PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ARBITRATION.

Statute of Frauds; Water Rights

The Supreme Court of New Hampshire holds in *Horne* v. *Hutchins,* 51 Atl. 651, that where the owners of mills on opposite sides of a reservoir of water, each claiming a right to the water in such quantity as to interfere with the use of the quantity claimed by the other, orally submitted their claims to arbitration, an award allowing one party to take the amount of water carried by the penstock which he then maintained, or by another of the same dimensions, did not operate as a transfer of one party's right to the other, so as to be within the prohibition of the Statute of Frauds; but instead of increasing or diminishing the share of either, was a mere definition of the already existing rights of each which could be properly done upon a parol submission to arbitration. Cf. *Dunklee* v. *Railroad Co.,* 24 N. H. 489.

BANKS.

Drafts for Collection

In *American Exchange National Bank* v. *Theummler,* 62 N. E. 932, it appeared that the plaintiff, holding a personal draft payable to her order, and drawn on a bank in St. Louis, left it for collection with a bank in Milwaukee indorsed in blank. The Milwaukee bank sent the draft to the defendant, its regular Chicago correspondent, which sent it to a bank in St. Louis, collected the amount from the drawee, and credited it to the account of the Milwaukee bank, which was overdrawn. The last-named bank had meanwhile suspended payment, but the defendant had no knowledge of this fact when it made the credit, and had at no time notice that the Milwaukee bank merely held the draft for collection, and was not its owner. Upon these facts the Supreme Court of Illinois decides that the defendant was entitled to apply the proceeds of the draft to the overdrawn account of the Milwaukee bank, and was not therefore liable to the plaintiff. Two judges dissent from this conclusion.

EVIDENCE.

Dying Declarations

A written statement was prepared while an injured person was in possession of all his faculties, and while he believed that he would recover. It was intended to be signed in the event of a subsequent conviction of impending death. Later the declarant grew worse, and becoming convinced that his end was near, he signed the paper. After his death the paper was attempted to be used as a dying declaration against the man alleged to have killed the deceased. The Supreme Court of Mississippi holds it inadmissible as a dying declaration: *Harper* v. *State,* 31 Southern, 195. "Such a paper at the time of its preparation goes for nothing, of course; and when the time comes for the execution of it, the tendency of human nature *in extremis* to be consistent and follow the formula, without effort, vitiates it. Such an instrument cannot be said to be the free and voluntary act of the person, originated and executed under a solemn sense of impending death."

GUARANTY.

Estoppel of Guarantor

A limited partnership executed its note to a bank as collateral security for such customers' notes as the bank should discount on its indorsement, a guaranty by one of the members of the firm being indorsed on such collateral note. Among the notes discounted by the bank for the firm were a number which were fictitious or forged. Under these facts the U. S. Circuit Court of Appeals (Third Circuit) holds that the guarantor as well as the firm was bound by the representations of the latter that the notes were valid, and could not assert their invalidity to avoid liability on his guaranty: *Pennsylvania Trust Co. of Pittsburg* v. *McElroy,* 112 Fed. 509.

GUARDIAN AND WARD.

Physician's Services Necessity

In *Williams* v. *Bouner,* 31 Southern, 207, the Supreme Court of Mississippi holds that where a ward was seriously injured by accident, so that the services of a physician were required to preserve her life, the guardian had authority, without order of court, to contract for the payment of the physician's charges from the corpus of the ward's estate; the income thereof being insufficient.

GUARDIAN AND WARD (Continued).

It is also held in the same case that, though the physician who had rendered the services to the ward at first charged the account to her guardian personally, and, on his refusal to pay the account, brought suit against him as guardian, the fact that the account had originally been charged to the guardian individually did not preclude recovery.

LANDLORD AND TENANT.

The Supreme Court of Illinois holds in *Springer* v. *De Wolf*, 62 N. E. 542, that where an instrument assigning a lease stated that the assignment was made in consideration of a certain sum and the "assumption by the assignee of all the obligations and liabilities of the assignor," such assumption created a privity of contract, as well as a privity of estate between the lessor and the assignee, so as to make the latter liable for rent to the lessor after the termination of the relation of lessor and lessee by a further assignment. Of course, without such "assumption" clause the first assignee of the lessee would have been liable only during his holding of the lease. Compare *Dean* v. *Walker*, 107 Ills. 540. It is improbable that such a decision in favor of the *lessor* could be reached in a State where a third person is denied the right to sue on a contract made for his benefit.

Assignment of Lease, Assumption Clause

LIEN.

