could obtain such a judgment.

Upon the principle that in all cases not within the provisions of the Bankrupt Law, the state insolvency laws remain operative, it was held in *Herron Co.* v. *Superior Ct.*, 68 Pac. 814 (Sup. Ct., Cal.), that as to a mining corporation which may not be adjudicated bankrupt, the provisions of the state insolvent law applicable to such corporations are not suspended.

State Law

BANKRUPTCY (Continued).

That the amount disbursed for attorney's fees by an assignee for creditors, prior to filing his petition in the bankruptcy court, for the settlement of his accounts forms no part of the assignor's estate in bankruptcy, was held *In re Klein,* 8 Am. B. R. 559, and no summary order directing the assignee to pay over to the trustee should be made as to such disbursements.

Assignor's Estate

That there is a limit to the right to amend would appear from *In re Mocbius,* 8 Am. B. R. 590, where it was held that leave to amend an original proof of claim made after the expiration of the year after adjudication must be denied, as the effect would be to permit proof of a debt in violation of section 57n.

Amending Claim

BILLS AND NOTES.

In adopting the interpretation that will give to the words "same class" in section 60a in the United States Bankruptcy Act relating to preference, the meaning probably intended, it was held *In re Harpke,* 8 am. B. R. 535, that the holder of the bankrupt's unindorsed note is not debarred from proving his claim thereon, because within the four months period he received from the indorser payment of another note, having reason to believe that the money therefor had come from the bankrupt, though in ignorance of his insolvency at the time of such payment.

Preference

In *Carroll* v. *Nodine,* 69 Pac. 51, the Supreme Court of Oregon holds that while an unqualified indorsement of negotiable paper is a written contract excluding parol evidence to vary its terms, an indorsement without recourse is not a contract, but merely operates to transfer the title; and hence parol evidence is admissible to show that at the time of the transfer of a note by indorsement without recourse, the buyer agreed to take the paper at his own risk, absolutely relieving the indorser even from the implied warranty of genuineness attending such a transfer. The court says: "There is an intimation in a note to *Drennan* v. *Bunn,* (Ill.) 7 Am. St. Rep. 354, 366 (s. c. 16 N. E. 100), that the general rule that oral evidence is inadmissible to change the contract of indorsement relates to restrictive indorsements also, and extended, it applies to indorsements without recourse."

Indorsement without Recourse

BILLS AND NOTES (Continued).

. . . But "we have been unable to find any case covering the exact point here." The court goes on to base its decision upon analogies drawn from the sale of personal property.

CARRIERS.

In *Glover* v. *Cape Girardeau B. & S. R. Co.*, 69 S. W. 599, the Court of Appeals at St. Louis, Mo., holds that

Charges

where, on delivery of goods to a carrier, no instructions are given it as to the route of carriage, and it sends them over a connecting line by a circuitous route, so that the charges are in excess of what they would have been if sent by the most direct line, the delivering carrier is entitled to the freight paid by it to the initial carrier.

The Supreme Court of Alabama holds in *Birmingham Ry. Light and Power Co.* v. *Nolan,* 32 Southern, 715, that

Punitive Damages

punitive damages may be recovered of a carrier by a passenger, where, through willfulness or gross negligence of the conductor, the passenger was carried by the place at which, when paying her fare, she told the conductor she wanted to get off. "It is settled that the infliction of actual damage is not essential to the imposition of exemplary damages. *Railroad Co.* v. *Sellers,* 93 Ala. 9."

CONSTITUTIONAL LAW.

The Supreme Court of the United States deals in *Hanover National Bank* v. *Moyses,* 22 S. C. R. 857, with the con-

Bankruptcy Act

stitutionality of the bankruptcy law, and holds; first that the constitutional requirement that bankruptcy laws be uniform throughout the United States is not violated by the Act of 1898, though it provides in the sixth section that bankrupts are allowed the exemptions prescribed by the state law in force at the time of the filing of the petition in bankruptcy, and second, that the recognition of the local law by the act, in the matter of exemptions, dower, priority of payments, and the like, does not render the act void as an attempt by Congress unlawfully to delegate its legislative power.

