PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ALTERATIONS.

Liability of Maker of Note

In *Bank of Herington* v. *Wangerin,* 70 Pac. 330, the Supreme Court of Kansas discusses the conflict in the cases upon the subject of alterations of negotiable instruments and holds that where a negotiable instrument is delivered to a payee, complete in all its parts, the maker thereof is not liable thereon, even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution. Nor, it is said, is such maker bound at his peril to guard against the commission of such forged alteration by one into whose hands such instrument may come. But see *Brown v.* Reed, 79 Pa. 370, and compare *Bank* v. *Burns,* 129 Mass. 596.

ATTORNEYS.

Right to Compensation

An attorney at law representing a party having a case pending in court became ill, and was unable to attend. With the consent of his client he called on another lawyer to argue the case, but nothing was said about compensation for his services. There was a written contract between the attorney first mentioned and the client, by the terms of which it was agreed that the former should conduct the litigation for a stipulated fee. Of this contract the counsel appearing in court had no knowledge. In an action against the client for compensation by the counsel representing him, the Supreme Court of Kansas holds in *Allen* v. *Parrish,* 70 Pac. 351, that the written contract was inadmissible in evidence on behalf of the defendant, and that the right to recover for services could not be affected by an understanding between the first attorney and the client that the attorney appearing would do so without charge. See *Brigham* v. *Foster,* 7 Allen, 419.

BANKS.

Dishonor of Check, Damages

In an action against a bank to recover damages for its wrongful refusal to honor a depositor's check, the Court of Appeals of Kentucky holds that the plaintiff, who at the time her check was dishonored was pursuing a special study in a strange city, may recover for any time she lost or any expenses she incurred, or for any loss of credit, of business, or of instruction that she sustained, by reason of the dishonor of the check; but only compensatory damages are to be allowed and she may not recover for humiliation or mortification of feelings: *American National Bank* v. *Morey,* 69 S. W. 759. And also the fact that the plaintiff had a nervous chill when her check was protested and returned to her is not to be considered in estimating the damage, as the chill was not such a thing as should reasonably have been anticipated from persons of ordinary health and strength. On the other hand it is said: "There is something more than a breach of contract in such cases; there is a question of public policy involved, as was said in *Bank* v. *Mason,* 95 Pa. 113, 40 Am. Rep. 632; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages."

CANCELLATION OF DEED.

Return of Consideration

The Court of Appeals of Kentucky holds in *Call* v. *Shewmaker,* 69 S. W. 749, that a grantor seeking a cancellation of his deed on the ground that it was procured by fraud, and also on the ground that it was inconsistent with the provisions of the will under which the land was held, need not tender back the consideration received, as the defendants had for many years had the use of the land, which even for a year was worth much more than the whole consideration given, they having in consequence received rents amounting to more than such consideration.

A similar late decision is made by the Supreme Court of Illinois in *Taft* v. *Myerscough,* 64 N. E. 711, where it is held that where the consideration for a note is entirely worthless corporate stock, it is not necessary for the maker to offer to return the same in order to maintain the defence of total failure of consideration.

CARRIERS.

In *Myers* v. *Southern Ry. Co.*, 42 S. E. 598, the Supreme Court of South Carolina holds that where a passenger bought a limited ticket, but missed the connecting train at a junction, and took the next train after the time limit had expired, there is sufficient evidence to go to the jury on the question of exemplary damages, where the conductor, after full explanation, collected fare on threats of expulsion.

Limited Ticket

In Kentucky it is provided by statute that all railroad companies shall open their ticket offices and waiting rooms for the passengers at least thirty minutes preceding the schedule time for the departure of all passenger trains. The similarity of statutes of other states to this one makes the holding of the Court of Appeals in Kentucy in *Illinois Central Railroad* v. *Laloge*, 69 S. W. 795, of more than local interest. It is there decided that such a statute fixes what is a reasonable time for the carrier to be required to care for passengers before they have taken actual passage, and, therefore, where the plaintiff was assaulted in the waiting room of the station about three hours before the schedule time for the departure of the train upon which she proposed to take passage, the company was not liable in the absence of any contract, express or implied, to accommodate her for a longer time than that fixed by statute. Compare *Phillips* v. *Railway Co.*, 124 N. C. 123.

Protection of Passengers

CHECKS.

