PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

CARRIERS.

In *Texas Mexican Ry. Co.* v. *Gallagher,* 70 S. W. 97, the Court of Civil Appeals of Texas holds that where in an action for damages to cattle shipped on defendant's railway, the plaintiff alleged that the shipment was under an oral contract with the defendant's agent, and that the written contract afterwards signed by him, limiting defendant's liability to its own line was executed under circumstances constituting duress, but it appeared that at the time of the alleged oral contract, he had knowledge of a rule of the defendant requiring all its shipments to be made under a written contract, he was not entitled to recover on the oral contract. See *Railroad Co.* v. *Wright,* 58 S. W. 846.

Contract of Carriage

CODE PLEADING.

In general the states which have adopted the Reformed Procedure provide that a counterclaim may be interposed by the defendant to the plaintiff's demand when it is a cause of action in favor of the defendant against the plaintiff arising out of the contract or transaction set forth in the complaint. The question of when a cause of action is regarded as arising out of the same transaction as that relied on by the plaintiff is one that has not been satisfactorily cleared up by the decisions. In *Patterson* v. *Bradley,* 69 S. W. 821, the Court of Appeals of Indian Territory holds that under this provision, in an action to recover for threshing defendant's grain, his claim against the plaintiff for damages for negligently setting fire to and burning other grain while doing such threshing may be set out in the answer as a counterclaim.

Counterclaim

CONSTITUTIONAL LAW.

Religious Exercises in Schools

The constitution of Nebraska contains a provision to be found in some form or other in all, or nearly all, the state constitutions or laws, namely, that "no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational expenses." It is held in *State* v. *Scheve*, 91 N. W. 846, that exercises by a teacher in a public school in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity are forbidden. The principal ground upon which the decision is based is that different translations of the Bible being accepted or rejected by different sects, it is impossible to have reading from it without such reading taking on a sectarian character. One judge dissents from this view, refusing to regard the translation as sectarian in character, and holding that the provision did not intend to exclude the Bible from the schools. He concurs in the result on the ground that the *manner* of conducting the exercises in the particular case was of a sectarian nature.

CONTRACTS.

Mistake as a Ground of Avoidance

A woman compromised and released a claim for a broken hip. She knew when she settled that her hip had been broken and that it was a bad break. She was induced by the statement of her own physician, who was also the company's physician, to believe and did believe that she would be well within a year, and she settled upon that basis. She was mistaken, and her injury and disability turned out to be permanent. Under these facts the United States Circuit Court of Appeals (Eighth Circuit) holds in *Chicago & N. W. Ry. Co.* v. *Wilcox*, 116 Fed. 913, that her mistake furnished no ground for an avoidance of her release. A mistake of a past or present fact, it is said, may warrant a rescission of a contract of settlement or release. But a mistake in opinion or belief relative to the future duration or effect of a personal injury is not a mistake of fact, and is no ground for the avoidance of a release or of a contract of settlement.

CONTRACTS.

In *Daily* v. *Minnick*, 91 N. W. 913, the Supreme Court of Iowa holds that the privilege of naming a child is a valid and legal consideration for a promise to convey land to the child. Where parents contracted to allow a relative to name their child in consideration of his agreement to convey land to the child, and the child was named, and continued to bear the name down to the bringing of the suit to obtain the land, he thereby ratified the contract made for him by his parents, and there was sufficient privity between him and the promisee to entitle him to sue. Nor, it is said, was the contract void for want of mutuality. A further objection was raised that the contract was indefinite and the consideration past in view of the following facts. The relative agreed to convey forty acres of land, and at the time of the agreement he did not own any land which could be appropriated to the contract, but after the child was named he purchased a particular forty acres of land, and thereafter by his declarations and otherwise, showed that he intended to appropriate such land to the fulfillment of the contract. The court holds that the original consideration, though past, was sufficient to support such new agreement made by the deceased after purchasing the land, so as to render the contract enforceable. One judge delivers a strong dissenting opinion.