CONSTITUTIONAL LAW (Continued).

In Colorado the Denver City charter provides that no saloon shall keep in connection therewith any wine room, into which any female shall be permitted to enter and be supplied with liquor. The Supreme Court of Colorado holds in *Adams* v. *Cronin*, 69 Pac. 590, that this is not unreasonable as a discrimination against women on account of sex. "If," says the court, "a discrimination is made against women solely on account of their sex, it would not be good; but if it is because of the immorality that would be likely to result if the regulation was not made, the regulation would be sustained." Construing it in this latter light, the court decides as above indicated.

Intoxicating Liquors

CONTRACTS.

The U. S. Court of Appeals (Fifth Circuit) holds in *Beasley* v. *Texas, etc. Ry. Co.*, 115 Fed. 952, that a contract by which a railroad company agrees to establish and maintain a station at a particular place, and not to establish and maintain any other station within a certain distance therefrom, is contrary to public policy, and cannot be enforced in a court of equity; but the court inclines to the view that the illegality of the agreement should not deprive one who on the faith of it, and without wrongful intent, has conveyed valuable property to the company, of a remedy at law. See *Pullman's Palace Car Co.* v. *Central Transp. Co.*, 171 U. S. 138.

Railroads, Validity

A provision in a contract to do work for a city that there shall be no assignment of it does not prevent the assignment of a claim for work done under it, and for damages for breach by the city; there having been a breach by it, and the work having been completed by another: N. Y. Supreme Court (Appellate Division, First Department) in *Snyder* v. *City of New York*, 77 N. Y. Supp. 637. See *Mellen* v. *Insurance Co.*, 17 N. Y. 609.

Provision against Assignment

In *Doyle* v. *Edwards*, 91 N. W. 322, the Supreme Court of South Dakota holds that a contract to pay a physician from $200 to $400 for the performance of a surgical operation was not too indefinite to be valid, but was binding and valid for $200 and the value of

Definiteness

CONTRACTS (Continued).

the services, up to $400, upon proof of such value Compare *Kramer* v. *Ewing*, 61 Pac. 1064, and also *United Press* v. *New York Press Co.*, 164 N. Y. 406, which latter case is distinguished by the court in the principal case.

DAMAGES.

Connecting Carriers

The measure of damages recoverable against connecting carriers for improper treatment of cattle shipped over their lines is the difference between their market value at their *final* destination and what it would have been but for the improper treatment, and the fact that each carrier limited its liability to its own line, and that none of them carried the cattle to the place of final destination is immaterial: Court of Civil Appeals of Texas in *Gulf, etc. Ry. Co.* v. *Houghton*, 68 S. W. 718. See in connection with this case *Railway Co.* v. *Stanley*, 89 Tex. 44

DIVORCE.

Extreme Cruelty

The definition of what constitutes cruelty sufficient to be a ground for divorce cannot be said to be generally agreed upon, and in many jurisdictions is very indefinite. In *Ellison* v. *Ellison*, 91 N. W. 403, the Supreme Court of Nebraska holds that any unjustifiable conduct, on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty," although no physical or personal violence may be inflicted, or even threatened.

FORMER JEOPARDY.

Assault and Battery

Where, on a trial for assault and battery in a court having jurisdiction to finally determine the charge, it appears that the offence was an assault with intent to rape, the accused having been in jeopardy under the charge of assault and battery, he could not be bound over to answer the charge of assault with intent to

FORMER JEOPARDY (Continued).

rape: Supreme Court of Alabama in *State* v. *Blemis,* 32 Southern, 637. In connection with this we may cite another very recent case, the case of *People* v. *McDaniels,* where it is held that conviction of a battery is a bar to a prosecution for assault with intent to commit murder.

FRAUD.

