PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

Breach of Promise of Marriage

In re Fife, 109 Fed. 880, the United States District Court (W. D. Pennsylvania) holds that where in an action for breach of promise of marriage a verdict was recovered before the defendant filed his petition in bankruptcy, on which judgment was entered before he applied for his discharge, such claim was provable under the Sixty-third Section of the Bankrupt Act, since it was founded on a contract and reduced to judgment after the filing of his petition and before the consideration of his application for a discharge.

Partnership

A mortgage given by a partnership on its property is not affected by bankruptcy proceedings against one of the partners alone, though after the giving of the mortgage, the firm was dissolved, and such partner took its assets and assumed its liabilities: United States District Court (E. D. North Carolina). *In re Sanderlin,* 109 Fed. 857.

False Statements by Bankrupt

Where a bankrupt knowingly made false statements of his assets or liabilities in reports made to commercial agencies, a wholesale dealer, who sold him goods on credit in reliance on such reports, is entitled to rescind the sale and recover the goods, without regard to whether or not the statements were made with fraudulent intent; but it is essential to such right of rescission that the credit should have been induced by the false statements, and, but for them, would not have been extended: United States District Court (W. D. Arkansas, E. D.). *In re Epstein,* 109 Fed. 874.

BROKERS.

Commissions, When Earned

Where a broker employed to procure a purchaser is discharged before producing a purchaser at the terms authorized, such broker is not entitled to any compensation: *Cadigan* v. *Crabtree,* 61 N. E. 37 (Supreme Judicial Court of Massachusetts).

BURDEN OF PROOF.

Notice to Director

The Court of Chancery Appeals of Tennessee holds in *Major* v. *Stone's River National Bank,* 64 S.W. 352, that where the cashier of a bank, being indebted thereto, pledged notes as collateral, and afterwards, being indebted to a director, pledged the same notes to him, without the knowledge or consent of the bank, such director cannot be held to be an innocent purchaser of such collateral, without positive evidence that he did not know of the original pledge to the bank, and that he loaned his money to the cashier on the faith of the collateral. "Two officers of the bank," says the court, "dealing with each other, and using the bank's collateral for their own purposes, would have to show by clear and positive evidence their own good faith."

CONDITIONAL SALE.

Payment by Installments

With one judge dissenting, the New York Supreme Court (Appellate Division, Third Department) holds, in *Gray* v. *Booth,* 71 N. Y. Supp. 1015, that where a contract for the sale of personalty provides that title shall not pass until full payment of installments of the purchase price, the vendor may maintain a suit for each installment as it falls due.

CONSTITUTIONAL LAW.

Suit Against a State

The United States Circuit Court (D. Massachusetts) holds, in *Haverhill Gaslight Company* v. *Barker,* 109 Fed. 694, that a suit by a gas company against a gas commission created by the state, and the attorney general, who is charged by the statute with the duty of enforcing the orders of the commission by proceedings in the court, to enjoin threatened proceedings to enforce such an order, and to have it decided void as in violation of a right of the complainant under the Constitution of the United States, is not a suit against the state within the meaning of the Eleventh Amendment to the Federal Constitution.

CONTRACTS.

Where the plaintiff contracted to sell to the defendant a certain quantity of peaches from certain orchards, and because of drought less than that quantity was grown, the defendant cannot recover damages for failure to deliver the quantity specified: Supreme Court of California in *Ontario etc. Association* v. *Cutting Fruit-Packing Co.*, 66 Pac. 28. The court allows the plaintiff to recover for peaches furnished and accepted under the contract, but refuses to allow the defendant to set off his damages due to the alleged breach.

Breach, Failure of Crop

CORPORATIONS.

Against the dissent of two judges, the Supreme Court of California holds, in *Yule* v. *Bishop*, 65 Pac. 1094, that where a note given by a corporation is paid by a surety thereon, such surety may recover the amount paid from the stockholders at the time the payment was made, but not from the stockholders at the time the note was given, who had parted with their stock, since, it is held by the majority of the court, the debt is not on the note, but for money paid for the corporation's benefit.

Stockholders' Liability to Surety

The question of what relation a director of a corporation sustains to the business thereof, becomes important in the case of *People* v. *Supreme Tent of the Maccabees of the World*, 71 N. Y. Supp. 960, where it appeared that the by-laws of a fraternal order provided that no person who is engaged as "principal, agent or servant" in the manufacture or sale of malt liquors shall become a member. The New York Supreme Court (Special Term, Monroe County) holds that this does not render ineligible the director of a corporation engaged in manufacturing and selling malt liquors, since he is in no sense a principal, agent, or servant in the transaction of the business of his corporation.

