PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

APPEALS.

In *Morrison* v. *Atkinson*, 85 Pac. 472, the Supreme Court of Oklahoma holds that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Hence, where a party assumes a position and asserts a legal right in the district court, and there asks the benefit of that position, he is estopped from denying the legality of that position on appeal to the Supreme Court. Compare *Abbot* v. *Wilbur*, 22 La. Ann, 368.

Theory of Case: Estoppel

ATTORNEY AT LAW.

The Supreme Court of Kansas holds *In re Smith*, 85 Pac. 584, that in a proceeding for the disbarment of an attorney, the statute of limitations is no defense. Compare *In re Lowenthal*, 78 Cal., 427.

Disbarment: Limitations

BANKRUPTCY.

The Supreme Court of Oklahoma decides in *West* v. *Bank of Oklahoma*, 85 Pac. 469, that where an insolvent person borrows money from a bank, and executes his note therefor, and deposits the money in said bank subject to his check, said trans-

Preferential Transfers

action does not constitute a preferential transfer under the bankruptcy act, and the bank may, before the depositor is declared a bankrupt, credit the amount of his deposit upon his debt due the bank, and such transaction will not entitle the trustee in bankruptcy to recover the amount of such deposit as a preference. Compare *In re Coulton Export & Import Co.*, 121 Fed., 663.

The United States Circuit Court of Appeals, Second Circuit, decides *In re Mertens et al.*, 144 Fed. 818, that

Partnership

a creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners, upon his claim against the partnership estate, but is entitled to the allowance of his debt in full against such estate, and to apply the securities upon his claim against the individual estate of the partner to which the property belongs. Compare *Wilder* v. *Keeler*, 3 Paige 167.

BILLS AND NOTES.

The Supreme Court of Kansas decides in *Scott* v. *Bankers' Union of the World*, 85 Pac. 604, that a person

Joint Makers: Liability

who is the joint maker of a promissory note, with a corporation which does not have the power to issue such an obligation, may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation.

CARRIERS.

The St. Louis Court of Appeals decides in *Gardner* v. *St. Louis & S. F. R. Co.*, 93 S. W. 917, that, though a

Ejection from Train

rule of a railroad required those riding on freight trains to produce tickets, where one was not able to procure a ticket because a station agent had none, but offered to pay fare, his ejection from the train by the conductor was wrongful.

CARRIERS (Continued.)

Liability as Warehousemen

It is well settled that in general a carrier's liability does not change to that of warehouseman until goods are unloaded from the cars in which they are transported. An exception to this general rule appears however in *Gratiot &c. Co.* v. *St. Louis &c. Co.*, 77 N. E. 675, where the Supreme Court of Illinois, decides that where a carrier had no depot or warehouse at the place of destination for the storage of such freight as corn, it had a right to warehouse the corn in cars on side-tracks. Compare *Gregg* v. *Illinois Cent. R. R. Co.*, 147 Ill., 555.

CONNECTING CARRIERS.

Transportation Charges: Final Carriers

The St. Louis Court of Appeals decides in *Berry Coal & Coke Co.* v. *Chicago P. & St. L. Ry. Co.*, 92 S. W. 714, that where a shipment over the lines of several carriers is not made under a through bill of lading, and the different carriers concerned in the shipment are not shown to constitute a connecting line by virtue of any traffic arrangement or association, the final carrier may pay apparently proper transportation charges demanded by a previous carrier, or hold the property according to any lawful directions given for the enforcement of a lien for such charges, unless it has notice or knowledge that in the particular instance the charge is unlawful; and, while it must act in good faith towards the consignee, it is not bound to investigate at its own trouble and expense the merits of an apparently just claim preferred by a preceding carrier. Compare *Bissel* v. *Price*, 16 Ill., 408.

CONSTITUTIONAL LAW.