Consideration, Enforcement

In *Reindl* v. *Heath*, 91 N. W. 734, it appeared that the defendants contracted to deliver a certain number of logs to be sawed by the plaintiffs, and the plaintiffs agreed to saw for no other parties during the season. The Supreme Court of Wisconsin holds that the fact that the plaintiffs sawed for other parties during the season, such sawing not interfering, however, with their work for the defendants, did not justify the defendants in refusing further delivery of logs, it being merely the breach of an independent stipulation. Compare *Proprietors* v. *Hovey*, 21 Pick. 437, and *Tipton* v. *Feitner*, 20 N. Y. 425.

Independent Stipulations

CONVERSION.

The test which determines whether one was a willful or an innocent trespasser is not his violation of or compliance with the law, but his honest belief and actual intention at the time he committed the trespass, and neither a justification of his acts nor any other complete

Timber, Willful Act

CONVERSION (Continued).

defence to them is essential to establish the fact that he was not a willful trespasser: U. S. Circuit Court of Appeals (Eighth Circuit) in *United States* v. *Homestake Min. Co.*, 117 Fed. 481. This is said with reference to its application in regard to the measure of damages, whether the value of the trees when standing, or their value after cut down, which depends upon whether the trespass is willful or innocent.

CORPORATIONS.

Retirement of Preferred Stock for Bonds

The plan of the United States Steel Corporation to substitute bonds for preferred stock gave rise to litigation already reported to a great extent in the daily press. One of the cases of interest is *Berger* v. *United States Steel Corporation*, 53 Atl. 14, in which the Court of Chancery of New Jersey holds that the reasonableness or judiciousness of a plan for the reduction of corporate capital stock by exchanging bonds therefor with the consent of the stockholders, and through the medium of a banking concern, when viewed in its business aspect is a matter wholly subject to the decision of the members and stockholders; and such decision will not be interfered with by the court upon the opposition of a dissenting stockholder except on the ground that the plan is clearly illegal. Preferred stock of a corporation was by its certificate made a first lien on all its assets. It was proposed to issue corporate bonds to an amount equal to two-fifths of the preferred stock, to be exchanged for preferred stock with such holders of preferred stock as consented to the exchange. These bonds were to be secured by a lien prior to that of the preferred stock. The court applying the principle stated above holds that as stockholders not consenting to the proposed exchange would be deprived of their vested right of precedence in distribution, to the extent of the capital represented by the bond issue, the plan was illegal. This decision was reversed on appeal to the Court of Errors and Appeals of New Jersey: *Berger* v. *United States Steel Corp.*, 53 Atl. 68, the court holding that the minority stockholder must abide by the decision of the majority in reference to a policy of management determined by them, and that under the law the majority have a right to create a lien prior to that of the preferred stockholders.

CORPORATIONS (Continued.)

Insolvency, Preference

The Supreme Court of Indiana in *Nappanee Canning Co.* v. *Reid, Murdock & Co.*, 64 N. E. 870, lays down the rule generally that an insolvent private manufacturing corporation may prefer its directors, or creditors on whose claims the directors are sureties, though their votes are necessary therefor, and though loss is thereby caused to persons having claims against the corporation, the directors owing no duty to the creditors. It is not surprising to find a dissent, but rather surprising that it is on the part of but one judge. Compare *Sargent* v. *Webster*, 13 Metc. 497.

CRIMINAL LAW.

Communication between Judge and Jury

After a jury had retired to deliberate on a verdict, the foreman sent a communication to the judge, asking if the jury could recommend the defendant to the mercy of the court, which the judge answered in the affirmative, and stated that he had made it an invariable rule to follow such recommendations. The Supreme Court of South Dakota holds in *State* v. *Kiefer*, 91 N. W. 1117, that such communication was prejudicial error. But affidavits of jurors that the communication by the judge in answer to a question submitted after the submission of the cause influenced their verdict of conviction, are not admissible for the purpose of impeaching the verdict.

DEEDS.

