PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

Landlord's Lien

In Pennsylvania a landlord has no lien for rent on the proceeds of the sale of his tenant's leasehold when it is sold on execution, and such a lien is not to be implied from a mere right to re-enter for breach of a condition of the lease. Therefore the District Court (W. D. Penna.) decided that where the tenant's leasehold is sold by the trustee in bankruptcy under such circumstances, the landlord is not a prefered creditor to the extent of his overdue rent: In *Re Ruppel*, 97 Fed. 778.

Accrual of Lien

In *In Re Higgins*, 97 Fed. 775, an action against the bankrupt had been commenced two years before the bankruptcy, but within four months previous to the filing of the petition an attachment was made in the same action, upon which judgment was obtained. The District Court (D. Ky.) held that this was an attachment within four months previous to the filing of the petition within § 67 c of the act, since, in effect, the attachment was a new proceeding and not merely a continuation of the original suit.

BANKS AND BANKING.

Check as Assignment of Fund

Contrary to the rule adopted in Pennsylvania and most states, the Supreme Court of Nebraska affirms the following as the law of Nebraska: "A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof,—in effect, an assignment of the amount of the check,—and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name": *Henderson* v. *U. S. National Bank*, 80 N. W. 898. But in this case the court refused to apply the rule, holding that the fact that the check was for an amount greater than the deposit, prevented it from operating as an assignment. From a logical standpoint it is hard to see how this fact makes any difference, and it would seem that the case of *Bromley* v. *Bank*, 9 Phila. 522,

BANKS AND BANKING (Continued).

cited with disapproval by the Nebraska Court, reaches a more reasonable conclusion on this point, although the premise upon which the latter case is based is clearly in opposition to the current Pennsylvania law.

Terms of Deposit In Savings Bank, Construction

The Supreme Court of New Jersey has given a reasonable construction to the terms of withdrawal contained in a savings bank book, although in doing so it was necessary to do violence to certain express words. The terms of withdrawal were: "Deposits and dividends shall be drawn out only by the depositors in person, or by their written order, or by some person legally authorized, and only upon the production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers." In *Cosgrove* v. *Provident Inst*, 44 Atl. 936, it was held that the last clause of the agreement did not operate to create a separate class of persons entitled to withdraw, but only added an additional qualification to the other three classes, viz., the necessity to produce the deposit book; therefore a payment to a stranger, who presented the book and represented himself as the depositor, did not discharge the bank.

BILLS AND NOTES.

Negotiability, Set-Off

In *Murphy* v. *Improvement Co.*, 97 Fed. 722, the Circuit Court (W. D., Ark.) decided (1) that a note "to A. or assignee" is negotiable; (2) that it remains negotiable in the hands of a holder, even though the payee has indorsed it to the holder, "Pay to B." without further words of negotiability; and (3) that the defence of set-off between the original parties is not such an equity as will effect a holder for value, even though he takes with knowledge.

CARRIERS.

Sleeping-Car Company, Obstructed Car

It seems that a passenger on a sleeping-car has a right to assume that the centre aisle is unobstructed. In *Levien* v. *Webb*, 61 N. Y. Suppl. 1113, the passenger, in walking up the aisle, which was dimly lighted, stumbled over a valise which had been left in the aisle with the knowledge of the defendant's porter. The Supreme Court of New York decided that the questions of the defendant's negligence and the plaintiff's contributory negligence were properly left to the jury.

CONSTITUTIONAL LAW.

In view of the violent opposition to the federal courts which has lately arisen, the question has been mooted whether or not Congress could constitutionally abolish them altogether. On this point *State* v. *Lindsay*, 53 S. W. 950, is interesting since it construes a clause of the constitution of Tennessee, which is similar to the one in the Federal Constitution, viz. (Const. Tenn. Art. 2, § 2) "The judicial power of this state shall be vested in one supreme court and in such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish." Under this section the Supreme Court of Tennessee (Snodgrass, C. J., and Beard, J., dissenting), held that the legislature had power to abolish the existing Court of Chancery and to confer its powers and jurisdiction upon other courts.

Power of Legislature to Abolish Courts

Whatever may be the constitutionality of general laws framed to protect workmen against unjust exactions by their employers, it is clear that such laws must be general in their operation. Thus the Court of Appeals of Maryland very properly held that the fourteenth amendment was violated by the Maryland statute (1898, C. 493), which applied only to railway and mining corporations, forbidding the officers of such corporations from being interested in company stores: *Luman* v. *Hitchen Bros.* 44 Atl. 1051.

