PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ANIMALS.

Thieving Dogs

The Court of Appeals at Kansas City, Mo., holds in *Fisher* v. *Badger,* 69 S. W. 26, that an owner of a house who, after securing the screen door of his kitchen, is awakened during the night and finds that a dog has broken in and stolen milk, would be justified in thereupon killing the dog. The ground of the decision is that it was necessary for the protection of property. "Because he killed the dog after, and not while he was in the act of committing the depredation, could make little or no difference, for it is a well-known fact that a thieving dog, when he has once obtained what he is in pursuit of, will come again for the same purpose. . . . We further hold that a thieving dog is as much a common nuisance as a sheep-killing dog, and as such is not entitled to the protection of the law, for there is no way to avoid his depredations except to kill him unless the owner, knowing his evil propensities, restrains him."

ASSAULT.

Mental Suffering

In *Kline* v. *Kline,* 64 N. E. 9, it appeared that an assault was committed on a woman by pointing a pistol at her. The Supreme Court of the state holds that this wrong being willful, the plaintiff was entitled to recover full compensation for the damages sustained by her by reason thereof, including damages for fright and mental sufferings, though there was no physical touching of her body and no direct physical injury. "While," says the court, "the current of authority supports the doctrine that there can be no recovery for mental suffering, where there has been no physical injury in ordinary actions for negligence, yet that is not the law as applied to a willful injury committed against the complaining party." See *Wyman* v. *Leavitt,* 36 American Rep. 303.

ASSAULT (Continued).

What Constitutes

The plaintiff, sixty-nine years old, was talking to a third person who had hold of his arm, when the defendant, a man thirty-five years old, weighing two hundred and twenty-five pounds, came past them, seized the third person's arm and pulled him with such force that the plaintiff on whose arm the third person retained his hold, was thrown and injured. "The defendant's act was friendly and was a customary form of greeting between him and the third person!" Under these facts the Appellate Court of Indiana holds in *Reynolds* v. *Pierson,* 64 N. E. 484, that the defendant was guilty of a willful assault. The defendant, it is said, exhibited such a reckless disregard of consequences, as to constitute a constructive intent to assault the plaintiff.

CARRIERS.

Passengers: Essentials of Relationship

In *Simmons* v. *Oregon R. Co.,* 69 Pac. 440, the Supreme Court of Oregon holds that while in general the conductor of a freight train does not have implied authority to accept persons as passengers, yet where a railroad company allows passengers to ride on regular freight trains, but not on "extras," and a person in good faith boards a train in fact an "extra," but in all appearances similar to a regular freight, and he is allowed by the conductor to ride thereon, he is to be regarded as a passenger to whom the company is liable as a carrier for injuries received while on such train.

The same case draws a distinction between where a railroad company is and where it is not liable to an employe being carried by it. An employe, it is said, travelling free as a part of his contract of service, to and from his work, or in immediate connection with his employment, is not a passenger, but an employe, and a fellow-servant with those in charge of the train. But, where an employe is traveling on his own private business, when his time is his own, even though he travels on a pass or ticket received on account of his employment, or is permitted to travel without a pass or ticket by reason of his employment, he is a passenger, and not a servant. See and compare *Gillshannon* v. *Railroad Corp.,* 10 Cush. 228, and *Dickinson* v. *Railway Co.,* 117 Mass. 365.

CHAMPERTY.

In *Irwin* v. *Curie,* the Court of Appeals of New York holds that where a customs broker, with the assent of his clients, has placed their claims against the government with an attorney for collection, with an agreement that such attorney will divide with him the amount of any recovery, he may maintain an action against the attorney for his share of the proceeds, though the statute law of New York prohibits attorneys from making such agreements. This provision, it is held, is directed against the attorney alone, and does not prohibit a layman from entering into such contract. It is not improbable that the case would be followed in other jurisdictions, but it is difficult to see how the broker should recover on the contract, since, if it is void as to the attorney the broker has given no consideration; and hence his recovery should be based on quasi-contract; but it is apparently the theory of the court that recovery is on the contract.

Contingent Fee

CONTRACTS.

In *Brown* v. *Levy,* 69 S. W. 255, the Court of Civil Appeal of Texas holds that where A. makes an offer to erect a building for a certain amount, and B. accepts it, there is a consummated and binding contract, though A., in adding up the items of his estimates, makes a mistake, for which B. is not responsible, by which the total is made $10,000 too small. No authorities are cited, and the opinion upon the point is very brief. See and compare *Webster* v. *Cecil,* 30 Beavan, 62, where upon very similar facts a different conclusion was reached.

Mistake.

CONVERSION.

