

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ADMINISTRATION.

The Supreme Court of Pennsylvania holds *In re Smith's Estate*, 54 Atl. 174, that where the Supreme Court has declared a judgment void, and the Court of Common Pleas has stricken it off, and all proceedings thereunder, including a sale of the mortgaged premises to the mortgagee, the latter may subsequently present his claim in the Orphans' Court, on distribution of the proceeds of the sale of the mortgagor's estate. See also *Mutual Life Insurance Co. of New York v. Tenan*, 54 Atl. (Pa.) 172.

#### AMENDMENT.

It is held by the New York Supreme Court (Appellate Division, Second Department), in *Clark v. Brooklyn Heights R. Co.*, 79 N. Y. Supp. 811, that on the trial of a personal injury case, the testimony being concluded, it is not an abuse of discretion to permit an amendment of the complaint from ten to twenty thousand dollars.

#### BANKRUPTCY.

Where the opposing creditor to a bankrupt's discharge is a partnership, the verification and signature of the firm to the specifications may be made by one of the partners authorized to sign the firm name: *U. S. District Court (W. D., Tennessee), In re Glass*, 119 Fed. 509. The court also holds that specifications in opposition to a bankrupt's discharge cannot be verified by the oaths of attorneys or solicitors or other agents, in the absence of a previous order of court allowing the same, in which event both the order and the oath should state the reasons therefor.

## BONDS.

A bond executed in pursuance of a statute providing for an appeal bond is not necessarily rendered void because the statute is afterwards pronounced unconstitutional: Supreme Court of Nebraska in *Stevenson v. Morgan*, 93 N. W. 180. The test of the enforceability of such bond is whether a consideration exists independent of the statute. If so, and the bond has the other essentials of a common-law contract, it may be enforced. See and compare *Brookman v. Hamill*, 43 N. Y. 554, and *Poole v. Kermit*, 59 N. Y. 554.

## CARRIERS.

The U. S. District Court (S. D., New York) holds in *De Sola v. Pomares*, 119 Fed. 373, that the settled rule of commercial law that freight prepaid, but which is not earned by the delivery of the goods, is to be refunded, in the absence of special agreement to the contrary, where the loss is not due to any fault of the shipper, cannot be overcome by proof of a local custom that freight prepaid is not to be returned to the shipper in case the vessel is lost on the voyage.

The Supreme Court of Georgia holds in *Brunswick & W. R. Co. v. Ponder*, 43 S. E. 430, that though a railroad company is bound to use extraordinary diligence to protect a passenger, while in transit, from violence or injury by third persons; yet where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest. So where such arrest by officers of the law is illegal, but the railroad company has no notice of that fact, the company is not liable to the passenger for a failure to interfere with the officers and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom. In such a case the company is under no duty to see that the officers use only such force as is necessary to make the arrest.

## CONSTITUTIONAL LAW.

The Supreme Court of Nebraska dealing with the question as to the use of the Bible in the public schools holds in *State v. Scheve*, 93 N. W. 169, that the law does not forbid the use of the Bible in the public schools; it is not proscribed by the constitutional provisions in reference to religious freedom; and the courts

**CONSTITUTIONAL LAW (Continued).**

have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully interfere to prevent the use of the Bible in a public school is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist. See the former opinion of the court in 91 N. W. 846.

In *Grossman v. Caminez*, 79 N. Y. Supp. 900, the New York Supreme Court (Appellate Division, Second Department), holds that a statute providing that in cities of the first and second class any person who should offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, should be guilty of a misdemeanor, is unconstitutional as a deprivation of liberty and property without due process of law.

An act of the New York legislature permitted the court, on application of either party to an action of divorce, at any time after final judgment, "whether heretofore or hereafter rendered, to annul, vary or modify" a direction of a judgment in divorce requiring a husband to provide for the support of his wife, and for the education and maintenance of the children. A man who prior to the passage of this act had been decreed to pay to his wife \$4,000 a year, applied to have the sum reduced on account of a material change in his circumstances. The Court of Appeals of New York holds in *Livingston v. Livingston*, 66 N. E. 123, that the act is unconstitutional in so far as it attempts to confer a power on the court to annul or vary valid and final judgments entered before the passage of the act. Three judges dissent.