Charging Land with Restrictions

In *Evans* v. *New Auditorium Pier Co.*, 53 Atl. 111, the Court of Chancery of New Jersey holds that where the several owners of lots fronting on a beach and extending to high-water mark join in a deed granting to a city, for their own benefit and that of the public, a continuous strip across them at the ocean edge for a walk, with a covenant that no building shall be erected to the oceanward of the strip, this restriction attaches in favor of another grantor, to lands below high-water mark owned by one of the grantors, who had acquired the state's title thereto. See also *Atlantic City* v. *New Auditorium Pier Co.*, 53 Atl. 99, and *Atlantic City* v. *Atlantic City Steel Pier Co.* (N. J. Ch.), 49 Atl. 825.

EQUITY.

Injunction, Intoxicating Liquors

In Maine a statute authorizes the Court of Equity to interfere by injunction to abate a nuisance arising from the unlawful sale of liquor. In *Davis* v. *Auld,* 53 Atl. 118, the Supreme Judicial Court of Maine holds, against the dissent of two judges, that this act is not unconstitutional; that the fact that the disobedience by the defendant of the injunction in such suit is *ipso facto* a criminal offence, subjecting him to punishment for the crime, does not exempt him from other punishment by the court for disobedience of its injunction as for contempt. The operation of the statute, it is said, is not to punish for past criminal acts, nor to enjoin from the commission of criminal acts in the future, but is to prevent the further continuance of a present, existing, continuous nuisance or hurt, a statute of the state having declared a place where intoxicating liquors were sold contrary to law to be a common nuisance. See *Carleton* v. *Rugg,* 149 Mass. 550, for an exhaustive discussion of the question as to how far the right to a jury trial is involved in such a situation.

Suit by Creditors

The Supreme Court of Wisconsin holds in *Oppenheimer* v. *Collins,* 91 N. W. 690, that where creditors sue to subject to their claims the debtor's interest in the estate of an intestate, the burden is on them to show no property of the value of the claim which can be reached by execution, and a return on execution of *nulla bona* is a *prima facie* showing of the exhaustion of legal remedies, entitling the creditor to proceed in equity. See *Davelaar* v. *Investment Co.,* 110 Wis. 470.

EVIDENCE.

Contradiction of Witness

The Court of Appeals of Kentucky holds in *Cox* v. *Commonwealth,* 69 S. W. 799, that while the declaration of the father of the accused to the mother of the deceased (the trial being for homicide) that no one regretted the killing more than he did, and that he would prefer, if such a thing were possible, that it were his boy that was shot, as he had always been a bad unruly boy, was not admissible as substantive testimony, it was admissible to contradict the statement of the father as a witness that the accused was at the date of the homicide and previous thereto insane. And it is further held that while the

EVIDENCE (Continued).

court should have instructed the jury as to the purpose of the testimony, its failure to do so was not materially prejudicial.

Parol Evidence Rule

The express agreement to pay contained in a promissory note of the usual form constitutes such instrument a complete contract, importing on its face an absolute obligation, as to which a reservation of right not to pay is contradictory: Supreme Court of Kansas in *Thisler* v. *Mackey*, 70 Pac. 334. It is, therefore, held that the parol evidence rule applies, and that oral evidence of a contemporaneous agreement to surrender the note without payment, in rescission of the contract pursuant to which it was given, is inadmissible. See, however, *Babcock* v. *Deford*, 14 Kans. 408.

Physical Examination of Accused

In *State* v. *Height*, 91 N. W. 935, the Supreme Court of Iowa holds that a compulsory physical examination of a person accused of a crime for the purpose of ascertaining if he is affected with a disease alleged to have been communicated to the prosecutrix at the time of the commission of the crime, is in violation of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law," and all evidence with reference to information secured by such examination is inadmissible. The court goes into a careful consideration of the subject, and reviews the authorities bearing upon it. "The only case," it is said, "sustaining the right to require disclosure of those parts of the person not usually exposed is that of *State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, where it was held not improper to require the exposure of the forearm to discover tattoo marks for identification, and even in this case it is said that accused should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever."

EXCHANGES.

