PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

"Vessels," What are

It may be remembered that in 37 Am. Law Reg. (N. S.) 233, the decision of the District Court in the case of *The International*, holding that a steam dredge is a vessel and not dutiable as "goods, wares and merchandise," was commented upon, and reference made to the appeal that had been taken. The decision of the Circuit Court of Appeals, Third Circuit, affirming that of the court below, appears in 89 Fed. 484. The argument of Bradford, J., that because ice-boats and pleasure yachts are vessels, though the former be designed solely to keep navigation open, and the latter may carry neither passengers nor merchandise for hire, therefore, this steam dredge is also a vessel, seems to be a complete *non sequitur*. The reference to *The Conqueror*, 166 U. S. 110, is also not conclusive. Everyone knows that "vessels" are not dutiable within the tariff acts; the question was whether a steam dredge is a "vessel." It is to be regretted that the opinion of the Supreme Court will probably not be obtained on this point, though it is most likely that the same result would be reached.

Towage, Negligence, Weather Predictions

The predictions of the weather bureau are often incorrect, it is true, but the Circuit Court of Appeals for the Third Circuit does not consider that tugs which start on a voyage relying on such predictions should be considered negligent or careless, as was urged by counsel for the libellants in the case of *The E. V. McCaulley*, 90 Fed. 510. As it appeared that the loss of the tow was not attributable to the breaking of the hawser, which it was claimed was of insufficient strength, but that the tow would have been lost anyway in the violent storm encountered, the decree of the District Court, dismissing the libel, was affirmed.

CARRIERS.

Waiver of Notice Against Riding on Platform

It is not necessarily negligence in a passenger to ride on the platform of a car, and a railway company waives its notice against standing in that position when it fails to provide a seat for the passenger, and yet, receives him on the train. The fact that there is standing room on the inside of a car does not raise a conclusive presumption of negligence. The question is for the jury: *Graham* v. *McNeill* (Supreme Court of Washington), 55 Pac. 631. The authorities support this ruling: Hutchinson, Carriers (2d Ed.), § 652; Beach, Contributory Negligence (2d Ed.), § 149; Shearman & Redfield, Negligence, § 284; Wood, Railway Law, § 308.

Carrier's Duty to Drunken Passenger

The obligation of a carrier to exercise a degree of care proportioned to the bodily condition of the passenger, was enforced in *Haug* v. *Great N. R.*, 77 N. W. (N. Dak.) 97. Plaintiff's husband was carried beyond his destination by the defendant company's negligence, and was put off at the next station. He was in an irresponsible and helpless condition of drunkenness, a fact known to defendant's servants, and the night was bitterly cold; he was not allowed to remain in the railway station, which was closed for the night soon after the train left, and no other accommodations were available. Death resulted from exposure. Judgment for defendant on demurrer was reversed by the Supreme Court.

The exact case has never before arisen, but the decision seems in line with the authorities: *Louisville, Etc., R.* v. *Sullivan*, 81 Ky. 624 (1883), [ejection between stations on a cold night]; *Louisville, Etc., R.* v. *Ellis*, 97 Ky. 330 (1895), [train coming]. In *R.* v. *Valleley*, 32 Ohio St. 345 (1877), and *Haley* v. *Chicago & N. W. R.*, 21 Iowa, 15 (1866), [drunken passenger run over by later train], the expulsion itself being considered not the proximate cause. See, also, *Roseman* v. *Carolina C. R.*, 112 N. C. 709 (1893); *Louisville, Etc., R.* v. *Johnson*, 92 Ala. 204 (1890); 2 Shear. & R., Neg., (5th Ed.), § 493; 3 Wood, Railroads, (2d Ed.), § 362. Wilson, J., in *Giles* v. *Great W. R.*, 36 Upper Canada, 369, declared that a conductor, who knew the intoxicated and helpless state of the passenger, was bound to give him that degree of attention . . . which a man in the state of the deceased is fairly entitled to *beyond that of the ordinary passenger.*

CONSTITUTIONAL LAW.

In *Austin* v. *State*, 48 S. W. 305 (Supreme Court of Tennessee), the Tennessee Act, prohibiting the manufacture and sale of cigarettes, was held to apply constitutionally to those brought in from other states. Two remarkable resolutions were made by the court: (1) Cigarettes are so well-known to be deleterious, morally and physically, that courts will take judicial notice of that fact and of the resultant fact that they are not proper subjects of interstate commerce; (2) A covered basket, owned by the carrier and used for convenient transportation of packages of cigarettes, is, itself, an "original package," broken as soon as the lid is raised.