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**CONTEMPT.**

In *Ogden v. State*, 93 N. W. 203, the Supreme Court of Nebraska holds that while a formal accusation is not necessary to a prosecution for contempt committed in the presence of the court, the record must show that such an offence has been committed in order to

**CONTEMPT (Continued).**

sustain a conviction. So a recital that the accused addressed insulting and menacing language to the court is a mere conclusion; the language itself should be set out to enable the reviewing court to determine whether it was actually contemptuous.

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**CONVERSION.**

In *State v. Omaha National Bank*, 93 N. W. 319, the Supreme Court of Nebraska holds that where property has been taken from the plaintiff without his knowledge or consent, or of those having the lawful custody and control over it, the motive which prompted the defendant to receive and dispose of it is an immaterial issue. But this rule does not apply when the plaintiff, his agent or servant, having the lawful custody or control over the property, consents to or requests the defendant to receive and dispose of it. In such case guilty intent is an essential element of conversion. Two judges dissent. See *Stephens v. Elwall*, 4 Maule & S. 259. The case presents in the majority and minority opinions a thorough review of the questions involved.

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**DISCOVERY.**

An order for the examination of the defendant's books and papers, containing no limitation on the time within which inspection shall be made, is void: Supreme Court of Montana in *State v. District Court*, 71 Pac. 602.

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**DIVORCE.**

A wife agreed not to contest an action for divorce brought against her by her husband in North Dakota, he agreeing in return that, if he obtained the divorce, the decree should contain a provision for the payment to her weekly of a certain sum for support. The decree contained the provision stipulated. Upon these facts the New York Supreme Court (Appellate Division, Third Department) holds in *France v. France*, 79 N. Y. Supp. 579, that, though the agreement was void as against public policy, its invalidity was not available in a collateral attack on the decree in a suit afterwards brought by the wife in New York to recover installments due thereunder.

**DIVORCE (Continued).**

The Supreme Court of Colorado holds in *Branch v. Branch*, 71 Pac. 632, that the plaintiff in a divorce suit having married pending the appeal from the decree granting the divorce is not entitled to be heard on appeal, or to have the cause remanded for a new trial, the decree being reversed.

**Marriage  
Pending  
Appeal**

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**DOWER.**

The Court of Appeals of New York holds in *Starbuck v. Starbuck*, 66 N. E. 193, that where one claiming to be the widow of a decedent sued for dower, an exemplified copy of a decree of divorce obtained in another state, in an action in which the decedent was personally served but did not appear, is competent evidence to show that she was not the widow of the decedent or entitled to dower in the estate acquired by him after the decree, as she was estopped to impeach a judgment which she herself had obtained. Compare *Matter of Swales' Estate*, 60 App. Div. 599.

**Effect of  
Divorce**

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**EMINENT DOMAIN.**

The law of Vermont provides that one who desires to erect or raise a dam to obtain water therefor, and thereby flow the lands of another, may secure the right to do so if commissioners or the court shall find that the flowing of the lands will be of "public benefit." A petition for the appointment of commissioners, etc., showed that the petitioner owned a dam, which he desired to raise in order to generate electricity for the operation of a railroad. Under these facts the Supreme Court of Vermont holds in *Avery v. Vermont Electric Co.*, 54 Atl. 179, that the power of eminent domain could not be invoked on the ground of public use, since, while the railroad must serve the public, there was nothing binding petitioner to serve the railroad or to give equal advantages to all.

**Flowing  
Lands**

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**EVIDENCE.**

In an action to recover damages for property taken by a railroad company, declarations of the owner of the land as to its value, and his offer of it at a certain price, and a sale of a portion thereof, are admissible to show his estimate of value: Supreme Court of Pennsyl-

**Value of  
Property**

## EVIDENCE (Continued).

vania in *Houston v. Western Washington R. Co.*, 54 Atl. 166.