Relation of Director to the Business

DAMAGES.

The Court of Appeals of Kentucky holds, in *Denhard* v. *Hirst*, 64 S. W. 393, that if manufacturers selling carpets know that the buyer intends to sell them at retail, the measure of damages for the failure of the sellers to deliver the carpets is the profits the buyer would have made if they had been delivered; but if the sellers do not know that the carpets are

Knowledge of Contracting Party

DAMAGES (Continued.)

to be resold at retail, the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery. "The profits which one reasonably and reliably anticipates from the possession and manipulation of the goods bought are considered as much a part of the contract of sale as the claim to any actual increase in value at the time of delivery over the contract price, and hence the prevailing rule of law permits the recovery of such profits as *special or consequential* damages."

DECEDENT'S ESTATES.

A tendency in the courts to depart somewhat from the harsh attitude of the common law towards illegitimate children appears in *Morton's Estate,* 87 N. W. 182, where the Supreme Court of Nebraska holds unanimously that an illegitimate child, whose parents, before his death, intermarry, and have other children, and whose father has adopted him into his family by admitting and receiving him into his family, and has given him his family name and acknowledged and recognized him as a child, is adopted into the family in fact, and is entitled to share as a legitimate child, where there is a devise to the children "share and share alike." The statute providing for such legitimatization by adoption is construed as intending an adoption in fact and not an adoption in law.

Illegitimate Children

DIVORCE.

In *McGean* v. *McGean,* 49 Atl. 1083, five justices of the Court of Errors and Appeals of New Jersey dissent from the proposition that a case of obstinate desertion is not made out against the husband, if it appears that the separation was not against the will of the wife.

Desertion

EMINENT DOMAIN.

In re Delafield, 109 Fed. 577, the United States Circuit Court (W. D. Pennsylvania) holds that the passage of an ordinance by a city, authorized by statute to condemn land for public purposes, stating its election to appropriate certain property, amounts to a present taking of such property, and entitles the landowner to institute proceedings to recover

Condemnation Ordinance

EMINENT DOMAIN (Continued).

compensation therefor; and the city cannot delay such proceedings by failing to file the bond required by the statute as a condition precedent to its taking possession or instituting proceedings on its own part to have the damages assessed.

ESTOPPEL.

A married woman, who makes a nuncupative will by public act, which recites that certain property acquired during the marriage in the name of the husband is his separate property, is not thereby estopped to assert the contrary: Supreme Court of Louisiana, in *Succession of Muller,* 30 Southern, 329.

Nuncupative Will

That abutting owners on a stream have not objected to the use of the stream as a sewer, does not estop them from objecting where the city proposes to increase such sewer: *Gale* v. *City of Syracuse,* N. Y. Supp. 986, New York Supreme Court (Special Term, Onondaga County).

Pollution of Stream

EVIDENCE.

The well-known Federal Statute, which authorizes courts of the United States, in actions at law, on motion and due notice, to require parties to produce books or writings which contain evidence pertinent to the issue "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," is held in *Owyhee Land and Irrigation Co.* v. *Tautphans,* 109 Fed. 547, to go no further than to apply to actions at law the remedy which, in equity, is afforded by a bill of discovery; and, before a defendant can be held in default for a failure to produce such evidence as is provided by the statute, the court must have determined that the evidence so sought is pertinent to the issues and ought to be produced, and have made an order for its production which has been disobeyed.

Requiring Production of Documents

EXECUTION.

Where a firm recovered judgment on a debt due it, and thereafter one of the partners died, the executrix of the deceased partner may join with the survivor in application for leave to issue execution after five years: New York Supreme Court (Special Term). *In re Armstrong,* 71 N. Y. Supp. 951.

Death of One Plaintiff

FIXTURES.

Telephone Companies

The Supreme Judicial Court of Maine holds, in *Readfield Telephone and Telegraph Co.* v. *Cyr*, 49 Atl. 1047, that as between debtor and creditor the posts of a telephone company, with the wires and insulators thereon, continue to retain their character as chattels, and may be seized and sold on execution as personal property. "In determining the question of whether a chattel has become so affixed to the realty as to become accessory to it and form a part and parcel of it, the modern and most approved rule is to give special prominence to the intention of the party making the annexation—not his hidden, secret intention, but the intention which the law deduces from such external facts as the structure and mode of the attachment, the purpose and use for which the annexation has been made, and the relation and situation of the party making it."

