PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

AFFINITY.

Husband and Daughter of Deceased Wife

The Supreme Court of Alabama decides in *Tagert* v. *State,* 39 S. 293, that under the State Criminal Code, which defines incest as the intermarriage of or sexual intercourse between persons within the degrees of consanguinity or relationship within which marriages are declared by law to be incestuous, and void, with knowledge of such consanguinity or relationship, and the Civil Code which provides that "no man shall marry the daughter of his wife," marriage or sexual intercourse between a man and the daughter of his deceased wife is incestuous where there is living issue of the marriage, which, it is held, continues the affinity between the husband and the wife's blood relations. Compare *Jacques* v. *Commonwealth,* 10 Grat. 690.

AGENCY.

Evidence of Authority

In *McClung* v. *McPherson,* 82 Pac. 13, the Supreme Court of Oregon decides that failure of a tenant to object to the introduction in evidence of a notice to quit signed by his landlord's attorneys, concedes the attorneys' authority to sign the notice but does not admit the sufficiency of the notice, which it is the province of the court to determine. Compare *Lowe* v. *Bliss,* 24 Ill. 168.

APPEALS.

In *State ex rel. Case* v. *Lyons,* 39 S. 214, the Supreme

Court of Alabama decides that where, pending an appeal from a judgment denying a petition for mandamus to compel the restoration of relator to an office from which he was illegally removed, he was legally removed, the appeal will be dismissed. Compare *California* v. *San Pablo etc. R. R.,* 149 U. S. 308.

Dismissal

ATTORNEY AND CLIENT.

In *Goodin* v. *Hays,* 88 S. W. 1101, the Court of Appeals of Kentucky holds that where an attorney under contract for employment is discharged without cause, he is entitled to recover for the services rendered at the contract price, abated by such sum as reasonably represents the unperformed part of the services; and where he is discharged for cause he can only recover a reasonable compensation for his services, without regard to the contract price. Compare *Henry* v. *Vance,* 111 Ky. 72.

Compensation

BANKRUPTCY.

The United States Court of Appeals, Eighth Circuit, decides *In re Habegger,* 139 Fed. 623, that the kind of legal services to be performed for which an insolvent debtor contemplating bankruptcy proceedings may contract and make payment for in money or by a transfer of property, under the provisions of section 60d of the Bankruptcy Act of 1898, are such services as are rendered in aid of the purpose sought to be accomplished by the act, conserve and benefit the estate of the bankrupt, and thus inure to the benefit of the creditors, or are such legal services as are contemplated by the act in bringing the bankrupt estate before the court, its subsequent administration and distribution to the creditors, and the like. Compare *Randolph* v. *Scruggs,* 190 U. S. 533.

Legal Services

BANKRUPTCY (Continued).

Assessment for Unpaid Stock Subscriptions

The power of the Bankruptcy Court in dealing with the estate of a corporation is illustrated *In re Remington Automobile & Motor Co.,* 139 Fed. 766, where the United States District Court (N. D. New York) decides that an agreement between a corporation and a person to whom it issues stock that only a certain per cent. of its par value shall be paid therefor, and that no more shall be called for or paid, is in fraud of creditors of the corporation, and may be set aside, and an assessment made upon the holders of the stock for the difference between the amount paid and its par value by a court of bankruptcy on application by the trustee in bankruptcy of the corporation. Compare *Handley* v. *Stutz,* 139 U. S. at page 427.

BILLS AND NOTES.

Negligence of Drawee

The Supreme Court of Tennessee decides in *Farmers' & Merchants' Bank* v. *Bank of Rutherford,* 88 S. W. 939, that a bank on which a forged cheque is drawn in the name of a customer, whose signature is well known to it, is negligent, where the cashier does not examine the signature closely, but passes the cheque, relying on previous indorsements. The Court further holds that an indorser of negotiable paper, does not warrant to the drawee the genuineness of the maker's signature, but such warranty only extends to subsequent holders in due course of trade. Compare *People's Bank* v. *Franklin Bank,* 88 Tenn. 299.