In South Carolina a female may, when over twelve years of age, make a will disposing of her personal property. The Supreme Court of this state deals with a will made by an infant female over twelve years of age in *Major* v. *Hunt,* 41 S. E. 816, where part of the estate purported to be bequeathed was a fund arising from the sale of certain real estate of the testatrix under an order of the court. It is held that the fund so arising which had been directed to be paid into court remained realty and did

Judicial Sale

CONVERSION (Continued).

not pass under the will. See *North* v. *Walk,* Dud. Eq. 212. "When land," it is said, "of an infant is sold under judicial proceedings, the fund arising from the sale is not divested of its character as realty, unless it appears from the order directing the sale that it was the intention of the court to convert the proceeds into personalty."

CRIMINAL LAW.

Incompetent Witness before Grand Jury

In *State* v. *Coats,* 41 S. E. 706, the Supreme Court of North Carolina holds that where a grand jury examines the wife of the accused, but also another and competent witness, and on the trial the latter only is examined, a motion in arrest of judgment of conviction is properly refused, as the verdict has conclusively established that the incompetent testimony before the grand jury was surplusage.

Recalling Witness

The Supreme Court of Georgia in *Strickland* v. *State,* 41 S. E. 713, holds that when, in a trial of a criminal case, after the jury have retired to consider the case they return into court, and state that they are unable to recollect the testimony on a given point, and in effect, request information from the court, as to what was the testimony on this point, there is no error in allowing a witness who had been sworn in the case to be recalled, and to restate his testimony on the point in question.

DAMAGES.

Delay in Delivery

The measure of damages for failure to deliver mill machinery within the time prescribed by the contract of sale is not the possible profits, estimated on a rising market, but is a fair rental value, during the time lost by the breach of the contract, of the mill or portion thereof which the machinery would have equipped, which value, if otherwise incapable of determination, may be based on the legal rate of interest on the capital invested in the plant and other machinery kept idle by reason of the seller's breach, together with losses and expenses incidental to the delay in delivery, such as insurance, idle labor, deterioration

DAMAGES (Continued).

in machinery, etc. Supreme Court of North Carolina in *D. A. Tompkins Co.* v. *Dallas Cotton Mills,* 41 S. E. 938, See also *Rocky Mount. Mills* v. *Wilmington & W. R. Co.,* 119 N. C. 693.

DONATIO MORTIS CAUSA.

A., in expectancy of death, delivered certain bonds to her lawyer, instructing him to give them to certain children after her death. After the delivery had been made, the lawyer suggested that she make a will to this effect, which she did. This will proved defective. Under these circumstances the Supreme Court of Vermont holds in *Darling* v. *Emery,* 52 Atl. 517, that a finding that there was a *donatio mortis causa* was justified as the two acts were not inconsistent either in fact or in law.

Effect of Will

EVIDENCE.

The Supreme Court of South Carolina holds in *Copeland* v. *Copeland,* 42 S. E. 105, that in an action on a note, where the defendant alleged that his signature was a mistake, and was intended to be put on another note, signed on the same date, such other note was admissible in evidence on behalf of the defendant.

Action on Note

In North Carolina the statute forbids husband and wife to testify to "a confidential communication made by one to the other during their marriage" or to give "evidence for or against" each other in a criminal case. Interpreting this statute, the Supreme Court of that state holds in *State* v. *Wiseman,* 41 S. E. 884, that a husband is a competent witness for the state in the prosecution of a third person and the wife of the witness for fornication alleged to have been committed before their marriage, the fact as to which he testifies having also occurred prior thereto, and the case being non pros'd as to her. There is a vigorous dissent on the part of one member of the court. The similarity of the North Carolina statute to the legislation of other states and the possible results of this apparent

Husband and Wife

EVIDENCE (Continued).

departure from the usual decisions makes the case of more than local interest. Compare *State* v. *McDowell,* 101 N. C. 734.

Dying Declaration

In *State* v. *Caster,* 32 Southern, 183, the Supreme Court of Louisiana holds that a dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves, and if standing alone would be admissible.

FEDERAL COURTS.

Jurisdiction

Where, in an action in a federal court a defendant township appears, answers, resists the action, files an appeal bond and prosecutes an appeal, the state court cannot inquire if the federal court had jurisdiction of the defendant, but such question can only be made by motion in the original action in the federal court: Supreme Court of South Carolina (one judge dissenting) in *McCullough* v. *Hicks,* 41 S. E. 761.

FRAUD.