FOREIGN MARRIAGE.

Validity

A marriage by a Russian Jew in Russia with his niece, though lawful in Russia, will not be recognized as valid in Pennsylvania, where a continuance of the relation would expose the parties to indictment in the criminal courts; United States District Court (E. D. Pennsylvania) in *U. S. ex rel. Devine* v. *Rodgers*, 109 Fed. 886.

FRAUD.

Expression of Opinion

In an action upon a contract for the production of a play, the evidence is insufficient to sustain fraud on the part of the plaintiff, because he stated in good faith that he had the exclusive right to produce such play in England, when in fact the play was public property, such statement, the court holding, being merely an expression of opinion upon a difficult question of law: New York Supreme Court (Special Term, New York County) in *Brady* v. *Edwards*, 71 N. Y. Supp. 972.

Concealment of Value, Partners

The parties were partners in certain mining enterprises, and jointly owned an interest in a mining claim, in which complainant also owned a separate interest. The defendants, by tunneling from an adjoining mine, managed by them, discovered an extensive and valuable vein of ore in such claim, and, concealing such fact from complainant, procured an option on his interest,

FRAUD (Continued).

and execution and delivery in escrow of a deed therefor, and afterwards by fraud, and without payment therefor, obtained possession of the deed. The United States Circuit Court of Appeals holds, in *Hanley* v. *Sweeny,* 109 Fed. 712, that such deed should be set aside as fraudulent and void, *both because of such concealment* and because never delivered.

FRAUDULENT CONVEYANCE.

A husband fraudulently conveyed his goods to his wife and another, and such other conveyed to the defendant, who purchased in good faith, and formed a partnership with the wife. Subsequently after notice of the fraud and of pending actions to set aside the conveyance, the goods of the partnership were transferred to a corporation organized for the purpose, and in which the members of the partnership were the principal stockholders. Under these facts the New York Supreme Court (Appellate Division, Fourth Department) holds, against the dissent of two judges, that the corporation, having purchased with notice, was bound by the judgments subsequently recovered in the creditors' actions adjudging the conveyance void: *Varnum* v. *Behn,* 71 N. Y. Supp. 903. The receiver, it is held, was entitled to judgment against the corporation for the amount of the wife's interest in the partnership at the time it was transferred to the corporation and against the wife individually for the value of the property conveyed to her by the husband, but to no judgment against the wife's partner individually.

Husband and Wife, Subsequent Purchaser

INSURANCE.

A member of a fraternal society took a certificate of life insurance payable to B., "as his fiancée." On his death the fund was claimed by B. and also by a deserted wife of the insured. The society deposited the fund in court, and the claimants interpleaded. Upon these facts, the Supreme Court of California holds, in *Woodmen of the World* v. *Rutledge,* 65 Pac. 1105, that since the society had waived all question of fraud and claim to the money, the wife cannot object that B. was not entitled to it because the insured was incapable of contracting marriage at the time of the engagement to B.

Fraud, Waiver by Society

JURISDICTION.

The United States Circuit Court of Appeals (Ninth Circuit) holds, in *Excelsior Wooden-Pipe Co.* v. *Pacific Bridge Co.*, 109 Fed. 497, that, while a circuit court dismisses a case on the ground that it has no jurisdiction, leaving pending motions undetermined, the only issue reviewable is that of jurisdiction, which must be taken to the Supreme Court, and an appeal will not lie to the circuit court of appeals.

Federal Courts

A federal court is without jurisdiction of a suit to enforce a lien against a railroad in favor of a partnership, brought by the plaintiff as one of the partners, and as assignee of his co-partner, unless it is shown that the citizenship of the assignor is such that the suit could have been maintained in that court by the firm: United States Circuit Court (D. Oregon) in *Barr* v. *Columbia Southern Ry. Co.*, 109 Fed. 501.

Suit by Assignee

The same court holds, in *Johnson* v. *Ford*, 109 Fed. 501, that a federal court is without jurisdiction of a suit by a legatee against an executor, the purpose of which is to secure the appointment of a receiver for the property of the estate, which is in process of administration in a probate court of the state, on the ground that the defendant has not included all the property in his inventory, and has been guilty of fraud and collusion to the detriment of the estate. In such matters the jurisdiction of the probate court is exclusive though the plaintiff is a citizen of one state and the executor of another. The court refuses to follow *Richardson* v. *Green*, 9 C. C. A. 565, and distinguishes *Payne* v. *Hook*, 7 Wallace, 425.

