PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTORNEY AND CLIENT.

Executor Acting as His Own Lawyer, Charges

Gen. Stat. (Colorado), § 3630 provides that, in addition to his commission, an executor shall receive "such additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable." Under this statute it was held by the Supreme Court of Colorado that, while an executor is entitled to a reasonable counsel fee, yet where he, being a lawyer, acts as his own counsel, he is not entitled to an extra allowance on this account, since, "to allow him to become his own client, and charge for professional services for his own case, although in a representative or trust capacity, would be holding out inducements for professional men to seek such representative places to increase their professional business, which would lead to the most pernicious results": *Doss* v. *Stevens*, 59 Pac. 67.

Withdrawal by Client

In *Burpee* v. *Townsend*, 61 N. Y. Suppl. 467, the Supreme Court of New York decided that the parties to an action have the right to settle and discontinue, even though the effect of such discontinuance is to deprive one of the attorneys of his lien. This question has been decided variously. As Gaynor, J., said, the authorities are "a bundle of confusion."

BONDS.

Estoppel by Recitals

Following the rules now firmly established in the federal jurisdiction, the Circuit Court of Appeals, Eighth Circuit (Caldwell, J., dissenting), held that where suit is brought upon county bonds, issued to refund judgments obtained against the county, (1) the judgments are *res judicata*, not only of every matter actually decided, but of every matter which might have been decided in the former actions, and (2) that the recitals in the bonds of the existence of the judgments estop the county from alleging, as against *bona fide* holders for value that the judgments do not exist: *Geer* v. *Board of Com'rs of Ouray*, 97 Fed. 435.

BONDS—(Continued).

But the rules above stated apply only to bonds and not to warrants upon the treasurers of municipal corporations for the payment of money. Such warrants, while transferable by indorsement and delivery, are not negotiable instruments under the law merchants, and recitals contained in them do not estop the municipality from alleging the falsity of the recitals and the invalidity of the warrants, even when they are in the hands of indorsees for value: *Watson* v. *City of Huron*, 97 Fed. (Circ. Ct. of App., 8th Circ.) 449.

Municipal Warrants, Impeachment

CARRIERS.

In *The Humboldt*, 97 Fed. (D. C., D. Wash.) 656, the plaintiff, a passenger for some days on board a steamship owned by the defendant, deposited his valise in his stateroom, from which it was stolen. Although unable to prove negligence on the part of the defendant, the plaintiff contended that the latter occupied toward him the position of an inn-keeper toward his guest. Hanford, J., following the weight of modern authority, decided that the steamship company was not an inn-keeper, but only a common carrier, and therefore was not liable, since the baggage had not been entrusted to its custody and care.

Liability of Steamship Company for Baggage

Following the doctrine announced by the Supreme Court of the United States, that a contract between a state and a corporation, exempting the latter from taxation, must be limited in its effect to the immediate parties thereto, the Circuit Court (E. D., N. C.) has decided that where a state has granted to a railroad the privilege of established rates, such privilege, even if a contract between the state and the railroad, does not pass under a foreclosure sale of all the "franchises, rights, privileges and immunities" of the railroad to its successor: *Matthews* v. *Corp. Board of Com'rs*, 97 Fed. 400.

Railroad, Right to Regulate Charges.

CONFLICT OF LAWS.

In *Blethen* v. *Bonner*, 53 S. W. 1016, the plaintiff claimed that the Texas courts should presume that the common law existed in Massachusetts in 1863, by virtue of Chap. 6, Art. 6, of the constitution of Massachusetts of 1780, which provided that, "All the laws which have heretofore been adopted, used or approved in the province, colony or state of Massachusetts Bay, and usually practiced in the courts of law, shall still remain and be in full force until altered or repealed by the

Presumption of Common Law in Sister State

CONFLICT OF LAWS (Continued).

legislature." The Supreme Court of Texas, however, decided that the above provision was not sufficient to rebut the presumption that the law of Massachusetts was similar to that of Texas, in the absence of evidence to prove that the common law of Massachusetts had not been altered by statute subsequent to 1780.

CONSTITUTIONAL LAW.

Separate Schools for Colored Children

The constitution of New York (Art. 9 § 1) provides that, "The legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated." In *People* v. *School Board*, 61 N. Y. Suppl. 330, the Supreme Court of New York decided that this section was not infringed upon by a law providing for separate schools for white and colored children (equal facilities being given to each class of schools), nor did the law invade any rights guaranteed by the amendments to the Constitution of the United States.

