PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

AGENCY.

B employed A, a real estate agent, to sell a piece of her land, authorizing him to sell it for $15,500, and promising to pay him $500 of the purchase price. A found a purchaser for the sum of $15,250 and B signed the following memorandum: "I hereby ratify sale of my lot this day made by A for the sum of $14,800 net to me." Owing to a defect in the title, the sale was not completed and the purchase money was never paid.

Agent to Sell Land, Contract, Commissions

The Supreme Court of California held that, under the modified agreement, there was no promise to pay any commissions, that A's only recourse was to keep the difference between the sum he should receive for the land and the $14,800, and that, therefore, in the absence of a sale, he could not recover anything for commissions from B, his principal: *Ford* v. *Brown et al*, 52 Pac. 817.

A real estate broker earns his commissions when he finds a purchaser who will buy on terms satisfactory to his client. A contemplated purchase which fails through no fault of his client is not enough: *Montgomery* v. *Knickerbocker*, 50 N. Y. Suppl. 128.

Commissions

ATTORNEY AND CLIENT.

In *State ex rel. State Bar Ass'n* v. *Finn*, 52 Pac. 756, the Supreme Court of Oregon gives an interesting discussion of an attorney's duty toward the court, and shows the difference between merely clever practice on the one hand and dishonest tricks on the other. In this case the attorney had presented affidavits before the court which were not really signed by those whose names appeared, while in other affidavits the signatures were genuine, but they appeared over his jurat as notary public, when it was shown that the parties had not sworn in his presence.

Attorney, Fraudulent Practices, Disbarment

Although the contents of the affidavits were substantially true and no harm had been done, since the case was decided on other grounds, the court thought that its dignity would be

ATTORNEY AND CLIENT (Continued).

conserved by disbarring the attorney for a year. "Such reckless demeanor by an attorney is not consistent with professional ethics or obligations, and constitutes, as we are lead to conclude, wilful misconduct in his profession."

Client, Power to Interfere in Conduct of Case

When a party appears in a case and is represented by an attorney of record, he cannot interfere in the conduct of the case, and any agreements or stipulations made with the opposite side by the party himself will be disregarded by the court. Defendant's time to put in his answer had expired and judgment had been entered against him by default. On a motion to open the judgment it appeared that plaintiff, without the knowledge of his counsel, had granted to defendant an extension of time. Held, that the order of the court denying the motion was proper, since plaintiff had no power to act: *Wyllie* v. *Sierra Gold Co.*, 52 Pac. (Cal.) 809.

Malicious Prosecution

An attorney employed by his client to conduct a criminal prosecution is liable for an improper arrest when he personally swears to the information on which the warrant is issued: *Whitney* v. *New York Casualty Ins. Ass'n* (Supreme Court, App. Div. N. Y.), 50 N. Y. Suppl. 227.

CARRIERS.

Connecting Lines, Liability for Negligence

A railroad company which issues a through ticket, and so contracts to carry a passenger beyond its own terminus, constitutes the connecting carrier its agent for the performance of the contract of carriage, and is liable for the injury caused by the negligence of such connecting carrier: *Omaha R. V. R. Co.* v. *Crow* (Supreme Court of Nebraska), 74 N. W. 1066.

Failure to Stop Train, Special Contract

Plaintiff purchased a ticket, with a return coupon, being informed by the ticket agent that the evening train would stop at the place of her destination so that she would be carried back. Owing to the negligence of the division superintendent, the evening train was not stopped, and plaintiff was put to great inconvenience in returning.

The Appellate Court of Indiana held that she could recover from the railroad in an action of tort. Although a passenger is bound by all the rules of a railroad in regard to the running of the trains, yet where a special contract is made (which the

CARRIERS (Continued).

court held to be present in this case) the company is liable for failure to stop the train in accordance with the special agreement, even though it is not within the implied authority of a ticket agent to change the duly established rules of the company for the stoppage of its passenger trains: *E. & T. H. R. Co.* v. *Wilson*, 50 N. E. 90.

Injury to Passenger, Negligence, Evidence

In an action for damages for personal injuries suffered by the plaintiff while travelling in defendants' train, it appeared that the plaintiff was sitting in defendants' dining car on an unfastened chair, such chairs being usually used on defendants' and other railroads. In going around a curve, the car gave a sudden lurch, which overturned the chair and injured the platniiff. The train was not running at an unusual rate of speed, and the road bed was in good condition. Held, that negligence could not be inferred, and it was error to submit the question to the jury: *Nelson* v. *Lehigh Val. R. Co.* (Supreme Court, App. Div. N. Y.), 50 N. Y. Suppl. 63.