Police Regulation Aimed at Class

CORPORATIONS

The generally prevailing rule that a stockholder in an insolvent corporation cannot set off an indebtedness of the corporation to him in an action by the assignee to recover the unpaid balance of his stock, does not apply when the action is brought against a mere debtor of the corporation. The Court of Appeals of Maryland in *Colton* v. *Dover Loan Association*, 45 Atl. 23, accordingly decided that the maker of a note, held by an insolvent bank, could, in an action on the note by the assignee, set off his deposit in the bank to the limit, even though by so doing he gained an advantage over the other depositors, who received merely small percentages.

Set off by Depositor in Insolvent Bank

"The Supreme Court of the United States has declared the law. We can but follow and obey." Such was the unwilling adoption by the Circuit Court of Appeals (Seventh Circuit) of the doctrine favored by the Supreme Court of the United States, that a corporation, when sued on its guarantee, is not estopped from pleading its lack of power

Ultra Vires, Estoppel

CORPORATIONS (Continued).

to make the guarantee by reason of its receipt of the benefits of the transaction: *Cent. Trust Co.* v. *I. & L. M. R. Co.*, 98 Fed. 666.

COURTS.

Jurisdiction, Penal Actions

Revised Statutes (U. S.), § 4966, provides that the proprietor of a dramatic composition, upon which a copyright has been issued, may recover a certain sum for each performance from any person giving public performances without the consent of the proprietor. In *Brady* v. *Daly*, 20 Sup. Ct. 63, the Supreme Court of the United States decided that an action brought under this statute was not an action for a penalty, but merely for damages; therefore the jurisdiction of the District Court of the United States was not exclusive, and the action could be brought in the Circuit Court.

Another case on this subject is *Slicktenoth* v. *Grain Exchange*, 99 Fed. 1, where an action was brought by a disinterested person under the Illinois act of 1885 (p. 792, c. 38, §132), providing that when money is lost by gambling, and no action to recover it back is brought by the loser, any person may bring an action against the winner to recover treble its value, half of the amount recovered going to the county. The Circuit Court (N. D. Ill.) refused to assume jurisdiction, on the ground that the remedy given amounts to a *qui tam* action and is therefore penal.

Suit Against Foreign State

In *Hassard* v. *United States of Mexico*, 61 N. Y. Suppl. 939, the plaintiff, having a claim against Mexico, attached goods of the Mexican government in New York. As a matter of course the suit was dismissed on the ground that the state court had no jurisdiction of an action against a foreign state, but it is interesting to observe that the dismissal was made upon the motion of the United States District Attorney for New York, who had no interest in the case, officially or otherwise, but who appeared merely as an *amicus curiæ*.

CRIMINAL LAW.

Repeal of Prohibitory Statute by Implication

The celebrated cigarette agitation in Tennessee appears to continue in full force. Subsequent to the act of 1897, prohibiting the sale of cigarettes within the state, the Legislature passed an act (1899, C. 30, § 1), enumerating certain vocations which might be carried on only with a license, and providing for a license

CRIMINAL LAW (Continued).

fee for the sale of cigarettes. The Supreme Court of Tennessee held that the latter act did not repeal by implication the act of 1897 so as to authorize the sale of cigarettes: *Blaufeld* v. *State*, 53 S. W. 1090. The court also affirmed its ruling that cigarettes are not the subject of commerce within the commerce clause of the Constitution of the United States.

Where a statute defines the crime of rape as sexual intercourse accomplished with a female "not the wife of the perpetrator," it is essential that the indictment should aver that the prosecutrix is not the wife of the defendant, and its failure to contain such an averment will render it demurrable: *Parker* v. *Territory*, 59 Pac. (Okla.) 9. But this rule is not applicable under the common law or in states where the statute does not contain the above provision.

Rape, Indictment

DAMAGES.

Burgoon v. *Johnston*, 45 Atl. 65, is interesting in showing how far a court will consider the status of the parties to a contract in determining whether or not a stipulation amounts to a penalty or merely a liquidation of damages. It appeared that the defendant, who was a physician, went to the plaintiff, a specialist on skin diseases, to be treated for a sore on the face. The plaintiff required that the defendant should, in case of a cure, either give him a certificate of proficiency or $5,000; to which the defendant assented. The Supreme Court of Pennsylvania, taking into consideration the fact that the defendant was a physician himself, and therefore probably familiar with the proper amounts for charges, decided that the $5,000 was liquidated damages, and not a penalty for the failure to give a certificate, and it could, therefore, be recovered as compensation for the cure.