Interstate Commerce, Cigarettes, Original Packages

The Supreme Court of Georgia has decided that a salesman taking orders by sample for goods manufactured in another state, is not engaged in interstate commerce, if the orders are filled, not from the point of manufacture, but from a distributing warehouse located in the state in which the salesman operates. Such a salesman is, accordingly, subject to a local license law: *L. B. Price Co.* v. *City of Atlanta*, 31 S. E. 619. It seems clear that the court is right. Products shipped in advance of sale to a distributing depot in the state of sale, certainly become intermingled with the general mass of property there, and both the goods and the selling of them should be taxable: *Brown* v. *Houston*, 114 U. S. 622.

Interstate Commerce, Sales by Samples, Intrastate Distributing Point

One who, of his own accord, invokes the aid of a court cannot afterwards complain of its decision. The case of *Grant* v. *Buckner*, 19 Sup. Ct. 171, decides that a receiver in a Federal court who voluntarily goes into a state court cannot question the right of that court to determine the controversy between himself and the other party in the suit.

Federal Court, Right of Withdrawal

The South Carolina Revenue Bond Scrip, issued under the Act of March 2, 1872, being made receivable for taxes and for payment of obligations owing by the state, was intended to pass as money, and under the United States Constitution, is void: *Wesley* v. *Eells* (Circuit Ct., N. D. Ohio), 50 Fed. 151.

"Bills of Credit"

CONTRACTS.

In *Atcheson, T. & S. F. Ry. Co.* v. *Cunningham* (Supreme Court of Kansas), 54 Pac. 1055, it was held that a release

CONTRACTS (Continued).

Undue Influence, Release to Railway Company

obtained from an injured passenger by a railroad agent, shortly after the accident, was invalid, since it appeared that the wounds operated to make the passenger weak both physically and mentally.

In *De Baun* v. *Brand*, 41 Atl. 958, the Court of Errors and Appeals of New Jersey decides that the rule that it is

Auction, Agreement Not to Bid

contrary to public policy for persons to enter into an agreement having for its object the suppression of competition in bidding at a public sale, is not applicable to the case of a person who, having an interest in the property to be sold, for the protection of such interest, agrees not to bid at the sale.

The Court of Errors and Appeals of New Jersey, in *Hensler* v. *Jennings*, 41 Atl. 918, holds that under a statute

Wager, Liability of Stakeholder

providing that any person who deposits money with a stakeholder upon the event of a wager prohibited by any law of the state, may sue for and recover the same, a person making such deposit may recover, though the event on which the wager is laid takes place out of the state.

The Supreme Court of Iowa has decided that the use of profane and insulting language is no excuse for a refusal to

Refusal to Allow Completion

permit one to carry out a contract, when the conduct of the other party tended strongly to provoke such outburst: *Thompson et al.* v. *Brown et ux.*, 76 N. W. 819.

CORPORATIONS.

Can a principal, who was not in existence at the time a contract was made, be held liable upon it by an application of

Contracts of Promoters, Ratification

the doctrine of "ratification?" If it be asked whether a contract made on behalf of an unborn child can afterwards be enforced against him upon his birth and coming of age, the answer will doubtless be in the negative, even if he has, in expressed words, signified his willingness to be bound. So, also, if it be asked whether (for example) an undertaker, who has buried a testator at the request of a relative, can recover in *contract* against an executor subsequently appointed, it will probably be concluded that, whatever his rights may be, they are not *contract* rights—even

CORPORATIONS (Continued).

if the executor expressly promises to pay. The doctrine of ratification has no application where the principal is not in existence at the date of the act in question. See *Melhado* v. *Porto Allegre Ry. Co.*, L. R. 9 C. P. 503 (1874). Where A sells goods at B's request, on the credit of a corporation thereafter to be organized, and the corporation receives the goods and uses them, how can A have a contract right against the corporation? It is submitted that he can have no such right, although the courts persistently refuse to analyze such a case and profess to explain it upon a doctrine of "ratification," as was done by the Court of Civil Appeals of Texas, in *Lancaster Gin & Compress Co.* v. *Murray Ginning System Co.*, 47 S. W. 387. Of course, A, in such a case, is entitled to recover—just as the undertaker is entitled to recover in the illustration given. The recovery, however, is in *quasi-contract*, for the benefit conferred. The distinction is not only of theoretical importance, but may be of great practical importance, as appears from such an unjust decision as *Tift* v. *Quaker City Bank*, 141 Pa. 550 (1891).