CONSTITUTIONAL LAW.

Anti-Scalping Statute, Invasion of Personal and Property Rights, Tickets, Redemption

A statute of the State of New York (Laws 1897, c. 506) prohibits the sale of tickets for passage on railroads or vessels by persons not the authorized agents of the carriers, authorizes the purchase by the agents of given lines of tickets over other lines to provide for through transportation, and requires carriers to redeem u used tickets purchased from their agents. In *People* v. *Warden of City Prison* (Supreme Court, App. Div. N. Y.), 50 N. Y. Suppl. 56, the court has made a sweeping decision, in which it holds (1) That a person excluded by the statute from the business of buying and selling such tickets is not deprived of any right under Art. 1, § 1, of the State Constitution, which provides that no member of the state shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers; (2) That the statute, in prohibiting any such person from engaging in such business, does not deprive him of liberty or property without due process of law, within the purview of the Constitution of New York, Art. 1, § 6, or the Fourteenth Amendment to the Constitution of the United States; (3) That the statute, in prohibiting sales of such tickets by any person other than the agents

CONSTITUTIONAL LAW (Continued).

of the carriers, does not discriminate against any class of citizens, thereby denying citizens the equal protection of the laws within the purview of the Fourteenth Amendment to the Constitution of the United States; (4) That such ticket being merely the evidence of a contract of carriage, and not the contract itself, and that since, under the statute, a purchaser may redeem an unused ticket, the statute does not impair the obligation of a contract; (5) The statute does not, in confining the business of buying and selling tickets to the agents of the carriers, create a monopoly; (6) It does not invade the exclusive power of Congress to control interstate commerce.

Contract with Indian

In the absence of a federal statute or treaty to the contrary, a state court has jurisdiction of an action *ex contractu* by a white man against an Indian belonging to a tribe and a particular reservation: *Stacy* v. *La Belle* (Supreme Court of Wisconsin), 75 N. W. 60.

Statutes, Construction

The Supreme Court of Nebraska, recognizing the rule that when the legislature of one state adopts the statute of another state it likewise adopts the construction which that statute has received by the highest court of such state, by a parity of reasoning has reached the conclusion that where a law, which has been interpreted by the supreme court of a state, is re-enacted by the legislature of the same state, such interpretation is thereby adopted: *State* v. *Cornell*, 75 N. W. 25.

Territories, Criminal Statutes, Validity

The Supreme Court of Utah has held that a statute of the Territory of Utah providing for conviction and punishment for adultery is valid, even though there is a similar statute of the Federal Government which refers to the same crime and applies to the inhabitants of the territories. The Act of Congress is not exclusive and does not forbid the territorial legislature from acting on the same subject.

Nor does the Utah Statute violate the constitutional inhibition against being placed twice in jeopardy for the same offense. That inhibition does not operate as to the act, but as to the offense, and an offense in legal significance is the transgression of a law. Although each government has the legal right to convict and punish for the same act, yet it is probable that punishment in one jurisdiction would be a ground for relieving the offender from punishment in the other: *State* v. *Norman*, 52 Pac. 986.

CONSTITUTIONAL LAW (Continued).

Zane, C. J., dissents on the ground that the territorial and the Federal Statutes both punish crimes against the United States, since the origin of both statutes is the federal sovereignty, and that offenses against each statute would therefore be the " same offense."

CONTRACTS.

An action was brought to recover damages for breach of a contract to furnish sufficient water power to run the machinery of a mill. The Court of Appeals of New York held that the measure of damages was the difference between the rental value of the mill and machinery with the power contracted for and its rental value with the power actually furnished.

Breach, Measure of Damages, Profits

The value of the profits which would probably have resulted to plaintiff, had defendant performed his contract, could not be considered in estimating the damages, because (1) they are too dependent upon numerous and uncertain contingencies to constitute a trustworthy measure of damages; (2) the loss of profits is the remote and not the direct result of the breach of contract; (3) the engagement to pay for loss of profits in case of default is not part of the contract, nor was it within the contemplation of the parties: *Witherbee et al.* v. *Meyer*, 30 N. E. 58.

Where the parties to a contract have agreed to express themselves in a written lease, the mere fact that the lease was never formally executed does not prove that there was no contract. In this case the terms of the contract were fully expressed in telegrams and letters which passed between the parties, but one of them refused to sign the formal lease when called upon to do so under the agreement. He was held liable for his failure to perform the contract, just as if he had executed the lease: *Post* v. *Davis*, 52 Pac. (Kan.) 903.