Liquidated Damages, Position of Parties

In *Auchincloss* v. *Manhattan Rwy. Co.*, 60 N. Y. Suppl. 792, which was a proceeding to recover damages for injury to plaintiff's land by reason of the erection of an elevated railway upon the street in front of the property, a rather novel method of assessing the damages was unsuccessfully brought forward by the plaintiff. Instead of claiming the difference between the values of his land, without and with the railway, he sought to establish as the basis of his damages the sum his property would have been worth if the railway had been built through the neighborhood, but not directly in front of his

Eminent Domain, Benefit from Railway

DAMAGES (Continued).

property. The Supreme Court of New York, however, frustrated this ingenious attempt to utilize the rise in values attending the construction of the railroad through the neighborhood.

Future Pain from Injury, Evidence

In an action for injury to the plaintiff's hand, the only evidence of permanent injury introduced by the plaintiff was the exhibition of the hand and his own testimony that he occasionally had pain when he used the hand. The trial judge charged: "You may award an amount which should reasonably compensate the plaintiff for the pain and suffering such as you are prepared to say he will endure in the future within reasonable probability." *Held*, error, by the Supreme Court of New York, on the ground that no sufficient evidence had been submitted to the jury to enable them to estimate whether or not there would be any future pain, or what its duration would be: *Webb* v. *Union Rwy. Co.*, 60 N. Y. Suppl. 1087.

EVIDENCE.

Proof of Foreign Practice

In *Patterson* v. *Kennedy*, 81 N. W. 91, an action was brought on a judgment obtained in Ontario. The defendant having contested the validity of the judgment on account of lack of service by the Canadian court, it was shown that the summons in the Ontario suit was served by a minor of the age of nineteen years. The plaintiff called a Canadian barrister, who testified that such a service was good under the Canadian practice, but no statute or decision of a Canadian court to this effect was produced. The Supreme Court of Minnesota decided that the service of a legal summons had been sufficiently proved, but from the authorities cited it would seem that there is some conflict upon this point.

HUSBAND AND WIFE.

Prohibition of Marriage Under Age, Effect on Validity of Marriage

A statute of Minnesota (Gen. St. 1894, § 4769) provides that "every male person who has attained the full age of eighteen years and every female who has attained the age of fifteen years, is capable in law of contracting marriage if otherwise competent." Other sections impose liabilities upon clergymen and officers solemnizing the marriage of persons under those ages. In *State, ex rel.* v. *Lowell*, 80 N. W. 877, the Supreme Court of Minnesota decided that the above statute did not by implication render void the marriage of persons under the prescribed ages, therefore the father of a girl of thirteen who had been married, had no right to restrain her from living with her husband.

HUSBAND AND WIFE (Continued).

Claim Against Husband's Estate

In Maine the common law rule prevails that a wife cannot sue her husband. In *Weeks* v. *Elliott*, 45 Atl. 29, the question was raised whether or not this rule prevented a wife from proving a claim, on a note given to her by her husband, against the assigned estate of the husband. The Supreme Court of Maine decided that, since the contract was a valid one, the mere fact that the wife was unable to enforce it by suit did not prevent her proving against the estate, since the reasons which caused the law to forbid suits between husband and wife did not apply to an action, not against the husband, but against his estate.

Evidence in Divorce Cases

That the common law rules of evidence in civil actions do not apply to cases of divorce tried by a judge is shown by *Warner* v. *Warner*, 44 Atl. 908. Here the Supreme Court of Maine decided that the general reputation of the respondent, accused of adultery, for virtue and chastity was admissible, although such evidence could not be received in a civil action at common law.

INSURANCE.

Standard and Solar Time

In *Jones* v. *German Insurance Co.*, 81 N. W. 188, the Supreme Court of Iowa holds that where an insurance policy, by its terms, expires at "12 o'clock noon," the presumption is that it expires at 12 o'clock, solar time, and the burden is upon the party alleging that standard, or railroad time is intended, to show such a general use of standard time at the place of the execution of the policy as will warrant the court in assuming that the parties intend that standard time shall prevail.

Requirement of Proof of Actual Death

In *Kelly* v. *Cath. Mut. Ben. Asso.*, 61 N. Y. Suppl. 394, the by-laws of the defendant, a mutual benefit association, provided that no life insurance should be paid without proof of actual death of the insured. In this case the insured had disappeared for over seven years, and the beneficiary contended that it was contrary to public policy and to the object and purpose of the association to require a greater evidence of death than that recognized by law. However, the Supreme Court of New York decided that there was nothing to prevent the association from requiring any particular form of proof that it chose, and that the beneficiary could not recover.