Equal Protection of Laws

In *People ex rel. Eisman* v. *Ronner*, 77 N. E. 1061, the Court of Appeals of New York, considering the statute passed in that State in 1905 for the taxation of mortgages on real estate, holds that such law is not in contravention of the Fourteenth Amendment to the Federal Constitution, because made

CONSTITUTIONAL LAW (Continued.)

to apply only to mortgages recorded after a certain day in the future. Compare *Mercantile National Bank* v. *Mayor of New York*, 172 N. Y., 35.

Judgment against Garnishee: Payment

In *Wright* v. *Southern Ry. Co.*, 53 S. E. 831, the Supreme Court of North Carolina decides that under the provision of the Federal Constitution, requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, payment by a garnishee of a judgment rendered against it in an action wherein process was personally served on defendant, and the court had jurisdiction of the parties and the subject-matter of the action, must be recognized as payment of the original debt by the courts of any other state, where it is properly pleaded by the garnishee in an action against him by defendant to whom he originally owed the debt. Compare *Railroad* v. *Sturm*, 174 U. S., 710.

Freedom of Contract

In *People* v. *Marcus*, 77 N. E. 1073, the Court of Appeals of New York lays down a principle very important under modern conditions and holds that a section of the Penal Code prohibiting any person from making the employment of another conditional on the employee not joining or becoming a member of a labor organization, is unconstitutional as impairing freedom of contract. One judge dissents. Compare *National Protective Association* v. *Cumming*, 170 N. Y. 315, 58 L. R. A., 135.

Classification

The Supreme Court of Wisconsin in *Village of Bloomer* v. *Town of Bloomer*, 107 N. W. 974, lays down the following rule, as to legitimate classification for the purpose of legislation.

(*a*) The classification must be based on substantial distinction, making one class really different from another.

CONSTITUTIONAL LAW (Continued.)

(*b*) The classification must be germane to the purposes of the law.

(*c*) The classification must not be based on existing circumstances only.

(*d*) The law must apply equally to members of the class.

(*e*) The character of the class must be so different from other situations as to reasonably suggest necessity or propriety, having regard for the public good, of substantially different legislative treatment therefor from that required for such others.

CONTEMPT OF COURT.

Irrelevant Questions

The Supreme Court of Arkansas holds in *Ex Parte Butt*, 93 S. W. 992, that since a witness should not be permitted to refuse to answer a question on the ground that it is irrelevant, where the same is put to him before a court having jurisdiction of the subject matter involved, the fact that questions are irrelevant furnishes no reason for impeaching the commitment of the witness for contempt for refusing to answer them. Compare *State* v. *Thaden*, 43 Minn., 253.

What Constitutes

The Supreme Court of Louisiana decides in *Fellman* v. *Mercantile Fire & Marine Ins. Co.*, 41 S. 49, that where a case had been finally decided, not only in the trial, but in the appellate court, and a person representing the defendant, in satisfying the judgment, writes to the counsel for the plaintiff a letter inclosing a check, and at the same time intemperately criticising the judgment, such criticism, having no tendency to impede or embarrass the court in the disposition of any pending case, cannot be made the basis of a proceeding for contempt. See in connection herewith *Ashbaugh* v. *Circuit Court*, 72 N. W. 193, 38 L. R. A., 559.

CONTRACTS.

Illegality

The Supreme Court of Oregon decides in *Jackson* v. *Baker*, 85 Pac. 512, that where the illegality of a contract sued on appears from the complaint, or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, though such illegality is not pleaded as a defense or insisted upon by the parties, and may have been expressly waived by them; it being an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties. Compare *Oscanyan* v. *Arms Co.*, 103 U. S., 261.

CORPORATIONS.

Fraud

That statements in articles of association of a corporation as to subscription and payment for stock were false, and that the Secretary of State issued a certificate of incorporation without knowledge of their falsity, does not render the incorporators liable to creditors as partners on the ground of fraud; the validity of the incorporation being impeachable only on direct attack by the state; Supreme Court of Missouri, Division No. 2, in *Webb* v. *Rockefeller*, 93 S. W., 772.

