PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMINISTRATORS.

Recovery of Wasted Assets

In *Karns Admr.* v. *Seaton,* 62 S. W. 737, it appeared that an administrator turned over to his wife as her share of the estate, notes which belonged to the estate. This was alleged to be a wasting of assets, and an administrator *de bonis non,* who had been subsequently appointed, sued to recover these notes. The trial court sustained his action, but on appeal to the Court of Appeals of Kentucky the decision of the lower court was reversed, it being held that under such circumstances the right to recover wasted assets is in the distributees, not in the administrator *de bonis non.*

BANKS.

Payment of Forged Check

The Appellate Court of Indiana holds in *Neal* v. *First National Bank of Lebanon,* 60 N. E. 164, that where a husband learns that his wife has forged checks on his bank account, which have been paid, and he examines the checks and pass book but fails to make any complaint to the bank, the latter is not liable to the husband for the payment of future checks forged by the wife. The principle upon which the court bases its decision is that the depositor, by failing to complain, makes the forger his agent, for the reason that he owes some duty as a depositor to the bank, and his failure to warn them upon his discovery of the forgery estops him from recovering for the payment of future forged checks, which the bank might not have paid but for his laches.

Transfer of Stock; Bank Insolvent

An owner of shares in a national bank sold the same in good faith when the bank was insolvent, without knowledge or reason to believe that it was so. He did everything that was reasonably possible to have the transfer made on the books of the bank. In such a case, the United States Circuit Court of Appeals (Third Circuit) holds such transferring shareholder can no

BANKS (Continued).

longer be regarded as such, nor held liable to an assessment made by the comptroller upon the subsequent closing of the bank as insolvent, though the evidence showed that the bank was in fact insolvent at the time the sale was made, and that the purchaser also was insolvent: *Earle* v. *Carson,* 107, Fed. 639.

CONSTITUTIONAL LAW.

Unreasonable Searches

In *Co-operative Building and Loan Association* v. *State,* 60 N. E. 146, the Supreme Court of Indiana holds that a constitutional prohibition against unreasonable searches is not violated by a statute giving tax officials the right to examine books and papers of taxpayers for the purpose of properly listing and assessing property for taxation. Such searches, says the court, are not unreasonable and the right to make them may be enforced by mandamus.

Assessment for Paving

Against the dissent of three justices (Harlan, White and McKenna), the United States Supreme Court holds in *French* v. *Barber Asphalt Paving Co.,* 21 Supreme Ct. Rep. 625, that the apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking of property without due process of law. The opinion of the court delivered by Mr. Justice Shiras, it need hardly be said, is an exhaustive review of the law upon this subject.

Cruel or Unusual Punishments

The Supreme Judicial Court of Massachusetts holds in *In re Storti,* 60 N. E. 210, that the statute of the state providing for the execution by electricity of criminals found guilty of a capital offence, does not violate the constitutional prohibition of the state against the infliction of cruel or unusual punishment. The punishment, says the court, is death; the electricity is only the means to accomplish this ancient punishment and does so in a manner lessening, instead of prolonging the pain of death. In answer to the argument that under this theory, a slow fire might be used to accomplish the end as well as the electric current, the court says that in such case the means would have not only the object of producing death, but for the purpose of causing other and additional pain.

CONSTITUTIONAL LAW (Continued).

Compelling Evidence

In order to enable the prosecutor to identify a prisoner, an officer took the former to the jail, and while the prisoner was confined put on her head a certain hat. This, the Court of Criminal Appeals of Texas holds, is not compelling the prisoner to testify against herself while confined in jail, and the prosecutor may testify to the identification which these circumstances enable him to make: *White* v. *State,* 62 S. W. 749.

CONTEMPT.

Review of Proceedings

A judgment of conviction in a contempt proceeding, which recites the facts on which the conviction is based is not conclusive as to such facts in a habeas corpus proceeding, but the falsity thereof may be shown: *Ex parte Duncan,* 62 S. W. 758 (Court of Criminal Appeals of Texas). One judge dissents regarding the decision a "radical departure" in the jurisprudence of the state, going further than any other case, and seriously affecting the power of the court to maintain its own dignity and authority.