Decision of Court Not a Law

Since the late decisions of the Supreme Court of the United States, the scope of *Gelpcke* v. *Dubuque*, 1 Wall. 175, has become well settled. The latest addition to the subject is *Allen* v. *Allen*, 97 Fed. 525, where the Circuit Court of Appeals (Ninth Circuit) affirmed the rule that the decision of the highest court of a state, introducing a new construction of a state constitution, which acts injuriously on previous contracts made on the faith of the former construction, is not a "law" within the clause of the Constitution of the United States forbidding any state to pass a law impairing the obligation of contracts.

CONTRACTS.

Impossibility of Performance

In *Fresno Milling Co.* v. *Fresno Canal Co.*, 59 Pac. 141, the defendant agreed to deliver water to the plaintiff through a certain canal, it being provided that the defendant should not be liable in case it was "lawfully or forcibly restrained from such delivery." The defendant allowed the canal to become a public nuisance, whereupon the canal commissioners filled it up and secured an injunction restraining defendant from attempting to operate it. In an action for failure to supply the water, the Supreme Court of California held that the facts presented an *impossibilitas rei*, as opposed to an *impossibilitas facti*, and that defendant was excused from performance.

CONTRACTS (Continued).

In *Carper* v. *Sweet*, 59 Pac. 45, it appeared that plaintiff, the broker of defendant, negotiated with a customer for the sale of defendant's property, but the sale was not consummated. Subsequently another broker, employed by the defendant, sold the same property to the same customer. The plaintiff contended that he was entitled to his commission since the property was sold to the purchaser with whom he had negotiated, but the Supreme Court of Colorado decided that the case fell within the rule that where a principal has openly placed his property in the hands of different agents for the sale, he may pay the commissions to the one who produces the purchaser, and be relieved from liability to the others.

Rival Brokers, Commissions

A statute of Colorado (1883, § 3121) provides that any instrument of writing to which the maker shall affix a scroll by way of seal shall be of the same effect as if the same were sealed. It was held that the printed word "seal," under the recital "sealed with our seals," was sufficient to satisfy the requisites of the statute, without the necessity of the maker actually placing any seal or scroll thereon: *Carlile* v. *People*, 59 Pac. (Colo.) 48.

Requisites of Seal

In an action to recover for negligence the defendant set up a written release by the plaintiff. The latter contended that it was expressly stipulated as part of the consideration for the release that the defendant should give the plaintiff employment when he recovered from the effect of the accident, and that the defendant had failed to do so. *Held*, that in the absence of fraud by the defendant at the time of the execution of the release, the mere fact that defendant did not keep his promise subsequently, afforded no reason for setting the release aside: *Szymanski* v. *Chapman*, 61 N. Y. Suppl. (Sup. Ct.) 310.

Release, Failure of Consideration

EVIDENCE.

On an indictment for larceny the prosecuting witness testified that at the time of the occurrence he felt the defendant's hand in his pocket and called out to the bystanders, "They are robbing me." *Held*, that the exclamation of the witness was admissible as part of the *res gestae*: *People* v. *Piggott*, 59 Pac. (Cal.) 31.

Res Gestae

Stewart v. *St. Paul Rwy. Co.*, 80 N. W. 855, suggests a reasonable limitation to the rule admitting photographs in evidence. In that case, which was an action for negligence, the question at issue was the distance of a hole in a street from a point at which a street

Photographs as Evidence: of Distance

EVIDENCE (Continued).

car stopped. The defendant proved that, some months after the accident, the same car was moved to the exact place where it had stood, a crowbar was inserted where the hole had formerly been (afterwards filled up), and a photograph of the scene was taken. The Supreme Court of Minnesota held that the offer of a photograph in evidence was properly rejected, on the ground that the question of distance was a mere mathematical problem, to be solved by measurement, and that the photograph would probably only confuse the minds of the jury on that point, since photographs are very misleading as to distances, relative size or location of objects.

HUSBAND AND WIFE.

Torts of Wife

Following the construction given by the Pennsylvania courts to the Married Women's Property Act of 1848, the Supreme Court of Missouri has held that the Missouri Act of 1889 (Rev. Stat. 6864), providing that married women should be as *femes sole* in respect to their property, was not sufficient to abrogate the common law rule in regard to a husband's liability for the torts of his wife: *Taylor* v. *Pullen*, 53 S. W. 1086.

Contract of Support, Consideration

Scherer v. *Scherer*, 55 N. E. 494, illustrates the close scrutiny which courts apply to all contracts of separation between husband and wife. In that case the wife brought suit against her husband on the latter's contract to support her, the contract reciting that the parties were living apart, " by reason of the abandonment one of the other." The Appellate Court of Indiana decided (1) that if the abandonment of the husband had taken place for a cause not justified by law, the contract of support would be without consideration and void, and (2) that in the absence of proof by the wife that she had left her husband for legal cause, there could be no recovery.