Contract to Make Lease

CRIMINAL LAW.

A newspaper made a violent attack on the members of the Supreme Court of Washington, charging them with dishonest practices and using language which was clearly libellous *per se*. Held, that the court had power to attach and punish the editor for contempt, through its power both under the common law and under the Washington Statute, 2 Ball. Cod. § 5798. The

Libel on Court, Contempt, Punishment

CRIMINAL LAW (Continued).

constitutional provision that every person may write and speak freely, etc., does not apply to a publication which amounts to contempt of court under the common law: *State* v. *Tugwell*, 52 Pac. (Wash.) 1056.

Malicious Prosecution

The Supreme Court of Georgia, in *Swift* v. *Witchard*, 29 S. E. 762, decided that simply making an affidavit before a justice of the peace, charging one with a crime, when not followed up by an arrest, does not render the prosecution, even if malicious and without probable cause, actionable.

Prosecution for Seduction, Offer of Marriage

The California Penal Code, § 269, provides that in a prosecution for seduction, marriage of the parties prior to the filing of an information or the finding of an indictment for such offense is a bar to the prosecution thereof. However, the mere fact that the defendant was "ready and willing to marry the prosecutrix, and his failure to so marry was by reason of her refusal" is no bar to the action because "the woman is not compelled to condone the offense by marrying the man and thus freeing him from the penalties of the law:" *People* v. *Hough*, 52 Pac. (Cal.) 846.

DECEDENT'S ESTATES.

Executor, Renunciation, Retraction, Contract not to Accept Executorship

By the will of testator, appellant and respondent were appointed executors. Appellant renounced his acceptance in writing, but before letters had been granted to respondent he retracted his renunciation. Held, that appellant was not bound by his renunciation since it may be retracted at any time before letters have been granted to another.

Held, also, that an agreement not to apply for letters cannot be enforced, since it is against public policy: *In re True's Estate*, 52 Pac. (Cal.) 815.

EQUITY.

Injunction, Breach of Contract

Where a vendor enters into agreements with his vendees whereby the latter agree not to sell at less than the list price, an injunction will issue to prevent a person, who has knowledge of such agreement, from buying from such vendees at less than list price, but the vendor must prove that the purchase is to be actually at less than list price: *L. E. Waterman Co.* v. *Waterman*, 50 N. Y. Suppl. 131.

EQUITY (Continued).

In *Meerritt* v. *Williamson*, 50 N. Y. Suppl. 113, the plaintiff asked for an order for the examination of the defendant in order to enable the plaintiff to frame his bill of complaint. It was held that such an order would not be granted unless the affidavit of the plaintiff clearly showed he was not already possessed of the requisite information.

Order for Examination

EVIDENCE.

In an indictment for bigamy the second marriage was proved, but the first still remained in controversy. Held, that the second wife was not competent as a witness to prove the marriage of defendant with his first wife, nor would she be competent even to prove the second marriage, unless the first was clearly established: *Lowery* v. *People*, 50 N. E. (Ill.) 165.

Bigamy, Second Wife's Testimony

In an action against the receiver of a railroad for injuries caused by the negligence of trainmen, statements of the engineer whose negligence was alleged were made under the following circumstances: After the accident the train proceeded to a station three miles distant and returned, with the coroner and jury, to the place of the accident, three hours after it had happened. The engineer then made the statements which were offered in evidence by the plaintiff to prove his negligence in running the train.

Hearsay, Res Gestæ, Admissions

Held, that the statements were inadmissible, since they were mere narratives of a past transaction and not part of the *res gestæ*, nor were they admissions, because they were not made by one who stood in such representative relation to the receivers as to be binding upon them: *Walker et al.* v. *O'Connell*, 52 Pac. (Kan.) 894.

The Supreme Court of Wisconsin, in *O'Brien* v. *City of La Crosse*, 75 N. W. 81, has recently rendered a decision on the vexed question whether, in the absence of statute, the defendant in an action for personal injuries has the right to a personal examination of the injured party by physicians or experts. In this case the court held that such right was not absolute, but rested in the sound discretion of the court. (See note in this issue.)

Physical Examination, Right to Compel

EVIDENCE (Continued).

Question by Trial Judge, Improper Form

In a trial for murder the identity of a certain oil can produced in court was a material circumstance in the case. During the examination of a witness as to his knowledge of the can and the time when he had seen it, the trial judge said to the witness, "I believe that is the same can?" The witness replied, "Yes, sir; I believe it is."