Suit by Legatee against Executor

LIMITATIONS.

The Supreme Judicial Court of Massachusetts holds, in *Pearson* v. *Treadwell*, 61 N. E. 44, that where the trustees under a will have in their hands undivided income of the trust funds, an agreement entered into between the beneficiaries determining their respective rights to such income, and declaring it to be their property in certain proportions, does not remove such income fund from the trust so as to make such trustees simple debtors, and start limitations running against a claim therefor.

Trusts, Contracts

OBSTRUCTION OF OFFICER.

The Georgia Code contains a provision, very similar to the law of the other states of the Union, providing that it is a misdemeanor to "knowingly and wilfully obstruct or oppose any officer of this state, or other person duly authorized, in serving or attempting to serve or execute any lawful process or order." In *Vince* v. *State,* 39 S. E. 435, the Supreme Court of that state, construing this provision, and reversing the decision of the court below, holds that merely refusing, upon the demand of a levying officer, to unlock a door of a house in order to enable him to enter the same for the purpose of levying a lawful process upon goods contained therein, is not a violation of this provision. The similarity of the Georgia legislation to that of other states gives to the case a more than local interest.

What Amounts to.

PRINCIPAL AND AGENT.

A decision of apparently wide effect is made by the United States Circuit Court of Appeals (Seventh Circuit) in *Central Exchange of Chicago* v. *Bendinger,* 109 Fed. 926. In that case it appeared that the plaintiff had intrusted money to an agent for the purchase of certain bonds. The agent, without the knowledge or consent of the plaintiff, deposited the money from time to time with the defendant, which conducted a "bucket shop," as margins to cover gambling transactions which were illegal and void, and constituted misdemeanors under the laws of the state. Subsequently the defendant paid to the agent certain sums as profits which the agent converted to his own use. The remaining margins were lost in the deals. The court holds that the defendant, having received the money illegally, became at once a trustee *de son tort,* and liable to the plaintiff for the entire amount, notwithstanding it had no knowledge of actual ownership; and that its repayment of sums to the agent, who had already violated his trust, was not a restitution to the plaintiff, of which it could avail itself as a defense, even *pro tanto.*

Trustee De Son Tort

PROPERTY RIGHT IN MARKET QUOTATIONS.

The furnishing by a board of trade of market quotations, made upon the transactions of its exchange to customers for their exclusive use, either by means of a ticker, or by placing them on a blackboard in the customers' office, is not such a publication as deprives the board

Publication

PROPERTY RIGHT IN MARKET QUOTATIONS (Continued).

of its property right therein, and it is entitled to the protection of such right by an injunction prohibiting the use of such quotations without its authority, and before their publication to a third party, to whom they are furnished by one who obtains them surreptitiously: United States Circuit Court (E. D. Wisconsin) in *Board of Trade of Chicago* v. *Hadden-Krull Co.*, 109 Fed. 705.

RAILROADS.

Excavations, Damages, Limitations

A railroad company's excavation disturbed the foundation of an adjacent church edifice. In 1882 a settlement was made, whereby the company erected a retaining wall for the protection of the church property, and paid for repairs on the building, taking a receipt acknowledging such payment in full settlement and discharge of all damages done to the church, adding that the company was to pay for all work in progress. In 1887, the church sustained damages arising from the failure of the wall to sustain the vibration by running trains, for which damage suit was instituted in 1891. Under these circumstances the Court of Errors and Appeals of New Jersey holds that the injury for which the suit was brought was entirely distinct from that arising from the first excavation, and was not embraced in the original settlement. The injury for which the suit was brought being in this view a new cause of action, arising in 1887, limitations began to run from that date. Five judges dissent. *Church of the Holy Communion* v. *Paterson Extension Railway Co.*, 49 Atl. 1030.

RIGHT OF PRIVACY.