Statutory Liability of Stockholder, Set-off

In Kansas (Gen. St. 1889, c. 23, §§ 32, 46), there is a statutory provision to regulate the right of a judgment creditor of a corporation to enforce against a stockholder his liability for unpaid balances, and an additional statutory liability equal to the amount of the defendant's stock. In *Musgrau* v. *Association*, 49 Pac. 338, it was decided that against this additional statutory liability the stockholder may set-off sums paid by him in discharge of corporate debts and claims held by him against the corporation. The Circuit Court for the District of Maryland, in a case involving the Kansas statute, has now properly held a plea of set-off bad which fails to show whether the counterclaim was acquired before or after the corporate insolvency; and if after, what percentage of its face value the defendant paid for it: *Brown* v. *Trail*, 89 Fed. 641.

Power of a Corporation to Buy its Own Stock, "Ultra Vires"

The courts of New Jersey display a commendable willingness to break away from the artificial rules which this century has produced on the subject of corporate power. In *Chapman* v. *Iron Clad Rheostat Co.*, 41 Atl. 690, the Supreme Court has incidentally expressed approval of the earlier decision in *Camden & A. R. Co.* v. *May's Landing, Etc., Co.*, 48 N. J. L. 530, which goes a long way towards permitting

CORPORATIONS (Continued).

recovery of damages for the breach of a so-called "*ultra vires* contract." The point actually decided in the Chapman case, however, is that, under the New Jersey corporation act, a corporation may buy its own stock for legitimate corporate purposes. An employe declined, on a contract, to repurchase his holding of stock upon the cessation of his employment. The corporation's demurrer was overruled. This satisfactory result is diametrically opposed to what was declared to be the common law rule in *Coppin* v. *Greenlese Co.*, 38 Ohio St. 275.

Insolvency, Creditor's Suit, Allowances

Judge Simonton, in *Tompkins Co.* v. *Chester Mills*, 90 Fed. 37, has made an allowance for expenses, out of the estate of an insolvent corporation, to the unsecured creditor who first began the proceedings for distribution, although, as it turned out, intervening lien creditors and bondholders exhausted the fund and left nothing but the judge's allowance for the unfortunate complainant.

Promoter, Fiduciary Character

The Supreme Court of Missouri, in *Exter* v. *Sawyer*, 47 S. W. 951, has added another decision to the group of those which recognize the salutary principle that a promoter must account for a secret profit made at the expense of stockholders, who had reposed confidence in him. The court reviews *Densmore Oil Co.* v. *Densmore*, 64 Pa. 43; *Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. Div. 73, and other cases. Readers who are interested in this subject will do well to read Adelbert Hamilton's article in 16 American Law Rev. 671.

CRIMINAL LAW.

Larceny by Bailee

In *Bergman* v. *People*, 52 N. E. 363, the defendant went to a jeweler and stated that certain people, including himself, wished to make a wedding present, and that he wanted to take some jewelry to show such persons. The jeweler declined to deliver it into his possession unless he had security, whereupon the defendant gave an instrument purporting to guarantee the payment of whatever jewelry the defendant should buy of prosecutor for not over $200. The defendant then got the jewelry, and promised to return it, or the money for it, within three days. The jewelry was not returned nor paid for. The representations as to the wedding present were false and made to obtain the jewelry. Held, guilty of larceny as a bailee. The court said that the guar-

CRIMINAL LAW (Continued).

anty was available only in case a sale was consummated, but the jewelry was never sold, and the title never passed out of the jeweler. The defendant simply had it to exhibit to others, who, like himself, contemplated buying, and converted it to his own use while such relation existed.

Determination of Punishment by Jury.

The propriety of allowing a jury to determine the punishment to be meted out to criminals convicted of murder has always been questioned. Yet the Supreme Court of the United States, in the case of *Winston* v. *United States*, 19 Sup. Ct. 245, held that a verdict of guilty "without capital punishment" may be rendered in a murder case under the Act of Congress of January 15, 1897, chap. 29, even if there are no mitigating or palliating circumstances.

