PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMINISTRATORS.

With two judges dissenting the Supreme Court of Alabama holds in *Jones* v. *Peables*, 32 Southern, 60, that the administrators of an estate have not authority to enter into a contract to mortgage all the crops grown on the estate to pay a mortgage on the land given by their intestate and future advances to be made by the mortgagee to assist in raising the crops. Compare, as supporting in some measure the dissenting judges, *Clark* v. *Knox*, 70 Ala. 622, and *Patapsco Guano Co.* v. *Ballard*, 107 Ala. 710.

Contracts

The Supreme Judicial Court of Massachusetts holds in *Lyman* v. *National Bank of the Republic*, 63 N. E. 923, that where an executor borrows money of a bank for the estate, and pledges stocks and bonds as security therefor, such securities cannot be recovered back by an administrator *de bonis non* without payment of the loan, though the executor drew out the money on a check payable to his own order, and appropriated it to his own use.

Prior Acts of Executors

ASSIGNMENTS.

Where a member of a partnership on being offered an appointment to the public office of boiler inspector accepted it under an agreement whereby the salary was to go to the partnership, and such partner continued to draw living expenses from the partnership, such agreement was not void, as an assignment of an unearned salary as a public officer, but was an agreement as to the application of the salary when paid: Supreme Court of Michigan in *McGregor* v. *McGregor*, 90 N. W. 284. Compare *Thurston* v. *Fairman*, 9 Hun, 584, and *Greenb. Pub. Pol.*, 355. The distinction seems to be a very close one.

Salary of Public Officers

ATTORNEY AND CLIENT.

In *Jones* v. *Haines,* 90 N. W. 518, the Supreme Court of Iowa holds that where an attorney is employed on an understanding that he shall receive no compensation unless he obtains a favorable judgment, and subsequently the client changes his plans as to the proposed course of procedure, such change is sufficient consideration to support an agreement whereby the attorney is to receive in any event, the reasonable value of his services.

Compensation, Contract

BANKRUPTCY.

An assignee under a general assignment for the benefit of creditors, where the assignor is adjudged bankrupt within four months after the assignment, is not entitled to any allowance for his services in the care and preservation of the property, since the assignment, being an act in violation of the bankruptcy law, to which he was a party, he becomes merely the agent of the bankrupt. But such assignee is entitled to an allowance from the estate for the actual and necessary expenses incurred in preserving the property while in his possession, since such expenses would have been provable debts of the estate had they been incurred as such by the bankrupt: U. S. District Court (S. D. West Virginia), *In re Mays,* 114 Fed. 600.

General Assignment, Allowance to Assignee

BILLS AND NOTES.

In *Tichenor* v. *Owensboro Sav. Bank,* 68 S. W. 127, the Court of Appeals of Kentucky holds that where the payor in a note executed for the price of land induced another to buy the note by his representation that he had no defence thereto, and that the note would be paid when due, he is estopped, as against the assignee, to plead a deficit in the land by way of set-off, though he was not aware of the deficit when he made the representation: See *Billington* v. *McColpin* (Ky.), 60 S. W. 923.

Estoppel

BROKERS.

When a broker was authorized to sell land for three dollars per acre net to the owner, and was offered three dollars and fifty cents by a purchaser, who subsequently bought the land of the owner without the broker's intermediation, the broker could not recover fifty cents

Commissions

BROKERS (Continued).

per acre from the purchaser, but his action was against the owner, as it was his duty to sell for the best price obtainable, and account to the owner therefor, less a reasonable compensation: Supreme Court of Arkansas in *Boysen* v. *Robertson,* 68 S. W. 243. Chief Justice Bunn dissents.

BUILDING AND LOAN ASSOCIATIONS.

Rights of Borrowing Stockholder

The dual relation of debtor and stockholder which frequently arises between building and loan associations and investors gives rise to some interesting questions. Thus the Court of Appeals of Kentucky holds in *Wills* v. *Paducah Building and Loan Association,* 67 S. W. 991, that a borrowing stockholder of an insolvent building and loan association, which had made an assignment for the benefit of creditors, was not entitled to credit on her loan for the amount of dues paid on her stock, though she had, before the assignment was made, ceased to pay, and had filed suit seeking to have all her payments applied to the discharge of her debts, as the association had been insolvent for some time before she quit paying, and had been endeavoring to wind up its affairs with a view to liquidation: See *Reddick* v. *Association's Assignee,* 49 S. W. 1075. If the fact of insolvency is to be made the test, numerous cases can be imagined in which it will be difficult of application.