Likenesses, Use for Advertising

The decisions arising in connection with questions as to a man's right "to be let alone" possess interest, as showing a development of a branch of law as yet in a formative condition. The tendency of the courts is apparently to protect a man in his right of privacy, and this appears where, in *Roberson* v. *Rochester Folding-Box Co.*, 71 N. Y. Supp. 876, the defendants without authority published and posted in conspicuous places a large number of lithographic prints of the plaintiff, with advertisements of their business thereon. This she alleged made her a subject of scoffs and jeers, and caused her humiliation and distress of mind, and she sued not only to restrain such publi-

RIGHT OF PRIVACY (Continued).

cation and use of her picture, but also *for damages,* and upon a demurrer to her complaint, the court overrules the demurrer, holds the cause of action maintainable for both purposes on the ground that the defendants have by the alleged acts invaded the plaintiff's right of privacy. The court does not regard the publication as libelous, but holds the action maintainable on the principle which it puts in this language: "The cause of action arises in such a case from the fact that the defendant has violated the right of personal immunity —the right not to be interfered with to his damage or danger or discomfort." The court makes an interesting, but by no means exhaustive, review of the subject.

SALES.

Where a note to a bank is secured by a trust deed, executed to stockholders and directors of the bank as trustees, and at the sale under the deed the bank is purchaser, the sale is not, for these reasons, void: Supreme Court of California in *Sacramento Bank* v. *Copsey,* 66 Pac. 8.

Validity

SALE OF GROWING TREES.

It has become settled law, says the Supreme Judicial Court of Maine in *Emerson* v. *Shores,* 49 Atl. 1051, by the great weight of authority, that parol or simple contracts for the sale of growing wood or timber, to be cut and removed from the land by the purchaser, are not to be construed by the parties as intended to convey any interest in the land, but as executory contracts for the sale of the timber after it shall have been severed from the soil and converted into chattel property, together with a license to enter upon land for the purpose of cutting and removing it. And while the license to enter and cut timber, thus created by parol or simple contracts, the court says, is irrevocable as to that part of the timber which has been severed from the land in execution of the contract, yet while it remains executory, as to the wood or timber not yet severed from the land, it is revocable not only at the will of the owner, but by his death or by his conveyance of the land without reservation.

Interest in Land, Contract, Construction

SPENDTHRIFT TRUST.

In *Murphy* v. *Delano,* 49 Atl. 1053, it appeared that trustees were authorized by the will of a testator to turn over the whole estate to his son after he became thirty years of age, if, in their judgment, it would be for the best interest of the son and his heirs for him to "have possession and control of the whole of said residue." But it appeared from the terms of a trust deed from the trustees to the son that, in their judgment, it was not for his interest to have control of the entire property, for the deed continued in the trustees the control of $25,000 of the estate, and attempted to protect the income payable to the son against either alienation by him or attachment by his creditors. The Supreme Judicial Court of Maine holds that such a stipulation whereby the son became absolutely entitled to receive one-fourth of the income quarterly is not in conformity with the terms of the trust, and, if held operative, would have the effect to defeat the manifest purpose of the testator by making this income subject to the claims of creditors.

Agreement between Trustees and Cestui

TELEGRAM.

The Supreme Court of Georgia holds in *Western Union Telegraph Co.* v. *Waxelbaum,* 39 S. E. 443, that while the sendee of a telegraphic message has a right of action against the company for any damages he may sustain in consequence of its negligence in the transmission of a message to him, he is bound by the reasonable terms of the contract made between the company and the sender of the message.

Sendee's Rights Conditions

TRIAL.

In *Yori* v. *Cohn,* 65 Pac. 945, the Supreme Court of Nevada holds that where a defendant, relying on promises of material witnesses, living without the state, who where not served with process, that they would be present at the trial, fails to take their depositions, a continuance will be allowed on an affidavit showing that they are prevented from attending by sickness. The Chief Justice dissents on the ground that, just as a litigant may not rely on the promise of a witness within the jurisdiction, but should serve him with process, so a litigant sh[illegible]

Continuance, Absent Witness

TRIAL (Continued).

take the deposition of a witness without the jurisdiction and his reliance on promises to be present will not entitle him to a continuance. The majority, on the other hand, hold that due diligence was used.

TRUSTEES.

Apportionment of Contributions

The growing custom of newspapers to solicit contributions through their columns for various charities of current interest renders important and interesting the decision of the Supreme Court of California in *Hallinan* v. *Hearst,* 66 Pac. 17. It is there held that the publisher in such case becomes a voluntary trustee of the funds, charged with devoting them to the objects indicated in the solicitations. The question in what proportion such moneys are to be distributed among the advertised beneficiaries is, in the first instance, to be decided by such publisher, with which decision the courts will not interefere except in case of gross abuse.