DAMAGES.

Death by Wrongful Act, Burial Expenses

The Supreme Court of Vermont has again announced its adherence to the rule that no recovery can be had by a father for the burial expenses of his child, killed by the negligence of the defendant: *Trow* v. *Thomas*, 41 Atl. 652. The decision is in accord with the right of authority, but seems an inequitable and illogical one. If, as is conceded, the father may recover for medical expenses incurred prior to the child's death, he ought, also, to recover what is just as proximate a consequence of the wrongful act, namely, the burial expenses: See, *Cross* v. *Guthrie*, 2 Root, 90. The rule is a survival of the doctrine, *actio personalis moritur cum persona*. The same ruling has been extended even to the case of death by the felonious act of another: *Insurance Co.* v. *Brame*, 95 U. S. 754. (See note in this issue.)

GUARANTY.

Reformation

A written agreement of guaranty, like any other such agreement, may be reformed upon clear proof that it does not express the actual intentions of both parties; the rule that mistakes of law cannot be corrected have no application to such a case: *Bank* v. *Mann*, 76 N. W. (Wis.) 777.

Incomplete Contract

The courts have always been astute to exonerate from liability on a guaranty one who has merely proposed to guarantee without the completed contract being made. *Lamb* v. *Carley*, 54 N. Y. Suppl. 804, is such a

GUARANTY (Continued).

case, where the incompleteness was shown by the statement "that the details would be stated more definitely when the money was sent."

HUSBAND AND WIFE.

Two cases arising under the Nebraska statute, authorizing divorce for extreme cruelty, whether practiced by using personal violence or by any other means, are *Walton* v. *Walton*, 77 N. W. (Neb.) 392, and *Berdolt* v. *Berdolt*, 77 N. W. (Neb.) 399. The former was a libel by the wife, charging cruelty by, among other things, calling her obscene and vile names: disregarding the unproved charge of infidelity on her part, the court held (1) that disobedience of his orders in such matters as visiting her family, whether improper or not, was not such conduct as justified him in this treatment of her—it being in no sense the natural and probable consequence of her misconduct; and (2), after criticising *Shaw* v. *Shaw*, 17 Conn. 189 (which follows the common law rule,—see *Russell* v. *Russell*, [1897] A. C. 395), that false charges of infidelity and calling of vile names in itself constitutes extreme cruelty.

Divorce, Extreme Cruelty

In the second case, false charges of physical incompetency to perform her marital duties were held such extreme cruelty as to entitle her to a divorce upon her cross bill in a suit instituted by him upon the faith of these charges. (See note in this issue.)

The Dakota Divorce Laws which have been the cause of so much litigation in the East, were the subject of discussion in *Streitwolf* v. *Streitwolf*, 41 Atl. (N. J.) 876, Pitney, V. C., holding, in an oral opinion, that a divorce obtained in Dakota, by virtue of a *mala fide* three months' residence, was not recognized in New Jersey, and could not be a defence to a divorce proceeding instituted by the deserted wife in that state.

Divorce in Another State

Canale v. *People*, 52 N. E. (Ill.) 310, gives a correct exposition of the proof required of foreign marriages. Canale was indicted for bigamy, and the prosecution proved that he had gone through a marriage ceremony in Italy; while admitting that this would be presumed to have been done according to Italian law, the court, nevertheless, held that, a competent witness having testified that the marriage was absolutely void in Italy because of non-compliance with statutory requirements, the defendant should have received binding instructions.

Proof of Foreign Marriage

INSURANCE.

A curiously precise construction of the word "in" may be found in *Van Bokkelen* v. *Traveler's Ins. Co. of Hartford*, 54 N. Y. Suppl. 307. The defendant insured, *inter alia*, against accidental death with a further provision for double indemnity should the injuries be sustained while the insured was "riding as a passenger in any passenger conveyance." The insured went upon the platform of a passenger car while the train was running slowly; he was thrown to the ground, dragged for some distance, holding to the hand-rail or step of the platform, and then killed by falling to the road below a bridge which the train was then crossing. The court holds that the double indemnity would not be payable were the insured injured while riding outside of or upon a passenger conveyance. The platform was without the body of the car in which the passengers were usually carried; there was, therefore, in this case no double liability under the policy. The court, moreover, intimates that the death was not due to injuries sustained while the insured was even upon the train.