INSURANCE.

Proof of Loss, "Forthwith"

Where a fire insurance policy provides that proof of loss shall be furnished to the company " forthwith," the time is not limited to the same extent as it would be under a similar provision in regard to notice of loss. Thus in *Rines* v. *German Ins. Co.*, 80 N. W. 839, the Supreme Court of Minnesota held that a proof of loss sent eighteen days after the fire and received by the company twenty-one days after the fire satisfied the above clause, while intimating that the same might not be true of a notice of loss.

LIMITATION OF ACTIONS.

The charter of a railroad, granted in 1865, provided that where the line should be constructed through the land of any person, it should be the duty of the railroad to construct suitable crossings, whereby access to the different portions of the land might be made easy, upon failure to do which, the railroad should be liable in damages. In *Louisville & N. R. Co.* v. *Pittman*, 53 S. W. 1040, the railroad claimed that as its line had been constructed through plaintiff's land for thirty years prior to the action, its liability was barred by the statute of limitations. The Court of Appeals of Kentucky decided that the duty of the railroad was a continuous one, therefore the right of action was not barred.

Duty of Railroad to Construct a Crossing

MASTER AND SERVANT.

It is impossible to formulate any absolute rule defining exactly the limits of the duty of a master to furnish safe appliances for his servants, but each case must be decided on its peculiar facts. In *Blakely Mill Co.* v. *Garrett*, 97 Fed. 537, the plaintiff, a workman, on a freight train, was injured through the breaking of the wooden supports which, fitted in iron sockets, held the load in place on a flat gondola car. A fellow servant had selected the supports from wood supplied by the defendant, and it was contended that the accident resulted from his negligence in not using sufficient care in the selection, but the Circuit Court of Appeals (Ninth Circuit) decided that the defendant was under the absolute duty of furnishing wood of an adequate quality, and it could not delegate the duty of making the selection to a servant.

Equipment of Car, Side Supports

NEGLIGENCE.

Where premises are leased in an unsafe condition and the lessee could, by the exercise of ordinary diligence, discover this condition, and where the lessor has not endeavored to conceal the defect from the lessee, the lessee, and not the lessor is liable to a third person for injuries received by reason of such defect: *Schwalbach* v. *Shinkle*, 97 Fed. (C. C. A., Ninth Circuit) 483. But it was said in this case that if the lessor were liable at all, he and the lessee would be liable jointly; therefore, it was held that the complaint in an action against the lessor and lessee was not demurrable on the ground that it joined separate causes of action.

Leased Premises, Unsafe Condition

QUASI-CONTRACTS.

Services Rendered Without Request

Perhaps no legal text-book of a theoretical character has been so universally recognized as expounding, in fact, almost creating, a new branch of the law, as that of Professor Keener on Quasi-Contracts. The latest case in which the principles laid down in that excellent work were applied is *Cleveland, etc., Rwy. Co.* v. *Shrum*, 55 N. E. 515. There it appeared that an attorney, of his own motion, sued on behalf of a railroad to recover back taxes which had been illegally collected from the railroad. The latter received the taxes from the attorney, but refused to pay him a fee, whereupon he brought an action against the road, upon an implied assumpsit, to recover the value of his services. After quoting several pages of Professor Keener's work, the Appellate Court of Indiana held that as the attorney had not been employed by the railroad, and there did not appear to be any reason why the railroad would have been compelled to employ him rather than any other attorney, the services had been rendered officiously, and the mere fact that the railroad had been benefited did not create any liability on its part. " From the authorities cited [by Professor Keener], we think it may fairly be deduced that one rendering services for another, in which the interests of the public are not involved, may, when the benefit of such service is enjoyed, recover the reasonable value of such service from the person who receives the benefit, although services are rendered without the knowledge of the beneficiary. But from the authorities it is also clear that there must exist a necessity for the rendition of the services without entering into a contract, or there must exist such circumstances as imply an obligation to pay therefor. This view is in line with the proposition that one may not force his services upon another, and that one has a right to select his creditor."

WILLS.

Testamentary Character of Paper

Webster v. *Lowe*, 53 S. W. 1030, carries the rule of construction of ambiguous papers as wills to a ridiculous extent. In that case the paper offered for probate was a mere autobiography of a man's life. The only provision from which a testamentary intention could possibly be deduced was the last sentence, reading: " I have requested my executors to give a clear deed for the property, after my death, to A." The Court of Appeals of Kentucky held that this sentence operated as a will, although to some minds it would clearly indicate that its writer did not intend it as a conveyance, but was referring to some other instrument.