PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ANIMALS.

Where the plaintiff, walking along a sidewalk, while attempting to get out of the way, by going further towards an outer railing, was kicked by a horse of the defendant, which the defendant's servant was leading on the sidewalk, the Supreme Court of New Jersey holds that it was proper to instruct that it was not necessary in order to recover, to show that the defendant knew that the horse was a kicker, since his use of the walk was wrongful: *Healey* v. *Ballantine & Sons,* 49 Atl. 511. The defendant relied mainly on the English case, *Cox* v. *Burbige,* 13 C. B. (N. S.) 430 in which it appeared that the defendant's horse being on a highway unattended, kicked the plaintiff, a child, who was playing there. There was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick, and it was held that there was no evidence upon which the plaintiff could go to the jury. In the late New Jersey case the court declines to follow this ruling, regarding the case as bad law.

Horse—Kicking, Vicious Propensities

BILLS AND NOTES.

Where notes were made to be discounted at a bank at the legal rate, the payment of a portion of the proceeds of the discount to an accommodation endorser to compensate him for the endorsement does not make the notes usurious: N. Y. Supreme Court (Appellate Division, Third Department) in *Birdsall* v. *Wheeler,* 71 N. Y. Supp. 67. Had the person who received this portion of the proceeds been the lender, says the court, it might properly be construed as an agreement to pay more than lawful interest, but not so under the circumstances.

Usury

CARRIERS.

A. secured a ticket from the defendant company, B., for transportation from Detroit to Chicago and return over connecting roads. It was represented that the ticket included a berth on a connecting boat, but the purser on the boat refused to honor the same, and A., refusing to pay the price demanded, slept on a couch in the cabin. Later he brought suit to recover for physical pain suffered from a cold alleged to have been contracted from the fact that the cabin door was open all night. The Supreme Court of Michigan holds in *Mewethy* v. *Detroit, G. R. & W. R. Co.*, 86 N. W. 827, that A. had assumed the risk of sleeping on the couch in the cabin and could not recover.

Assumption of Risk by Passenger

CONFLICT OF LAWS.

The written promise of a married woman, domiciled in New Jersey, to pay a sum of money to the order of her husband, signed by her at her domicile, and carried by him, with her acquiescence, to New York, and there endorsed, and delivered in exchange for other notes of like import, is a contract made in the state of New York; and hence the capacity of the wife to bind herself by a contract of suretyship is to be determined by the law of that state: *Thomson* v. *Taylor* (N. J.), 49 Atl. 544. Such a contract, the Court of Errors and Appeals holds, if valid in the state of New York, will be enforced against the married woman in New Jersey, though such contract if made in the latter state would be void, the majority of the court deciding that the New Jersey law as to suretyship in such cases is not a declaration of a public policy that closes the courts of the state to rights of action arising in other jurisdictions where the law is different. Three judges dissent.

Public Policy

In *Shannon* v. *Georgia State Building and Loan Association*, 30 Southern, 51, the Supreme Court of Georgia holds that where a foreign building association loaned money to a resident of the state on property within the state, and payments of interest were made to a local board in the state; though the contract stipulated that payment was to be made in the

Building and Loan Associations, Contracts

CONFLICT OF LAWS (Continued).

state of the association's domicile, yet the association, by establishing local boards within the state, and doing a regular and continuous business, had domesticated itself within the state, and its contracts were subject to the laws of the state.

CONNECTING CARRIERS.

Liability as Partners

The Supreme Court of Mississippi holds in *Alabama & V. Ry. Co.* v. *Lamkin,* 30 Southern, 47, that where two connecting railroads are under one management, so as to constitute one system, or have contracts for the carriage of goods, in which the roads are held out as a line for through transportation, they are jointly liable as partners for injuries to goods so shipped, though the general management of each road is retained by the respective companies. "Wherever there is an identity of interest, or the companies have placed certain features of their business under one general control, although the general management of each road is retained by its owners, the companies are, as to such features of their business, partners, and liable as such."

CONSTITUTIONAL LAW.

Vested Rights, Mortgage Foreclosure

A person has no vested right in a cause of action or defence based solely upon an informality or irregularity in judicial proceedings, not affecting his substantial equities; and a retroactive statute curing defects in such proceedings which are mere irregularities and mistakes and do not extend to matters of jurisdiction is not void as depriving one of his property without due process of law. This rule is applied by the Supreme Court of Minnesota, in the case of *Farnsworth Loan and Realty Co.* v. *Commonwealth Title Ins. and Trust Co.,* 86 N. W. 877, to a case where there had been a failure to file an affidavit as to costs and disbursements in mortgage foreclosure proceedings required by a statute. The defect having been cured by a later statute, the court holds such later statute constitutional. The Chief Justice and one of the Associate Justices dissent.