In a prosecution for homicide, the issue being whether the defendant, when he killed the deceased, believed that the **Similar Occurrences** deceased was about to assault his wife—defendant's sister—testimony showing that, to the defendant's knowledge, the deceased had made prior assaults on his wife was admissible: Supreme Court of Montana in *State v. Felker*, 71 Pac. 668. See also *Gray v. State*, 72 S. W. 169, where it is held by the Court of Criminal Appeals of Texas that on the issue whether one selling liquor to a minor knew he was under age, testimony that two others, both of them minors, drank with him at the same time, is relevant.

A written agreement between the vendor and vendee for the sale, purchase and conveyance of land is not executed **Consideration** by and merged in the deed, as to the stipulations of the vendee therein concerning the consideration to be paid for the property; and such written agreement is competent to show the actual consideration: Supreme Court of Ohio in *Conklin v. Hancock*, 66 N. E. 518. Compare *Brumbaugh v. Chapman*, 13 N. E. (Ohio), 584.

In *Calivada Colonization Co. v. Hays*, 119 Federal, 202, the United States Circuit Court (Western Division, Pennsylvania) holds that the Pennsylvania **Testimony of Party Called by Adversary** act, permitting a party to be called and examined "as on cross-examination" has no application in a suit in equity in a federal court, and a party so called and examined therein becomes a witness for the party calling him, and his testimony is to be given weight accordingly. See *Drave v. Fabel*, 132 U. S. 487.

The New York Supreme Court (Appellate Division, First Department) holds in *McEvoy v. Tourmel*, 80 N. Y. Supp. **Medical Books** 71, that in an action for personal injuries it was error to permit the defendant to read in evidence extracts from a standard medical book, and this though the matter contained in the book had been in some respects the subject of examination by the plaintiff as a part of her affirmative case and though the defendant had a right to cross-examine the physician who testified on such subject

**EVIDENCE (Continued).**

with respect thereto, it appearing that he did not do so, but that he attempted to read the extracts as a part of his affirmative case. See *Foggett v. Fischer*, 23 App. Div. 207.

**HABEAS CORPUS.**

The U. S. Circuit Court (M. D. Pennsylvania) holds in *Ex parte Rearick*, 118 Fed. 928, that while the United States courts have power to intervene by *habeas corpus* in a case where a disregard of the federal law is charged, it is not always expedient to do so, involving as it does a conflict of authority which it is desirable to avoid. Where, therefore, an agent of a non-resident corporation was arrested for violating a borough ordinance imposing a license on canvassers, and on conviction his appeal was allowed to a higher state court, he was held not to be entitled to a discharge on *habeas corpus* in the federal courts, pending determination of the appeal in the state court, on the ground that the ordinance under which he was convicted was invalid as against him, as a regulation of interstate commerce. See the recent case of *Minnesota v. Brundage*, 190 U. S. 499.

**LANDLORD AND TENANT.**

Where a landlord agreed to make repairs, an action *ex delicto* for injuries sustained by reason of his failure to make repairs cannot be maintained in the absence of notice to the landlord of the need of repairs: Court of Appeals of Maryland in *Thompson v. Clemens*, 53 Atl. 919. See also *Hines v. Wilcox* (Tenn.), 34 L. R. A. 824.

The general rule that upon a tenant's taking a new lease the right to fixtures upon the premises at the time of the new lease is lost unless specifically reserved, is well settled. The rule appears in a somewhat modified form in *O'Brien v. Mueller*, 53 Atl. 663, where it is held by the Court of Appeals of Maryland that where the owner of a barroom and restaurant leased the premises, and sold the fixtures to the tenant and in the paper then executed authorized the tenant to remove any or all of said property, and agreed "not to regard them, or any of them, as fixtures," the right of the tenant to remove such articles was not lost by taking a new lease after

## LANDLORD AND TENANT (Continued).

the first lease expired, and failing to mention or reserve such articles in the new lease. See *Sheldon v. Edwards*, 35 N. Y. 279.