In a cash sale of cotton the seller accepted the buyer's check in payment. The buyer sold a part of it to a third party, drawing his draft on him for the payment, and depositing it, with the bill of lading, to his credit in the bank on which the check was drawn. The bank credited the draft to the buyer's account, and honored checks drawn by him, until his credit was reduced below the amount of the check held by the seller, without knowledge that he had bought the cotton on an agreement to pay cash. Under these facts the Supreme Court of North Carolina holds in *Perry* v. *Bank of Smithfield*, 42 S. E. 551, that the seller could not maintain an action against the bank for the purchase money. See *Finch* v. *Gregg*, 126 N. C. 176. One judge dissents, but unfortunately writes no dissenting opinion.

Action by Holder

CONSTITUTIONAL LAW.

Regulating Hours of Employment

The questions arising under the clause of the Constitution forbidding any state to deprive a person of life, liberty or property without due process of law, furnish the most interesting problems in modern constitutional law, with the exception, perhaps, of the questions arising out of the relations of the United States with its insular possessions. In *State* v. *Buchanan,* 70 Pac. 52, the contention was made that the state law there in question interfered with the liberty of contract, but the Supreme Court of Washington holds that an act providing that no female shall be employed in certain business establishments more than ten hours in a day does not violate this constitutional provision, but is within the police power of the state. Compare on the other hand *In re Morgan,* 26 Colo. 415, and see *Holden* v. *Hardy,* 169 U. S. 366.

Delegation of Legislative Power

In *United States* v. *Blasingame,* 116 Fed. 654, the U. S. District Court (S. D., California) holds that a provision of an appropriation act, making it a crime to violate any rule or regulation thereafter to be made by the Secretary of the Interior for the protection of forest reservations, is void, as in substance and effect an attempt to delegate legislative power to an administrative officer. Compare the principles laid down in *Field* v. *Clark,* 143 U. S. 649, and *In re Kollock,* 165 U. S. 526, though the decision reached held that there had been no delegation of legislative power.

CONTEMPT.

Applying Abusive Epithets to Judge

Readers of the REGISTER are already familiar from the newspaper accounts with the strong stand taken by the U. S. Circuit Court in West Virginia in reference to the action of the miners in that district during the recent coal strike. A case growing out of this situation is the case of *United States* v. *Gehr,* 116 Fed. 520, where it is held that a man who came into a federal district from a distant state for the purpose of inciting a strike among miners, and who there publicly denounced the judge of the district for his official action in granting an injunction, using abusive language, and applying opprobrious epithets to him personally is guilty of a contempt of court.

CONTRACTS.

Consideration, Parol Evidence

In *Arnold* v. *Arnold,* 70 Pac. 23, it appeared that the plaintiff alleged that he and the defendant having been partners, the plaintiff transferred his interest solely that the defendant might conveniently handle the business, and the prayer was for a dissolution and an accounting. The defence was that there had been a dissolution and transfer for value. The plaintiff had introduced a written instrument between him and the defendant reciting a dissolution and a transfer for value. Notwithstanding the general rule that the true consideration or want of consideration may be shown by parol, the Supreme Court of California holds it proper not to allow the plaintiff to testify that the instrument was without consideration. The evidence, it is said, was not admissible on the theory that the consideration might be shown by parol, owing to the confidential relation of partnership, no unfairness or suppression of knowledge being averred. Compare *Hendrick* v. *Crowley,* 31 Cal. 472.

Services of Son, Validity

In *New* v. *Southern Ry. Co.,* 42 S. E. 391, it is held by the Supreme Court of Georgia that a contract whereby a father hires his minor son to another, and releases him from all liability for "damages for any injuries sustained" by the son while in the employer's service will, when such contract can, under the facts of a case arising thereunder, be properly treated as valid and binding, defeat a recovery by the father for the loss of the value of the son's services during minority, even where such loss is occasioned by the homicide of the minor. And further such a contract, though made with a railroad company, is valid and binding to the extent of exempting the latter from liability for negligent acts of itself or servants which are not criminal. It seems hardly in line with the trend of authority to hold that a stipulation, as above, includes injuries due to negligence.

CORPORATE ASSETS.

Jurisdiction of Equity

In *Henderson* v *Hall,* 32 Southern, 840, the Supreme Court of Alabama holds that where stock subscribers to a corporation, intending to defraud the corporation and hinder its creditors, sold their stock to a nonresident, not believing, and having no reason to believe, that the buyer was able to perform his promise to pay the

CORPORATE ASSETS (Continued).

subscription notes, a judgment creditor of the corporation has no standing in equity to compel the original subscribers to pay their subscription notes. The creditor, it is said, should proceed at law by garnishment.