Property Right in Quotations

In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 116 Fed. 944, the U. S. Circuit Court (W. D., Missouri) holds that the Board of Trade of the city of Chicago has at least a qualified property right in the quotations made on its exchange based on transactions between its members and gathered by its

EXCHANGES (Continued).

own employes, and in their distribution, and in such right it is entitled to protection by a court of equity, as against one who obtains and uses such quotations without complying with reasonable regulations established by it as a condition to the right of others to receive and use its quotations. The regulations which are held reasonable are that the quotations shall not be used in the conduct of a "bucket shop," and that they shall be for the private and individual use of the applicant and the business in which he is engaged. The defendants had refused to comply with these requirements.

FEDERAL COURTS.

Jurisdiction

A state cannot by legislation confer a substantive right or remedy in the way of a suit *inter partes* upon its own citizens that will not be available to the citizens of the other states, nor can it by any device restrict such right or remedy thus made available to enforcement in its own courts, the conditions of citizenship being such that it would otherwise be enforceable in the federal courts: U. S. Circuit Court of Appeals (Seventh Circuit) in *Williams* v. *Crabb,* 117 Fed. 193. So it is held that where the statutes of a state confer upon a state court of equity original jurisdiction of suits to contest the validity of a probated will, a circuit court of the United States has concurrent jurisdiction of such a suit in which the amount in controversy is sufficient and the parties are citizens of different states. Compare *Darragh* v. *Manufacturing Co.,* 23 C. C. A. 609. "By any other view," it is said, "it would be in the power of a state by legislation to deprive citizens of other states either of the new right or remedy given by the state statute or of the forum granted by the federal constitution and laws. The citizen of another state cannot be compelled to make such election, or to accept a remedy upon condition that he forego the constitutional forum to which he would otherwise be entitled."

FELLOW SERVANT.

Concurring Negligence

The U. S. Court of Appeals (Eighth Circuit) holds in *Cudahy Packing Co.* v. *Anthes,* 117 Fed. 118, that where a servant is injured owing to the negligence of the master in furnishing proper appliances for an elevator, the negligence of a fellow servant in the opera-

FELLOW SERVANT (Continued).

tion of the elevator does not relieve the master from liability. See also *Clark* v. *Soule,* 137 Mass. 380, and the late case of *Loveless* v. *Standard Gold Min. Co.,* 42 S. E. 741.

FRAUD.

Concealment

The general question of how far a party is bound to disclose facts within his own knowledge relating to a contract is stated as a general principle in *Thomas* v. *Murphy,* 91 N. W. 1097, where the Supreme Court of Minnesota holds that if a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated.

GIFTS.

Validity, Duebills

In *Ross* v. *Walker,* 32 Southern, 934, the Supreme Court of Florida holds that where the subject-matter of an alleged gift consists of a debt due the donor by the donee, evidenced by duebills, and no receipt for the debt is actually given, and no credit entered, and where the evidence of the debt is not cancelled, destroyed, delivered to the donee, or otherwise placed beyond the control of the donor, no valid gift is effected. Until consummated in the manner stated, the transaction amounts to no more than a promise to give, which being without a valuable consideration, will not be enforced by the courts.

HOMICIDE.

Justification, Belief of Necessity

The Supreme Court of Florida, adopting the well-settled rule that the belief of the accused as to the apparent necessity to kill in order to save his own life or protect him from great personal injury, must be based upon facts and circumstances justifying such belief, holds in *Lane* v. *State,* 32 Southern, 896, that where the evidence authorizes the submission to the jury of this question, the actual belief of the accused is material, and it is error to refuse to permit him who is permitted by statute to become a witness in his own behalf, to testify to his belief based on such facts and circumstances. One judge dissents, holding that the evidence is irrelevant. The case

HOMICIDE (Continued).

presents a careful discussion of this point as well as of other questions in reference to justifiable homicide.

HUSBAND AND WIFE.

In *Johnson* v. *Mutual Life Ins. Co. of Kentucky,* 69 S. W. 751, it is held by the Court of Appeals of Kentucky that where a husband and his wife conveyed property which was the wife's separate estate to one who at once reconveyed the property to the husband, each conveyance reciting a cash consideration, a subsequent purchaser from the husband was not charged with notice of the fact that the transaction was only colorable, and intended to evade a provision of the instrument creating the estate, by which the wife was prohibited from selling or incumbering the property for any debt of the husband. As against a subsequent innocent purchaser, a married woman is estopped to deny the recital of her deed conveying her separate property, to the effect that she had received the cash consideration recited. See *Scarborough* v. *Watkins,* 9 B. Mon. 540, and *Connolly* v. *Braustler,* 3 Bush, 702. The advance taken in the case in hand is that whereas the former cases concerned the general estate of married women, this case applies the same principles to their separate estate. "Estoppel," says the court, "operates not so much upon the estate as upon the conscience."