CARRIERS.

Mistake of Conductor

A. purchased a return trip ticket of the B. railway. The ticket was in eight coupons, four for the outward and four for the return trip, each containing a notice that it was void if detached from the signature coupon. On the outward trip the first two conductors tore off coupons from the wrong end of the ticket. The third conductor told A. of the mistake, and delivered to him the coupons which should have been first taken, stating that he could use them in place of those taken. On the return trip the conductor refused to take the detached coupons and on A.'s refusal to pay fare put him off the car. A bec

CARRIERS (Continued).

the next car, paid the fare, forty cents, and rode to his destination. He then sued for breach of contract with aggravated damages. Under these facts the Supreme Court of Michigan holds in *Brown* v. *Rapid Ry. Co.*, 90 N. W. 290, that he was entitled to recover only the forty cents which he was compelled to pay for the extra fare. No authority is cited.

Assault on Passenger

The Supreme Court of Michigan holds in *Johnson* v. *Detroit Y. & A. A. Ry.*, 90 N. W. 274, that the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting within the scope of his employment does not apply between a common carrier of passengers and a passenger, since it is the duty of the carrier to protect its passengers against injury from the wilful misconduct of its servants while performing the contract to carry. The duty of protection of passengers owed by the common carrier has usually been illustrated in the decisions in cases of female passengers. But the principle remains the same in the case of a male passenger and it is here so applied.

Construction Train

A., who had formerly been a railroad employe, when passengers were carried on all trains, purchased a ticket and was accepted by the conductor of a construction train, as a passenger thereon, which was against the defendant's orders, except on official permit of which A. had no notice. He knew nothing about the construction train except that he had ridden thereon before as a passenger, and that other passengers were on the train when he took it. Construction trains were not on the defendant's passenger time tables, but two other freight trains were, and the train in question looked like an ordinary freight train, except that it carried only a single car. Upon this case the Supreme Court of Iowa holds in *Spence* v. *Chicago R. I. & P. Ry. Co.*, 90 N. W. 346, that the conductor had such an apparent authority to accept A. as a passenger that such acceptance made him a passenger, and as such he could recover for injuries caused by the defendant's negligence: Compare *Shoemaker* v. *Kingsbury*, 12 Wall. (U. S.) 369, where the United States Supreme Court reaches a different conclusion on similar, but not identical, facts.

CODE PLEADING.

Petition, Distinct Theory

The difficulties arising from the desire to consolidate actions under the code system, and the tendency of the courts to lean towards methods of the older practice, are constantly appearing in the cases. A new example is presented in *Grentner* v. *Fehrenschield,* 68 Pac. 619, where the Supreme Court of Kansas holds that the plaintiff must frame his petition upon a distinct and definite theory, and upon that theory the facts alleged must state a good cause of action. If the petition is not drawn upon a single and definite theory, or there is such a confusion of theories alleged that the court cannot determine from the general scope of the petition upon which of several theories a recovery is sought, it is insufficient. Compare *Supervisors of Kewaunee County* v. *Decker,* 30 Wis. 624.

CONFLICT OF LAWS.

Limitation of Liability by Carrier

A stipulation in a contract for the carriage of a horse, limiting liability in case of injury from the negligence of the carrier to $100, is held in *Hughes* v. *Pennsylvania R. Co.,* 51 Atl. 990, by the Supreme Court of Pennsylvania, to be against the policy of the state so as not to be enforceable when the injury occurs within the state, though the contract is made outside the state, for carriage from a point without to a point within it by connecting carriers.

It is further held that the interstate commerce act, the object of which is to secure continuous passage and uniform rates, and to compel the furnishing of equal facilities, is not violated by holding a contract for carriage from a point without the state to a point within it invalid, so far as concerns points within the state, in its stipulation limiting the carrier's liability in case of injury from negligence. Two judges dissent from the opinion of the court.

CONNECTING CARRIERS.