Officers: Breach of Trust

In *Heineman* v. *Marshall*, 92 S. W. 1131, the St. Louis Court of Appeals decides that the act of the officers of a beneficial association in surrendering control of the association and transferring their offices to others for a money consideration was a breach of trust, which rendered them liable to account to the association for the money which they received. It is held, however, that where this was the case subsequent creditors of the association were not entitled to recover from the delinquent officers the proceeds of the illegal transaction. Compare *Parker* v. *Roberts*, 116 Mo., 662.

DIVORCE.

In *Trough* v. *Trough*, 53 S. E. 630, the Supreme Court of Appeals of West Virginia decides that a court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him. Such decree is not due process of law. Compare *Hovey* v. *Elliot*, 167 U. S., 409.

Enforcement of Payment of Alimony

EMINENT DOMAIN.

The Supreme Court of Washington holds in *State ex rel. Harris et al* v. *Superior Court of Thurston County et al.* 85 Pac. 666, that a constitutional provision prohibiting the taking of private property for private use, prevents a corporation from condemning property to further not only the operation of the municipal light plant and electric car system, but also the business of selling electricity generally. Compare *Brown* v. *Gerald*, 61 Atl. 785, 70 L. R. A., 472.

Extent of Power

EVIDENCE.

The Supreme Court of Michigan decides in *People* v. *Christian*, 107 N. W. 919, that where one sought to introduce a certified copy of a letter-press copy of a lost letter written to him by the commissioner of the land office, an objection to such certified copy, on the ground that the letter-press copy could be procured, was erroneously sustained, as there are no decrees of secondary evidence.

Secondary Evidence: Letters

EXECUTORS.

The Supreme Court of Illinois decides in *Peterman* v. *United States Rubber Co.*, 77 N. E. 1108, that executors who carried on the business of testator, and without an order of court, sold goods on time without security, were responsible for loss there-

Management of Estate

EXECUTORS (Continued.)

from, though the total profits from their sales exceeded the losses on such unsecured debts. Compare *Marshall* v. *Coleman*, 187 Ill., 556.

FALSE IMPRISONMENT.

The Supreme Court of Mississippi holds in *Vice* v. *Holley*, 41 S. 7, that an officer who arrests a person, having no warrant for him, but mistaking him for one wanted for a crime, and over his protest puts him in jail, he making no misstatements or misrepresentations leading to his arrest, is liable therefor. Compare *Hayes* v. *Creary*, 60 Tex., 445.

Mistake

GAMING.

The Supreme Court of Missouri, Division No. 1, holds in *Hobbs* v. *Boatright*, 93 S. W. 934, that the officers of a bank who, knowing the methods of a gang of conspirators of enticing strangers to bet on races, the results of which were determined in advance, allowed the bank to be used to effect the exchange and transference of money, and to lend an appearance of respectability to the transactions, thereby assisting in the fraud, were liable with the conspirators for the amount of which a stranger was thus defrauded.

Liability

GRAND JURY.

The Court of Appeals of Kentucky holds in *Commonwealth* v. *Berry, Judge*, 92 S. W. 936, that under the statute there in force similar to statutes generally existing throughout the country declaring that no person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge, the court had no authority to direct a stenographer to take the testimony before the grand jury. Two judges dissent.

Presence of Stenographer

INJUNCTIONS.

The Supreme Court of Kansas holds in *Mathis* v. *Strunk*, 85 Pac. 590, that where there is a dispute whether the wall of a building stands wholly upon the land of its owner or rests in part upon that of another, the owner of the building, being in the peaceable possession thereof, may maintain an injunction to prevent the adjoining proprietor from using such wall as a party wall until he has established his right thereto in a proceeding brought by him for that purpose. See in connection with this case *Echelkamp* v. *Schrader*, 45 Mo., 505.

Party Wall: Title

INSURANCE.