CONTRACTS.

Convict Labor

A contract was entered into between B. and the warden of the state prison of Michigan by which the warden agreed to furnish B. with the labor of three hundred convicts at a stated price per day. A., while a convict, was required by the warden to work for B., and B. paid the state the contract price for his labor. After A.'s discharge from prison he sued B. for the value of his work. In *Thomson* v. *Bronk,* 85 N. W. 1084, the Supreme Court of Michigan holds that he cannot recover, on the ground that even though his commitment to prison were void, he has no contract relations, express or implied, with B.

CONTRIBUTION.

Compromise Surety's Liability

In *Boutin* v. *Etsell,* 85 N. W. 964, there had been eleven sureties on a defaulting county treasurer's bond. Four of them effected a compromise of a judgment on the bond against all, and settled with the county. Upon these facts the Supreme Court of Wisconsin decided that they can recover from a fifth his proportionate share of the amount paid in settlement, though

CONTRIBUTION (Continued).

they had not paid more than their proportion of the original judgment, holding that upon this point the law has undergone modification from its original form.

CORPORATIONS.

Stock Subscriptions

The Court of Chancery Appeals of Tennessee holds in *Lellyett* v. *Brooks*, 62 S. W. 596, that where a corporation permits the cancellation of a stock subscription, it and its assignee in insolvency are estopped to sue thereon. Creditors existing at the time, and still unpaid, are the only ones who can sue on such subscriptions.

Contract to Control Election

The president and teller of a bank who were large stockholders in it agreed that the president should endeavor to secure the co-operation of other stockholders or control of sufficient stock to secure the election of a board of directors satisfactory to them, and who would continue them in their respective offices. The expense of securing such control was to be shared equally by them. After the president had incurred expense, and secured control of stock which together with that already owned by the parties gave them control of the corporation, the teller defeated the plan by selling his stock. The president thereupon brought suit for the expenses he had incurred, but the Court of Civil Appeals of Texas denies recovery, on the ground that, while it is legal for a majority of stockholders to combine and control the election of the board of directors and management of the corporation, a contract is not legal "if it provides that a lucrative position shall be given to one or more of the parties to the contract": *Withers* v. *Edwards*, 62 S. W. 795.

DAMAGES.

Measure

In an action for damages caused by injuries to the plaintiff's wife, the value of the husband's services in attending on his wife must be measured by the value of services of a competent nurse and not by the time lost from his business pursuits: *Howells* v. *North American Transportation and Trading Co.*, 64 Pac. 786 (Supreme Court of Washington).

DAMAGES (Continued).

Insurance Agent

The New York Supreme Court (Appellate Division, Fourth Department), holds in *Stowell* v. *Manufacturers' and Merchants' Insurance Company of Pittsburg*, 70 N. Y. Supp. 80, that an insurance agent, whose contract is wrongfully terminated by the company, is entitled to damages for prospective commissions on business he might have done if the contract had not been broken. One judge (McLennan) dissents, assigning, however, no reasons.

Lease: Failure to Give Possession

In an action to recover damages for failure to give possession of leased property, the measure of damages is the difference between the leased rental value and the rent reserved, where the premises were necessary to the plaintiff for the purpose of carrying on a new business, since there could be no basis on which to estimate the profits: *Engstrom* v. *Merriam*, 64 Pac. 914 (Supreme Court of Washington).

DURESS.

Avoiding Deed

A husband conveyed to his wife land worth more than her inchoate right of dower in all his lands, in consideration of her agreement to release her dower rights in any lands of his, when requested, without further consideration. Subsequently, he being in pressing need of funds, his wife in order to take an advantage of his necessities, refused to release her dower rights in certain lands which he wished to sell in order to raise funds, unless he would convey to her certain other lands. The husband yielded under the pressure of circumstances. Upon these facts the New York Supreme Court (Appellate Division, First Department), holds that the latter deed to her was procured by duress and should be set aside: *Van Dyke* v. *Wood*, 70 N. Y. Supp. 324. Two of the five judges dissent.