Recitals in Deed

ILLEGITIMATES.

The Supreme Court of North Carolina holds in *Fowler* v. *Fowler,* 42 S. E. 563, that where, by the laws of the domicile of the parents at the time of the birth of their illegitimate child, and of their marriage, their marriage legitimates him, the legitimacy attaches at the time of the marriage, he being a minor, and goes with him wherever he goes. See Story, Confl. Laws (8th Ed.), §§ 93, 93 v, and *Ross* v. *Ross,* 129 Mass. 252.

Status

INFANTS.

The Supreme Court of Illinois holds in *Illinois Cent. R. Co.* v. *Jernigan,* 65 N. E. 88, that a child under the age of seven years is, as a matter of law, incapable of contributory negligence. This, it is said, is in analogy to the rule of the common law which exempted children under the age of seven years from criminal responsibility. See also *Railway Co.* v. *Tuohy,* 196 Ills. 410.

Contributory Negligence

LANDLORD AND TENANT.

In *Rowlands* v. *Voechting*, 91 N. W. 990, it appeared that the defendant leased a farm to the plaintiff, the lease providing that the plaintiff should pay in lieu of rent half of the income of the farm. The premises were placed in the exclusive possession of the plaintiff, and the lease used the technical words, "lease, demise, and let." Under these facts the Supreme Court of Wisconsin holds that the relation of landlord and tenant existed and that the title to the crops was in the tenant, with the right of disposition, and he could recover of the landlord for a taking by him of part of the crops from the premises. Compare *Strain* v. *Gardner*, 61 Wis. 174.

Title to Crops

LIMITATIONS.

The Supreme Court of Kansas holds in *Wilcox* v. *Eadie*, 70 Pac. 338, that when a promissory note, and trust deed given as security, contain an option authorizing the owner to declare the entire debt due upon default in the payment of interest, and the exercise of this option by an agent, before the maturity of the paper is relied upon to support a plea of the bar of the statute of limitations, it must be shown, to establish the defence, that the agent was authorized to declare the paper due before maturity; and proof that such agent received payments of interest, and wrote a letter attempting to declare the option, is not sufficient evidence of authority. See *Lester* v. *Snyder*, 55 Pac. 613. The case in hand shows an advance upon the general rule that though a mortgagee has authorized an agent to collect interest, and to receive payment of the principal when due, the agency does not extend to receiving payment of the principal before maturity.

Action on Note

MAILS.

The U. S. Circuit Court of Appeals (Eighth Circuit) holds in *Bankers' Mutual Casualty Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 117 Fed. 434, that a railroad company carrying the United States mails, whether under contract or by virtue of the requirements of the constitution and laws, is not in respect to such service a common carrier, but is a public agent of the United States, employed in performing a governmental function and as such it is liable for its own negli-

Railroads as Carrying Agents

MAILS (Continued).

gence, but not for the negligence or tortious acts of its subordinates or employes in the selection of whom it has exercised ordinary care. For another recent case upon the same matter see *Boston Ins. Co.* v. *Chicago, R. I. & P. R. Co.*, 92 N. W. 88.

MALICIOUS PROSECUTION.

In an action for malicious prosecution, a requested instruction that by malice is meant special or particular malice; not general malice, but particular malice against the plaintiff; and that, before the plaintiff could recover, he must prove that the defendant was prompted by particular malice toward him in procuring his arrest, etc.—was proper, and its refusal was error:—Supreme Court of North Carolina in *Savage* v. *Davis*, 42 S. E. 571.

Particular Malice

MECHANICS' LIENS.