CONTRACTS.

Executed on Sunday

A contract which has been executed on Sunday, and which is therefore void, cannot be made valid by ratification on a subsequent week-day: Supreme Court of Michigan in *Acme Electrical, Illustrating and Advertising Co.* v. *Van Derbeck,* 86 N. W. 786. Of course, this rule does not bar recovery on a *quantum meruit,* where part or all of the work contracted for has been performed and accepted: *Bollin* v. *Hooper,* 86 N. W. 795 (same jurisdiction).

Factor's Lien

In reference to the same question, as to the effect of acts done on Sunday, the Supreme Court of North Dakota holds in *Rosenbaum* v. *Hayes,* 86 N. W. 973, that the fact that a factor acquired possession of the property on Sunday will not defeat his possession or lien based thereon. A Sunday transfer of property, even when prohibited by law, is effective so far as executed. The law merely refuses to lend its aid to enforce executory features of the contract, or to help the parties to regain their former position.

CONVERSION.

Delivery of Certificates in Envelope

The owner of certificates of indebtedness, which by custom were negotiable, called on a broker and stated that he wished to leave the certificates in the broker's keeping. The broker consented, and the owner handed him the certificates, which the broker placed in an envelope, on which was written the owner's name and the words "Private Property." The broker then sealed the envelope and carried it into his safe. Subsequently he pledged the certificates for his individual debt, and they were sold by the pledgee. In *trover* by the owner against the purchaser, it being in issue whether the certificates had been entrusted to the broker, the Supreme Judicial Court of Massachusetts held that the facts did not show such to have been the case, but that it was the sealed envelope containing the certificates which was entrusted, giving no implied right to break the package and pledge the certificates so as to confer title on a *bona fide* purchaser: *Scollans* v. *Rollins,* 60 N. E. 983.

CONVERSION (Continued).

In *Ritchie* v. *Burke,* 109 Fed. 16, the United States Circuit Court (N. D. Ohio) holds that a pledgee of railroad bonds payable to bearer does not convert such bonds by causing them to be registered in his own name, so that they are thereafter payable only to him or his order, but such action is proper for the protection of both himself and the pledgor. The reporter refers, in connection with the case, to a note to *Frater* v. *Bank,* 42 C. C. A. 135, in reference to the rights and liabilities of pledgees of corporate stock.

Registration of Bonds by Pledgee

CORPORATIONS.

In *Niles* v. *New York Cent. and H. R. R. Co.,* 71 N. Y. Supp. 271, a minority stockholder sued to recover damages to his stock sustained by the defendants' alleged tort in forcing the foreclosure of a mortgage on the property of his corporation with the consent of a majority of the stockholders to the end that the defendants might gain the control of the property. The foreclosure practically destroyed the value of the plaintiff's stock, but the New York Supreme Court (Special Term, New York County) holds that the action is not maintainable, on the ground that such injury is common to all the stockholders.

Corporations, Action by Minority Stockholder

In re Ervin, 109 Fed. 135, the United States District Court (Eastern District of Pennsylvania) holds that where a corporation entered into partnership articles with a firm, and embarked moneys in and sold goods to the firm, the corporation, to the extent of such acts, executed the articles of partnership by becoming a partner *de facto,* and could not, by asserting that the partnership agreement was *ultra vires,* prove a claim in competition with general creditors upon the bankruptcy of the firm.

Bankruptcy of Partner

DAMAGES.

The New York Supreme Court (Appellate Division, First Department) holds in *Williams* v. *Underhill,* 71 N. Y. Supp. 291, that a recovery for mental injuries and suffering alone is not precluded in cases of wilful tort. The court distinguishes the cases which refuse

Mental Injuries

DAMAGES (Continued).

to allow a recovery where such damages are all that can be shown to have resulted where the action is based on the negligence of the defendant, on the ground that in such cases the mental injuries are not regarded as the natural and probable consequences of the negligent act, and that this reason fails in cases of wilful tort.

DANGEROUS PREMISES.

An employer is not bound by the act of his employe, "not his *alter ego*," in inviting or permitting children to be on his premises: Supreme Court of Michigan in *Formall* v. *Standard Oil Co.*, 86 N. W. 946. Nor will tacit acquiescence on the part of an employer in permitting children upon his premises, be sufficient to fasten liability for injuries caused by negligent conditions thereon.