CARRIERS.

Conversion: Re-shipment

The Supreme Court of Alabama decides in *Stafsky* v. *Southern Ry. Co.,* 39 Southern, 132, that where a buyer, to whom goods are consigned, wrongfully refuses to receive them on their arrival within a reasonable time, the seller is authorized to rescind the sale, and the carrier is not guilty of conversion in complying with

the seller's orders to ship the goods back to him. It is further held that where a carrier tenders goods to the consignee, and the latter denies ownership or obligation to receive the same, and the carrier, in reliance on such denial, returns the goods to the shipper, on the latter's orders, the consignee is estopped to sue the carrier for conversion. With this decision compare *Bacharach* v. *Chester Freight Line,* 133 Pa., 414.

Termination of Liability

It is held by the Supreme Court of Rhode Island in *Vaughn* v. *New York, N. H. & H. R. Co.,* 61 Atl. 695, that where a carrier permits the consignee of merchandise to open the cars containing the same after they have been placed on a spur track near the consignee's warehouse, and to remove part of the contents thereof, and exercise and retain dominion over the same, and puts his own locks on the cars, the carrier's liability, as such, for the merchandise in the cars, is terminated. It is further decided that where the consignee of merchandise has accepted such a delivery thereof, and sold and removed some of the goods, the fact that some merchandise still remains in the carrier's cars for the convenience of the consignee does not impose any liability as warehouseman on the carrier. Compare *Richardson* v. *Goddard,* 23 How. 28.

Who Are

The question of the extent to which a person owning a building is responsible for the safety of persons using an elevator operated therein occurs not infrequently in present-day cases. A new consideration of this matter appears in *Edwards* v. *Manufacturers' Bldg. Co.,* 61 Atl. 646, where the Supreme Court of Rhode Island decides that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers is not a common carrier, nor bound to the same degree of care as that imposed upon a common carrier, but is bound only to exercise reasonable care for the safety of those who enter upon his premises and use the elevator. Compare *Griffen* v. *Manice,* 166 N. Y. 197.

CONSTITUTIONAL LAW.

The Court of Appeal, Third District of California, decides in *Ex parte Finley,* 81 Pac. 1041, that a provision of the code that every person under life sentence in a State prison, who with malice aforethought commits an assault on the person of another with a deadly weapon or instrument, or by means of force likely to produce great bodily injury, is punishable with death, is not unconstitutional, as inflicting cruel and unusual punishment, or as depriving such convict of life or liberty without due process of law or as depriving him of the equal protection of the laws. See also *State* v. *Lewin,* 37 Pac. 169.

Equal Protection of the Law

In *Gould* v. *Gould,* 61 Atl. 604, the Supreme Court of Errors of Connecticut decides that a law forbidding marriage by an epileptic while the woman is under the age of forty-five years is constitutional. The case presents a very elaborate and interesting discussion of the questions involved. It is further decided in this connection that where one was induced by fraudulent concealment to marry an epileptic, such marriage being forbidden by statute, the person so deceived is entitled to a divorce on the ground of fraudulent contract. Compare *Bissell* v. *Davison,* 65 Conn. 183, 29 L. R. A. 251.

Marriage: Epileptics.

In *People ex rel. Bolt* v. *Society for Prevention of Cruelty to Children,* 95 N. Y. Supp. 250, the New York Supreme Court (Special Term, New York County) decides that a child on whom an assault has been committed is not, when committed to the custody of a charitable institution as a witness against the assailant, under the Penal Code, deprived of his constitutional liberty. He is not, the court says, within the meaning of the constitutional provision, deprived of his liberty at all, but rather for his own welfare is intrusted temporarily to the care and custody of a society organized for such kindred purposes and recognized as a state agency.

Deprivation of Liberty

CONSTITUTIONAL LAW (Continued).