Recovery of Money Paid

The Supreme Court of Nebraska holds in *Klein* v. *Pederson,* 91 N. W. 281, that a party *in pari delicto* cannot make his illegal act a basis of recovery; but where the stronger mind takes possession of the weaker, or where, through ignorance and without any intent to violate the law, one is led by fraud and misrepresentation to the performance of an act against public policy, the courts will not deny him relief against those whose fraud persuaded him to act, and who seek to profit therefrom. Compare *Hess* v. *Culver,* 77 Mich. 598, and also *Duval* v. *Wellman,* 124 N. Y. 156.

HOMICIDE.

Justification

In *State* v. *Bonofiglio,* 52 Atl. 712, the Court of Errors and Appeals of New Jersey holds that under the law of New Jersey, a person upon whom an attempt to rob is being made, is justified in taking the life of his assailant, even when other and less radical means would render the attempt abortive. His right to kill, it is said, is absolute. Three judges dissent.

Assisting Suicide

In Texas the Penal Code (Art. 77) provides that if any one prepare any means by which a person may injure himself with intent that he shall thereby be injured, he shall, by the use of such indirect means, become a principal. In *Grace* v. *State,* 69 S. W. 529, it is held that this provision has no application to suicides, and does not make one who knowingly furnishes a suicide with the means of killing himself guilty of murder. It is further said: "It is not a violation of any law in Texas for a person to take his own life. . . . So far as the law is concerned the suicide is innocent; therefore, the party who furnishes the means to the suicide must also be innocent of violating the law."

INDEMNITY BOND.

In an action to recover from an alleged surety upon an indemnity bond, the evidence tended to show that the party sought to be charged as such surety intended to sign same as a witness, but inadvertently placed his signature thereto under the name of the obligor, instead of in the proper place for the witness to sign. Under these facts the Supreme Court of Minnesota holds in *United States Fidelity and Guaranty Co.* v. *Siegmann,* 91 N. W. 473, that between the original parties to the transaction in a suit to charge such alleged surety, that he is not estopped from claiming that he did not execute the instrument as a surety, although no facts were pleaded or proved to show that any fraud had been perpetrated to induce him to sign the bond in the apparent capacity in which his name appeared therein. Compare *In re Knox's Estate,* 131 Pa. 230.

Defence

INJUNCTION.

The N. Y. Supreme Court (Appellate Division, Third Department) holds in *Harvey* v. *National Drug Co.,* 77 N. Y. Supp. 647, that where an employe of a company manufacturing certain pharmaceutical preparations by secret formulæ and processes, after learning such secrets, became an officer of a rival corporation, and thus communicated and used such formulæ and processes in the manufacture of similar preparations, such use should be enjoined; but where such employe took copies of prescriptions sent to the first company by various physicians to a rival company, the first company had not such interest in the prescriptions as would entitle it to an injunction to restrain such use by its rival, though the employe learned the prescriptions in the course of his employment.

Trade Secrets

INSANITY.

On a prosecution for bigamy the defendant testified that he knew that it was legally wrong to marry a second time without a divorce, but that he had been told by God that it was not wrong. A physician testified that the defendant was religiously or emotionally insane, and did not believe he was able to distinguish between right and wrong, with regard to the crime of bigamy. The Court

Bigamy

INSANITY (Continued).

of Criminal Appeals of Texas holds upon these facts that all the evidence was confined to the issue of moral insanity, and that the jury were, therefore, justified in finding the defendant guilty: *Harrison* v. *State*, 69 S. W. 500. "If a party had, at the time of the commission of the act, such degree of reason and understanding as is sufficient to enable him to understand that his act was forbidden by law, and that the law directed that the person who did such act should be punished, he is responsible:" *Cannon* v. *State* (Texas), 56 S. W. 361. One judge dissents on the ground that the evidence shows an inability to distinguish right from wrong, and this should acquit the defendant.

INSURANCE.