EASEMENTS.

After-Aquired Title

Against the dissent of two judges the New York Supreme Court (Appellate Division, First Department), holds in *Farley* v. *Howard*, 70 N. Y. Supp. 51, that where the owner of a lot erects a building thereon with the stoop extending by mistake on an adjoining lot, of which he was an owner in common,

EASEMENTS (Continued).

and he then sells the house and lot and afterwards acquires title in severalty in the adjoining lot, such acquisition does not create an easement, entitling the owner of the first lot to maintain the stoop on the second.

Partition: Implied Reservations

Muir v. *Cox,* 62 S. W. 723 (Court of Appeals of Kentucky), decides that each of the several parcels of land allotted in a partition proceeding is subject to the benefits and burdens of existing passways as between *it and the other parcels,* though there be no reference to the passways in the deeds of partition; and that a subsequent purchaser of a part of one of the lots takes it subject to an existing passway between it and that part of the lot retained by the vendor.

EVIDENCE.

Attorney and Client

The line between what facts an attorney may and what he may not be compelled to disclose, is drawn in the case of *United States* v. *Lee,* 107 Fed. 702, where the United States Circuit Court (E. D. New York) holds that where an accused person admitted to bail could not be found, and on investigation by the grand jury it appeared that his counsel was not retained by the accused, but by some person acting for the accused, or in his interest, the counsel might be compelled to disclose the name and residence or usual place of abode of such person, but not the interest such person had in the matter.

FELLOW-SERVANTS.

Duty to Select Competent Fellow-servants: Insanity

A. was injured while tearing down some brick walls at the California State Insane Asylum, by the alleged negligence of some of the inmates, who were working with him as fellow-servants. The inmates allowed to work were selected by subordinate officers appointed by the superintendent of the institution. A., the plaintiff, in order to recover in spite of the fellow-servant rule, claimed that the employment of such fellow-servants was an act of negligence, and a violation of the substantive duty to employ competent fellow-servants owed by the master to his employes. The Supreme Court of California holds in *Atkinson* v. *Clark,* 64 Pac. 772, that in the absence of

FELLOW-SERVANTS (Continued).

further evidence than the mere insanity of the workmen, the superintendent is not liable. "There can be no presumption," says the court, "that the inmates were dangerous or unskillful from the fact alone that they were insane."

FIXTURES.

In *Solomon* v. *Staiger,* 48 Atl. 996, the Court of Errors and Appeals of New Jersey holds that where fixtures have been constructively severed from the freehold (in this case by a bill of sale), but their physical annexation is permitted by the purchaser of the realty and of the fixtures to remain undisturbed, the execution by such purchaser, of a subsequent conveyance of the realty, not referring to the fixtures either by way of transfer or of reservation, is a constructive reannexation of the fixtures to the freehold, and makes them a part thereof.

Sale of Freehold

HUSBAND AND WIFE.

The Supreme Court of New Hampshire in deciding the case of *Foote* v. *Nickerson,* 48 Atl. 1088, reviews at length the law relating to a greements for separation between husband and wife. The opinion is an excellent review of this branch of the law, and supports the holding of the court that a contract between a husband and wife, which provides that they shall live separately and which releases their claims on the property of each other both before and after death, is an entire contract, and being void as to the separation, does not bar the interest of the husband in the estate of the wife.

Agreement for Separation: Entire Contract

INTOXICATING LIQUORS.

In Indiana a statute, not unlike that of some other states, authorizes an action against a person unlawfully selling or furnishing liquors by any person injured thereby. The extent to which this liability is carried by the courts appears in *Homire* v. *Holfman,* 60 N. E. 154, where the Supreme Court of Indiana holds that a saloon keeper who sells liquors to an intoxicated person (an unlawful act by statute), by which the latter becomes so crazed that he commits a homicide, and is sent to the penitentiary, is liable for loss of support by the wife of the intoxicated person.