Invitation of Employe

In *Kent* v. *Halliday*, 49 Atl. 700, it appeared that the plaintiff alleged that he purchased Paris green of the defendants, to kill potato bugs, and that because of the impure and weak character of the article, it failed to kill them, and that by reason of such failure the plaintiff's crop was ruined. The Supreme Court of Rhode Island holds that the damages are not so remote and indefinite as to render a declaration based thereon demurrable.

Remoteness

DEATH BY WRONGFUL ACT.

The statute law of Rhode Island, similar to that of most of the states of the Union, provides that wherever death shall result from a wrongful act the next of kin may maintain an action therefor, if the negligence was such that the deceased could have maintained an action had he survived. In *Gorman* v. *Budlong*, 49 Atl. 704, the Supreme Court of the state holds that where a mother was injured through the negligence of the defendant so that she gave premature birth to a child, which died as a result of the premature delivery, the statute did not entitle the child's father to maintain an action, as the next of kin of its wrongful death.

Unborn Child

ELECTION OF REMEDIES.

In *Baltimore and Ohio S. W. R. Co.* v. *Adams*, 60 N. E. 1004, the Appellate Court of Indiana holds that where a person contracting to sell a right of way to a railroad company refuses to perform, a condemnation of the right of way does not prevent the company from maintaining an action for damages for breach of contract.

Condemnation: Effect

ESTATES.

Against the dissent of three justices the Supreme Judicial Court of Massachusetts holds in *Powow River Nat. Bank* v. *Abbott*, 60 N E, 973, that where the plaintiffs had claims against an estate, and relying on the statements of the administrator that the estate would be represented insolvent in such time as to give them ample opportunity to present their claims to the commissioners, and that it would waste the assets to bring suit, refrained from doing so, and the commissioners were appointed so late that the plaintiffs were unable to present their claims until after the expiration of the period allowed by statute for the presentation of claims, there was no mistake such as to entitle them to equitable relief permitting them to share with the other creditors.

Claims, Delay, Mistake

FOREIGN ADMINISTRATOR.

A savings bank paid a deposit therein to a foreign administrator of a deceased depositor upon his production of a certified copy of his letters. A domestic administrator of the depositor had been appointed in the same county five months before the foreign administrator's appointment. Under these facts the City Court of New York (General Term) holds in *Maas* v. *German Savings Bank*, 71 N. Y. Supp. 483, that the presentation of the foreign letters put the bank on inquiry as to the appointment of a domestic administrator in its county, and such payment to the foreign administrator was no protection against the claim of the domestic administrator.

Payment of Deposit

FOREIGN DIVORCE.

In *Starbuck* v. *Starbuck,* 71 N. Y. Supp. 104, it appeared that the plaintiff sought to recover dower to the estate of her deceased husband. She had been a resident of Massachusetts and married a resident of New York. She later returned to Massachusetts and instituted proceedings for a divorce on the ground of cruelty. The husband was served personally in New York and the divorce decreed. On the strength of the decree thus obtained by the wife, he remarried. The New York Supreme Court (Appellate Division, Second Department) holds that the Massachusetts decree is not binding on the plaintiff in New York, though obtained by proceedings prosecuted by her, and that hence it did not bar her right to dower in her husband's lands in New York. The fact that her husband remarried on the strength of the divorce obtained by her does not stop her from claiming such dower. Goodrich, P. J., dissents.

Dower, Bar

FRAUD.

A circle of King's Daughters was induced to support a certain woman during several years by her fraudulent pretense that she was destitute, when in fact she had a considerable estate in bank. The complainants, after her death, brought a bill in equity for relief. The Court of Errors and Appeals of New Jersey holds in *Anderson* v. *Eggers,* 49 Atl. 578, that the complainants were entitled to be recompensed out of the estate for the money and property so furnished to her; and further that in view of the numerous small items to be considered in ascertaining the compensation due, the jurisdiction in equity should be sustained.

Support

FRAUDULENT CONVEYANCES.

A wife, with the knowledge and approval of her husband, to secure a present loan, mortgaged property which she held in trust for him. This trust arose upon a conveyance by the husband to the wife. The mortgagee knew the circumstances under which the trust arose, but so far as appeared, he did not know of any intent on the husband's part to defraud his creditors thereby nor of circumstances from which that intent could be inferred. Under these circumstances the

Trust Property, Notice of Fraud

FRAUDULENT CONVEYANCES (Continued).

Supreme Court of New Hampshire holds in *Lewis* v. *Dudley*, 49 Atl. 572, that the mortgagee was an innocent purchaser for value, and took a good title under his mortgage, though her title may have been fraudulent.