The Supreme Court of Illinois held that if it had been but a mere question put by the court to the witness, it would have been unobjectionable; but that under the circumstances, the question, coming as it did from the presiding judge, would be likely to cause the witness (who appeared to be an ignorant man) to believe that he was expected to identify the can in the manner indicated, and it was therefore a reversible error: *Marzen* v. *People*, 50 N. E. 249.

Verdict, Presumption of Arrival by Chance

In an action against a municipality for injury by negligence, a verdict was rendered for $2537.50. In the jury room, after the jury were discharged, there were found a number of small pieces of paper with different sums written on them, also a large sheet with twelve different amounts ranging from $100 to $5000. The sum of these was divided by 12, and the quotient appearing on the paper was $2537.50, the exact amount of the verdict.

The Supreme Court of Georgia held that the foregoing facts were not sufficient to raise a presumption that the jury had previously agreed to arrive at their verdict in the manner above indicated; therefore it could not be impeached: *City of Columbus* v. *Ogletree*, 29 S. E. 749. Lumpkin, J., dissented.

HUSBAND AND WIFE.

Married Women's Contracts

In Nebraska a married woman is not liable on a note unless she intended to render her separate estate liable, or gave it with reference to her separate property, trade or business, or upon the faith and credit thereof, nor does the mere signing of a note raise a presumption of the existence of such collateral facts: *State Bank* v. *Smith*, 75 N. W. (Neb.) 51. The same principle was applied to an effort to convert a married woman's deed into a mortgage in *First Nat. Bank of Sutton* v. *Grossham*, Ib. 51.

INSURANCE.

In *Lampkin* v. *Travelers' Ins. Co.*, 52 Pac. (Col.) 1040, the application for an accident policy contained the clause: "Write policy payable . . . to B, whose relationship to me is that of wife." On suit by B against the insurance company it was shown that although deceased lived with B as man and wife, yet he had another wife living at the time, and that he was aware of the fact.

Representations, Warranty, Insurable Interest

Held, that the statement in the policy was neither a warranty nor a material representation, and its falsity did not render the policy void. Since B lived with deceased as his wife, she had a reasonable right to expect some pecuniary advantage from the continuance of his life, and therefore she had an insurable interest in his life.

MASTER AND SERVANT.

In *Rupprecht* v. *Brighton Mills*, 50 N. Y. Suppl. 157, it was decided that the doctrine of obvious risks was not applicable where the plaintiff is not connected with that which causes the injury. Therefore a complaint by one employed in a building for injuries sustained by falling through an elevator shaft is sufficient, though it does not allege that the employer knew that the elevator was defective, or that the employe was ignorant of such fact, where his duties were not connected with the elevator.

Action for Negligence against Master, Sufficiency of Complaint

In *Garety* v. *King*, 50 N. Y. Suppl. 180, it was decided that where a servant is ordered to go on the roof to remove snow and falls through a skylight and is killed, there can be no recovery if the deceased knew of the skylight, or should have known of it and nevertheless went on the roof; and this, although the deceased was free from contributory negligence. The question is not whether there was contributory negligence, but whether the risk was assumed.

Assumption of Risk by Servant

MORTGAGES.

Under the law of Nebraska the title to mortgaged chattels remains in the mortgagor until foreclosure.

In a recent case in that state a physician had mortgaged a buggy, which he retained and used in his business. One clause in the mortgage was that the mortgagor should not use the buggy

Chattel Mortgage, Common Law Lien

MORTGAGES (Continued).

negligently or improperly so as to subject it to probable loss or material depreciation. The buggy was taken by the doctor without the consent or knowledge of the mortgagee to a carriage company for certain repairs. The bill for repairs not being paid, the carriage company held the buggy, claiming a common law lien for their services. The mortgagee replevied. It was proved at the trial that the mortgagee had knowledge of the fact that the buggy needed repairing from time to time, and had, on one occasion, at least, seen it left at the shop for repairs.

The court held that the common law lien was superior to the lien of the chattel mortgage, because the recital in the mortgage, and the facts proven, disclosed that the mortgagor had at least implied authority to have repairs made: *Drummond Carriage Co.* v. *Mills*, 74 N. W. 966.

Subsequent Advances

Hopkinson v. *Rolt*, 9 H. L. C. 514, has definitely settled in England, and generally, the rule that a prior mortgagee takes no priority over a subsequent mortgagee as to advances made by him after knowledge of the second mortgage. It is well settled in this country that the rule has no application to the case where the prior mortgagee is bound by contract to make the subsequent advances, and the same decision was recently reached in England in *West* v. *Williams* [1898], 1 Ch. 488.