Where, while the relation of landlord and tenant is existing between a person in occupation of the second story of a building, whose rear abuts upon a yard, the landlord builds in the yard a three-story extension, cutting off light and air from the rear windows of the tenant's premises, a mandatory injunction will issue compelling the landlord to remove so much of the extension as is higher than the windows of the tenant: New York Supreme Court (Special Term, New York County) in *Stevens v. Solomon*, 79 N. Y. Supp. 136. See *Doyle v. Lord*, 64 N. Y. 432. Nor is it material that "the defendant succeeded in completing the structure before service of the injunction order was made upon him. The plaintiff had promptly objected to his acts, and notified him of her purpose to bring the action. *Daniel v. Ferguson* [1891], 2 Ch. 27."

## LARCENY.

To acquire a property right in animals *ferae naturae*, so that they may be the subject of larceny, it is well settled that the pursuer must bring them into his power and control, so that he may subject them to his own use at his pleasure, and must so maintain his possession and control as to indicate that he does not intend to abandon them again to the world at large; but it is held in *State v. Shaw*, 65 N. E. 875, that in cases where larceny is charged, the law does not require absolute security against the possibility of escape.

## MARSHALING ASSETS.

In *New York Public Library v. Tilden*, 79 N. Y. Supp. 161, it appeared that a debtor agreed that a particular creditor should have a lien upon two funds, one of personal and the other of real property. The New York Supreme Court (Special Term, New York County) holds that payment should be made to such doubly secured creditor one-half from each fund, where other claims against the personalty, upon the singly secured creditors have no lien, would exhaust the fund.

## MUNICIPAL CORPORATIONS.

*In re Municipal Fuel Plants*, 66 N. E. 25, the Supreme Judicial Court of Massachusetts holds that though the legislature cannot authorize cities and towns to buy fuel and sell it to their inhabitants in competition with private dealers, yet where, by reason of the supply of fuel being very small, and the difficulty of obtaining it very great, persons desiring to purchase it are unable to supply themselves through private enterprise, the government may constitute itself an agent for the relief of the community, and money expended for that purpose would be expended for public use. One judge dissents. The opinion of the justices in 155 Mass. 601, will be recalled.

## NEGLIGENCE.

*In Texas State Fair v. Brittain*, 118 Fed. 713, the U. S. Circuit Court of Appeals (Fifth Circuit) holds that where a state fair association, under a contract giving the exclusive use of its ground to an exhibitor, advertised such exhibit as one of the attractions of the fair, it was liable for injuries to a spectator caused by the falling of seats negligently constructed by the exhibitor. "It may be," says the court, "as between the Texas State Fair and Smith & Lucas [the exhibitors], the latter were authorized, on such terms as to them were satisfactory, to carry on and supervise the side show; but it seems clear that no contractual relations between such parties can be invoked to release the state fair, under the state of case shown in the record, from the duty of exercising reasonable care in the interests of the people who were attending that fair, or were witnessing such attractions in side shows as it offered to the public." See also *Sebeck v. Plattdeutsche Volkfest Verein* (N. J.), 46 Atl. 631, 50 L. R. A. 199.

The very recent case of *Thornton v. Maine State Agricultural Society*, 53 Atl. (Maine) 979, is also noteworthy as an application of similar principles under an analogous state of facts.

## NOTES.

A., owing B. money, agreed to make his notes therefor, with C. as surety, giving a temporary deed of trust as security till C.'s signature could be obtained, the deed of trust to be then cancelled. A. got C.'s signature written on the back of the notes, and B. can-

**NOTES (Continued).**

celled the deed of trust. The Supreme Court of Mississippi holds, in *Pearl v. Cortright*, 33 Southern, 72, that C. was a co-maker of the notes on the same consideration as A., and further that C. was not released from any liability on account of B.'s cancelling the deed of trust, as it could not have been enforced against A., and B. was unaffected by any fraud practiced by A. in getting C.'s signature. See also *Graves v. Tucker*, 10 Smedes & M. 9.

The Supreme Court of Georgia holds in *State Mut. Life and Annuity Ass'n. v. Baldwin*, 43 S. E. 262, that where  
**Payment,** a promissory note has been satisfied in full, and  
**Subsequent** the payee, instead of complying with a promise  
**Protest,** to return it to the maker, negligently sends it  
**Damages** to a bank "for collection, with instructions to protest said note if not paid," and it is accordingly protested for non-payment, such negligent conduct on the part of the payee amounts to an actionable wrong if injury results therefrom to the maker's financial standing.