In *Continental Casualty Co.* v. *Johnson*, 85 Pac. 545, the Supreme Court of Kansas decides that the word "sunstroke," when used in an insurance policy in describing one of the risks covered, should not be interpreted as applying only to an effect produced by the heat of the sun, unless the context or other special considerations require it. The term unexplained denotes a condition produced by any heat, solar or artificial.

Accident Policy: "Sunstroke"

In *Thompson* v. *Fidelity Mut. Life Ins. Co.*, 92 S. W., 1098, the Supreme Court of Tennessee, laying down the general rule that mere indulgences in the payment of premiums do not constitute a waiver of the condition authorizing forfeiture for non-payment of premiums when due, holds further that a course of dealing between insurer and insured, whereby the former has accepted payment of premiums after maturity, does not bind it to accept premiums for the purpose of avoiding forfeiture, where they are not tendered until after insured's death.

Indulgence in Payment

MASTER AND SERVANT.

In *Andrecsik* v. *New Jersey Tube Company*, 63 Atl. 719, the Court of Errors and Appeals of New Jersey decides that when the agreement to repair is general, *i.e.* inferential, as to the time of its performance, if the master's promise is not performed within a reasonable time for its fulfilment, and the servant continues to incur the danger in the employment, after the lapse of such reasonable time the servant assumes the risk of injuries occurring thereafter. In such case, there may be a question, for the jury, of reasonable time, but when the agreement to repair is not indefinite, but specific, as to the time of its performance, if the promise is not performed within the time specified for its fulfilment, and the servant continues in the employment after a manifest breach of the master's promise to repair, the assumption of risk by the master ceases, and the servant re-assumes the risk of subsequent injuries therefrom. Compare *Standard Oil Company* v. *Helmick*, 148 Ind., 457.

Defective Appliances: Promise to Repair

NEGLIGENCE.

The Supreme Court of Iowa in *Van Camp* v. *City of Keokuk*, 107 N. W. 933 holds that where a boy ran rapidly in front of a pedestrian in the night time, causing her to shrink back and her foot to slip into a hole in a sidewalk, whereby she was injured, the defect in the sidewalk, and not the action of the boy was the proximate cause of the injury. Compare *Kitteringham* v. *Sioux City* 62 Iowa, 285.

Proximate Cause

NEW TRIAL.

In *Grantz* v. *City of Deadwood*, 107 N. W. 832, the Supreme Court of South Dakota decides that when a party moves for a new trial on the ground of misconduct of the jury, he must aver and show affirmatively that both he and his counsel were ignorant of the misconduct until after the trial. Compare *Wynn* v. *Ry. Co.*, 17 S. E., 649.

Misconduct of Jury

NOTARIES PUBLIC.

Officers De Facto

The Supreme Court of Louisiana holds in *Davenport* v. *Davenport*, 41 S. 240, that one who has been commissioned as notary, and has taken the oath of office, and has been acting as notary for many years, and has the reputation of being such in the community in which he lives, but who has failed to file his oath of office in the offices of the Secretary of State and of the clerk of court, and has also failed to renew his bond every five years, as required by law, is a notary de facto; and acts passed before him have the same validity as acts passed before a notary de jure. Compare *Monroe* v. *Liebman*, 47 La. Ann., 155.

PARTIES.

Deficiency by Entireties

In *West* v. *Aberdeen & R. F. R. Co.*, 53 S. E., 477, the Supreme Court of North Carolina, decides that an action for damage by fire to land held by a husband and wife by entireties may be maintained by the husband alone. Compare *Topping* v. *Sadler*, 50 N. C., 359.

PARTNERSHIP.

Dealing in Realty: Parol

The Supreme Court of Minnesota decides in *Stitt* v. *Rat Portage Lumber Co.*, 107 N. W. 824 that a partnership may be formed by parol to deal in real estate and to improve and sell for joint profit a particular piece of land. When real estate is acquired in a partnership business so formed, and for partnership purposes, notwithstanding the provisions of the statute of frauds and the statute of uses, it is partnership assets although the legal title be taken in the name of one of the partners. See also *Fountain* v. *Menard*, 53 Minn., 443.

