PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTORNEYS.

In re Cahill, 50 Atl. 119, the Supreme Court of New Jersey summarizes the grounds upon which an attorney may be disbarred as follows: To justify the disbarment of an attorney, one of three things should be established: (1) conviction of crime, (2) evidence which, in the judgment of the court, shows that he has committed a crime and that the facts proven would justify a conviction thereof, (3) such intentional fraud upon the court or a client as shows evidence of mortal turpitude. For less offences, such temporary suspension, as the court might deem proper should be imposed.

Grounds of Disbarment

BANKRUPTCY.

A testator devised certain real estate situate in Pennsylvania to the mother of the bankrupt "for and during the term of her natural life and at the time of her decease to her *surviving* children equally share and share alike . . . to hold to them their heirs and assigns, forever." After the death of the testator and during the lifetime of the life beneficiary, one of her children was adjudged a bankrupt. Under these facts the United States District Court (District of Delaware) holds *In re Twaddell,* 110 Fed. 145, that he had a *vested* interest in the subject of the devise, which passed to his assignee in bankruptcy.

Assets, Estate Devised

CONTRACTS.

The Supreme Court of Iowa holds in *Marshalltown Stone Co.* v. *Des Moines Brick Mfg. Co.,* 87 N. W. 496, that an agreement between a party about to enter into a contract to furnish certain paving materials to a city for use on a certain street, and another, whereby the latter is to pay the former a certain amount per cubic yard for the material used in such street,

Public Policy, Restraint of Competition

CONTRACTS (Continued.)

on condition that the former will not enter into such contract nor sell any such material in that city, is not void as against public policy, because tending to prevent competition, because it is limited as to time, place, and commodity. The court relies on *Hedge* v. *Lowe,* 47 Iowa, 137. Nothing is said in the opinion as to the validity of the contract, in view of the fact that its immediate effect is to compel the municipality to pay an exorbitant price for material furnished. This might well constitute a ground of attack, but the court treats the question as though the furnishing the material had reference to a private individual.

Moral Obligation

A concise definition of a moral obligation which is a sufficient consideration to support a promise and render valid a contract founded thereon is given by the Supreme Court of Appeals of Virginia in *Davis* v. *Anderson,* 39 S. E. 588, where it is held that, for a moral obligation to be sufficient to sustain a promise or conveyance, it must be one which has been once a valuable consideration, but has ceased to be binding for some supervenient cause; as, for example, the statute of limitations, or the intervention of bankruptcy.

Repudiation, Action for Installments

Where one repudiates a contract by which he is bound to make certain payments at certain times, the other party is not bound to sue for damages as for a breach, or to wait till all the installments are due, but may bring separate actions for the installments as they become due: United States Circuit Court (S. D. Ohio, W. D.) in *Pennring* v. *Carter-Cunne Co.,* 110 Fed. 107.

Delivery of Goods, Recovery

The Supreme Court of North Carolina holds in *Bowers* v. *J. B. Worth Co.,* 39 S. E. 635, that where, in accordance with a contract, a vendor delivers a number of bags of peanuts to a carrier under the contract for shipment on the day fixed, the fact that two days later he placed a number of other bags in the car with the station agent's consent, and the bill of lading was changed so as to include the latter bags, such transaction in no way delaying shipment, will not prevent recovery for

CONTRACTS (Continued).

the original number of bags, since such transaction did not work any damage to the buyer.

Damages for Breach of Contract

An action to recover damages for a breach of contract to purchase securities cannot be maintained by one who, after making such contract to sell, has received payment thereof from the maker of such securities, and has canceled the securities: Supreme Court of Nebraska, in *Kay* v. *McAuley*, 87, N. W. 335. The ground of the decision is that, though the defendant's breach is complete, the plaintiff has put it absolutely beyond his power to complete the transaction.

CONSTITUTIONAL LAW.