LIENS.

Lien for Keep of Horse

The common law rule, that the lien of a stable keeper upon horses for their keep is lost by surrender of possession, is still strictly enforced. Thus in *Darling* v. *Hunt*, 61 N. Y. Suppl. 278, the livery stable keeper accepted from the owner of the horse a chattel mortgage of the horse in payment of its keep, and allowed the owner to retain possession of the horse during the period of the mortgage. *Held*, that the keeper had lost his lien.

MASTER AND SERVANT.

Fellow Servants, Railroad Crew

The Supreme Court of the United States has finally overruled its decision in *Chicago, etc., Rwy Co.* v. *Ross*, 112 U. S. 377, in which it decided that a conductor of a railroad train was not a fellow servant of the engineer, but that the railroad was liable, in an action by the engineer, for the negligence of the conductor. After explaining, distinguishing and qualifying the decision for a number of years, the Supreme Court finally overruled it flatly, and in *New England R. R. Co.* v. *Conroy*, 20 Sup. Ct. 85, decided that a brakeman was a fellow servant of the conductor of the train. Harlan, J., dissented, adhering to the rule laid down in *R. R.* v. *Ross*.

NEGLIGENCE.

Liability for Article Lost in Restaurant

In *Montgomery* v. *Ladjing*, 61 N. Y. Suppl. 840, Freedman, J., gives an excellent discussion regarding the liability of restaurant keepers for articles lost by their guests. Following the weight of authority, he decided that the restaurant keeper does not occupy the position of an innkeeper, or even of a bailee, unless the custody of the articles is given to his servants; therefore where a man on entering a restaurant hung his overcoat on a hook near him, from which it was stolen while he was dining, it was held that he could not recover from the restaurant keeper in the absence of proof of negligence by the latter.

PRINCIPAL AND AGENT.

Promise in Official Capacity

In *Kierstead* v. *Bennett*, 45 Atl. 42, suit was brought against the maker of the following promissory note: "I, in my official capacity as treasurer of the Danforth Trotting Park Association, promise to pay, etc. . . [signed] Horace A. Bennett, Treas." The Supreme Court of Maine, intimated that this was a personal undertaking of Bennett to pay the amount, but it was unnecessary to decide the question, since the association was unincorporated.

QUASI CONTRACTS.

The Supreme Court of Michigan holds that the plaintiff may waive a tort and sue in assumpsit only (1) where the defendant has converted property of the plaintiff or (2) where the defendant holds property of the plaintiff by virtue of contract relations with the plaintiff. In *St. John* v. *Iron Co.*, 80 N. W. (Mich.) 998, it was therefore held that where a third had converted the plaintiff's property and had sold it to the defendant, the plaintiff could not sue the defendant in assumpsit, but was relegated to his action of trover. There does not seem to be much reason for this very fine distinction in regard to the waiver of tort, and the case would probably not be followed in all jurisdictions.

Waiver of Tort

REAL PROPERTY.

In *Smith* v. *James*, 54 S. W. 41, the Court of Civil Appeals of Texas held that the rule that possession under an unrecorded deed is constructive notice of the grantee's title, was not varied by the fact that, previous to the deed, the grantee had occupied the premises as a tenant of the grantor, and there was consequently no change of possession under the deed.

Unrecorded Deed, Notice

SURETYSHIP.

Where a surety on a written instrument agrees in writing to ratify all "extensions" of time of payment and to be responsible as if no extension had been allowed, such an agreement covers only actual extensions resting upon positive agreements between the creditor and the debtor, and it does not render the surety liable on an extension of time implied from the fact that the creditor receives interest from the debtor subsequent to the maturity of the instrument: *Bank* v. *Thomson*, 59 Pac. (Kas.) 178.

"Extension," Payment

TRIAL.

It is generally held that it is within the discretion of the trial court in cases of personal injury to order the plaintiff to submit to a physical examination by the defendant's physicians. In *Wittenberg* v. *Ousgard*, 81 N. W. 14, the defendant demanded that the plaintiff should allow the region of his injury to be photographed by means of the Rœntgen rays. The Supreme Court of Minnesota held that the lower court had properly exercised its discretion in refusing the application, since the Rœntgen rays have not become so thoroughly recognized by science that a court can take judicial notice of the fact that they can be employed without injury to the subject.

Physical Examination of Plaintiff, Rœntgen Rays