Civil Damage Act: Loss of Support

LANDLORD AND TENANT.

Where a tenant holds over after a lease for eleven months, he becomes liable for another term of the same length, says the New York Supreme Court (Trial Court, Kings County) in *Ketcham* v. *Ochs,* 70 N. Y. Supp. 268, laying it down as a general principle that the holding over is presumed to be for the same term as the original lease. But such holding over must be voluntary or wrongful to have this effect and therefore where a subtenant of premises demised under a lease expiring on the last day of April removed on the morning of May 1 all his property except certain mortgaged chattels which he abandoned on the afternoon of the same day to the chattel mortgagee, with the key of the premises, and in consequence of the fact that this mortgage retained the key until the fifteenth of May, the landlord did not get possession until then, the tenant is not liable for a new term on the ground of holding over.

Holding Over

LEGITIMACY.

Where a wife secures a divorce, according to the laws of the place where domiciled, and thereafter marries another, to whom a child is born, such child is legitimate everywhere, though such divorce and remarriage may not be recognized as legal elsewhere: *In re Hall,* 70 N. Y. Supp. 406 (N. Y. Supreme Court, Appellate Division, Third Department).

Divorce: Remarriage

LIBEL.

A. sued B. for the publication of a charge that he, A., had entered a house and had stolen property therefrom. The jury found a verdict for the plaintiff, awarding him substantial compensatory damages. This verdict the New York Supreme Court (Trial Ter, Kings County) sets aside in *O'Connor* v. *Press Pub. Co.,* 70 N. Y. Supp. 367, on the ground of public policy, since the evidence showed that though he had not entered the house in question for the purpose of larceny, he had entered it for the purpose of committing the crime of statutory rape on an infant daughter of the owner.

Verdict Public Policy

LIENS.

Sale of Property

The Court of Appeals of Kentucky holds in *Lancaster* v. *Wolff*, 62 S. W. 717, that where one of two joint owners of property, who has a lien upon the interest of the other, procures a sale of the property for partition, he may enforce his lien against the proceeds of the property, though he waived his lien upon the property by failing to assert it in the suit for partition.

LIMITATIONS.

Debts of Decedent: Enforcement Against Devisees

A testator died, and his devisees entered into possession of his real estate before judgment was rendered against the testator's executors on a note executed by the testator. Judgment was afterwards obtained in the probate court establishing the judgment as a claim against the estate and an execution was issued and returned *nulla bona*. Upon these facts the Supreme Court of South Carolina holds in *Brock* v. *Kirkpatrick*, 38 S. E. 779, that the statute of limitations commences to run against a suit to enforce the judgment against the land in possession of the devisees on the date of the return of the execution and not when the cause of action accrued on the note.

Stockholders' Liability: Part Payment

A right of action to enforce the individual liability of stockholders for debts of a corporation, where such liability is created by statute, does not accrue till the creditor has exhausted his remedy against the corporation, though the liability accrues when the debt is incurred. Therefore, the Supreme Court of Rhode Island holds the statute of limitations begins to run from the former date: *Kilton* v. *Providence Tool Co.*, 48 Atl. 1039. The court further holds in this case that where the president of an insolvent corporation, with the assent of its stockholders, turns over its business and assets to a committee of its creditors, for the purpose of disposing of all assets and dividing them among creditors, a payment of a dividend by such committee to a creditor, does not constitute such a new promise by the corporation as will avoid the statute of limitations.

MUNICIPAL CORPORATIONS.

Private Ways

With one judge dissenting the New York Supreme Court (Appellate Division, Third Department) holds in *Dennis* v. *Village of Elmira Heights,* 70 N. Y. Supp. 312, that where a driveway, apparently, though not in fact, a public highway, is commonly used by the public, and a municipality in the exercise of its right of improving an intersecting street, leaves the approach to the driveway in a dangerous condition, the duty of the municipality to the public requires its exercise of reasonable care to prevent accidents which might reasonably be anticipated to those traveling on the road with due care, and in ignorance of the danger, and renders it liable for injuries occasioned by failure to exercise such care. The dissent is based upon the proposition that the circumstances do not impose such duty upon the municipality.