CORPORATIONS.

Purchase of Stock, Equitable Jurisdiction

Although a contract for the sale of shares of stock cannot be specifically enforced (*Cud* v. *Rutter,* 1 Peere Wms. 570), the Supreme Court of Georgia holds in *Thornton* v. *Martin,* 42 S. E. 348, that where one purchases shares of stock in a railroad company, and the vendor and the agents of the company refuse to recognize the validity of the sale or to allow a transfer on the books of the company, the purchaser may bring an equitable proceeding against the vendor and the company to restain the former from disposing of the stock or interfering with its transfer, and to compel the company to make the transfer and receive the purchaser as a shareholder; and these two causes of action, the one against the company and the other against the vendor, may be joined.

DIVERSITY OF CITIZENSHIP.

Action by Guardian

The question of diversity of citizenship in its relation to federal jurisdiction presents some interesting questions when one of the parties sues or is sued in a representative capacity. Under the statutes of Iowa the appointment of a guardian for a minor or an insane person does not vest the guardian with title to the property of his ward or to a cause of action existing in his favor, but only with the right to manage and control the ward's property, and to prosecute actions in his behalf and for his benefit. In consequence it is held in *Wilcoxen* v. *Chicago, B. & Q. R. Co.,* 116 Fed. 444, that in an action brought by a guardian for an insane person appointed by a court of Iowa, the ward is the real party plaintiff, and his citizenship, and not that of the guardian controls with respect to the jurisdiction of a federal court or the right of removal. See notes to *Shipp* v. *Williams,* 10 C. C. A. 249; *Mason* v. *Dullagham,* 27 C. C. A. 298.

HUSBAND AND WIFE.

Torts of Wife

The Supreme Court of California holds in *Henley* v. *Wilson,* 70 Pac. 21, that the husband's liability for the torts of his wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, is not changed by the fact that under the statutes she may have a separate estate and may manage it. "It matters not what was the origin of the common law doctrine; its rule is settled and exists independently of the grounds on which it originally rested." See *Van Maren* v. *Johnson,* 15 Cal. 312.

Note for Husband's Debt

In *Johnston* v. *Gulledge,* 45 S. E. 354, the Supreme Court of Georgia holds that if a promissory note, owned by a wife, is given in pledge to secure a debt which is in part that of the wife and in part that of the husband, and such parts are readily ascertainable, though it be invalid as to the part of the debt due by the husband, the pledge is valid as to the part of the debt which is due by the wife, and the pledgee is entitled, when the note is due, to recover from the maker. Compare *Jones* v. *Harrell,* 110 Ga. 373, where a married woman signed a note to cover partly her own and partly her husband's debt, and the court made a similar decision.

INJUNCTION.

Restraining Water Company from Shutting off Water

The general principle that equity will ordinarily not compel specific performance of a continuing contract or of one for personal services is held by the Supreme Court of Georgia not to apply to the state of facts presented by *Edwards* v. *Milledgeville Water Co.,* 42 S. E. 417. In that case it is decided that where a petition for an injunction against a company owning and operating a system of waterworks showed that the defendant and the plaintiff entered into a contract by the terms of which the plaintiff was to bear the entire expense of the material and labor necessary to conduct water from the company's main to his residence, as well as the cost of the necessary plugs, faucets, etc., and to pay the company a stated amount per annum for the use of the water, and the company on its part was to furnish him with the water during a term of years, which still extended far into the future; that the plaintiff had expended a large sum of money in having a pipe laid from the company's

INJUNCTION (Continued).

nearest water main to his residence, and all the connections made, and faucets placed, and had for several years been using the water, and paying "his water rental promptly;" that the company had lately notified him that, unless he made with it a new contract, agreeing to pay a much larger sum annually for the use of the water, it would sever the connection between its main and his private pipe, thereby depriving him of the use of the water,—a case was stated for the grant of an injunction prohibiting the defendant from executing his threat. See, also, *Callery* v. *Waterworks Co.*, 35 La. Ann. 798.

