PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADVANCEMENTS.

In *McElroy* v. *Barkley*, 58 S. W. 406, the Court of Chancery Appeals of Tennessee holds that positive testimony of heirs that certain sums paid to them by their intestate were in payment of services performed, and not as advancements, is sufficient to support a finding that such payments were not advancements, although there is testimony of conflicting statements made by the heirs. The danger of regarding such evidence as sufficient is apparent, but probably justifiable, since it is in the nature of testimony to rebut a presumption.

Sufficiency of Evidence

BANKRUPTCY.

The distinction between the contempt of court and the civil or criminal wrong which may arise from the same state of facts is again drawn in the case of *In re Anderson*, 103 Fed. 854. The United States District Court (S. C.) there holds that an involuntary bankrupt who withholds property from his trustee is liable to punishment for contempt of court, and this, too, notwithstanding the provisions in Rev. St., § 990, providing that no person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of the state imprisonment for debt has been abolished, the Constitution of South Carolina having forbidden such imprisonment. The court has power to make the order for the delivery of property, and hence an equal power to punish for disobedience of it. "But," says the court, "this power should be most cautiously exercised."

Commitment for Contempt

BANKS.

The general similarity between a cashier's check and a certified check, and the rule that for many purposes the latter appropriates a specific sum to meet a certain demand, gives plausibility to the contention of the petitioner in *Clark* v. *Chicago Title & Trust Co.*, 57 N. E. 1061. He claimed that the cashier's check given him, the cashier at the same time marking such

Deposit, Effect of Cashier's Check

BANKS (Continued).

sum as paid to him, amounted to an assignment of it by the bank to him and gave him a preference over other creditors. But the Supreme Court of Illinois held otherwise: that such check was equivalent to an acknowledgment of indebtedness, and, though it changed the form of indebtedness, did not change the fact, the bank remaining a mere debtor of the petitioner.

BILLS AND NOTES.

A question on which conflicting opinions are held by the courts arose in *Brown* v. *Johnson*, 28 Southern, 579. In that case the defendant had given plaintiffs his note, and after delivery the plaintiffs added the name of another thereto as a co-maker. The Supreme Court of Alabama held this a material alteration and that the note was avoided by it. Even in Alabama this doctrine has not been consistently upheld. In a somewhat early case, *Railroad Co.* v. *Hurst*, 9 Ala. 513, an opposite view was announced, but this was subsequently departed from in that state, and the court acts under these later authorities in its decision. The basis upon which the alteration is regarded as material is, according to the court, that "the law proceeds on the idea that the identity of the contract has been destroyed—that the contract made is not the contract before the court."

Material Alteration

CANCELLATION OF INSTRUMENTS.

In *Lockwood* v. *Lockwood*, 83 N. W. 613, an old woman had made a conveyance of certain land—practically all the property she possessed—to her son and his children on consideration that the son should support her, and on the further consideration of natural love and affection. The son failed to keep his part of the contract, and his mother was sent away from his home. The Supreme Court of Michigan set aside the conveyance upon these facts, and in answer to the claim that the rights of the grandchildren under the deed would thus be destroyed through no fault or misrepresentation on their part, the court answers that as to them the conveyance is purely voluntary. The basis of the main decision does not distinctly appear, but the underlying theory seems to be that the mother had been induced by her son to do this, she having implicit confidence in him, that there is a strong resemblance to the case where confidence has been reposed and betrayed, or influence has been acquired and abused.

Consideration of Support

CONSTITUTIONAL LAW.

The Constitution of Illinois provides that private property shall not be taken or damaged for public use without just compensation, a restraint practically equivalent to that of the Fourteenth Amendment of the Federal Constitution. In *Frazer* v. *City of Chicago*, 57 N. E. 1055, it was held that this provision did not render the City of Chicago liable to a property owner whose property was depreciated in consequence of the location by the city of a smallpox hospital in the neighborhood. The court lays down the general proposition that for the doing of an act clearly within the power of the city under its police power, where injury is the necessary result of the doing thereof, no redress can be had, and regards this as clearly within the police power. The case is a hard one, but the court holds that no taking of property has occurred, since all property is held subject to the police power.

Police Power

COVENANTS.

The modification of the old common-law rule, of the necessity for severance from the freehold in order to change what is affixed thereto into personalty, appears in *Asher Lumber Co.* v. *Cornett*, 58 S. W. 438, where the Court of Appeals of Kentucky holds that trees, when counted, marked and sold, to be cut and removed, become personal property, and, as a consequence, that a covenant of warranty in a bill of sale of such trees was not a covenant running with the trees, but was merely personal to the purchaser, and one who purchased from him could not sue thereon.