HOMICIDE.

Where, in a murder trial, the court did not define a "reasonable doubt" in its charge it is error to refuse such a charge when offered by the defendant: *Terrell* v. *State*, 64 S. W. 223 (Supreme Court of Arkansas).

Reasonable Doubt

HUSBAND AND WIFE.

A husband's right to damages from a man who debauches his wife is not precluded by the fact that his wife was equally guilty in making improper advances: Supreme Court of Pennsylvania in *Seiber* v. *Pettitt*, 49 Atl. 763. Such fact, however, is proper in mitigation of damages, since the court says: "Less money may indemnify him for the loss of such a wife's affection and society, and a milder penalty may suffice to punish such a degree of guilt on the part of the man, but the essence of the action—a wrong and injury to an innocent husband—remains," and hence the *cause of action* is not lost by these facts.

Debauchery of Wife

INSURANCE.

The Court of Errors and Appeals of New Jersey, in *Campbell* v. *Supreme Conclave Improved Order Heptasophs*, 49 Atl. 550, meets the old question of the effect of suicide upon a life insurance policy and holds, against the dissent of six justices, that suicide will not defeat recovery upon a contract of life insurance not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms.

Suicide

LANDLORD AND TENANT.

The general rule of law that, "when a tenant with the consent of the landlord, express or implied, holds over his term, the law implies a continuation of the original tenancy upon the same terms and conditions," does not obtain in a case where the rent reserved in

Holding Over

LANDLORD AND TENANT (Continued).

the original lease for the most part consists of the performance by the tenant of labor upon the premises of such a nature that, being once performed during the original term, becomes incapable of further performance by the tenant while holding over: Supreme Court of Kansas in *Martin* v. *Hamersky,* 65 Poc. 637.

In *Young* v. *Consolidated Imp. Co.,* 65 Pac. 720, it appeared that a lease provided that the tenant could put up such additional improvements as it (a company) might consider advisable, and remove the same at the expiration of the lease. Later it was mutually agreed that the lease should be extended, with the right in the lessee to occupy the premises from month to month, each party to give a reasonable notice of a desire to terminate the tenancy. The Supreme Court of Utah holds that the extension of the terms and conditions of the lease included the right of the lessee to remove improvements placed there by it. The case presents a different aspect from the well known state of facts arising where a new lease is accepted which fails to refer to the improvements.

Improvements

LIFE TENANT.

"Ordinarily," says the Supreme Court of Nebraska in *Schimpf* v. *Rhodenald,* 86 N. W. 908, "a life tenant who makes betterments upon the estate is not entitled to be reimbursed for the same by the reversioners or out of the reversion." But, it is held, even in case he should be so entitled, his right will not pass by his will purporting to devise the lands in fee; and the occupying claimant's act will not in such case be available to the devisee with respect to the betterments made before the termination of the life estate.

Improvemen

LIMITATIONS.

The New York Supreme Court (Appellate Division, First Department) holds in *Brintnall* v. *Rice,* 71 N. Y. Supp. 441, that where A. made an accommodation note to enable B. to obtain a loan, and pledged certain personal property to secure such note, subsequently paying a portion of it to regain possession of the pledged property, a letter of B., saying that he would see that A. should be at

New Promise, Sufficiency

LIMITATIONS (Continued).

no loss in the transaction, was a sufficient acknowledgment of indebtedness and a promise to pay to prevent the running of the statute of limitations. Two judges dissent on the ground that the writing does not contain such a distinct and unequivocal promise to pay the debt as the law requires.

TENANTS IN COMMON.

In *Polk* v. *Gunther,* 64 S. W. 25 the Supreme Court of Tennessee holds that where one tenant in common, at his own expense, improves the common property, and afterwards partition in kind is made, such improvements should be alloted to the party making them, without any charge for their value.

Improvements

VENDOR'S LIEN.

In a proceeding to enforce a vendor's lien on certain described land, it appeared that the sale was not only of the land on which the lien was claimed, but also of certain timber on other land, and that no value had been placed upon the timber. The Supreme Court of Michigan holds that, as it was impossible to state the amount of the purchase price of the land, no lien therefor could exist: *Warner* v. *Bliven,* 87 N. W. 49.

Purchase Price

WATER COURSES.

The Supreme Court of Minnesota holds in *Kray* v. *Muggli,* 86 N. W. 882, that where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, *acquire a reciprocal right* to have the artificial condition remain undisturbed, and the person who placed the obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state to the injury of such riparian owners. Chief Justice Start dissents, but writes no individual opinion.

Obstruction, Prescriptive Rights