Local Legislation

A very interesting and important decision of the Supreme Court of Pennsylvania in reference to local legislation appears in *Sample* v. *Pittsburg*, 212 Pa. 533, where it is decided that the Act of April 20, 1905, P. L. 221, providing that where two cities are contiguous, and in the same county, the smaller may be annexed to the larger, prescribing the method of proceeding and the effect of annexation; providing for the division of such enlarged cities into wards, for the apportionment of common council, and for the indebtedness of such cities, violates Article III, section 7, subdivision 2, of the State Constitution, which provides that the general assembly " shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, borough or school districts," inasmuch as the only two cities in the Commonwealth that " are contiguous and in the same county," are the cities of Pittsburg and Allegheny, and the clear intent of the act is to legislate locally for them alone. In determining that the act is unconstitutional it is said that the court will consider as without merit the contention that some time in the future there may be two cities which may become contiguous and in that event can be consolidated under the provisions of the act. Mr. Justice Potter dissents. Compare *Commonwealth* v. *Patton*, 88 Pa. 258.

CONTRACTS.

Government Work: Bonds of Contractor

The Supreme Court of Washington decides in *United States to Use of Standard Furniture Co.* v. *Hennisingsen*, 82 Pac. 171, that an act which requires the bond of a contractor for government work to be conditioned that he will make payment to all persons supplying him labor and material in the prosecution of the work, does not merely give the relief afforded by the foreclosure of a mechanics' lien on a building erected for a private owner, but protects persons furnishing materials in the prosecution of the work, though

CONTRACTS (Continued).

they do not become a part of the permanent structure. Compare *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. 719.

CORPORATIONS.

In *Hastings Lumber Co.* v. *Edwards*, 75 N. E. 57, the Supreme Judicial Court of Massachusetts decides that a by-law of a corporation providing that the directors shall have general supervision and control of the business of the corporation and full power to take all such steps as shall be for its best interest, and may issue and dispose of such part of the treasury stock as they deem for its best interest, does not empower the directors, at request of a subscriber, to convert shares for which he had subscribed, but which he did not wish to take and pay for, into such stock, and thus relieve him from his subscription. Compare *Penobscot & Kennebec R. R. Co.* v. *Dunn.*, 39 N. E. 587.

Cancelling Subscriptions

CRIMINAL LAW.

In *State* v. *Call*, 61 Atl. 833, the Supreme Judicial Court of Maine decides that a plea of guilty in court is a confession of the crime charged in the complaint or indictment, and may be shown by oral testimony. It is not necessary to show it by record.

Evidence

DAMAGES.

The Supreme Court of Pennsylvania decides in *Carpenter* v. *Lancaster, Appellant*, 212 Pa. 581, that if an injury resulting from the pollution of a stream by a municipality sewer system is permanent, the land owner is to be compensated for the diminished value of his land. In an action to recover such damages, it is said that, it is immaterial that the city has or has not the right to appropriate private property as part of its sewer system; and

Sewers: Municipalities

DAMAGES (Continued).

the carelessness and negligence of the city in doing the work are also immaterial as they are not involved in determining the damages resulting from the use of the stream.

DEEDS.

The Supreme Court of Washington holds in *Chapman* v. *Tyson,* 81 Pac. 1066, that where a father purchased lands with his own funds for himself, but used the name of his infant son in the transaction, falsely representing such name to be his own name, a conveyance made by him under the assumed name passed title to his grantee, and could not be successfully attacked as a forgery. Compare *Queen* v. *Martin,* 5 Q. B. D. 34.

Use of Assumed Name

DURESS.

The City Court of New York, Trial Term, decides in *Fuerst* v. *Musical Mut. Protective Union,* 95 N. Y. Supp. 155, that a threat made by the officers of a union of musicians that, unless a member paid an illegal fine imposed he would be expelled, causing the member to fear that, unless he paid the fine, he would be expelled and deprived of his means of earning a living, amounts to duress, entitling him to maintain an action for the fine paid.