Accident Insurance, Construction of Policy, "In a Conveyance"

What would be the ruling in the case of a passenger conveyance carrying all the passengers outside? In other words, is the decision to be limited to conveyances having an interior and presumably safer place for carrying passengers? The court quotes with approval the following passage from the opinion in *Schoonmaker* v. *Hoyt*, 148 N. Y. 431.

"In the construction of contracts . . . the intention of the parties . . . is to be sought in the words and language employed, and if the words are free from ambiguity, and express plainly the purpose of the instrument, there is no occasion for interpretation. Contracts or statutes are to be read and understood according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation . . . If the words employed convey a definite meaning, and there is no contradiction or ambiguity in the different parts of the same instrument, then the apparent meaning of the instrument must be regarded as the one intended."

This may well be compared with the decision in *Menneiley* v. *Insurance Corporation*, reported in the same volume (148 N. Y. 600) and referred to in our note in this number upon *M'Glother* v. *Provident Mutual Accident Co.*, 89 Fed. 685.

M'Master v. *New York Life Ins. Co.*, 90 Fed. 40, contains a most elaborate argument of some propositions that are made

INSURANCE (Continued).

Life Insurance; Annual Premiums, Forfeiture

to appear almost self evident. The Appellate Court, however, had ruled the question otherwise in an equity proceeding involving the same policy (87 Fed. 63), which constrained the court in this proceeding to enter a judgment adverse to the opinion delivered. A policy provided that it should not be in force until the first premium was paid; it was dated December 18th, but the first premium was not paid until December 26th; the policy contained a provision that thereafter the *annual premium* should be paid on December 12th; the insured died January 18th, thirteen months later, and the question was whether this was within the month's grace allowed him by the terms of the policy for the payment of the second premium. Judge Shiras considered the policy a contract for the life of the assured, subject to forfeiture for non-payment of premiums, rather than a renewable yearly contract; the burden, therefore, was on the insurer to establish the forfeiture. The terms of the policy being inconsistent, the construction most favorable to the insured was adopted, for "the construction must be against the party who prepared the contract," and "if possible, the contract must be so construed as to sustain it, and not to defeat it." The insurer had no right, consequently, to forfeit the policy for the non-payment of the second premium, and the court held that a policy once in force is not terminated by the failure to pay premiums unless the right to forfeit it is reserved.

It will be found interesting to compare this very thorough opinion with that of the Circuit Court of Appeals in 87 Fed. 63.

MASTER AND SERVANT.

In *Di Vito* v. *Crage*, 55 N. Y. Suppl. 64, the servant's assumption of the risks of his employment is said to be based upon the performance by the master of the duties imposed upon him; the rule excuses the master only when the injury results from a cause which could not have reasonably been foreseen and guarded against by him.

Assumption of Risk

The somewhat delicate duties of a master, with respect to a discharged servant, are set forth in *Hundley* v. *Louisville & N. R. Co.*, 48 S. W. (Ky.) 429. The plaintiff complained that he had been discharged from the employ of the defendant company, and that a false entry of the cause of his discharge upon the records of the company rendered it impossible for him to obtain similar

Discharge, Conduct of Master

MASTER AND SERVANT (Continued).

employment with other companies. The court admitted his right to pursue any lawful occupation, and that it would be a legal injury to prevent him from so doing; but a demurrer to his petition was sustained on the ground that he had set forth only legal conclusions as to his damage and not the actual consequences of defendant's wrongful acts.

Assumption of Risk, Promise to Repair

The Supreme Court of Indiana, in *McFarlan Carriage Co.* v. *Potter*, 52 N. E. 209, passed on the question of the duty of a master when a servant notifies him of a defect in machinery and the master promises to repair it. They held where the master promises to repair it, either specifically or generally, the servant does not assume the risk of injury from such defect by remaining at work, with knowledge thereof, for a reasonable time to allow such repairs to be made. Where, however, the promise is to repair after the completion of the work on hand, the servant assumes the risk of injury until such time by continuing at work. In this case the servant complained of a defect in a saw. The master promised to repair as soon as the present order was run out. The servant was injured in the meantime and, of course, under the above rules, could not recover.