Powers of Agents

In *Commercial Union Assur. Co.* v. *Urbansky*, 68 S. W. 653, the Court of Appeals of Kentucky holds that where a man authorized one who was agent for several companies to select the companies in which to place insurance of a certain amount, the agent had no authority, after selecting the companies and issuing the policies, to cancel one of the policies, without notice to the insured, and substitute for it a policy in another company, though the cancelled policy had not been actually delivered, since an enforceable contract would have existed if no policy had been issued at all; and, therefore, the cancelled policy remained in force.

Insurable Interest, Sole Ownership

In *Steinmeyer* v. *Steinmeyer*, 42 S. E. 184, the Supreme Court of South Carolina holds that an insurance policy requiring sole and unconditional ownership is not void when taken out by the grantee of realty by deed of gift, though the deed has been adjudged void as against the grantor's creditors. The grantee is held to have had an insurable interest and, "With respect to any right of the insurance company, the insured by the grant of the owner, was invested with the fee-simple title at the time of the insurance. The insured's ownership was sole, because no one else had any interest in the property, and it was unconditional because the quality of her estate therein was not limited or affected by any condition. The right of the grantor's creditors in certain contingencies to subject said property to their claims did not give such

INSURANCE (Continued).

creditors any interest in the property as owners, nor did the judgment declaring the deed void as against creditors operate to restore the fee to the grantor, with respect to the insurance company. The existence of a lien or incumbrance on the insured's property is not a breach of the condition which requires sole and unconditional ownership." See *Insurance Co.* v. *Weill,* 28 Grat. 389.

JUDGMENT.

Where pending an action to recover the value of goods alleged to have been sold and delivered in reliance upon defendant's false representations as to his financial condition, he is discharged in bankruptcy, a judgment in said action subsequently and regularly entered reciting that, "upon the trial the plaintiffs having withdrawn all allegations of fraud in their complaint the defendants consented that the plaintiffs may have judgment for the amount claimed with interest," is not affected by the discharge in bankruptcy, and defendants are not entitled to an order directing said judgment to be canceled and discharged of record, under section 1268 of the Code of Civil Procedure. *Stevens* v. *Meyers,* 8 Am. B. R. 446.

Cancelling

LEASE.

Where the owner of farm land leases the same, reserving to himself the right to enter thereon and prepare the ground for or sow a crop of wheat, and when it is provided in the agreement that for such purpose "he and his servants and agents may enter upon such premises without let or hindrance, and the parties of the second part hereby waive all claims for damages incident thereto," the right of such landlord so to enter upon the lands for the purposes named in the agreement, is assignable and may be conveyed to a tenant: Supreme Court of Kansas in *Brewster* v. *Gracey,* 69 Pac. 199.

Rights of Landlord, Assignment

LIMITATIONS.

In *Ewbank* v. *Ewbank,* 42 S. E. 194, the Supreme Court of South Carolina holds that an equitable mortgage, as well as the note secured thereby, barred by limitations, is revived, as between the original holders, by a payment on the note.

Renewal of Debt

LIEN.

In *Levor* v. *Seiter*, 8 Am. B. R. 459, reversing 5 id. 576, (Supreme Court of New York, Appellate Division, First Dept.), it was held that where money collected upon an execution issued upon a judgment obtained against the bankrupt within the four months period is paid over to the judgment creditor before the filing of the petition in bankruptcy, the case does not fall within the provisions of section 67f of the Bankrupt Act, and that such money is not recoverable back by the trustee under section 60b, in the absence of proof that the creditor had reasonable cause to believe that the bankrupt, by suffering judgment to be taken against him, intended to give a preference.

Preference

LUNATIC.

That a lunatic may not be adjudged a bankrupt upon the petition of his committee was held in *Matter of Eisenberg*, 8 Am. B. R. 551, upon the ground that the court had no jurisdiction to entertain such petition.

Bankrupt

MARRIAGE.