Sale of Trees

CRIMINAL LAW.

In addition to other peculiarities of Kentucky it appears that she can furnish some novel conduct on the part of prosecuting officers. In *Owens* v. *Commonwealth*, 58 S. W. 422, this attorney lay down on the floor and "holloed at the top of his voice" during his argument, for the purpose of bringing vividly before the jury the facts which he believed the testimony established. The Court of Appeals held that this was not such improper conduct as required the court to interfere.

Conduct of Prosecuting Officer

On the other hand, in *Oldham* v. *Commonwealth*, 58 S. W. 418, the same court held it improper for the Commonwealth's attorney, when defendant objected to the testimony, to remark: "Oh, yes; I knew you would object, for it cooks your goose."

DEEDS.

Delivery, Acceptance

The perplexing question of what acceptance of a deed is necessary in order to convey full title comes up again in *Knox* v. *Clark*, 62 Pac. 334. In that case a husband was indebted to his wife, and becoming involved was requested by her to deed certain property to her, but he did not promise to do so. Afterward he executed certain deeds to her without her knowledge, and left them with the proper officer to have them recorded, and this was done; but they were not taken therefrom and given to the wife until the property had been attached by a creditor, and she was not shown to have had any knowledge thereof before such time. The Court of Appeals of Colorado holds that there was no delivery vesting title in the wife before the attachment. The court refers to the contention that where a deed is for benefit of grantee, its acceptance will be presumed; but claims that the presumption only obtains where the facts are unknown, and since the recorder had not been constituted the wife's agent and the facts showed no other delivery, delivery to him for recording was not sufficient to vest title in her. The court treats it as a case of contract and refers to the necessity for the "meeting of the minds." It is admitted that decisions are in existence not in harmony with this view, but it is claimed that it is supported by the great weight of authority, and this though the wife sought to accept after she knew of the deed.

It was further argued in this case that the conveyance was fraudulent as to creditors, but the court held that it was not so, that he had the right to prefer creditors, of whom his wife, in this case, was one.

DOWER.

Conveyance as Security

A case in some points almost the reverse of this arose in New Hampshire. A statute of that state provides that no conveyance of lands in writing shall be defeated, or estate encumbered, by an agreement, unless it is inserted in the condition of conveyance. A husband before marriage had conveyed land as a security and received a bond for reconveyance on the payment of the debt. After his death his administrator paid the debt and had the property conveyed to himself for the use of the estate. It was held that the widow acquired no dower right in such property. *Hall* v. *Hall*, 47 Atl. 79. The court proceeds on the basis that the statute prevents this from being a mortgage, that hence the husband had not even an equitable title to the land, but "only a right to obtain title upon performing the condition of the bond;" and whatever rules might be as to dower in equitable estates, this was not sufficient to support the widow's claim.

EQUITABLE EASEMENTS.

Injunction to Enforce

The general doctrine of the enforcement of the agreements on the part of the several owners along a given block to build only up to a certain line is well known. We have a modification of this doctrine by the Supreme Court of Illinois in the case of *Ewertsen* v. *Gerstenberg*, 57 N. E. 1051. Such agreements existed in this case, but the restriction had not been uniformly observed by the property owners, who, like the defendant in this case, were bound by restrictions, nor for that matter by any number of them. The character of the property had changed (having grown into a business section) and in consequence, the enforcement of the restriction would have been a disadvantage to the property owners generally. On these grounds an injunction to prevent the defendant's building beyond the agreed-upon line was refused, the court holding that "all doubts [as to the right to enforce such restrictions in equity] should be resolved against restrictions of the free use for lawful purposes of property in the hands of the owner in fee." Of course this does not interfere with the defendant's liability at law, but such liability would under the facts be a doubtful source of substantial damages to a plaintiff.

HUSBAND AND WIFE.