Delegation of Legislative Powers

The recent Act of March 21, 1901, in New Jersey, provided that the governor should have power, in his discretion, on the application of one hundred voters, to appoint a commission to district or redistrict wards in the cities of this state. In *State* v. *City of Elizabeth*, 49 Atl. 1106, the Supreme Court of New Jersey holds the act unconstitutional and void, not only on the ground that it was local and special and authorized the regulation of municipal affairs by a commission, but principally because it is decided to be an unlawful delegation of legislative power. The court cites with approval the distinction laid down in *Moers* v. *City of Reading*. 21 Pa., 202, that, "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."

Interstate Commerce

The Court of Appeals of Kentucky holds in *Com.* v. *Mobile & O. R. Co.*, 64 S. W. 451, that a state statute requiring a foreign railroad corporation to become a resident corporation, as a condition of its right to continue to operate that part of its road within the state, is not an interference with interstate commerce, within the inhibition of the federal constitution on the subject. Nor does such a statute deny to the foreign corporation the equal protection of the laws of the state. Guffy, J., dissents without assigning any reasons.

CORPORATIONS.

Personal Liability of Directors

In New York the Statute (Laws 1848, c. 319) imposes on directors a liability for corporate debts. The Court of Appeals of New York holds in *Marsh* v. *Kaye*, 61 N. E. 177, that under this provision an action in equity cannot be maintained to enforce the personal liability of the directors, such liability being absolute and unlimited, and not constituting a fund for the benefit of creditors, since in the view of the court there is an adequate remedy at law. But, it is said, if such liability were limited in amount, and the fund constituted thereby were insufficient to satisfy the corporation's debts, the rule would be otherwise. The court holds the liability of the directors under the statute the same in kind with that of stockholders and that it differed only in degree. It was argued that to allow a suit in equity by one creditor on behalf of all would avoid a multiplicity of suits, but the court refuses to sustain this contention: *Dykman* v. *Keeney*, 154 N. Y. 483, 48 N. E. 894. Two judges dissent, arguing on the admitted theory that the liability of the director is the same with that of the stockholder except in degree and claiming that the equitable action would be sustained against these defendants were they stockholders. See *United States Trust Co. of New York* v. *United States Fire Ins. Co.*, 18 N. Y. 199, 210.

DEFECTIVE BUILDING.

Dispossession of Tenant

A tenant takes the premises subject to the risk of being dispossessed through the condemnation of the leased building as unsafe and dangerous, without recourse to the landlord for damages resulting from such removal: New York Supreme Court (Appellate Division, Second Department) in *Steefel* v. *Rothschild*, 72 N. Y. Supp. 171.

ELECTRIC LIGHT COMPANIES.

Use of Highways

The Court of Chancery of New Jersey holds in *Point Pleasant Electric Co.* v. *Borough of Bay Head*, 49 Atl. 1108, that until the borough council passes an ordinance regulating the use of the borough streets, or prescribing the manner in which electric light companies shall exercise their street privileges, an electric light company which has obtained the consent of the owners of the soil may string its wires in the public streets of the borough.

EMINENT DOMAIN.

Persons Entitled to Compensation

The Supreme Court of Appeals of Virginia holds in *Virginia-Carolina Railway Co.* v. *Broker,* 39 S. E. 591, that where, pending the hearing of exceptions to the commissioners' allowance of compensation in condemnation proceedings by a railroad, the land was conveyed, the owners of the land at the time the commissioners' report was confirmed are entitled to compensation, and not the owner at the time when the proceedings were commenced.

EQUITY.

Jurisdiction, Territorial Limits

The Supreme Court of Washington holds in *Lindsley* v. *Union Silver Star Mining Co.,* 66 Pac. 382, that the fact that the necessary parties are before a court of equity does not give it jurisdiction in proceedings to enjoin trespass and waste in a mine located in a foreign jurisdiction, where there is no further ground for equitable interference. "In the examination of the authorities," says the court, "we observe no instance of such suit being maintained unless the controversy between the parties involves primarily equitable jurisdiction. It is apparent that the complaint involves in its essence the possession of the mining lode. The possession here is not incidental to the enforcement of a contract or trust or relief from fraud, but is in itself the foundation of the controversy." Compare the cases of *Jennings Bros. & Co.* v. *Beale,* (Pa.) 27 Atl. 948, and *Northern I. R. Co.* v. *Michigan Cent. R. Co.,* 15 How. 233.