Ejection of Passenger

The New York Supreme Court (Appellate Division, First Department) holds, in *Jacobs* v. *Third Ave. R. Co.,* 75 N. Y. Supp. 679, that a street railway company is liable for ejecting a person who presents a transfer ticket from a connecting road, not acceptable under the

CONNECTING CARRIERS (Continued).

of the company because not properly punched, though the mistake was made by an employe of a connecting road, there being a traffic agreement between the two roads, whereby transfers were issued from one to the other. The ground of the decision is that, under the traffic agreement between the two railroads, each conductor acted as agent of the respective railroads in issuing transfer tickets for carriage thereon. See *Minor* v. *Railroad Co.*, 53 N. Y. 363; *Talcott* v. *Railroad Co.*, 89 Hun, 492.

CONSTITUTIONAL LAW.

The Supreme Court of South Carolina holds in *Lowe* v. *Seaboard Air Line Ry. Co.*, 41 S. E. 297, that a statute providing that a common carrier shall pay a penalty of $500 for shipping freight by a route other than that designated by the shipper, is unconstitutional when applied to goods shipped from a foreign state, as in violation of the interstate commerce section of the Federal Constitution.

Interstate Commerce

The Tennessee Code provides that in non-resident attachment proceedings, based on attachment of property and service by publication, "when the property attached is not sufficient to satisfy the recovery, execution may issue for the residue as in other cases." In *Kemper-Thomas Paper Co.* v. *Shyer*, 67 S. W. 856, the Supreme Court of Tennessee, considering this provision, holds that in so far as it attempts to authorize a personal judgment and an execution against a non-served, non-appearing, non-resident for any amount whatever after the appropriation of his impounded property, it is repugnant to the due process of law clause of the fourteenth amendment to the Federal constitution. Two judges dissent.

Attachment against Nonresidents

In *Wilson* v. *Iseminger*, 22 S. C. R. 573, the United States Supreme Court holds that no unconstitutional impairment of the obligation of a contract is made by the provision of the Pennsylvania act, April 27, 1855, § 7, conclusively presuming a release and extinguishment of any irredeemable ground rent on which no payment or demand for payment has been made for twenty-one years, and of whose existence no acknowledg-

Obligation of Contracts

CONSTITUTIONAL LAW (Continued).

ment has been made during that period, even though such provision is applicable to a ground rent reserved before the passage of the act, as the further provision that "this section shall not go into effect until three years from the passage of this act," gave a reasonable time to the owners of such ground rents for preserving their rights.

Damages to Freight

The Supreme Court of South Carolina holds, in *Porter* v. *Charleston & S. Ry. Co.*, 41 S. E. 108, that a statute providing a penalty on common carriers for failure to pay or refusal to pay damages on freight within sixty days is not in violation of the Federal constitution as denying to the carrier the equal protection of the laws, nor is it unconstitutional as in conflict with the interstate commerce clause of the constitution.

CONTRACTS.

Damages

Where a contract of employment of an actor provided for its termination at any time on two weeks' notice by the employer, on an arbitrary discharge on five days' notice by telegram, the damages under the contract could not be more than the two weeks' salary: City Court of New York (General Term) in *Dallas* v. *Murry*, 75 N. Y. Supp. 1040. See *Watson* v. *Russell*, 149 N. Y. 388.

Transferability

The New York Supreme Court (Appellate Division, First Department) holds, in *Collister* v. *Hayman*, 75 N. Y. Supp. 1102, that if theatre tickets are mere personal licenses, given by the proprietor to the purchaser to enter and witness the performance, as it is said the weight of authority indicates, they are not salable or transferable by the purchaser, notwithstanding he has a municipal license therefore.

Making Wills, Specific Performance

Where a husband agreed with his wife, in consideration of the discharge by her of a mortgage on his property, that he would not change, alter or revoke a will theretofore made by him, leaving all his property to her, and after performance by her made a new will, leaving the property in trust to his executor, to pay the income to her for life, and then convey to another, on such last will being probated, such agreement should be enforced

CONTRACTS (Continued).

in equity, by requiring the legal title to be conveyed to her: New York Supreme Court (Appellate Division, First Department) in *Kine* v. *Farrell,* 75 N. Y. Supp. 542.