Against Employing Others

The converse of the famous case of *Lumley* v. *Wagner*, 1 De C. McN. & G. 604 (followed by *Daly* v. *Smith*, 49 How Pr. 150, and other cases), appears in *Stone Cleaning and Pointing Union* v. *Russell*, 77 N. Y. Supp. 1049, where it is held that an injunction will not lie to restrain a breach of contract to employ only members of a certain stone cleaners' and pointers' union, since the employment is not unique or extraordinary. The novelty of the attempt to restrain the employer instead of the employe is commented on by the court, it being pointed out that the plaintiff's attorney fails to cite a single case restraining an employer, and then it is held that the distinction applicable where an injunction is sought against the employe holds against the employer.

INSANITY.

Irresistible Impulse

The Supreme Court of Florida in *Davis* v. *State*, 32 Southern, 822, enters into a careful discussion of insanity as a defence to crime. The rule laid down in *McNaghten's Case*, 10 Clark & F. 209-211, is approved, and it is held that the tendency of some modern courts to recognize that phase of insanity known as "irresistible impulse," as a defence, should not be favored and will not be supported in that court.

JUDGMENTS.

Conclusiveness

The Supreme Court of South Carolina holds in *Holstein* v. *Board of Com'rs of Edgefield Co.*, 42 S. E. 180, that where the United States Circuit Court declares a statute authorizing townships to subscribe bonds in aid of a railroad constitutional, the Supreme Court

JUDGMENTS (Continued).

of the state will give full credit to such judgment, and refuse to enjoin the corporate authorities of such township from carrying into effect such judgment, though such court had previously declared similar acts unconstitutional. The decision is based upon the theory that such a holding is required by the section of the Constitution providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state:" *McCullough* v. *Hicks,* 63 S. C. 542, having held that this constitutional provision is applicable to the judgment of a circuit court of the United States.

NAVIGABLE WATERS.

In *McCauley* v. *City of Philadelphia,* 116 Fed. 438, the U. S. District Court (E. D., Pennsylvania) holds that a city, although charged by statute with the duty of keeping the channels of navigable streams within its limits free from obstructions, cannot be held liable for injuries caused by a sunken wreck, where the owners had contracted with a wrecking company to raise the vessel, and the company was prosecuting the work with diligence, using such appliances as were in common use for the purpose, and apparently, even in the opinion of experts, with prospect of success, although the attempt ultimately resulted in failure. The city's duty, it is said, was "to watch the work that was being done, and to use due care to see that it was prosecuted with diligence and with proper appliances."

Obstructions; Liability of City

NUISANCE.

In *Duffy* v. *E. H. & J. A. Meadows Co.,* 42 S. E. 460, the Supreme Court of North Carolina, dealing with the question of the degree of inconvenience sufficient to justify a nuisance, holds that a guano manufactory, though it may largely use undeodorized decayed fish in its processes is not a nuisance *per se,* unless it is so situated as to affect the health or comfort of the community by means of its odors. The fact that odors carried a great distance by the wind are "unpleasant and objectionable" is not sufficient ground for interference by the court with the establishment from which they arise.

Offensive Odors

PARTIES.

Joining Judge in order to Disqualify Him

A complaint in partition made the judge of the Superior Court a party defendant, and alleged that he claimed to have some interest in the land, but that he had no interest therein. After service of the summons on the judge, without answering or appearing in the cause, he, of his own motion, and without notice to any party, caused an order to be made and entered striking the complaint from the files, reciting that the allegations therein as to him were false, deceitful, and abusive of the process of the court, and made for the sole purpose of disqualifying him in the trial of the action. Under these facts the Supreme Court of California holds in *Younger* v. *Superior Court of Santa Cruz,* 69 Pac. 485, that since a judge should not sit or act in an action to which he is a party, or in which he is interested, he could not thus arbitrarily determine that he was not a party and not interested in the action, even if the plaintiff was guilty of contempt in making the judge a party for the purpose of disqualifying him. See a thorough discussion of the question of striking a pleading from the files as a punishment for contempt in *Hovey* v. *Elliott,* 167 U. S. 409.

PARTNERSHIP.

Contribution by Special Partner

In *Moorhead* v. *Seymour,* 77 N. Y. Supp. 1050, the affidavit in relation to the constitution of a special partner in a certain firm declared that his contribution had been actually and in good faith paid in cash. It appeared that the "cash" was "paid" in the following way: The firm obtained money from a third person giving him its note therefor; it then gave the special partner its check, and he gave it back his check for a like amount, and thereupon a large part of the money was paid back to the person from whom the firm obtained it. The City Court of New York holds that under these facts the special partner has made no contribution of capital.