GIFT.

Delivery

In *King* v. *Smith,* 110 Fed. 95, the United States Circuit Court of Appeals (Ninth Circuit) holds that it is immaterial that delivery to a donee is made while the donor is unconscious; he having, while capable of transacting business directed the delivery to be made.

HOMICIDE.

Degree of Crime, Jury

The Supreme Judicial Court of Maine holds in *State* v. *Oakes,* 50, Atl. 28, that in the trial of a person upon an indictment charging him with murder, an instruction to the jury by the presiding justice, that their verdict should be not guilty, or guilty of murder in the first degree, is repugnant to a statute, which provides that "the jury, finding a person guilty of

HOMICIDE (Continued).

murder, shall find whether he is guilty of murder in the first or second degree," and is therefore erroneous.

MALICIOUS PROSECUTION.

It is well known that the settled rule in cases of malicious prosecution is that the burden is on the plaintiff to establish a termination of the prosecution in his favor, that it was prosecuted with malice and without reasonable and probable cause. In *Lauterbach* v. *Netzo*, 87 N. W. 230, the Supreme Court of Wisconsin holds that the malice may be inferred from the want of probable cause.

Malice

MISREPRESENTATION.

How far the purchaser may rely on the representations of the vendor, and to what extent it is his duty to examine for himself when he is purchasing real estate, furnish perplexing inquiries in the law on the rescission of contracts. In *Trammell* v. *Ashworth*, 39 S. E. 593, a vendee of a house and lot sued to set aside the sale thereof, on the ground that the vendor had informed her prior to the sale, that her boundary line would fall at a certain place, and that the vendor informed her that a chimney in the hall of the house was more than two feet distant from a partition wall, so that the partition might easily be moved two feet and the hall be enlarged. Both of these representations were false. The Supreme Court of Appeals of Virginia holds that they were of such a character that their truth or falsity was apparent, and refuses rescission of the contract, notwithstanding that complainant averred her reliance upon the representations, and that without them she would not have entered into the contract. The court does not in its opinion decline to believe that the representations were relied on, but the spirit of the opinion makes that seem a probable ground for the decision.

Rescission of Contract

MORTGAGE.

In *Wills* v. *Field*, 49 Atl. 1128, the Court of Chancery of New Jersey holds that where a distinct parcel of the mortgaged premises has been held for over twenty years by grantees of the mortgagor, without covenant to pay the interest or principal of the mortgage, or

Lien, Discharge

MORTGAGE (Continued).

actual payment of either, or other recognition of the incumbrance of the mortgage on such distinct parcel, and without entry by the holder of the mortgage, the mortgage has ceased to be a lien on such distinct parcel of the mortgaged premises, notwithstanding it was duly and seasonably recorded, and interest has been continuously paid by other holders of other distinct parcels of the mortgaged premises.

A mother died, leaving a husband and five surviving children. The husband and a son forged a deed purporting to convey her real estate to the husband, and the latter then conveyed the property to the son, and it was conveyed by the latter to a son who was not a party to the forgery, though he had knowledge thereof, and the latter gave a mortgage in return therefor, which was assigned to A. Under these facts the Supreme Court of Michigan holds in *Cline* v. *Wixson,* 87 N. W. 207, that the mortgage was a valid lien on a two-fifths interest in the property, as the deed from the brother operated to pass his interest in the land as heir.

Validity, Estoppel

NUISANCE.