Option, Specific Performance

In *Caldwell* v. *Frazier,* 68 Pac. 1076, the Supreme Court of Kansas holds that an option contract to purchase is but a continuing offer to sell, and conveys no interest in the property, and that when such a contract is accepted it takes effect from the date of acceptance, and binds the grantee only to a conveyance of the property in its present condition. If, it is said, intervening the offer and acceptance, the improvements thereon are destroyed by fire, equity will not decree a specific performance of the contract with the improvements restored, or with an abatement in price equal to the lost improvements; See *Bras* v. *Sheffield,* 49 Kans. 702.

CORPORATIONS.

Preference to Director, Burden of Proof

In *Pitman* v. *Chicago Lead Co.,* 67 S. W. 946, the Court of Appeals of Kansas City holds that where the directors of an insolvent corporation conveyed property to one of its members in payment of an alleged corporate debt such director has the burden of proving the good faith of the transaction, and that he did not vote for such proposition nor improperly influence his associates to do so; and a showing that the debt was genuine, and that the preference was made by a quorum of the directors without the vote of such director is insufficient. In Missouri it is well settled that an insolvent corporation may prefer its creditors, but the degree of proof sufficient to uphold such a preference in favor of a director is settled by this case: Compare *State* v. *Manhattan Rubber Mfg. Co.,* 149 Mo. 181.

Contracts with Stockholders

A secret contract between a corporation and certain stockholders that, at the end of two years, the corporation will repurchase their stock at a 10 per cent advance, is void as to creditors of the corporation, the capital stock being a trust fund for the benefit of creditors; and such stockholders are not entitled to file a claim against the corporation for the amount of such repurchase price in proceedings to wind up the affairs of the corporation: Supreme Court of Illinois in *Olmstead* v.

CORPORATIONS (Continued).

Vance & Jones Co., 63 N. E. 634. See, in connection with this case, *Clapp* v. *Peterson*, 104 Ill. 26; *Bank* v. *Burch*, 141 Ill 519.

DEEDS.

Delivery, Statute of Frauds

A vendor of realty, having secured the cash payments and notes for the purchase price, executed a deed which he retained, in order that his wife who was ill at the time, might subsequently sign it. The vendee went into possession, and the vendor assumed that he had title to the notes. The Supreme Court of Tennessee holds, under these facts, that no title passed because there was no delivery of the deed, and that the deed could not be regarded as a memorandum satisfying the statute of frauds, and entitling the vendee to specific performance: *Wilson* v. *Winters*, 67 S. W. 800. The court regards such a memorandum as incomplete without delivery. Compare an apparent exception to this view in *Bowles* v. *Woodson*, 6 Grat. 78.

EVIDENCE.

Criminal Law, Admissions

It is frequently said that statements made in the presence of a person accused of a crime charging him with the commission of it, if uncontradicted by him, are admissible in evidence against him. This almost seems like manufacturing testimony, for on the other hand, if he voluntarily answers, his replies would be evidence. In *People* v. *Young*, 76 N. Y. Supp. 275, the New York Supreme Court (Appellate Division, First Department) takes a somewhat different view from that ordinarily suggested and holds that evidence that after defendant's arrest a statement of a third person connecting him with the murder was read to him, and that he said nothing, is not admissible against him as an admission; the officer in charge cautioning him that he was not required to speak, as anything he said might be used against him, and telling him that the statement was to inform him of the nature of the evidence against him. The attending circumstances make the actual decision somewhat weak, but the policy of the general rule may be questioned: See *People* v. *Kennedy*, 164 N. Y. 449.

EVIDENCE (Continued).

Entries in Books

In *Meyer* v. *Brown,* 90 N. W. 285, the Supreme Court of Michigan holds that on the question of weight of wood shipped by the plaintiff to the defendant, books of the railroad in which are copied in the regular course of business the weights of cars, from the cards on which the weights are first entered under the supervision of the weighmaster, he comparing the entries in the books with the cards, after which the cards are destroyed, are competent, the weighmaster being called to authenticate them: See *Lassone* v. *Railroad Co.* (N. H.), 24 Atl. 902.

Illegitimate Children

In Iowa following the policy of some of the states an illegitimate is allowed to inherit from the father in case he has recognized it either publicly and notoriously or in writing (Code § 3385). In applying this provision of the Code the Supreme Court holds in *Britt* v. *Hall,* 90 N. W. 340, that declarations by a deceased parent recognizing an illegitimate child are admissible as declarations against interest in an action by the child against the father's executor to be allowed to inherit; but declarations denying paternity are not admissible.