MUNICIPAL CORPORATIONS.

Liability for Acts of Agents

The duty imposed on a municipality of keeping its highways clear of incumbrances is a private one, and its agents employed to perform it are the agents of the municipality in its private capacity; and for their acts within the scope of their duty, the municipality is civilly liable: *Scott* v. *Mayor, etc., of City of New York* (Supreme Court, App. Div.), 50 N. Y. Suppl. 190.

NEGLIGENCE.

Imputing Driver's Negligence to Passenger

The New York Supreme Court, in *Meenagh* v. *Buckmaster*, 50 N. Y. Suppl. 85, laid down the following qualification to the rule that the negligence of a driver is not to be imputed to the passenger, the court saying, "The general rule that the negligence of a driver of a vehicle is not to be imputed to a passenger therein, who at the time has no authority to direct his move-

NEGLIGENCE (Continued).

ments or control his actions, is subject to the qualification that it is the duty of the passenger, where he has the opportunity to act, to learn of the danger and avoid it if practicable." If the passenger neglects to do this he is chargeable with contributory negligence for continuing to ride with a careless driver.

Landlord and Tenant, Alteration of Portion of the Tenement

In *Quigley* v. *H. W. Johns Mfg. Co.*, 50 N. Y. Suppl. 98, an owner of a building let an upper story to A, who made alterations therein. A later ceased to be a tenant. A lower story was rented to the plaintiff's intestate. The alterations made by A, it was alleged, occasioned a collapse of the building, which killed the plaintiff's intestate. In a suit against the owner for negligence it was held, that it was the owner's duty on gaining possession not to suffer the continuance of any condition created by a former tenant which he knew occasioned, or had reasonable cause to believe would occasion, danger to plaintiff's intestate; and, also, that the landlord might well be held to a higher degree of care than the tenant.

Lynching, Liability of Sheriff, Sureties

In the absence of malicious intent, a sheriff is not liable for damages for the death of a prisoner caused by a lawless mob, although he was warned of the outrage intended, and was present, and offered no resistance thereto: *State* v. *Wade* (Court of Appeals of Maryland), 40 Atl. 104.

The sureties on a sheriff's bond are not liable for the acts of the sheriff in maliciously aiding a mob to lynch a prisoner in his charge: *Ibid.*

NEGOTIABLE INSTRUMENTS.

Check, Genuineness, Warranty, Estoppel in Pais

In *Oppenheimer* v. *West Side Bank*, 50 N. Y. Suppl. 148, a deposited with defendant a "raised" check, which was credited to him and collected from drawee bank. The depositor was informed that it was "all right," whereupon he paid the same to the person from whom he received the check. The raising being discovered, and the amount being claimed from him by defendant in a suit to recover it, it was held: (1) The plaintiff, as endorser and holder of the check, and claiming to receive the amount thereof from the drawee, warranted the premiums of the instrument and of every preceding endorsement: *Canal Bank* v. *Bank of Albany*, 1 Hill, 287

NEGOTIABLE INSTRUMENTS (Continued).

(1841); *Bank of Commerce* v. *Union Bank*, 3 N. Y. 230 (1850). (2) The drawee bank can only be held to a knowledge of the signature of the drawer, and vouched only the genuineness of that signature, and cannot be held to a knowledge of the want of genuineness of any other part thereof, or the *bona fides* of the holder: *Bank* v. *Banking Association*, 55 N. Y. 211 (1873); *White* v. *Bank*, 64 N. Y. 316 (1876). (3) Money paid upon a raised check may be recovered, provided the one seeking to recover has not, by his careless or negligent act, prejudiced the person from whom recovery is sought.

Draft Deposited for Collection, Failure of Correspondent, Liability

The vexed question as to the responsibility of a bank with whom a draft has been deposited for collection in a distant city, when a loss occurs through the failure of the correspondent bank, has again been decided by the Appellate Court of Indiana: *Irwin* v. *Reeves Pulley Co.*, 50 N. E. 317. The majority of the court held to the sound rule that the bank of deposit is not liable for the laches of its sub-agent, if it has used due care in the selection of its correspondent bank, since the depositor is presumed to know that such is the custom, and to have given an implied assent to the employment of a sub-agent.

Robinson, C. J., and Comstock, J., dissented on the ground that since the depositor kept an account with the bank of deposit and gave it all his business in collecting drafts, etc., a valid contract existed, in consideration of the above, by which the depositing bank undertook absolutely to collect the draft and return the money.