Defective Appliances, Inspection

The Supreme Court of Michigan, in *Wachsmuth* v. *Shaw Electric Crane Co.*, 76 N. W. 497, decided that the master is not bound to periodically inspect small tools in everyday use, in which defects may be ascertained by the servants themselves. The man who uses it must judge of its fitness. The tool in question was a hammer, but the same rule would apply to crowbars, picks, shovels, chisels, files, etc.

MORTGAGES.

Absolute Deed as Mortgage

The usual litigation arising out of the execution of a deed as security for a loan is a bill by the grantor to redeem. In *Chine* v. *Robbins*. 55 Pac. (Cal.) 150, we have such a suit by a grantee to have the deed, absolute on its face, declared a mortgage, which was done, after some doubt in the lower court as to whether in such a case, after holding the transaction to be a mortgage, a foreclosure of the mortgage could be ordered.

MORTGAGES (Continued).

Hossack v. *Graham*, 55 Pac. (Wash.) 36, is a decision with which no lawyer is likely to find fault, in view of the difficulties surrounding equitable liens. A company, having executed a mortgage in the usual form, added thereto a covenant that 25 per cent. of the proceeds of the sale of all other lands of the mortgagor company (describing them) should be paid by a bank and from a sinking fund for the further securing of the mortgage debt. It was held that this was a mere personal agreement and did not constitute an equitable lien on the other lands, even as against the subsequent mortgagees, with actual notice.

Equitable Mortgage, What Constitutes

Huzza v. *Sikorski*, 76 N.W. (Wis.) 1117, decides that, where an agent of a mortgagor has been given money to pay off the mortgage, he does not thereby become the debtor of the mortgagee, so as to subject him to garnishment by the mortgagee's creditor.

Agent of Mortgagee, Garnishment

MUNICIPAL CORPORATIONS.

The Supreme Court of Louisiana, in *City of New Orleans* v. *Werlein*, 24 So. 232, following the well-established rule that property of a municipality, once dedicated to public use, is *extra commercia*, allowed a recovery of such property by the city, twenty years after a sale of same under an execution against the municipality, it not clearly appearing that previous to the same the public use had been abandoned or lost by non-user.

Property, Non-Alienability

NEGLIGENCE.

An interesting question arose in *Isaackson* v. *Duluth St. Ry. Co.*, 77 N. W. 433, where the rules of a street railway company imposed a greater degree of care on the motorman than the law did, and the question was whether the plaintiff could take advantage of it and treat it as the criterion of due care. Held, he could not. Special rules made for the guidance of the company's employes were not to govern, but he must rely on the general rule of law that everybody must use a reasonable degree of care to avoid causing injury to another. This is especially true where the plaintiff did not know of the rule and his conduct was not influenced by it.

Street Railways, Rules of Company Requiring Greater Degree of Care than the Law

NEGLIGENCE (Continued).

Trespasser on Railroad Tracks, Duty of Company

Chesapeake and Ohio Ry. Co. v. *Perkins*, 47 S. W. 259, was an action for damages resulting from an injury received by being struck by a train while trespassing (walking) upon the railroad tracks. On the question as to what duty a railroad company owed a person who was walking along its tracks the Kentucky Court of Appeals held that the company must use reasonable care to avoid injuring him, after discovering his danger; that in cities where persons are likely to be found trespassing it must keep a lookout along its tracks, and, when discovered, must avoid hitting him even to the extent of stopping the train.

PARENT AND CHILD.

Wages

The familiar rule that a child must prove an express contract to recover wages from its parent is applied to the claim of a grandchild against its grandfather's estate in *Jackson's Adm'r* v. *Jackson*, 31 S. E. (Va.) 78.

PARTNERSHIP.

Rule in Ex parte Ruffin, Partner's Equity

X and Y were partners. X sold out to Y, Y covenanting to pay firm debts. The firm being solvent, this transfer converted the firm property into the separate property of Y: *Ex parte Ruffin*, 6 Ves. 127. Y then formed a partnership with B into which he put the property late of the old firm. On dissolution of Y and B, Y conveys his interest in the property to B in trust for payment of debts of Y and B and debts of Y for which B was liable. A, a creditor of the old firm of X and Y, filed a bill to subject the property in the hands of B to a payment of his claim. Obviously, under *Ex parte Ruffin* (*supra*), A had no right against the property merely in virtue of the former ownership of X and Y. Nor had he rights in virtue of the terms of the conveyance from Y to B, because A's debt was not one for which B was liable. The court properly dismissed A's bill, but the reasons given are not very clear or satisfactory, the rule in *Ex parte Ruffin* not being even referred to. To the extent that there is in the opinion an intimation that a transfer of a partner's interest extinguishes the partner's equity the opinion is certainly unsound: *Wolfe* v. *Pringle*, 31 S. E. 605 (Supr. Ct. of App. of Virginia).