PRINCIPAL AND SURETY.

With one judge dissenting the Kansas City Court of Appeals decides in *Burrus* v. *Cook*, 93 S. W. 888, that

Subrogation

though a judgment creditor held no securities for his debt, a surety of the judgment debtor having satisfied the judgment, there was an equitable assignment to him and he might maintain an action against his co-surety after the running of limitations against the statutory actions for contribution, and within the period within which the judgment creditor might have asserted his rights against the principal. See also *Junker* v. *Rush*, 136 Ill. 179, 11 L. R. A., 183.

RECEIVERS.

In *Ætna Life Ins. Co.* v. *Broecker*, 77 N. E. 1092, the

Foreclosure of Mortgage

Supreme Court of Indiana decides that though the rents and profits of mortgaged premises were specifically mortgaged, the property being sufficient to satisfy the lien, a receiver will not be appointed.

RELEASE.

In *Chicago Herald Co.* v. *Bryan*, 92 S. W. 902, the Supreme Court of Missouri decides that where plaintiff

Joint Tort-Feasor

delivered his notes to a corporation to discount for plaintiff, and the corporation intrusted the discounting to defendant, who effected such purpose, but converted the proceeds, and the corporation made a settlement with plaintiff, fully satisfying the injury, plaintiff could not subsequently maintain an action against defendant. Compare *Hubbard* v. *Ry. Co.*, 173 Mo., 255.

SALES.

The Supreme Court of Arkansas holds in *Gottlieb* v. *Rinaldo*, 93 S. W. 750, that where plaintiff sent rings

Option: Return of Goods

to defendant, with the option to purchase at a specified price or return within a reasonable time, and defendant, within such time, delivered the rings to a responsible public carrier, which

SALES (Continued.)

had been used by plaintiff to transport the rings to defendant in the first instance for return, defendant's delivery to the carrier constituted a delivery to plaintiff, absolving defendant from liability for loss of the rings by the carrier. Compare *Sturm* v. *Boker*, 150 U. S., 312.

STATUTES.

In *Ex parte Helton*, 93 S. W. 913, the St. Louis Court of Appeals decides that in construing a new statute of doubtful meaning, it is proper for the court to resort to the journals of the legislative assembly showing the original bill and amendments made thereto, to ascertain the intent of the Legislature. Compare *Bradley* v. *West*, 60 Mo., 33.

Construction

WATERS AND WATER COURSES.

The Pennsylvania Common Pleas Court of Blair County decides in *Knisely* v. *Dively*, 32 Pa. C. C. R. 373, that a lower riparian owner may go upon the land of an upper riparian owner, and turn a stream back into its original channel, where it appears that the stream was diverted from its channel by a freshet in the land of the upper owner. Compare *Darlington* v. *Painter*, 14 Pa., 475.

Riparian Owners

WILLS.

In *Ackerman* v. *Ackerman*, 32 Pa. Co. Ct. Rep. 353, the Pennsylvania Common Pleas Court of Dauphin County decides that when an estate is given to one only and the heirs of two (as to the wife and the heirs of her and A.), the word heirs is a word of purchase. Compare *Nightingale* v. *Quartley*, 1 Durn. & East., 630.

"Heirs": Word of Purchase

WITNESSES.

Privileged Communications With Attorney

The Supreme Court of Kansas *In re Burnette*, 85 Pac. 575, decides that after a party to a cause has voluntarily solicited and procured the reading of his unfiled pleading by a nonprofessional stranger, has published its contents in a newspaper interview, and has spread the substance of it upon the record of a court of general jurisdiction in a pleading filed against the attorney who assisted in preparing it, the privileged character of the document is waived; it then becomes common public property, the attorney is released from the confidential relation he bore to it before its publication, and his production of a copy of it for use as evidence, in a subsequent proceeding brought against the party, is not a breach of privilege.