Slander

In an action for slander, words spoken at different times before suit brought, though not declared on, may be given in evidence to show the intent with which the words declared on were spoken; but words spoken after suit brought cannot be given in evidence, for they may be the ground of another action: Supreme Court of Appeals of West Virginia in *Swindell* v. *Harper,* 41 S. E. 117. See *Morgan* v. *Livingston,* 2 Rich. 573, and *Howell* v. *Cheatham,* Cooke, 247.

Impeachment of Witness

The Supreme Court of Arizona holds, in *Qualey* v. *Territory,* 68 Pac. 546, that where the court below erred in sustaining an objection to a question seeking to lay the foundation for impeachment of the witness by evidence of prior conversations of the witness, such error is harmless and not ground for reversal, when it is not followed by an offer to establish such conversations. "Were this cause reversed and a new trial granted for the reason assigned, there is no showing in the record indicating that the witness would or could be impeached in the manner indicated by the question excluded by the court." Compare *Snead* v. *Tietjen,* 24 Pac. 324.

EVIDENCE (Continued).

Statements by an Ex-Official

In an action against a municipal corporation for injuries from a defective sidewalk, statements by an ex-councilman as to what knowledge he had of the defect while a member of the city council, were not admissible, as he could not bind the city after the termination of his term: Supreme Court of Oregon in *Adkins* v. *City of Monmouth,* 68 Pac. 737.

FIXTURES.

Title to Realty

In *Schellenberg* v. *Detroit Heating and Lighting Co.,* 90 N. W. 47, the Supreme Court of Michigan holds that, where machinery is purchased by a husband under a contract, that title is to remain in the seller till paid for, and it is installed by the seller at the request of the husband on real estate held in the name of the husband and wife, the want of unity of title to the machinery and ownership of the land prevents the machinery from becoming a part of the realty, and it may be removed by the seller.

INFANTS.

Compensation of Attorney

Attorneys who have represented a minor in litigation are entitled to a lien on his recovery for a reasonable compensation: Supreme Court of Tennessee in *American Lead Pencil Co.* v. *Davis,* 67 S. W. 864. But they cannot have the amount of their fees fixed on an *ex parte* application to the court.

INJUNCTIONS.

Mutuality

In *Philadelphia Ball Club* v. *Lajoie,* 51 Atl. 973, a case of considerable newspaper notoriety, the Supreme Court of Pennsylvania holds that a contract of employment of a ball player for a season, giving the employer a right of renewal of the contract for three succeeding seasons, by notice given before the close of each current season, and providing for termination of the contract on ten days' notice, and providing that the employe may be enjoined from playing for another during the continuance of the contract, these provisions being declared part of the consideration for the agreement to pay the stipu-

INJUNCTIONS (Continued).

lated salary, is not lacking in mutuality of remedy, or so unreasonable as to prevent the issuance of an injunction, the contract having been partly performed and the employer being desirous of its continuance.

In general the court holds that, to authorize an injunction restraining an employe from rendering services for another contrary to his contract of employment, it is necessary that they be of such a unique character, and display such a special knowledge, skill and ability, as to render them of peculiar value to the employer and difficult of substitution.

INTOXICATING LIQUORS.

The Supreme Court of Kansas holds, in *State* v. *Cairns*, 68 Pac. 621, that the agent of an express company, who in good faith delivers to the assignee, or upon his order, goods carried by his principal, consigned C. O. D., and collects the charges thereon, is not guilty of selling intoxicating liquors to the purchaser, or his order, though he has reason to believe or knows the goods so consigned and delivered to be intoxicating liquors. In such case, it is held, it is the consignor who delivers the intoxicating liquor to the carrier upon an order from the consignee that makes the sale, and the sale is made at the place of delivery to the common carrier. The important bearing of this decision upon the question of the relation of the carrier to traffic which the state seeks to control is obvious. See also *Com.* v. *Fleming*, 130 Pa. 138, and *State* v. *Flanagan*, 38 W. Va. 53, 17 S. E. 792.

Delivery by Express Company

JUDGMENT.