PARTNERSHIP (Continued).

Co-Owners Erroneously Suing as Partners

In *Win* v. *Devine* (Court of Errors and Appeals of New Jersey), 41 Atl. 213, three co-owners of property brought replevin for it. As the three had once been members of a firm since dissolved they were led into the error of suing as Jacob Win and others, "trading under the firm name and style of Win & Sons." It is clear that if the defendant had filed a plea denying the existence of a partnership and the plaintiffs had accepted the issue thus tendered, the parties would have gone to trial on an immaterial point. The plaintiffs would have been in law entitled to recover because they were co-owners, but they would, nevertheless, have lost their case, because the jury could not have avoided finding a verdict for the defendant on the issue as joined. Failing to grasp this situation, the trial judge non-suited the plaintiffs on the theory that the failure to prove the partnership as alleged was a fatal variance. On appeal decision was promptly reversed, the court remarking "the impropriety of this ruling is manifest."

Right of Action on Promise to Contribute Capital

George v. *Benjamin*, 76 N. W. 619, recently decided by the Supreme Court of Wisconsin, represents an interesting application of the rule that a partner may sue his co-partner at law on a promise to contribute capital. The expressions cited by the court from the opinion in *Glover* v. *Tuck*, 24 Wend. 153, and from Collier, Part. 132, really originated with Lord Ellenborough in *Venning* v. *Leckie*, 13 East, 7. This is perhaps the leading case on the subject. See other authorities collected in note on p. 462, Ames's Cases on Partnership.

PLEADING AND PRACTICE.

Revenue Act, Recording Non-Stamped Instrument

Cases under the "War Revenue" Act may be expected to pop up from time to time as the requirements of the new law shall be tested and determined in the courts. The First Department (Appellate Division) of the Supreme Court of New York has recently ruled a a practical point of everyday importance. The decision was that the provisions of sections 14 and 15 of the Revenue Act of 1868, that no unstamped instruments required to be stamped shall be recorded, applies only to records pursuant to United States Statutes. Therefore a Register of Deeds must file an instrument for record under the Laws of

PLEADING AND PRACTICE (Continued).

New York though it is not stamped. The opinion of O'Brien, J., is, that "the responsibility of seeing the proper stamp affixed rests upon the parties to the instrument . . . To hold that such a duty rested upon the register would be to constitute him a judicial instead of a ministerial officer:" *People* v. *Fromme*, 54 N. Y. Suppl. 833.

Change of Venue under Statute of Missouri not Limited to Jury Trial

The Supreme Court of Missouri has decided that there is no distinction between cases to be tried by the court and those to be tried by a jury, that the right to a change of venue applies to a suit in equity in that state, under the statutes, which is as follows: "A change of venue may be awarded in any civil suit to any court of record, for any of the follow causes. First, that the judge is interested or prejudiced, or is related to either party, or has been of counsel in the cause; second, that the opposite party has an undue influence over the mind of the judge; third, that the inhabitants of the county are prejudiced against the applicant; fourth, that the opposite party has an undue influence over the inhabitants of the county:" *Walker* v. *Ellis*, 48 S. W. 457.

PRINCIPAL AND AGENT.

Evasion of Liquor Laws

The liquor laws have been the occasion of many applications of the law of agency, one frequent point of which is illustrated in *Cunningham* v. *State*, 31 S. E. (Ga.) 585. C, at N's request, undertook to buy for him some liquor in a county where its sale was forbidden. M, the owner, upon the facts being explained to him, refused to sell on credit, as was doubtless C's hope, but delivered it to C, with instructions to bring back either the liquor or its price. He returned the price, but the court held that, although a person may be agent for both parties to a contract, yet C was not, under the circumstances, M's agent, and his conviction was set aside.