In *State* v. *Stark,* 66 Pac. 243, the Supreme Court of Kansas holds that all places where intoxicating liquors are sold or kept for sale, or places where persons are permitted to resort for the purpose of drinking the same, are nuisances under the statute law of the state. This fact, however, says the court, does not justify their abatement by any person or persons without due process of law. They can be abated only by a prosecution instituted in behalf of the public by the proper officer. The destruction or injury to property used in aid of the maintenance of such nuisances, except in the matter provided by the statute, is a trespass. This case grew out of the attempts of certain persons to take into their own hands the punishment for the violation of the Kansas liquor laws. The principles of law are clear and well settled, and one is only surprised that action was not more promptly adopted to suppress the lawless measures of ignorant fanaticism. "It was a congregation of law breakers on one side retaliating upon an individual law breaker on the other for lawless acts of the latter, which affected not them alone, but hundreds of others (the public), whom they assumed to represent."

Abatement

ARTITION.

Where partition proceedings were void for failure to join one of the interested parties, though his interest was recognized and apportioned, if all the parties acknowledged the proceedings, and exercised ownership over their respective tracts, the Court of Chancery of New Jersey holds that the partition, though not valid as an oral partition, as contrary to the statute of frauds, nor followed by twenty years' possession, was binding between the parties, and they might be estopped from denying its validity: *Wescoat* v. *Wilson,* 49 Atl. 1112.

Validity when by Parol

PUBLIC OFFICERS.

The Supreme Court of Appeals of West Virginia holds in *State* v. *Chilton,* 39 S. E. 612, that while acts of a private agent may bind the principal where they are within the apparent scope of his authority, yet it is not so in the case of the acts of public officers. In this case the state is bound only by such authority as is actually vested in the officer, and his powers are limited and defined by its laws. Their unauthorized acts, therefore, though within the apparent scope of their duty, do not bind the state nor act as an estoppel against it.

Unauthorized Acts

RAILROADS.

In *Sands* v. *Southern Ry. Co.,* 64 S. W. 478, the Supreme Court of Tennessee holds that where a party, knowing that he is not entitled to ride on a freight train, pays a brakeman for the privilege, and follows the brakeman's directions so as to evade the conductor, he becomes a tresspasser, and the company is not liable for injuries received in alighting from the train. Nor in an action by a boy against a railroad company for injuries received while riding on a train contrary to the road's regulations, is proof of a custom as to allowing boys to ride between stations admissible.

Riding on Freight Trains

In *Louisville & N. R. Co.* v. *Breeden's Adm'x,* 64 S. W. 667, the Court of Appeals of Kentucky holds that a railroad corporation leasing its road without direct legislative authority, is responsible for the torts of its lessee, though it surrenders complete control of the leased road. The principle upon which is thus stated in Bailey

Liability of Lessor for Negligence of Lessee

RAILROADS (Continued).

Osborne, 97 Ky. 112, 30 S. W. 21: "Public policy and the law alike forbid that a railway company shall be allowed to place its road, train, hands, and cars in the hands of or under the control of a stranger for such purpose as is claimed in this action, and thus evade liability for the wrongs done by such person." The case of *Louisville* v. *N. R. Co.* v. *Chesapeake & O. Ry. Co.* (Ky.), 53 S. W. 277, was relied on by the appellee, the lessor, it having been held in that case that an employee of the lessor engaged in the maintenance of the road having been injured, and the lessor having paid the loss, the lessee was liable to the lessor therefor. But the court in this case distinguishes that decision on the ground that all that was determined in that case was that the loss was part of the expense incidental to the maintenance of the road.

SEDUCTION.

Subsequent Conduct of Prosecuting Witness

The Kentucky statute, similar in this respect to statutes of various other states, provides that in case the offence of seduction is committed under promise of marriage, no prosecution shall be instituted when the person charged shall have married the girl seduced. In *Commonwealth* v. *Hodgkins,* 64 S. W. 414, the presecutrix was shown to have had intercourse with another subsequent to the seduction, and the defendant claimed that this relieved him from the necessity of offering to marry the prosecutrix, on the same principle that it would furnish a defence to a suit for breach of promise of marriage, and yet was sufficient to enable him to escape punishment. But the Court of Appeals of Kentucky holds that the statute provides a certain penalty for a certain crime, and that that penalty can be avoided only in the precise manner pointed out by the statute.

SLANDER.