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**PARTITION.**

In an action for partition of certain lands, the complaint alleged that the plaintiff and certain defendants were owners  
**Parties,** as joint tenants or tenants in common of the  
**Adverse** land; that other defendants claimed interests  
**Claimants** therein adverse to the plaintiff and his co-tenants, the extent of which was unknown to the plaintiff, and that they were in possession of certain portions of the land in hostility to the plaintiff, but contained no allegation that such defendants were tenants in common. With one judge dissenting the Court of Appeals of New York holds that it was erroneous to dismiss such complaint as to such defendants on the ground that they were not proper parties, and that the issues raised by the complaint could not be tried in partition: *Satterlee v. Kobbe*, 65 N. E. 952. See also *Weston v. Stoddard*, 137 N. Y. 119.

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**PARTNERSHIP.**

In *Fisk v. Fisk*, 79 N. Y. Supp. 37, the New York Supreme Court (Appellate Division, First Department) holds  
**Right to** that though, where all the members of a firm  
**Name** die without having made any disposition of the right to use the firm name, that right does not pass to the personal representatives of the last survivor, but dies with

**PARTNERSHIP (Continued).**

him, nevertheless, such personal representatives, being entitled to the good will of the late firm, are entitled to an injunction restraining third persons from using the partnership name and pretending to be its successor. Two judges dissent. "As to administrators the policy of the law is that they should take everything, as far as possible, wearing the semblance of property of the intestate as part of the assets to pay debts. If the right to state that one has succeeded to the property and business of the firm has been rendered valuable, then it is as much a property right, to be sold by administrators, as the goods which a merchant has in his store when he dies; and strangers who endeavor to illegally appropriate such a valuable right should be prevented from so doing by a court of equity."

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**PLEDGE.**

The Supreme Court of Iowa holds in *Loomis v. Reimers*, 93 N. W. 95, that where a pledgee of bank stock honestly and in good faith consulted an attorney in reference to a defence in a replevin action, and did not defend because he was advised that he could not do so successfully, he did what an ordinarily prudent man would do under the circumstances, and was not liable for the loss thereof, even though the replevin action was barred by limitations. See also *Willits v. Hatch*, 132 N. Y. 41.

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**REFORMATION.**

The Court of Appeals of Maryland holds in *Boulden v. Wood*, 53 Atl. 911, that a contract for sale of land having provided that it should be subject to the operation of a mortgage of \$1,000, and the scrivener, whom the grantee instructed to prepare the deed in conformity with the agreement, having omitted reference to the mortgage, the deed will be reformed, *notwithstanding any negligence of the grantor*, who merely asked, *without looking to see*, if it was made subject to the mortgage.

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**SPECIFIC PERFORMANCE.**

In *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 65 N. E. 967, the Court of Appeals of New York holds that where the defendant contracted to sell and deliver to the plaintiff a fixed quantity of pulp wood annually for a certain period of years, to be taken

## SPECIFIC PERFORMANCE (Continued).

from land belonging to the defendant, and it also agreed not to sell the land so as to prevent the performance of the contract, and that the purchaser would have an equitable interest in the wood for advances made, it is an agreement giving the purchaser certain rights in connection with the land, entitling him to relief in equity on failure of the defendant to perform.

On the other hand, in the recent Pennsylvania case of *Mundy v. Brooks*, 53 Atl. 1000, the contract sought to be specifically enforced was for "all the hemlock bark standing, growing, lying or being" upon certain land, and the Supreme Court holds that it will not enjoin a sale to some one else, the plaintiff, it is said, having an adequate remedy at law.

A contract for the sale of an undivided interest in land provided that the land was to be surveyed by the vendee **Hardship** at his expense; that, when the amount thereof was ascertained, the vendee should pay a certain price per acre for the vendor's undivided interest, and the vendor should make a quitclaim deed. The vendee attempted to survey the land, but his surveyors were prevented by force by third parties claiming title from doing so; and the vendee was advised that he would be in great danger of being killed if he went on the premises. The Court of Appeals of Kentucky holds that, as the contract could not be performed until the number of acres was ascertained by survey, and as this could not be done without great hardship to the vendee, specific performance would not be enforced: *Williamson v. Dils*, 72 S. W. 292.