NUISANCE.

Burial of the Dead

The charter of the city of Portland, Oregon, authorized the city to protect the health of the city and remove nuisances and to declare what should constitute the same. Under this grant of authority the city council declared generally that the burial of a dead body in any part of the city would constitute a nuisance. In *Wygant* v. *McLouchlan,* 64 Pac. 867, the Supreme Court of Oregon holds this regulation not authorized by the grant in the charter, on the ground that the burial of a human body is not *per se* a nuisance and cannot be made so by the declaration of the municipality and, it appearing that interment might be made in certain sections of the city without giving offence to any human sense or endangering the health of the city, it is held that the city council overreached its granted power.

PARTIES.

Sale Pending Action

In *Scholle* v. *Metropolitan Elevated Railway Co.* 69 N. Y. Supp. 1118, it appeared that property had been sold pending an action by the owner against the elevated railway company for obstructing the owner's right to light and air in the use of the property, and to enjoin a continuance of the obstruction. The trial court thereupon made an order that the grantees be made co-plaintiffs. On appeal by the defendants the New York Supreme Court (Appellate Division, First Department)

PARTIES (Continued).

reversed this action, holding that the grantees were not entitled to be made co-plaintiffs, on the ground that their presence was unnecessary to protect any of their interests. One judge, Judge Ingraham, dissents, assigning as one reason that multiplicity of suits would thus be avoided.

PENAL BOND.

The Supreme Court of North Carolina holds that a judgment on a penal bond in excess of the prescribed penalty, though computed by taking a principal sum within the penalty and adding interest thereon from the time of the breach of the bond, is not authorized at common law, nor by any statute of the state: *New Home Sewing Machine Co.*, v. *Scago*, 38 S. E. 805. One judge dissents on the ground that "the penalty of the bond is payable because the principal did not fulfill his obligation. The interest is the penalty upon the sureties [the action here was against the sureties] for not fulfilling theirs," that is, their duty to pay promptly.

Interest

PLEDGE.

In an action where personal property was pawned for a usurious rate of interest, no right to retain the same as collateral security for the loan accrued to the pledgee, and the pledger was entitled to recover the value of the property: *Scott* v. *Reid*, 85 N. W. 1012 (Supreme Court of Minnesota).

Usury

RAILROADS.

A railway company, having constructed its station and a platform incident thereto, does not by permitting persons to use such platform for purposes of their own, not connected with the transaction of business at such station, become charged with a duty to reconstruct guard, or light such platform so as to render it safe for the permitted use: *Cincinnati, H. & D. R. Co.* v. *Aller*, 60 N. E. 205 (Supreme Court of Ohio). The case of *Harriman* v. *Railway Co.*, 12 N. E. 45, 45 Ohio St., was urged upon the court as leading to a different conclusion, but it is distinguished on the ground that in that case a change in the mode of operating the road added "a new and further peril to such permitted use without taking precaution against injuries which would naturally result therefrom."

Platform Injury to Licensee

REFORMATION OF INSTRUMENTS.

In *Harlan* v. *Central Phosphate Co.*, 62 S. W. 614, the facts showed that a half interest in common in a lot descended to A., who supposed, under a mistake as to the law of descent, which was also shared by B., that the lot descended in severalty to the latter who inherited no interest therein. Each of the parties owned adjoining, and thereafter they executed a joint mineral lease to several descending tracts owned by them in severalty, which included the lot in question. The lease was executed as a joint lease merely for convenience, and all the parties, including the lessee, supposed that A. had no interest in the lot in question, though they all knew the facts. Under these circumstances the Court of Chancery Appeals of Tennessee holds that the lease did not convey the interest of A. in such lot since it was executed under a mutual mistake as to the ownership thereof. But the lessee having transferred the lease to a third person, who knew nothing of the facts, the court refuses to reform the deed against such transferee, on the ground that the transferee was entitled to rely on the execution of the lease by A.