Telegraph Company, Operator

The Supreme Court of Michigan very properly decides in *Carland* v. *Western Union Telegraph Co.*, 76 N. W. 762, that a telegraph operator is the agent of the company in receiving over a telephone and writing a message to be transmitted by the company, in the absence of proof that the regulations of the company forbade it, and that the sender had notice of such regulations.

PROPERTY.

Rights in Literary Productions

A report was read before an incorporated society, and was accepted by the society. Subsequently a person not a member of the society, but who was present at the time of the report by reason of an invitation of the general public to the meeting, procured a copy of the report and used certain extracts therefrom for advertising purposes. The society filed a bill to restrain such use of the report. The answer was a dedication of it to the public, by reason of its being read in a meeting to which the public was invited. An injunction was granted: *Dental Society* v. *Denticura Co.*, 41 Atl. (N. J.) 672. In support of the opinion of the court, that the facts in the case did not constitute a dedication to the public, see *Tompkins* v. *Halleck*, 133 Mass. 32; *Palmer* v. *DeWitt*, 47 N.Y. 532; *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209; *Caird* v. *Sime*, 12 App. Cas. 326.

RECEIVERS.

Appointment, Who May Obtain

In different jurisdictions different rules exist as to the requirements of a bill praying for the appointment of a receiver. In Alabama a simple contract creditor of a corporation may not obtain a receiver, though the corporation has ceased to be a going concern; there must exist some recognized principle of equity jurisdiction, such as fraud: *Smith-Dimmick Lumber Co.* v. *Teague*, 24 So. (Ala.) 4.

SURETYSHIP.

Surety, Subrogation

Utah Bank v. *Forbes*, 55 Pac. (Utah) 61, is an authority for the elementary principle that, upon payment by a surety, he is entitled to be subrogated to all rights of the creditor against the principal—as for example, in the case cited—to maintain the suit begun by the creditor against the principal on the original obligation.

TRIAL.

Jury, Delivering Letters after Retiring

The Supreme Court of Washington takes no chances when the possibility of a juror being influenced is in question. In *State* v. *McCormick*, 54 Pac. 764, a new trial was granted the defendant, who had been convicted of assault with intent to commit murder, on the ground that the court authorized two letters and a paper to be delivered to two jurors without the defendant's consent, notwithstanding the statement of the trial judge that

TRIAL (Continued).

he had examined the letters before allowing them to be delivered, and had ascertained that they were from a considerable distance and had been in transit for several days, and that he had also examined the paper, and found that it contained nothing relative to the case at issue. (See note in this issue.)

STATUTE OF LIMITATIONS.

In *Kuhl* v. *Chicago & N. W. Ry. Co.*, 77 N. W. 155, it was held that the statute of limitations applies to suits to recover damages for the taking of and by a railroad company under the right of eminent domain, whether the action in which such recovery is to be had is prescribed by statute or not. A contrary rule is followed in Pennsylvania: *Keller* v. *Ry. Co.*, 151 Pa. 67; *Ry. Co.* v. *Burston*, 61 Pa. 369. The principal case overrules *Tucker* v. *Ry. Co.*, 91 Wis. 576. It is in accord with the weight of authority: *Ry. Co.* v. *McCauley*, 121 Ill. 160; *Pratt* v. *Ry. Co.*, 72 Iowa, 249; *Lyles* v. *Ry. Co.*, 73 Tex. 95; *Frankel* v. *Jackson*, 30 Fed. 398.

Damages for Property Taken by Right of Eminent Domain

TRUSTS.

A deposited in a bank a check with unrestricted indorsement. The payor was in a distant city. The bank of deposit credited the depositor with the face value of the check. The check was lost in transmission to the payor. There was no evidence that the bank of deposit had stated to the depositor that they considered themselves merely agents for collection. The court held that the transaction amounted to a sale to the bank by the depositor, and, therefore, that questions in regard to the negligence of the bank of deposit were immaterial: *Taft* v. *Bank*, 52 N. E. (Mass.) 387.

When a Debt, Not a Trust, is Created

A testator left property to his wife in these words: "I give all my estate to my said wife, to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to during our joint lives . . . and that when she shall no longer need the property it will be equally divided among our dear children, or their representatives." The court held that these words did not create a trust: *Aldrich* v. *Aldrich*, 51 N. E. (Mass.) 449.

Creation, Precatory Words