Forged Signatures, Promise to Pay, Estoppel

Plaintiff held a note of A, which B and C signed as sureties. After the maturity of the note, A made a new one payable to plaintiff in the same form as the original one, and forged B's and C's signatures as sureties on the second note. It was shown that B and C had several times verbally promised to pay plaintiff under the mistaken apprehension that the forged signatures were genuine. On suit against B and C, it was held that they were not estopped from denying the forgery of their signatures, since it was not shown that plaintiff "was in any way prejudiced by them, or that they induced him to do, or to omit to do, anything whatever to his disadvantage, or that his status by reason thereof was in any respect changed:" *Barry* v. *Kirkland et al.*, 52 Pac. (Ariz.) 771.

NEGOTIABLE INSTRUMENTS (Continued).

Northrup v. *Cheney*, 50 N. Y. Suppl. 389. In an action by holder for value of a promissory note against maker and endorser it appears that the notice of non-payment and protest served on the endorser described the note as being dated November 11, 1893, instead of November 1, 1895. Held, that in the absence of evidence showing that the endorser was misled as to the identity of the note, the notice was not vitiated.

Notice of Dishonor, Misdescription

As a general rule, notice must contain (1) a fair description of the bill dishonored; (2) an intimation of the fact of dishonor; (3) the name of the person giving notice, or by whose authority it is given.

In *American Boiler Co.* v. *Fontham*, 50 N. Y. Suppl. 351, the defendant was sued by payee of a draft accepted by defendant in the following words: "Accepted, and I agree to pay the sum specified herein within sixty days from date." The defense was that the drawer did not complete a certain contract with the defendant, thus producing a partial failure of consideration for the acceptance. The defense was overruled on the familiar principles that, by his acceptance, the defendant became the principal debtor, and that the failure of consideration cannot affect a payee who takes without notice of the failure: *Davis* v. *McCreaay*, 17 N. Y. 230 (1858).

Payee and Acceptor, Failure of Consideration

PARENT AND CHILD.

Defendant enticed away plaintiff's minor daughter and induced her to live at his house. While she was there, she was debauched by defendant's son, for which seduction this action was brought. It was not shown that the defendant connived at his son's act, nor that he even knew of it, and the court refused to find as a matter of law that he was negligent in not knowing of it.

Enticing away Child, Seduction, Probable Cause

Held, that since a person is responsible for the consequences of his faults only so far as they are natural and proximate and since the damages sustained by the debauchment of plaintiff's daughter were remote, and not the proximate cause of the wrongful enticing away, a judgment for defendant was properly rendered: *Stewart* v. *Strong*, 50 N. E. (Ind.) 95.

POWERS.

A testator by his will bequeathed his estate to trustees in trust to pay the income to his children in equal shares, the shares of the daughters to be for their separate use, and not by way of anticipation, and after their decease, to their children; but if there should be no child or children of such daughters who should attain twenty-one years, then the share of such daughters should at their decease go over to other uses therein set forth. The will also contained this clause: "It shall be lawful to apply in or towards the advancement in life of each child of mine a sum not exceeding five hundred pounds of his or her presumptive share, such sum to be paid, if my trustees shall think fit, to any daughter of mine, notwithstanding her share is settled, and my trustees shall be the sole judges of the advisability of such payment and of what the term advancement in life may signify."

Advancements, Breach of Trust

The testator left surviving him two daughters, both of whom attained twenty-one. One daughter, B, married after attaining her majority, and the trustees at her request advanced two hundred and fifty pounds to her under the above power, with knowledge that the sum so advanced was to be used to pay a debt due from her husband to one of the trustees.

It was held that this was not a *bona fide* exercise of the power and, therefore, not good as against the children of the daughters who were entitled in remainder. The court intimated that in its opinion the words "advancement" and "presumptive share" were, in the absence of controlling words to the contrary, referable to the period of minority of the daughters, and that an advancement to any of them after majority was not in accordance with the terms of the power; but the decision was put on the broad ground that while the powers given to the trustees under the will were very sweeping, still an advance to a daughter whose share was held in trust for her separate use, for the purpose of paying her husband's debts, could in no sense be construed as a *bona fide* advance for her advancement in life: *Molyneux* v. *Clark* [1898], 1 Q. B. 648.