In *Cahnmann* v. *Metropolitan St. Ry. Co.* 75 N. Y. Supp. 970, the New York Supreme Court (Appellate Term) holds that where a firm recovered a judgment against a street railroad company for damages to the firm's horse and wagon, caused by the negligence of the street railroad company, and the question of the company's negligence and the contributory negligence of one of the firm, who was driving the team, had been litigated in that

Res Judicata

JUDGMENT (Continued).

action, the judgment rendered therein in favor of the firm is admissible in the driver's favor, in an action brought by him alone to recover for personal injuries received. Compare *House* v. *Lockwood,* 137 N. Y. 259, and authorities there cited.

LEASE.

The Surrogate's Court of Kings County, New York, holds, *In re Henshaw,* 75 N. Y. Supp. 1047, that a covenant of a lessor to buy, at the termination of the lease, the buildings remaining on the premises, is personal to the lessor, and does not run with the land nor bind heirs or legaties. Compare *Tallman* v. *Coffin,* 4 N. Y. 134. The court says: "The general theory of contracts of character similar to this is that, where there is no specific provision making it a covenant running with the land, then it can be admitted as a personal covenant only.

Covenants of Lessor

LIMITATIONS.

In *Farm Inv. Co.* v. *Wyoming College and Normal School,* 68 *Pac.* 561, the Supreme Court of Wyoming holds that a creditor responsible for the loss of collateral security notes by the bar of the statute of limitations is chargeable with the value thereof as of the date of the bar, and not of the date of the collateral's maturity, as had the notes been collected after maturity, the date of collection would be the date of credit to the principal debtor.

Collateral Security Notes

MECHANIC'S LIEN.

The City Court of New York (Trial Term) holds, in *Berger Mfg. Co.* v. *Zabriskie,* 75 N. Y. Supp. 1038, that a provision in a lease that the tenants shall make all repairs, etc., is not such a consent on the part of the landlord that a third party shall furnish labor and materials as to give the latter a mechanic's lien therefor, especially in the absence of any notice or knowledge on the

Liability of Landlord

NEGLIGENCE.

Contributory Negligence

The difficulty in developing a standard of due care in negligence cases appears in *San Antonio & A. P. Ry. Co.* v. *Gray*, 67 S. W. 763, where the court is confronted with the question of how far danger to human life will render an act not negligent which is generally held to be so. The Supreme Court of Texas there holds that, where the plaintiff was injured while running *on a railroad track* to rescue his child, who was in danger of being run down by an approaching train, the fact that he was wrongfully on the track when he discovered his child's peril does not make him a trespasser in his subsequent efforts to save his child; nor was it under such circumstances contributory negligence for him to run back along the track towards the train in an effort to save the child. See *Spooner* v. *Railroad Co.*, 115 N. Y. 22; *Becker* v. *Railway Co.*, 61 S. W. 997.

PROXIMATE CAUSE.

Nervous Prostration

In *Watson* v. *Dilts*, 89 N. W. 1068, the Supreme Court of Iowa holds that recovery may be had for nervous prostration from fright, caused by the defendant's trespassing, by stealthily entering, in the nighttime, plaintiff's home; this being a physical injury, and in the view of the court, the proximate result of the wrong. Some of the cases bearing upon this question will be found reviewed in *Braun* v. *Craven*, 175 Ill. 401. See, also, note in *Ewing* v. *Railway Co.* (Pa.), 14 L. R. A. 666.

RENT.

Action by Executor

In *Shell* v. *West*, 41 S. E. 65, the Supreme Court of North Carolina holds that an executor renting devised land can recover the rents, notwithstanding the claim of the devisee, on showing that the rents are required to pay the testator's debts. See *Moore* v. *Shields*, 68 N. C. 332.

STATUTE OF LIMITATIONS.

Pleading

In *Talbot* v. *Sioux National Bank*, 22 S. C. R. 621, the United States Supreme Court holds that a petition which shows on its face that the action was not commenced within the statutory period, may be met by a demurrer, and the statute of limitations need not be set up in an answer or plea.

SUBMERGENCE OF LAND.

In *Hughes* v. *Birney's Heirs,* 32 Southern, 30, the Supreme Court of Louisiana holds that if, after submergence, the water disappears from the land either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks or by situation, extent, quantity or boundary lines, the proprietorship remains in the original owner. And it is said: "No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship:" See *City of St. Louis* v. *Rutz,* 138 U. S. 226.

Reappearance, Ownership

TELEGRAMS.