Mistake of Law: Innocent Purchaser

While a corporation was insolvent, a mortgage was given by it to prefer some of its existing creditors. This, though a mistake of the draftsman, conveyed only a life estate in its real property. After the corporation had been adjudged insolvent and a receiver appointed to wind up its affairs, application was made to the court to reform the instrument so as to express the intention of the parties. This application was granted by the trial court, but on appeal the Court of Errors and Appeals of New Jersey holds this error, it appearing that the mortgages had not acted to their detriment on the supposition that the mortgage conveyed the fee: *Miller* v. *Savage*, 48 Atl. 1004.

Insolvency of Mortgagor

REPLEVIN BOND.

In *Henderson-Achert Lithographic Co.* v. *John Shillito Co.*, 60 N. E. 295, the Supreme Court of Ohio holds that sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship until such loss has occurred; nor has the defen-

Rights of Sureties

REPLEVIN BOND (Continued).

dant in the replevin suit who recovered a judgment therein, though the sureties and judgment debtor be insolvent and the judgment be otherwise uncollectible. The Chief Justice dissents.

STATUTE OF FRAUDS.

Indemnity

A promise by one person to indemnify another for becoming surety upon the bond of a third is not within the statute of frauds, and will support an action, although not in writing: *Hartley* v. *Sandford,* 48 Atl. 1009 (Supreme Court of New Jersey).

TESTAMENTARY TRUSTEES.

Contracts: Liabilities

In *O'Brien* v. *Jackson,* 60 N. E. 238, it appeared that executors and testamentary trustees contracted for repairs to buildings devised to them in trust, the will having authorized them to make such repairs. However, the Court of Appeals of New York holds that they are not liable in an action at law therefor in a representative capacity, to recover such amount, stating as a general principle that an executory contract entered into by executors or testamentary trustees for the benefit of the estate upon a new consideration does not bind the estate, nor create any liability not founded on the contract of the testator.

TRUSTS.

Charitable Use

The Supreme Court of New Hampshire in *Rollins* v. *Merrill,* 48 Atl. 1088, takes for granted that a legacy for the permanent care of a cemetery lot is for a charitable use, and therefore upholds it. The Court of Chancery of New Jersey reaches a different conclusion in *In re Corle,* 48 Atl. 1027, holding such a legacy vioid as not being for a charitable use, and therefore violating the rule against perpetuities.

WATERS AND WATER COURSES.

Irrigation: Diversion

A. was the owner of certain land through which a stream of water ran, the waters of which he used for irrigating. There was a natural depression in the bank above his land, over which water flowed to B.'s land when the stream was high. Within two or three years channels had been cut through this de-

WATERS AND WATER COURSES (Continued).

pression, so that a material portion of the stream at all times flowed to B.'s land, leaving A. an insufficient supply of water. It did not appear whether the channels were cut by natural or artificial means. Under these circumstances the Supreme Court of Oregon holds in *Cox* v. *Banard,* 64 Pac. 860, that, however the facts may be as to this last point, in either case, whether the channels were cut by natural or artificial forces, A. is entitled to restore and maintain the banks of the stream in their normal condition.

In *Jones* v. *Conn,* 64 Pac. 855, this same court holds that where defendant owned land bordering on a stream and subsequently acquired under different grants lands adjacent thereto, but which were not contiguous to the stream, the lands subsequently purchased were riparian, and that where part of the defendant's land bordered on the stream the fact that part of it extended *beyond the natural watershed* of the stream did not prevent that part from being riparian land. Hence it is decided that a use of the water of the stream on such land will not be enjoined so long as it does not materially injure the plaintiffs.

Riparian Land

WILLS.

The New York Supreme Court (Appellate Division, Second Department), in *In re Austin's Will,* 69 N. Y. Supp. 1036, holds that where a will directs the income of testator's property to be paid to certain persons for life, remainder over, the life tenants, and not the estate, are entitled to the first year's income. Proceeding on this principle the court decides that the executor and trustee cannot pay all the income to the life tenants and collect their commissions from the principal of the estate, but must make the two funds share the burden together.

Income of Estate