By a marriage settlement in 1793, a fund was settled in trust for husband and wife successively for life, with remainder to such of their children as they should, by deed, appoint. In 1835, there being then seven children living, including three unmarried daughters, the husband and wife executed a deed appointing, *inter alia*, out of the fund fifteen hundred pounds, to be paid to each of the three unmarried daughters "who

Appointment, Valid Execution, Rule Against Perpetuities

POWERS (Continued).

shall hereafter marry;" so long as the three daughters or any of them should be living and unmarried, the income of the residue of the fund under the settlement should be paid to them, or such of them as should from time to time be living and unmarried, equally; and "in case one or two only of them should marry" (which was the event that happened), that then, after the death or marriage of such one as should be last living and unmarried, the capital of the residue should be paid to the four other children and such of the three unmarried daughters "as should marry as aforesaid," equally.

It was held, (1) that the ultimate gift over of the residue was void for remoteness, as the class was not necessarily ascertainable within twenty-one years after the death of the survivor of the appointors; (2) that the appointment of the three sums of fifteen hundred pounds to the daughters was also void, as the daughters might not marry until more than twenty-one years after the death of the survivor of the appointors; (3) that the gift of the income of the residue of the fund to the three unmarried daughters was a valid appointment to each daughter as long as she was living and unmarried: *In re Gage* [1898], 1 Ch. 498.

QUASI-CONTRACTS.

Abandonment of Contract, Recovery on Quantum Meruit

In the Court of Appeal, *Sumpter* v. *Hedges* [1898], 1 Q. B. 673, the plaintiff, a builder, who had contracted to erect certain buildings on defendant's land for a lump sum, after he had done part of the work, abandoned the contract, and defendant thereupon completed the buildings. Held, that the plaintiff could not recover from the defendant in respect of the work which he had done, as upon a *quantum meruit*, there being no evidence of any fresh contract to pay for the same: *Marres* v. *Butt* (1858), 8 E. & B. 738, followed. See, also, *Cutter* v. *Powell*, 6 T. R. 320 (1796).

REAL PROPERTY.

Covenant by Lessor, Liability for Breach after Lessor's Death

A lessor executed a lease under seal to lessee for a term of fourteen years, covenanting, *inter alia*, to finish laying down 1000 acres of the leased premises in good English grass within a year. The lease contained also this declaration "that their shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto." The lessor failed to comply with his covenant, and died within the year.

REAL PROPERTY (Continued).

In an action for damages by the lessee for breach of covenant, it was held that the covenant must be construed as qualified by the subsequent declaration above recited and that, therefore, the covenant did not run with the reversion, and the liability for the breach thereof should be borne by the testator's general estate, and not by the specific devisees of the reversion of the lease. The court further declared that even if there had been no qualifying declaration, and the covenant ran with the reversion, still it would not be a charge thereon primarily, but that as between the specific devisees of the reversion and the general estate, the latter should be primarily liable for breach of a covenant which was not incident to the relation of landlord and tenant, but rather preparatory thereto: *Eccles* v. *Miller* [1898], A. C. 360.

Covenants Running with the Land, Party Walls

A and B were adjoining land owners. A, being about to build, executed an agreement with B to the effect that A's wall should be built equally upon each land, and B, his heirs and assigns, should, whenever they might desire to use the wall, pay one half of its value. There was a special stipulation in the agreement that the covenant should run with the land. By various mesne conveyances A's property passed to plaintiff and B's to defendant. Plaintiff brings this action for one half the price of the wall, against defendant who had made use of it in the erection of a building.

The New York Court of Appeals held that the covenant was merely personal between A and B and did not run with the land so as to bind defendant: *Sebald* v. *Mulholland*, 50 N. E. 260.

Easements of Light and Air, American Rule

A sold a house and lot to plaintiff and afterwards sold an adjoining lot to defendant. When the latter was about to build, and thus cut off plaintiff's light and air, an injunction was sought, which was refused.

In affirming the decree the Supreme Court of California gives an excellent review of the American authorities on the subject of easements of light and air and shows conclusively that the English doctrine was never adopted in this country. It is now definitely settled that California is in line with the other states, nor is the rule changed (as regards the present case) by Civ. Code, § 1104, which provides that a transfer of realty "creates an easement to use other realty of the grantor in the same manner and to

REAL PROPERTY (Continued).

the same extent as such property was obviously and permanently used by him:" *Kennedy* v. *Burnap et al.*, 52 Pac. 843.

Lease, Covenant, Assignee, Under-Lessee

The lessee of a public house covenanted with the lessor that he, his executors, administrators and assigns, "would not wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conduct of licensed public houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licenses for the sale of beer and ale, wine and spirituous liquors therein."