What Constitutes: Payment

EMINENT DOMAIN.

The Supreme Judicial Court of Maine decides in *Brown* v. *Gerald,* 61 Atl. 785, that a public use, such as justifies the taking of private property against the will of the owner, cannot rest merely upon public benefit, or public interest, or great public utility. It implies a possession, occupation and enjoyment of the property taken by the public at large, or by public agencies. That only can be considered a public use where the government is supply-

Public Use

EMINENT DOMAIN (Continued).

ing its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character and the difficulty or impossibility of making provision for them otherwise are alike proper, useful, and needful for the government to provide. Applying this rule it is held that manufacturing, generating, selling, distributing, and supplying electricity for power for manufacturing or mechanical purposes is not a public use for which private property may be taken against the will of the owner. See *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694.

FALSE IMPRISONMENT.

Special Officers

With two judges dissenting, the New York Supreme Court (Appellate Division, First Department) renders a very important decision in *Samuel* v. *Wanamaker*, 95 N. Y. Supp. 270, where it is held that defendants, at whose request one was designated as a special officer at their store under a provision of the New York City Charter, providing that the public board may on application of any persons appoint a special patrolman to do special duty at any place in the city, on the persons applying therefor paying for his services, he to be subject to the orders of the chief of police, and to possess all the powers and discharge all the duties of the police force applicable to regular patrolman, are not liable for an arrest made by him, in the absence of anything to show that they ever authorized him to make an arrest, or that in doing so he was acting otherwise than in the exercise of the powers conferred on him by his appointment. Compare *Healey* v. *Lothrop*, 171 Mass. 263.

HUSBAND AND WIFE.

In *Kreider's Estate*, 212 Pa. 587, the Supreme Court of

HUSBAND AND WIFE (Continued).

Real Estate: Funds of Wife

Pennsylvania decides that where a husband receives from his wife moneys of her own separate estate which he applies with her knowledge, consent and approval to the purchase of real estate in his own name for their joint occupancy and use, neither the wife nor her representative after her death can recover such money from the husband. Compare *Heck's Estate,* 11 Mont. 66.

INJUNCTIONS.

Suit by Attorney-General

The Court of Chancery of New Jersey holds in *McCarter* v. *Firemen's Ins. Co.,* 61 Atl. 705, that in the absence of statute authorizing it, the Attorney General may not maintain a suit to enjoin insurers carrying out an agreement regulating rates, though against public policy as in restraint of trade; and the fact that the insurers are private corporations makes no difference. Compare *Attorney General* v. *Central Railroad Co.,* 50 N. J. Eq. 52.

INSURANCE.

"Fire" Defined

It is decided by the United States Circuit Court of Appeals, Eighth Circuit, in *Western Woolen Mill Co.* v. *Northern Assur. Co. of London,* 139 Fed. 637, that the word "fire" as used in an insurance policy, in the absence of language showing a contrary intention, is to be given its ordinary meaning, which includes the idea of visible heat or light. It appeared in the case that a quantity of wool in fleeces covered by fire insurance policies was submerged for several days during a flood, which caused spontaneous combustion, with smoke and great heat, by which the wool was damaged and its fiber destroyed, but there was no visible flame or glow. Under these circumstances the court applying above rule decided that the loss was not the result of fire, within the meaning of the policies.

LIMITATIONS.

Waiver of Defense

The Supreme Court of California decides in *Glassell* v. *Glassell,* 82 Pac. 42, that where a will expressly enumerates various obligations of the testator, and directs his executors to pay the obligations so enumerated without reference to any law of limitations, "which I positively repudiate and waive," such waiver of the defense of limitations against the enumerated obligations is binding on the executors, and enforceable against them in a suit brought by one of the enumerated creditors on his claim.

MUNICIPAL CORPORATIONS.