Damages, Mental Suffering

In *Hacker* v. *Heiney,* 87 N. W. 248, the Supreme Court of Wisconsin holds that a recovery for mental suffering *alone* may be had for malicious slander. "The rule," says the court, "for which appellant contends (i. e., that in the absence of *other* actual damage, no recovery could be had), has been applied only to cases of negligence or of personal injury, where the mental

SLANDER (Continued).

suffering can result only from the injury and not from the tort. . . . . It has never been applied to cases of malice, such as false imprisonment and slander." See *Ford* v. *Schliessman,* 107 Wis., 479, 83 N. W. 761.

STATUTE OF FRAUDS.

In *Kling* v. *Bordner,* 61 N. E. 148, the Supreme Court of Ohio holds that a verbal agreement to leave property to another by will or otherwise in consideration of personal services to be rendered by the latter is within the Statute of Frauds and void, and the rendering of services is not such part performance as will take the agreement out of the operation of the Statute. This decision is, of course, in line with the English authority, *Maddison* v. *Alderson,* 8 App. Cas., 467, but can hardly be said to be in line with some of the cases in this country, especially in the Western States, where the test has usually been treated as being whether the plaintiff has by the promise of the defendant placed himself in a position, from which he cannot dislodge himself as fully as though he had never been induced to make the move. See *Slingerland* v. *Slingerland,* 39 Minn. 197. Further, the court says, the doctrine of part performance obtains in equity only, and does not avail to render a contract which is void by the statute because unwritten or unsigned capable of being sued on in a court of law. One judge dissents, but unfortunately writes no opinion.

Part Performance

TELEPHONES.

The United States Circuit Court (Western District of Kentucky) holds in *Cumberland Telephone Co.* v. *Louisville Telephone Co.,* 110 Fed. 593, that where a city has granted to each of two telephone companies the right to construct its line on the same side of the same street, neither grant being exclusive, in the absence of any statute or ordinance regulating the construction and operation of such lines, the company which is prior in grant and in occupancy has the superior right, and the second company is not entitled to plant its poles within the space previously occupied by the first company, so that they will extend up through its wires, or to occupy with its own wires the space beneath them, where it will

Rights under Conflicting Grants

TELEPHONES (Continued).

impair the safety or interfere with the efficient operation of the first line. *Cf. Paris Electric Light & Ry. Co.* v. *Southwestern Telegraph & Telephone Co.*, 27 S. W. 902. "There are many instances where numerous persons have equal rights in a given locality, and yet where the law, good manners, and common sense equally require that the old maxim, 'First come, first served,' shall be observed."

TENANTS IN COMMON.

The question as to the effect of a sale by a co-tenant of an interest in the property held in common is raised in the case of *Burt & Brabb Lumber Co.* v. *City Lumber Co.*, 64 S. W. 652, where the Court of Appeals of Kentucky holds that a co-tenant cannot, without authority, sell the right to cut logs from the land owned in common so as to pass the legal title to the purchaser, and that the interest which the purchaser acquires can be asserted only in equity. *Cf.* the case of *Barnes* v. *Lynch*, 151 Mass. 510, 24 N. E. 783, where one tenant in common assumed to convey to a stranger a part of the common property by metes and bounds; and also the case of *Benedict* v. *Torrent* (Mich.), 47 N. W. 129.

Sale by Cotenant, Effect

TRIAL BY JURY.

The Supreme Court of Oregon deals in *Shobert* v. *May*, 66 Pac. 466, with the rather frequently raised contention that the constitutional guaranty of the right of trial by jury prevents the court from taking a case from the jury. The court holds that in a negligence case the only situation that authorizes the court to withdraw a case from the jury is where the facts are uncontradicted, *and* where the law adjudges the acts shown by such facts to be negligent. *Durbin* v. *Navigation Co.* 17 Or. 5, is cited where the Court said: "It is true that negligence is ordinarily a question of fact for the jury to determine from all the circumstances of the case, and that the cases where a nonsuit is allowed are exceptional, and confined to those, as here, where the uncontradicted facts show the omission of acts which the law adjudges negligent." (The word "omission" should probably be "commission").

Negligence