The lessee assigned the term to the defendants, who sub-let the premises for a short period of the term vested in them to E, who committed an offence against the license laws, the result of which was that the renewal of the license was refused. The lessor having sued the assignee of the lessee for breach of covenant, it was held that the breach was committed by E, the under-lessee, and not by the assignee, and that, therefore, the defendant was not liable for breach of the covenant: *Bryant* v. *Hancock & Co.* [1898], 1 Q. B. 716.

Mechanics' Lien, "Erection and Alteration," Consent of Owner

In *Mason Ice Machine Co.*, v. *Upham*, 50 N. Y. Suppl. 197 it was held that an ice machine built on the premises of the defendant by the plaintiff in pursuance of a contract made with the defendant's tenant and fastened to the ground and to the building in such a manner that it would be necessary to tear down the building in order to remove the machine, came within the words "work and material used in the erection and alteration of the buildings on the premises," as used in the statute, so as to give a mechanics' lien, provided that such work was done with the consent of the owner of the building.

Waters, Percolation, Adjoining Land Owners

The Supreme Court of Vermont, following the general rule, has held that there are no correlative rights between adjoining property owners as to water percolating through earth without a defined channel, but that such water is to be regarded as a part of the earth, and, therefore, the subject of absolute use and appropriation by owner of the land in which it is.

In the case at issue, S conveyed by warranty deed to W certain lands and also a spring of water on other land of the grantor adjoining the portion conveyed. This spring had been formed by an excavation in the soil about four feet deep.

REAL PROPERTY (Continued).

Subsequently S sold other land around and above the spring to J, who dug another spring, or well, at a point above the plaintiff's land, and the flow of water to the plaintiff's spring was diminished thereby.

It was held that a bill for an injunction would not lie against J on the ground that while the warranty deed gave the plaintiff the right to such water as was actually in his spring, it did not give him any right to the percolating water before it reached his spring. Judge Taft dissented, but the ground of the dissent is not stated: *Wheelock* v. *Jacobs*, 40 Atl. p. 41.

RES JUDICATA.

Trespass Against Sheriff, Action on Bond

In *Gray et al.* v. *Noonan*, 53 Pac. (Ariz.) 7, the sheriff had made an unlawful attachment of goods, for which an action of trover was brought against him and judgment obtained, which was unsatisfied. This judgment was held not to bar a subsequent suit against the sheriff, based on the bond given by him for the faithful performance of his duties. The cause of action in the latter suit was the breach of the bond and not primarily the trespass. Although the same acts constituting the trespass on the part of the sheriff make the breach of the obligation expressed in the bond, they give rise to several and distinct rights of action.

WILLS.

Bequest, Revocation, Disposition of Revoked Share

Testator directed his land to be sold and the proceeds divided equally between A, B and C. He afterwards made a codicil revoking the bequest to A and directing that A should receive $1200 on the final settlement of his estate. Held, that there was nothing to imply an intention that the revoked share should go to B and C, although the omission was probably due to an oversight, and that A's share should descend as intestate property: *Winkler et al.* v. *Simon's et al.*, 50 N. E. (Ill.) 176.

Bequest, Revocation by Codicil

A testator by will bequeathed to his executors the sum of $20,000 in trust to pay the interest to E during her life, and the principal sum, after E's death, to her children. The testator subsequently made a codicil reciting the former gift as one to the executors to pay the interest to E for life and revoking it, and directing the executors to invest $12,000, and to pay the interest to E for life.

WILLS (Continued).

The Chancery Court of New Jersey held that the codicil did not revoke the gift to the children over after E's life estate, but simply reduced the amount of the gift, on the ground that the gift in the codicil was substitutional, and that the substituted legacy was subject to the same conditions as the original: *Lyons* v. *Clawson*, 39 Atl. 1064.

Devise, Condition Void as Against Public Policy

Testator devised land to his executors in trust for R (who was then married), to pay him the rents and profits as long as he should remain married, but if he should become unmarried during his life, to convey the land to him in fee. In case R should die married, there was a limitation over.

The Supreme Court of Illinois held that although conditions whose tendency are to induce husband and wife to be divorced are void, yet that the circumstances of the case were to be taken into consideration. In the present case it was shown that R and his wife had been separated and divorce proceedings had been instituted between them for some time prior to the making of the will, that they afterwards remained separated, and that testator was aware of the fact. Under these circumstances the condition could not be said to "encourage" the bringing of a divorce suit and was therefore valid: *Ransdell* v. *Boston et al.*, 50 N. E. 111.