In a suit to enforce a mechanic's lien, it appeared that the principal debtors had been discharged of the debt by proceedings in bankruptcy under the federal act of 1898, after steps to affix the lien had been taken by the plaintiff. The Court of Appeals at St. Louis, Missouri, holds that the discharge of the bankrupt debtor did not defeat the lien: *Holland* v. *Cunliff*, 69 S. W. 737: "The principle," says the court, "on which this result must rest is that a discharge in bankruptcy does not extinguish the debt, but merely confers a personal immunity from the enforcement thereof. Hence, any valid lien already imposed on property to secure the debt, at the time when the bankruptcy proceeding became effective, continues in undiminished vigor, unless the bankrupt law itself or our own positive law abates it. The lien in question is not of that class." See 14 Am. & Eng. Enc. Law (2d Ed.), 774; *Insurance Co.* v. *Jackson*, 12 Gray, 114.

Bankruptcy

MORAL CERTAINTY.

The Supreme Court of California in *People* v. *Huntington*, 70 Pac. 284, approves the following instruction: "Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it." Three judges dissent from this view on the gen-

Instructions

MORAL CERTAINTY (Continued).

eral ground that "Instructions on the general subject of reasonable doubt should be confined to the language that has been frequently approved;" that the instruction in question was an unnecessary innovation, lacking in precision and clearness and leading to confusion.

NAVIGABLE WATER.

The Supreme Court of Tennessee adhering to the well-settled rule in this country that the test of the navigability of a stream in the legal, technical sense of the term is whether or not it has capacity for the usual purposes of navigation, holds in *Webster* v. *Harris*, 69 S. W. 782, that in determining the navigability of a body of water under this test, it must be considered in the condition it was at the time of the determination with all the natural obstructions existing in it at the time; and conditions as they might be altered by engineering skill and the expenditure of money in the removal of obstructions cannot be considered.

Test of Navigability

NEGLIGENCE.

In Illinois the statute law provides that whoever willfully disturbs the peace and quiet of any neighborhood or family by loud or unusual noises shall be fined, etc. The Supreme Court of Illinois construing this statute holds in *Gilmore* v. *Fuller*, 65 N. E. 84, that members of a charivari party, engaged in serenading a bridal couple with tin horns, sleigh bells, and firearms, are engaged in an unlawful enterprise, and that where a member of such party was negligently shot by another member of the party, there could be no recovery for the injury, because it was the result of the unlawful enterprise in which the parties were jointly engaged. See *Heland* v. *Lowell*, 3 Allen, 407.

Unlawful Enterprise

NUISANCE.

With two judges dissenting the Court of Appeals of New York holds in *Bly* v. *Edison Electric Illuminating Co. of New York*, 64 N. E. 745, that a tenant in possession of premises injuriously affected by the operation of an electric lighting plant, though the lease was made during the existence of the nuisance, can sue to abate the same. Such tenant in possession, suing to

Action by Lessee, Damages

NUISANCE (Continued).

recover damages for a nuisance, can recover the depreciation in the rental value of the premises occasioned thereby. The case presents a thorough review of the principles involved on both sides. See the *Kemochan Case,* 128 N. Y. 568, and *Hine* v. *Railroad Co.,* 128 N. Y. 571.

PARENT AND CHILD.

In a controversy for the custody of a child between its mother, who voluntarily parted with its custody, and a party who took it before it was two weeks old, and cared for it with parental solicitude up to the time of the suit,—a period of several years,—the question as to whom the custody should be awarded must be determined by a consideration of the child's welfare in the light of all the circumstances: Supreme Court of Iowa in *McDonald* v. *Stitt,* 91 N. W. 1031.

Custody of Child

A man and his wife being advanced in years, deeded their property to their son, taking a bond secured by a mortgage, for a certain sum, conditioned that the son furnish the parents support in the same house, and as members of the son's family during their lives. Upon a breach of the condition by the son, the Supreme Court of Wisconsin holds that the parents were not restricted to their remedy on the bond and mortgage, but equity would regard the performance of the condition as a condition subsequent, a breach of which would cause a reversion of title: *Wanner* v. *Wanner,* 91 N. W. 671. Compare with this case *Glocke* v. *Glocke* (Wis.) 89 N. W. 118.