Dissolution by Death

The Supreme Court of Georgia holds in *Bass Dry Goods Co.* v. *Granite City Mfg. Co.,* 42 S. E. 415, that the surviving partner or partners have the right, under the law, to wind up the partnership affairs; and if, in so doing one partner, acting as a surviving partner and traveling salesman, sells to a third person goods which have already been sold by a resident surviving partner, and which for this reason, cannot be delivered, neither the partnership

PARTNERSHIP (Continued).

assets nor the estate of the deceased partner can be held liable for the failure to deliver the goods to the purchaser from the traveling partner.

PLEDGES.

In *Colton* v. *Oakland Bank of Savings*, 70 Pac. 225, the Supreme Court of California holds that where B. pledged stock to A., and A. pledged it to C., and B. treated it as a conversion, and put in a claim for the value of the stock against A.'s assignee, he cannot recover the value of the stock of C. on the theory that B.'s title was not effectually pledged by A. to C., but any right to recover is on the assumption that A. converted the stock by his pledge thereof, and thus, in connection with the payments to B., his title was acquired by the assignee.

Conversion, Assignment

PRESUMPTIONS.

In *Kane* v. *Rochester Ry. Co.*, 77 N. Y. Supp. 776, the N. Y. Supreme Court (Appellate Division, Fourth Department) holds that where the evidence in an action for personal injuries shows that an alleged injury is not apparent from objective symptoms, but will be disclosed by an X-ray examination, and the plaintiff introduces a physician who testifies that he made such examination, but fails to show the result thereof, the defendant is entitled to an instruction that the jury may assume that the testimony of the witness, if given, would have been adverse to the plaintiff, even though the fact of such examination was called out by the defendant, who could have examined the witness as to the result of the examination.

Failure to Introduce Evidence

RAILROADS.

The U. S. Circuit Court (N. D., Iowa) holds in *O'Brien* v. *Chicago, etc. Ry. Co.*, that a state, through whose legislative consent alone a railroad company derives the right to construct and operate a railroad within its territory, may attach to such consent conditions for the protection of the lives and property of those who may be subjected to risk through the operations of such roads, and as one of such conditions it may lawfully abrogate as to railroad companies, by a general law applicable to all companies operating roads within the state, the common-law rule which exempts a master from liability for

Abrogation of Fellow-Servant Rule

RAILROADS (Continued).

injuries resulting from the negligence of fellow-servants. Compare *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. Co.*, 175 U. S. 91.

STATUTE OF LIMITATIONS.

Against the dissent of two judges, the Supreme Court of Kansas holds in *Missouri, etc. Ry. Co.* v. *Bagley*, 69 Pac. 189, that where the original petition states no cause of action whatever, it will not arrest the running of the statute of limitations, and an amendment made after the bar of the statute is complete must be treated as filed at the time the amendment is made. A cause of action, being then stated for the first time, cannot escape the bar of the statute of limitations by being filed as an amendment. Compare with this result *Coffin* v. *Cottle*, 16 Pick. 383 and *Webb* v. *Hicks*, 125 N. C. 201, cited by the dissenting judges as opposed to the view of the majority.

Pleading, Amendment

SURETY.

The Court of Appeals at Kansas City, Mo., holds in *Springfield Lighting Co.* v. *Hobart*, 68 S. W. 942, that where a surety executed a bond, conditioned that his principal would faithfully fulfill a certain contract whereby it agreed to furnish power for an electric light company to operate its apparatus, and afterwards the electric light company was consolidated with another company, and a new corporation formed, the surety continued liable to the new corporation for the performance of the contract.

Liability, Discharge

TRIAL.

With one judge dissenting (Judge Acheson) the U. S. Circuit Court of Appeals, Third Circuit, holds in *Carstairs* v. *American Bonding and Trust Co. of Baltimore*, 116 Fed. 449, that under the Pennsylvania practice a reservation of "the question whether there is any evidence to go to the jury in support of the plaintiff's claim" is a good reservation of a question of law; and the entering of judgment for the defendant on such reserved point, notwithstanding a verdict for the plaintiff, is within the province of the court, being practically equivalent to the direction of a verdict. The dissenting judge regards this procedure an "unwarrantable departure from the constitutional provision" that in certain cases trial shall be by jury.

Reserved Question of Law