Negligence of Fire Department

Against the dissent of two judges, the Supreme Court of Washington decides in *Cunningham* v. *City of Seattle,* 82 Pac. 143, that a city is not liable for the negligence of the members of its fire department in permitting a horse used exclusively in the department to trespass on private property; the maintenance of a fire department by a city being an exercise of a governmental function. Compare *Roland* v. *Kalamazoo Superintendents of Poor,* 49 Mich. 553.

Improper Use of Property

The Court of Chancery of Delaware decides in *Bancroft* v. *Bancroft et al.* 61 Atl. 689, that a citizen and taxpayer, as such, may not maintain a suit to enjoin improper use of property conveyed to a city for a park. Compare *Biggs* v. *Buckingham,* 6 Del. Ch. 267.

NEGLIGENCE.

Liability of School District

In *Rosenblit* v. *Philadelphia,* 28 Pa. Superior Ct., 586, the Superior Court of Pennsylvania decides that the city of Philadelphia which is co-terminous with the first school district of Pennsylvania, and has legal title to the public school buildings therein, is not liable in damages for injuries to a pupil in a public

NEGLIGENCE (Continued).

school by a fall of a part of the plastering from the ceiling of a schoolroom, although the board of education and its architect had several weeks notice of the defect in the ceiling before the accident occurred. The ground for the city's exemption in such a case is that the school buildings are in actual control of the school board and board of public education, and that the city has no voice in the selection of the officers, agents or architects of the school district, and no power to remove them. With this decision compare *Powers* v. *City of Philadelphia,* 18 Pa. Superior Ct. 621.

PERPETUITIES.

In *Stone* v. *Forbes,* 75 N. E. 141, the Supreme Judicial Court of Massachusetts decides that where a power must be exercised, if at all, by the children of the donee, and therefore could not be exercised beyond the limit of the rule against perpetuities, it was not an infringement of such rule, though an appointment might be made under the power that would be too remote. See *Gray on the Rule Against Perpetuities,* 322.

Power of Appointment

PRINCIPAL AND AGENT.

The Supreme Court of Oregon decides in *Moss Mercantile Co.* v. *First Nat. Bank of Payette,* 82 Pac. 8, that an agent or attorney to collect and remit the amount due on a judgment is not estopped, by reason of his relationship to his principal, to assert as against the latter that the amount due, in fact, belonged to another, and that he paid it over to that other, on demand, prior to the commencement of suit against him by the principal. Compare *Burton* v. *Wilkinson,* 18 Vt. 186.

Estoppel

RAILROADS.

The Supreme Court of Appeals of Virginia holds in *Risque's Adm'r* v. *Chesapeake & O. Ry Co.*, 51 S. E. 730, that where a railroad company furnished defective cars to the employer of plaintiff's intestate for the use upon the employer's side track, to be loaded and unloaded upon such side track, it was the employer's duty to inspect the cars for defects, and the railroad company was not liable for injuries to the plaintiff's intestate caused by such defective cars. Compare *Baltimore & Potomac R. Co.* v. *Mackey* 157 U. S. 72.

Injury to Licensee

SALES.

In *International Register Co.* v. *Recording Fare Register Co.*, 139 Fed. 785, it appeared that defendants who had been employees of a manufacturing company which had sold its business and goodwill to complainant, found a sketch and a pattern necessary to be used in filling certain orders given to the selling company and transferred to complainant, and, with knowledge that they had been left by an officer of the complainant through mistake, attempted to use the same, to divert such orders to a company formed by themselves, having knowledge of the orders through their connection with the former company. Under these facts the United States Circuit Court (D. Connecticut) decides that complainant was entitled to an injunction to restrain defendants from such use of its property to deprive it of its contracts.

Good Will: Employees

STATUTE OF FRAUDS.