A person who has a lien on a horse for the expense of its keeping, and who in good faith demands an excessive sum as a condition of delivering possession to the owner, will not thereby lose his lien, in the absence of an actual tender by the owner of the sum actually due, or declaration by the lienor that he will not accept it if produced, or some equivalent act: Supreme Judicial Court of Massachusetts in *Folsom* v. *Barrett*, 62 N. E. 723.

Excessive Demand

It is also held that such lienor can hold the owner of the horse personally liable for expenses incurred after his demand for possession, where it does not appear that the owner has manifested any intent to revoke the contract for keeping the horse, or that he has ever given the lienor to understand that he did not intend some time to discharge the lien.

LIEN (Continued).

Rights of Intervenor

An intervenor who asserts in his petition a general lien in favor of the class of creditors of whom he is one, on securities in the hands of a receiver of the court, may properly be permitted, in the discretion of the court, to amend his petition by alleging a specific lien in his own favor on certain of such securities, growing out of facts which were not known to him at the time he filed his original petition, and to rely upon both liens, the two not being inconsistent: U. S. Circuit Court of Appeals (Eighth Circuit) in *Anthony* v. *Campbell,* 112 Fed. 212.

LABOR UNIONS.

Rival Organizations

Against the dissent of three judges the Court of Appeals of New York holds that where a labor union refuses to permit its members to work with fellow servants who were members of a rival organization, and notifies the employer of that fact, and that a strike will be ordered unless such servants are discharged, with intent to secure only the employment of approved workmen, or to secure the exclusive employment of its members on their own terms, and the employes objected to are discharged, neither they nor the organization of which they are members have a right of action against the union, provided that no force is employed or unlawful act committed: *National Protective Association of Steam Fitters and Helpers* v. *Cumming,* 63 N. E. 369. The case is elaborately considered on both sides and contains an excellent review of the opposing views upon a subject of growing interest.

SLANDER.

Privileged Communications

In *Buisson* v. *Huard,* 31 Southern, 293, the facts showed that aspersions of the defendant upon the plaintiff's character were neither just nor well founded. In view of the fact, however, that the defendant did not originate nor volunteer the matters complained of, but made use of them in answer to inquiries made of him by interested parties, touching defamatory remarks made by other persons, the Supreme Court of Louisiana holds him protected from an action for damages under the rules governing privileged communications. One judge dissents without assigning any reasons.

STATUTE OF FRAUDS.

The Court of Appeals of New York holds in *Ward* v. *Hasbrouck*, 62 N. E. 434, that an agreement for the leasing of premises for four months, with an option for an extension not exceeding three years, is not within the Statute of Frauds, as a contract not to be performed within a year. It is also held that a lease for one year, to take effect in the future, need not be in writing. Two judges dissent without assigning any reason therefor.

Lease with Option of Renewal

TELEGRAPH COMPANIES.

Where the agent of a telegraph company wilfully sent a false and forged dispatch to an unmarried man, purporting to be signed by an unmarried lady, with whom he had a casual acquaintance, requesting him to meet her at a certain town, and afterwards exhibited the telegram and boasted of having sent it, the Supreme Court of Mississippi holds that the act was within the scope of the agent's business, so that the telegraph company was liable for damages arising from the mental suffering caused by injury to her reputation: *Magouirk* v. *Western Union Tel. Co.*, 31 Southern, 206. Compare *Richberger* v. *Express Co.*, 73 Miss. 161, and *Warehouse Co.* v. *Pool*, 78 Miss. 147. It is also held that in such action evidence of the agent's habits as to the use of intoxicants and of his demeanor when under their influence was admissible to show his fitness for his position.

Forged Dispatch

The Supreme Court of Georgia holds in *Western Union Tel. Co.* v. *Flint River Lumber Co.*, 40 S. E. 815, that when one requests another to make an offer for the sale of an article, and the offer is made by telegraph, and the telegram as delivered to the addressee is materially different from the telegram delivered for transmission, the sender is bound by the terms of the proposal as contained in the telegram delivered to the addressee, and may recover from the telegraph company any damages which he has sustained in fulfilling a contract resulting from an acceptance of such proposal. See an article written on the general subject by M. J. Stevenson, Esq., in 54 *Cent. Law Journal*, 23.

Error in Telegram

TORT.

A person cannot make the forced discontinuance of an illegal act simply through threats the foundation of a legal right: Supreme Court of Louisiana in *Prude* v. *Sebastian*, 31 Southern, 764; and applying this general principle it is held that a person cannot claim damages from another for the loss of prospective profits of his business, by reason of his having forced him to discontinue it by threats, where it is shown that the business which was discontinued was the illegal selling of intoxicating liquors without a license.