Necessaries Furnished to Wife

The tendency of the courts to restrict the operation of the legislative acts in regard to the rights and liabilities of married women is in evidence in numerous cases. A fresh illustration occurs in the case of *Ott* v. *Hentall*, 47 Atl. 80, where the Supreme Court of New Hampshire held that the statutes of that state, enabling married women to hold property to their own use, and enlarging their rights and liabilities, do not affect the wife's right to pledge her husband's credit for necessary medical attendance, nursing and board while compelled to live apart from him by his misconduct. The court does not examine to any extent the basis of the husband's liability, assuming as a principle to start with that it is an obligation of the husband suitably to maintain his wife. A ground to relieve the husband might have been found in the theoretical origin of this rule, from the fact that at common law the husband practically controlled all his wife's estate and therefore had in consequence a duty of support. When this estate is given back to her control, it might be argued, such duty ceases; but the court takes the conservative position—a position which is certainly supported by common sense.

INSURANCE.

In *Metropolitan Life Insurance Co.* v. *Blesch*, 58 S. W. 436, the Court of Appeals of Kentucky, while admitting that adjudications as to the right of a party to recover money paid voluntarily under a mistake of law, differ greatly in the states of the Union, many of them denying relief, holds that the law in Kentucky is well settled and allows recovery of such money. The rule is applied to the case where a daughter procured a policy upon the life of her father without his knowledge or consent. The court held such policy void as against public policy, but being convinced that she had paid in good faith and in ignorance of the law, allowed her to recover what she had paid the company.

Recovery of Money Paid Under Mistake of Law

JUSTICES OF THE PEACE.

The general rule that a judicial officer is not to be held liable in a civil action for the performance of his official duty, provided he has jurisdiction of the person and the subject-matter, is applied by the Court of Appeals of Kentucky, in *Dixon* v. *Cooper*, 58 S.W. 437, to the case where a justice of the peace acts within his jurisdiction in issuing a warrant and trying the defendant thereunder. It is held he is not liable civilly, though the acts charged did not constitute an offence and though he was actuated by malice.

Liability for Wrongful Arrest

POWERS.

The broad general rule that a person should not "take all the benefits of property with the right to dispose of it at his death as he pleases, without the same being subject to the payment of his debts," since this is an "idea inseparable from the institution of property," is a principle that is continuously appearing and reappearing in the decisions. The Court of Virginia rather reluctantly follows former authority, and decides this rule not controlling in the case of *Humphrey* v. *Campbell*, 37 S. E. 26. There a trust deed directed trustees to pay the income of an estate to the testatrix for life, and power to her to dispose of estate by will. She gave to certain persons other than those who would have taken by the laws of descent. Held that the estate was not liable for her debts. The main reason given is that since the appointment is to be by will she can derive no control of such trust estate. A Pennsylvania case, *Commonwealth* v. *Duffield*, 12 Pa. 277, is cited, among others, as holding a contrary view.

Debts of Donee of Power

SALES.

Reasonableness of Amount of Goods Ordered

An offer was made by a firm to A. to sell him bran at $7.00 per ton f. o. b. at F., and closed by "hoping to receive your order." On receipt of this A. immediately telegraphed: "Ship fifty tons as per your letter." The Court of Chancery Appeals of Tennessee, in *College Mill* v. *Fidler*, 58 S. W. 382, held this a binding contract. The point was made that the amount ordered was unreasonably great. The court regarded it otherwise on the ground that, though it was proved that an order for this amount was unusual, one or more retail merchants at the place had ordered that amount at one time before this, and that the amount ordered did not exceed the demand of A.'s trade, and that there was no proof that he knew what quantity the company had on hand, or what it could produce in a given time. These, in the opinion of the court, are criteria to judge of the reasonableness of the amount ordered. It is intimated that a different holding would be had on a "catch-order."

WILLS.

Purchase of Legacy

The Supreme Court of New Hampshire in *Ellis* v. *Aldrich*, 47 Atl. 95, discusses the effect of the statute of the state providing that "every devise or bequest by the husband or wife to the other shall be holden to be in lieu of the rights which either has by law in the estate of the other, unless it shall appear by the will that such was not the intention." It is held that this provision, where applicable, renders the wife or husband a purchaser of the bequest or devise, and hence as entitled to a preference over the general legacies in case there are not sufficient assets to pay all in full.

Executory Devise

The narrow boundaries of the rights of an executory devisee with respect to the property devised appear in *Vaughn* v. *Tealey*, 58 S. W. 487. In that case an estate had been devised to A. with an executory devise to others. An order was made charging a certain expense to the corpus of the estate, and in the proceedings for this the executory devisees were not parties. The estate of A. under the terms of the devise having become divested, the question as to the legality of the order was raised, and it was upheld notwithstanding the non-joinder, the court saying that A. "occupied such a relation to the estate as to represent all interests . . . . so far as concerned the preservation of the estate."