In North Carolina among others the following rights of action do not survive: "Causes of action for false imprisonment, assault and battery, or other injury to the person, where such injury does not cause the death of the injured party." The fact that this provision has its counterpart in the legislation of most of the states renders the decision of the Supreme Court of North Carolina in *Morton* v. *Western Union Tel. Co.,* 41 S. E. 484, of more than local interest. It is there held actions for injury to the person include an action against a telegraph company to recover for mental anguish caused by its delay in delivering a telegram.

Right of Action, Survival

USURY.

Against the dissent of three judges the Court of Appeals of Kentucky holds in *Blakeley* v. *Adams,* 68 S. W. 473, that in an action on a note executed by the obligor to reimburse the payee for money paid as the obligor's surety the obligor is not estopped to plead that the debt paid by the surety embraced usury, and to resist a recovery to that extent, unless it is made to appear that he stood by and permitted the surety to pay the debt in ignorance of the fact that it embraced usury.

Payment by Surety

WATERS AND WATERCOURSES.

Riparian Owners

The fact that the waters of a water course find their source in springs situated on land owned by a person, does not justify him in erecting a dam on his land by which the water is spread out, and in consequence of evaporation less than formerly flows to the riparian proprietors below: Supreme Court of California in *Barneich* v. *Mercy,* 68 Pac. 589. The property rights of such land owner, it is held, are lost after the water has passed into the water course. See, upon the subject, *Eddy* v. *Simpson,* 3 Cal. 253.

Underground Channels, Evidence

The difference in the rules of law governing underground water which flows in a defined channel and such as does not is well settled. In *Board of Supervisors of Clarke County* v. *Mississippi Lumber Co.,* 31 Southern, 905, the Supreme Court of Mississippi holds that underground waters are presumed to be percolating, and therefore, in order to enable one to maintain rights in them such as he would have in a surface stream, it must be shown that they flow in a well-defined and distinct underground channel, the existence of which is known or easily ascertainable: See the note to *Wheelock* v. *Jacobs* (Vt.) 43 L. R. A. 105.

WAYS.

Way by Necessity

The right to a way of necessity over the lands of a grantor existing in favor of the grantee, because the land granted is surrounded partially by the land of the grantor and elsewhere by the land of strangers, is not affected by a contract of sale of part of the surrounding lands of the grantor, made prior to the conveyance to the grantee, and of which he had no notice: Supreme Court of Iowa in *Fairchild* v. *Stewart,* 89 N. W. 1075.

WILLS.

Restraints on Alienation

Whether it is possible to give a person a fee simple interest in land and at the same time limit it over upon his death in case he does not alienate or will it, is a question of some doubt. It arose in *Kelley* v. *Hogan,* 76 N. Y. Supp. 5, where the New York Supreme Court

WILLS (Continued).

(Appellate Division, First Department) holds, with one judge dissenting, that it may not be done on the ground that the limitation over was repugnant to the former provision, and was void as an attempt to limit the estate after a previous disposition thereof.

The question of how long alienation may be prevented comes before the Court of Appeals of Kentucky in *Wallace* v. *Smith,* 68 S. W. 131, where it is held that a provision of a will that land devised to an infant shall not be sold until he is thirty-five years old is an absolute condition of the devise, and not a mere request or suggestion, and not being an unreasonable restraint of alienation, is valid. In Gray, Restr. Alien. Prop. § 52, it is said: "The actual state of the law in the United States is as follows: It has often been said that a condition against alienation confined to a limited period is good, but such remarks have been *obiter dicta* without any reasoning or citation of authorities." It is further said: "The weight of authority, and especially of reasoned authority, is against the validity of restraints upon alienation, however limited in time." The court however in the present case refused to adopt Professor Gray's view, and the decision is as above stated.

In *Simpson* v. *Millsops,* 31 Southern, 912, the Supreme Court of Mississippi holds that where a will directed that the income of the *corpus* of the estate should be paid to certain beneficiaries for life, increase in the value of stock owing to the earnings of the corporation after the testator's death having been withheld by the corporation and carried to the surplus, instead of distributed as dividends, was income and belonged to the life beneficiaries. The argument of counsel for appellants, in whose favor the decision of the court is rendered, is an elaborate and exhaustive review of the authorities on the subject, the court saying: "The authorities on all phases of this question are presented and discussed with absolute fairness and much ability in the written argument of solicitors for appellants."

Income, Stock Earnings