Damages from Threats

TRUSTS.

It is improper and incompatible with the relation of a *ces tui que* trust towards the trust estate that she should afterwards be appointed trustee: Court of Appeals of New York in Woodbridge v. Bockes, 63 N. E. 362. This principle is applied in this case under peculiar circumstances. A testator gave his residuary estate to the defendant in trust to apply the income thereof to the use of the testator's daughter during her life, remainder to her children. The trustee turned the management of the property over to the daughter's husband under a power of attorney ratified by her, and seventeen years later made over all the real estate included in the trust to the daughter individually, and at the same time she and her children, who were then of age, released the trustee from all liability. Thereupon the daughter was appointed substituted trustee, and some ten years after executing the release, sued the defendant in her capacity *as trustee* to compel an accounting in her own behalf as *cestui que* trust. The court holds that she cannot maintain the action.

Trustee

TRUSTEES.

In *Ahrens* v. *Jones*, 62 N. E. 666, the Court of Appeals of New York deals with the case where in prospect of death, and in order equitably to dispose of his property among those entitled to it, the grantor conveyed it to his wife upon her express promise that she would pay a specific sum to his grandchild, and holds that, while the deed created no express trust, equity would treat the woman as a trustee *ex maleficio*, and compel her to turn over such

Trustee Ex Maleficio

TRUSTEES (Continued).

sum to the grandchild. The court relies principally on the well-known case of *Amherst College* v. *Ritch,* 151 N. Y. 282 (323). Against the decision one of the arguments made was that no trust was created for the reason that the defendant agreed to pay the plaintiff a certain sum of money, and not to turn over to her any portion of the property described in the deed. But the court holds that it must have been intended that the payment should be made out of the property since the grantor had invested his wife with the whole title, so that she had the power to mortgage, lease or sell, and since she had no other property, this fact being specifically alleged.

But in *Monson* v. *Hutchin,* 62 N. E. 788, where a bill alleged the conveyance of a tract of land by complainant to his father, with the understanding that the father should retain the same only for his support, and reconvey either by deed or will, but there was no allegation that the agreement to reconvey was in writing, the bill was held demurrable by the Supreme Court of Illinois, because it was regarded as setting up an express trust, resting in parol, and therefore void by the statute of frauds. The alleged trust, it was held, arose only from the agreement and not from the existence of facts, and consequently was express and not resulting. It is somewhat difficult to reconcile this case in principle with the preceding one.

USURY.

Extension of Mortgage Debt

In *Gantz* v. *Lancaster,* 62 N. E. 413, the Court of Appeals of New York holds that a contract by a mortgagee with one purchasing the premises subject to the mortgage debt to extend the time for its payment in consideration that he assume such debt, and pay a sum above the legal interest for such extension, was usurious. The decision of the Appellate Division, which was reversed, proceeded on the theory that to constitute a valid agreement for the extension of the time of payment of the mortgages in suit, it was necessary that some consideration should be paid, and that by reason of that necessity, the contract to pay a sum in excess of the legal interest was justified: Compare in accord with the final decision, *Perkins* v. *Hall,* 105 N. Y. 539.

WATER COURSE.

Interference

In *Mace* v. *Mace*, 67 Pac. 660, the Supreme Court of Oregon holds that where there is a natural depression in a river bank, with a well-defined channel leading therefrom through which the water is accustomed to flow during the irrigating season, thereby rendering the plaintiff's lands highly productive, the waters flowing through such channel partake of the nature of a natural stream to such extent that the defendant cannot, by damming up such outlet, divert such water to the plaintiff's injury. The court further decides that where in an action to restrain the defendant from obstructing the flow of water through a natural depression to the plaintiff's land, his rights are those of a riparian owner only, and not based on contract or usage, the court cannot decree the maintenance and regulation of artificial works constructed by the defendant, but only the restoration and maintenance of the natural condition: See *West* v. *Taylor*, 16 Or. 165; *Cox* v. *Bernard*, 39 Or. 53.

WAYS.

Way of Necessity

The principle that a way of necessity arises only upon an implied *grant* is well illustrated in the case of *Quimby* v. *Straw*, 51 Atl. 656. In that case two adjoining owners of property agreed to erect their buildings using a party wall between the first story and having no partition on the second story. The Supreme Court of New Hampshire holds that no way of necessity arises in such case for the reason that such a way arises only from an implied grant, and that the agreement to erect the buildings according to the plan on which they were constructed was not a grant of land or of any interest therein.