In *Smith* v. *Burditt*, 95 N. Y. Supp. 188, the New York Supreme Court (Appellate Division, Third Department) decides that an oral agreement by an owner to pay for the work and materials furnished by a subcontractor in the construction of a building, in case the principal contractor neglected to do so, is void within the statute of frauds. It is further held that where, in an action

Debt of Another

STATUTE OF FRAUDS (Continued).

against an owner for work and labor furnished by a subcontractor, the complainant alleged that the owner promised to pay the subcontractor if the principal contractor failed to do so, there can be no recovery on the theory that the owner became the principal debtor of the subcontractor. Two judges dissent.

TRUSTS.

In re Bulwinkle, 95 N. Y. Supp. 176, it appeared that D. deposited money in a savings bank in the name of "D., in trust for L." Without being informed thereof L. predeceased D. Thereafter D. continued to make deposits in the account, and stated to some person that the children of L. had money in the bank, that it was in trust for their mother, but that they would eventually get it. Before the death of D. the words "in trust for L." in the bank book were obliterated. Under these facts the New York Supreme Court (Appellate Division, Second Department) with one judge dissenting, decides that the tentative trust came to an end with the death of L., and that there was no trust for her children. Compare *Matter of Totten,* 179 N. Y. 112.

Deposit in Bank

The New York Surrogate's Court, Chautauqua County, decides *In re Stevens,* 95 N. Y. Supp. 297, that where shares of a corporation were devised in trust, the income to be paid to the beneficiaries, and the corporation went out of business, and its assets were sold, the proportionate part of the working cash capital represented by the trust estate should be retained as part of the corpus of the estate. Compare *Matter of Kernochan,* 104 N. Y. 618.

Capital and Income

WILLS.

Against the dissent of six judges the Court of Errors and Appeals of New Jersey decides in *Demarest* v. *Demarest,* 61 Atl. 596, that a will giving "all moneys derived from my father's estate as my share of the same, after my decease," to "be equally divided between my sons,"

Construction

WILLS (Continued).

and providing that the share of one son is to be given him "as soon as convenient after my executors receive the same," and the share of the other son is to be invested for him, does not entitle the legatees to any money received by testator in his lifetime as his share of his father's estate.

In *Calkins* v. *Calkins,* 75 N. E. 182, it appeared that after testator had signed his will in the presence of the attesting witnesses, the latter withdrew to another room outside of the range of his vision, and there signed their names as witnesses. The witnesses then returned to the testator, and one of them read the will to him, including the signatures, and showed the signatures to him, and he said it was all right. Under these facts the Supreme Court of Illinois decides that there was not a compliance with the statute requiring the will to be attested in the presence of the testator by two or more witnesses. Compare *Mendell* v. *Dunbar,* 169 Mass. 74.

Attestation

WITNESSES.

The Court of Appeal, Second District, of California, decides in *McRae* v. *Erickson,* 82 Pac. 209, that a physician in charge of a railroad hospital, whose services are compensated by assessments upon the wages of the railroad employees, acts in a professional employment, within the rule excluding communications made by a patient to his physician, in the course of professional employment in examining an injured employee who is sent to the hospital, and in eliciting information as to his injuries on the day of examination. Interpreting the same statutory provision it is held that all statements made by a patient to his physician while the latter is attending the former in that capacity for the purpose of determining his condition, are

Physicians: Care of Patient

WITNESSES (Continued).

privileged, although they have nothing to do with the patient's treatment, or the determination of his injuries, but relate to the way in which the injuries occurred. Compare *Sloan* v. *New York Central R. R. Co.*, 45 N. Y. 215.

Experts: Competency

The Supreme Court of Georgia decides in *Macon Railway & Light Co.* v. *Mason*, 51 S. E. 569, that one who is the graduate of a college where anatomy and physiology are taught, and who is engaged in the practice of osteopathy, and has gained experience in the treatment of nervous disorders, may be examined as an expert witness, upon these facts being made to appear, notwithstanding he is not a licensed physician and does not administer drugs to his patients. Compare *White* v. *Clements*, 39 Ga. 232.