Under the statute law of California it is provided that a subsequent marriage contracted by any divorced person during the life of a former husband or wife is void unless the decree of divorce in the case of the former marriage has been rendered at least one year prior to the subsequent marriage. A woman within five months after obtaining a divorce in California, was married in Nevada, to a citizen thereof in accordance with the laws of that state. *In re Wood's Estate*, 69 Pac. 900, the Supreme Court of California holds that this marriage was valid in California, the prohibition of remarriage except after a certain time having no extraterritorial effect. Three judges dissent, on the ground that the first divorce is not absolute until the lapse of a year, and that consequently at the time of the second marriage the woman was not in a situation to contract marriage.

Extraterritorial Effect

It is interesting to compare with this decision, the decision of the same court in *Wood* v. *Wood's Estate*, 69 Pac. 981, a case arising in relation to the same persons as above. The court holds that though it recognizes the validity of the

MARRIAGE (Continued).

marriage it will not enforce a contract by which, in consideration of this marriage, and a release of interest by the wife in the husband's property, he agreed to pay her $10,000, since the consideration was in violation of the spirit of the California law.

MORTGAGE.

A formal release of a mortgage executed by the mortgagee extinguishes the lien of the mortgage, whether the same is fully paid or not. If the release is made through inadvertence or mistake the lien of the mortgage may be reinstated by proper proceedings taken therefor. Supreme Court of Nebraska in *Gadsden* v. *Johnson,* 91 N. W. 285.

Release, Reinstatement

MUNICIPAL BONDS.

In *Board of Commissioners* v. *Vandriss,* 115 Fed. 866, the U. S. Circuit Court of Appeals (Eighth Circuit) holds that where municipal bonds were sold in the open market for full value to purchasers who had no knowledge of any facts impairing their validity, the municipality is estopped to deny the truth of any recitals therein stating the act authorizing their issuance and certifying that "all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and due form as required by law;" and the bonds cannot be defeated unless they themselves, or the act under which they were issued, or both, when read together, disclosed that they were issued without authority or not in conformity with law.

Estoppel by Recitals

MUNICIPAL CORPORATIONS.

The extent to which police power may be exercised by a municipality and the manner of its exercise furnished an important question in *Richmond Safety Gate Co.* v. *Ashbridge,* 116 Fed. 220. An act of Pennsylvania (May 5, 1899), provided that cities of the first class might, by general ordinance, regulate the management and inspection of elevator hoistings and elevator shafts in such cities. Acting under this act the City of Philadelphia

Police Powers

MUNICIPAL CORPORATIONS (Continued).

provided that "full automatic gates, wherever found, will be condemned, and must be replaced within a reasonable time by gates approved, etc." The U. S. Circuit Court (E. D. Pennsylvania) holds that the city under the above act has no power to condemn without inspection, and by a general regulation an entire class of elevator appliances, and to require their removal wherever found, whether such regulation is adopted by ordinance or by the bureau of building inspection under authority given by an ordinance; and a manufacturer of such appliances is entitled to an injunction to restrain the enforcement of such a regulation as unreasonable, where it will work irreparable injury to him if enforced. See also *City of Philadelphia* v. *Western Union Tel. Co.*, 32 C. C. A. 246.

NEGLIGENCE.

Proximate Cause

A railroad company took charge of an employe afflicted with smallpox and hired one to guard and nurse him. While the patient was delirious with fever, the nurse fell asleep, and the patient escaped and wandering on the plaintiff's premises communicated the disease to his child. Under these facts the Court of Civil Appeals of Texas, holds in *Missouri, etc. Ry. Co.* v. *Wood,* 68 S. W. 802, that the evidence showed liability for the injuries due to the communication of the disease. See also *Railroad Co.* v. *Wood,* 66 S. W. 449. It is not, the court holds, contributory negligence on the part of the father that he had failed to have the child vaccinated.

OVERDRIVING HORSE.