Bond for Support

PARTNERSHIP.

The Supreme Court of Pennsylvania holds in *Sturgeon* v. *Apollo Oil & Gas Co.,* 53 Atl. 189, that where a limited partnership association is duly created by three persons, who hold themselves out as limited partners, two of them are estopped to assert subsequently that the third has no interest in fact in the firm. Thus a limited partnership association was formed by three persons, each having a nominal division of the capital stock. The capital was borrowed by two of the parties from a limited partnership which they controlled. The money thus borrowed was thereafter paid out of the profits. The court holds that the

Limited Partnership

PARTNERSHIP (Continued).

other partner was entitled to his share when the partnership was ultimately dissolved, though he had made no actual contribution to the capital. See *Rowley's Appeal,* 115 Pa. 150. Where three persons form such a limited partnership, the third partner cannot be excluded from the profits on the allegation that his name was used merely because a third person was required under the statute, when the articles were recorded in successive years in which he was held out to the world as an actual partner.

PHYSICIANS.

Skill Required

The Court of Appeals of Kentucky discussing the measure of skill required from a physician, reverses the lower court in *Burk* v. *Foster,* 69 S. W. 1096, and holds that the care and skill required of a physician in treating a patient is not to be measured by that exercised by "ordinarily skilful and prudent physicians in that [particular] vicinity in treating a like injury," but by such as is exercised generally by physicians of ordinary care and skill in similar communities. It is also said that the mere fact that the result of a patient's treatment "is as good as is usually obtained in like cases similarly situated" will not preclude a recovery by the patient against the physician for negligence and lack of skill, the patient being entitled to the chance for the better results which might come from proper treatment.

QUITCLAIM DEED.

Construction and Effect

The owner of a building conveyed three inches of land to an adjoining owner, with the right to use his party wall, in consideration of a covenant by the grantee, stipulated to run with the land that she would not during a specified time use the building to be erected for a saloon. A dispute arose as to the title to a portion of the lot, and the grantor executed and delivered for a consideration a quit claim deed of her entire lot, including the portion in dispute, without any reservation as to the building restriction. Against the dissent of three judges the Court of Appeals of New York holds in *Uihlein* v. *Matthews,* 64 N. E. 792, that the building restriction was thereby removed. Nor is evidence admissible of acts and conversations between the parties to a quitclaim deed, before its delivery, in order

QUITCLAIM DEED (Continued).

to show that it was not intended thereby to release a building restriction in a prior deed to a part of the same land. See *Jenks* v. *Quinn,* 137 N. Y. 223.

RAILROADS.

The Court of Civil Appeals of Texas holds in *Denison & Sherman Ry. Co.* v. *Randell,* 69 S. W. 1013, that where, in an action for malicious assault and ejecting of a passenger from a street car, it was shown that the conductor was prosecuted before a justice, and that the railroad defended him by its attorneys, and that its general manager was present at the trial, and paid the conductor's fine, and that he was retained in the company's employ after the assault, a finding that the company ratified the conductor's acts was justified.

Ejection of Passenger, Ratification by Company

RELEASE.

In *Carroll* v. *Missouri K. & T. Ry. Co. of Texas,* 69 S. W. 1004, it appeared that a servant, after being injured, returned to his work, and a few days later executed a release of claim for damages, in consideration of the master's agreement to employ him for such time only as might be satisfactory to the master, he knowing of the master's rule not to keep in its employ one injured in its service unless he executed a release. He worked for a month longer, receiving pay therefor, and then left voluntarily. Under these facts the Court of Civil Appeals of Texas holds that though the agreement to give employment for an indefinite time was no consideration for the release, yet the employment given after the release was under the contract of employment evidenced thereby, and was a sufficient consideration for the release. Compare *Railway Co.* v. *Scott,* 72 Tex. 70.

Consideration

STOCK DIVIDENDS.

Where a dividend has been declared by a corporation on its capital stock, payable in new stock certificates, based on accumulated profits, it is received as income by the stockholders, and not capital. Court of Appeals of New York in *Lowry* v. *Farmers' Loan & Trust Co.,* 64 N. E. 796.

Income