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 STATUTE OF LIMITATIONS.

Where the physician and surgeon operates upon a patient and neglects or carelessly forgets to remove a foreign substance placed in the wound (*e. g.*, a sponge), **Time Covered** and closes the incision, with this foreign substance remaining therein, and this continues during his entire professional relation to the case, and is present when he abandons or otherwise retires therefrom, the statute of limitations does not commence to run against a right to sue and recover on account of such want of skill, care and attention, until the case has been so abandoned or the professional relation otherwise terminated: Supreme Court of

STATUTE OF LIMITATIONS (Continued).

Ohio in *Gillette v. Tucker*, 65 N. E. 865. Three judges dissent on the ground that "if the original act of negligence causes damage, although only nominal in extent, a cause of action arises *eo instante*, and that consequential damages may be recovered thereon up to the time of the trial." See *Lattin v. Gillette*, 95 Cal. 317.

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SUBROGATION.

In *Elliott v. Tainter*, 93 N. W. 124, it is held by the Supreme Court of Minnesota that where a person having an interest in real property has paid money to satisfy a lien thereon to protect such interest, he is entitled for the purpose of effecting substantial justice, to be substituted in place of the incumbrancer, and treated as an assignee of the lien, notwithstanding it had been discharged of record.

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SURETIES.

In *McDowell County Commissioners v. Nichols*, 42 S. E. 938, it is held by the Supreme Court of North Carolina that one about to become a surety with others can stipulate with the principal, without the knowledge of the other sureties, for a separate indemnity for his own benefit, in which, in the absence of fraud, or unless it was intended for the benefit of all, the others cannot participate till he is reimbursed. See *Long v. Barnett*, 38 N. C. 631.

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TELEPHONES.

By mistake, a physician's telephone was disconnected for non-payment of rent, when the rent was in fact paid. During the eighteen hours that it was disconnected, persons endeavoring to reach the physician by telephone, were informed that the telephone had been disconnected for non-payment of rent. The physician suffered no pecuniary injury. The Court of Appeals of Kentucky holds in *Cumberland Telephone and Telegraph Co. v. Hendon*, 71 S. W. 435, that in an action by the physician against the company, he could not recover punitive damages, but that the measure of damages was the amount paid for the service for the time the telephone was disconnected, taking as a basis the amount paid per month. See *Robinson v. Telegraph Co.* (Ky.), 68 S. W. 656.

## TELEGRAPHIC QUOTATIONS.

In *National Tel. News Co. v. Western Union Tel Co.*, 119 Fed. 294, the U. S. Circuit Court of Appeals (Seventh Circuit) holds that the matter gathered and transmitted by a telegraph company, and printed on a tape by tickers in the offices of its customers, consisting merely of a notation of current events, such as market quotations or the result of a race or game, and having only a transient value, due solely to its quick transmission and distribution, is not copyrightable as literary property, under the constitution and statutes of the United States; but is essentially a commercial product, and as such the object of ownership as property by individuals and protection by the courts. So in *Illinois Commission Co. v. Cleveland Tel. Co.*, 119 Fed. 301, the same court holds that a telegraph company which by contract with the Board of Trade of Chicago is furnished by such corporation with the continuous market quotations from its exchange, for which the company pays, and which it transmits and distributes to patrons who pay therefor, has a property right in such quotations, which entitles it to protection by injunction restraining others, who are not its patrons, from taking the same from its wires or from the offices of its patrons, and selling or distributing them in competition.

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## TENANT BY THE CURTESY.

A tenant by the curtesy cannot convey the right to a lessee to extract oil from the land, and a lease executed by him purporting to convey such right is void: U. S. Circuit Court (N. D., West Virginia) in *Barnsdall v. Boley*, 119 Fed. 191.

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## WITNESSES.

In *Gordon v. Sullivan*, 93 N. W. 457, the Supreme Court of Wisconsin holds that where a married woman was sued as an administratrix, her husband was not debarred from testifying on the ground of his relationship to her. See *Strong v. City of Stevens Point*, 62 Wis. 255.