Hiring on Sunday

The Supreme Court of New Jersey holds in *Newbury* v. *Luke,* 52 Atl. 625, that in an action to recover damages for the overdriving of a horse, the fact that the defendant hired the horse from the plaintiff upon a Sunday, for the purposes of Sunday driving, and was driving on that day, in violation of the law of New Jersey, constitutes no defence. In such a case, is is said, the overdriving, and not the Sunday violation, is the proximate cause of the injury and the maxim, *"In pari delicto,"* etc., has no application.

ARTIES.

The Supreme Court of Kansas holds in *Atchinson, etc., Railroad Co.* v. *Anderson,* 69 Pac. 158, that in an action against a railroad company for damages in laying a track in a public street and obstructing the ingress and egress of a lot owner to and from his property, where it appeared that the company sued was not the owner of the track when it was built, nor at the time the action was commenced, but was a lessee only, the lessor company which laid the track and caused the obstruction was a necessary party. See also *Railway Co.* v. *Cuykendall,* 42 Kans. 234.

Obstruction of Highway

PARTNERSHIP.

The powers of the court being sufficient to fairly protect the equities of the individual creditors where the facts justify it, it was held by Shires, Dist. J., *In re Green,* 8 Am. B. R. 553, that where an individual is adjudged a bankrupt, parties to whom he is indebted, in connection with other persons as partners, may share in his estate with his individual creditors, it not appearing that there is any solvent partner from whom the debt can be collected, nor any partnership assets to which the firm creditors can look for payment of their just claims.

Priority

PUBLIC OFFICERS.

In *Carter* v. *Fidelity and Deposit Co. of Maryland,* 32 Southern, 632, the Supreme Court of Alabama holds that where a surety on a bond of a public officer has been held liable thereon, his right to contribution from the sureties on other bonds is not limited to the actual default of the officer, but includes the costs of defending the suit on the bond; such defence not being frivolous or unnecessary.

Bonds, Sureties

SEDUCTION.

The Court of Appeals of Kentucky in a carefully reasoned opinion upon a case of seduction, concludes by summarizing the law as follows: "We conclude, therefore, that the word 'seduction' when applied to the conduct of a man towards a woman, means the use of some influence, artifice, promise, or means on his part, by which he induces the woman who is then, and has theretofore for a reasonable time been, a woman of chaste conduct, to sub-

Definition

SEDUCTION (Continued).

mit to unlawful intercourse with him. To this may be added, if the evidence justifies it, a statement that proof of former unchastity may be considered in mitigation of damages, and to show that sexual intercourse was without enticement, artifice, persuasion or solicitation, but is not of itself a defence if the plaintiff had, for a reasonable time before the alleged seduction, been leading a virtuous life." The case is *Stowers* v. *Singer*, 68 S. W. 637. See also *Patterson* v. *Hayden*, 17 Oreg. 238.

SLANDER OF TITLE.

In *Butts* v. *Long*, 68 S. W. 754, the Court of Appeals at St. Louis, Mo., holds that slander may be perpetrated by two persons jointly. The court is discussing slander of title but speaks of slander generally. See *State* v. *Marlier*, 46 Mo. App. 233.

Joint Wrong

SPECIFIC PERFORMANCE.

The N. Y. Supreme Court (Special Term, N. Y. County) holds in *Haffey* v. *Lynch*, 77 N. Y. Supp. 587, that where a vendor having a marketable title to land, contracted to sell it at a time fixed, but was unable to do so because of a defect which arose after the making of the contract, and without the fault of the vendor, the vendee could obtain specific performance later when the defect had disappeared at the time of the trial of the action.

Defect in Title

SURETY.

The surety on a note who, after the maker's adjudication as a bankrupt, pays the balance due thereon, cannot be required as a condition of filing his claim therefor, to surrender preferential payments received by the payee of the note. *In re New*, 8 Am. B. R. 566, holding that the latter part of section 57i was not intended as a restriction upon the surety creditor.

Cam vs. Bankrupt Principal

TAXES.

That a franchise tax due and owing by a corporation at its adjudication as a bankrupt is a "tax" within the meaning of section 64a of the Bankruptcy Act, and is entitled to priority of payment, is held in *Matter of Mutual Mercantile Agency*, 8 Am. B. R. 435. See 4 Thomp. Corp., sec. 5, 560.

On Corporation Franchise

TOLL ROADS.

In *Mobrey* v. *Cape Girardeau, etc., Road Co.*, 69 S. W. 394, the Court of Appeals at St. Louis, Mo., holds that where persons riding on a toll road paid toll to a certain point at which they usually left the road, and, on reaching it, decided, because of darkness and an approaching storm, to continue thereon, they were not thereby rendered trespassers or precluded from recovering for injuries caused by defects in the road.

Personal Injuries

TRESPASS.

The Court of Appeals of New York deals in *Magar* v. *Hammond*, 64 N. E. 150, with the question of the liability of an owner of land to a trespasser, where the act by which the trespasser suffers is voluntary. The facts were as follows: The defendant had established a fish preserve, and posted notices as prescribed by statute. To protect the fish from poachers, he employed a night watchman, who was in the habit of discharging fire-arms into the air to frighten off the poachers. The plaintiff with knowledge of such facts, on a dark night entered the park for the purpose of poaching and was injured by a bullet fired by the watchman in the direction of the noise made by the plaintiff. The court holds that the lower court committed error in refusing to charge, in an action to recover for the injuries, that, if the plaintiff knew the habit of the watchman, he could not recover, even if the defendant or the watchman were negligent. No authorities are cited and it may be questioned whether the case does not mark a departure from the current of authority upon this subject.

Injury to Trespassers

TRUSTS.

The right of a *cestui que trust* to follow trust funds was considered *In re Marsh*, 8 Am. B. R. 576, where it was held that unless a trust fund, the greater portion of which came into the hands of the bankrupt, as trustee, several years prior to his bankruptcy can be traced in some shape into the estate which came into the hands of his trustee in bankruptcy, the equitable owners of such fund are not entitled to priority of payment over the general creditors, and upon the claimants is the burden of proof to show the fact.

Following Funds

USURY.

In *Anderson* v. *Oregon Mortgage Co.*, 69 Pac. 130, the Supreme Court of Idaho holds that no one but a party to a contract can avail himself of the defence of usury, and that consequently the grantee of a mortgagor who assumes the payment of the mortgage cannot set up such defence. The mortgagor "has in effect put the money in the hands of respondents with which to pay said debt, and they agreed to pay it, and without authority from him they are trying to avoid the payment thereof by setting up the usurious contract." This, it is held, may not be done.

Parties

WATER COURSES.

In *Fisher* v. *Feige*, 69 Pac. 618, the Supreme Court of California holds that damage to a riparian owner resulting from the diminution of the flow of water incident to the cutting of trees by a riparian owner higher up the stream, thereby causing an increase of evaporation, is *damnum absque injuria.* Nor can the motive of the riparian owner in thus cutting the trees growing along the bank of a river affect the lawfulness of such acts with respect to the rights of riparian owners lower down the stream. See *Mayor, etc.* v. *Pickles* [1895], App. Cas. 587.

Riparian Rights

WILLS.

A will provided that on the death of certain legatees before the time limited for the payment thereof, the share of any deceased legatee should be paid over to their "next of kin" according to the statute of distributions. The Court of Appeals of New York, interpreting this part of the will, holds *In re Devoe*, 63 N. E. 1102, that the widow of a deceased legatee is not entitled to share in the legacy her husband would have taken had he lived at the time of the payment since she is not of "the next of kin," and the direction as to such payment does not extend the meaning so as to include the widow. Two judges dissent. The fact that so many wills provide substantially as this one did makes the case an interesting precedent. Compare *Platt* v. *Mickle*, 137 N. Y. 106.

Construction; "Next of Kin"