Representations to Mercantile Agency

In *Tindle* v. *Birkett,* 64 N. E. 210, it appeared that a member of a firm knowingly made false statements to a mercantile agency as to its financial condition in order to obtain a favorable rating in the reference books furnished to the subscribers of the agency. The Court of Appeals of New York holds that a subscriber who sells and delivers goods to such firm on credit, relying solely on such rating, and without any further knowledge, where the members are adjudged bankrupt on their own petition before the goods are paid for, may maintain an action for obtaining the goods by fraud, though the statements were made to the agency and not to the vendee personally. One judge dissents, stating as his reasons: "The rating of a mercantile agency is merely its conclusion as to the financial status of the person to whom it relates. In this case the conclusion was based partly upon statements furnished by the defendant, and partly upon information derived from other sources."

GIFTS.

The New York Supreme Court (Appellate Division, First Department) holds in *McGavie* v. *Cossum,* 76 N. Y. Supp. 305, that where the owner of bonds in the care of a bank during her last illness gave another a writing stating that she had given him such bonds and actual delivery was impossible, owing to the owner's illness, there was a good gift *inter vivos.* See Gifts, Vol. 24, Cent. Dig., § 33.

Symbolical Delivery

HUSBAND AND WIFE.

The Appellate Court of Indiana holds in *Guy* v. *Liberenz,* 64 N. E. 527, that in an action on the joint note of a husband and wife, and to foreclose a mortgage on realty held by them as tenants by entireties, and given to secure their note, the burden was on the plaintiff to establish affirmatively that the wife did not sign as surety, and that the contract was one which she was authorized to make, there being a presumption of suretyship in such case; hence it is held that special findings of fact which show that she received no part of the consideration, without a finding of the ultimate fact of suretyship, were sufficient to sustain a conclusion of law holding the note and mortgage invalid as to her. See also *Potter* v. *Sheets,* 5 Ind. App. 506.

Joint Note

Under the modern practice an action by a wife for personal injuries and an action by her husband for loss of services resulting from such injuries were tried at the same time, before the same jury, and were submitted on the same evidence. A verdict was returned for the wife and against the husband, though the instructions stated that if the wife was injured and suffered both parties were entitled to verdicts. The judgment for the wife was affirmed on appeal. Under these facts the New York Supreme Court (Appellate Division, Second Department) holds in *Gray* v. *Brooklyn Heights R. Co.,* 76 N. Y. Supp. 24, that the verdict against the husband was so irreconcilable with the verdict for the wife that a judgment on the former verdict would be set aside, and a new trial granted.

Injury to Wife, Conflicting Verdicts

ILLEGITIMATES.

The statute law of Missouri provides that illegitimates shall be capable of inheriting and transmitting inheritance on the part of their mother, as if they had been lawfully begotten of her. Construing this provision, which is similar to provisions in other states, the Supreme Court of the state holds in *Moore* v. *Moore*, 69 S. W. 278, that an illegitimate may, like a legitimate child, inherit from a brother of his mother dying after her. Compare *Stevenson* v. *Sullivant*, 5 Wheat. 207, where the court refuses to allow any inheritance except from the mother or through the mother in a direct line.

Right to Inherit

INSURANCE.

In *Vernon Ins. & Trust Co.* v. *Maitlen*, 63 N. E. 755, the Supreme Court of Indiana holds that where a fire policy requires, as a condition precedent to action thereon, that the loss be appraised by an appraiser selected by the company and one selected by the insured and an umpire selected by the appraisers, the fact that the appraisers, acting in good faith, cannot agree on an umpire, is not a waiver of the condition requiring appraisement which will authorize suit without an appraisement, but the parties must select other appraisers: See and compare *Westenhaver* v. *Insurance Co.* 84 N. W. 717 (Iowa).

Appraisement of Loss

INJUNCTION.

With two judges dissenting the Court of Appeals of New York holds in *Marlin Firearms Co.* v. *Shields*, 64 N. E. 163, that the publication of unjust and malicious criticisms of a manufactured article in a magazine cannot be restrained by injunction, though the manufacturer has no remedy at law because of his inability to prove special damage.

Publication of Libel

The "right of privacy" receives a very thorough discussion by the Court of Appeals of New York in *Roberson* v. *Rochester Folding Box Co.*, 64 N. E. 442. The court holds that the so-called right of an individual, founded on the claim that he has a right to pass through this world without having his picture taken, his

Right of Privacy

INJUNCTION (Continued).

business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented on in circulars, periodicals, or newspapers, whether the comment be favorable or otherwise, does not exist in law and is not enforceable in equity. Therefore the unauthorized publication of lithographic prints or copies of a photograph of a young woman as part of an advertisement of a legitimate article cannot be enjoined where there is no allegation that the picture is libellous in any respect, but the complaint alleges that the likeness is so good that it is easily recognized, and that it is used to attract attention to the advertisement, although the publication has caused great mental and physical distress to such woman, necessitating the employment and attendance of a physician. There are not a few reasons for regretting this decision, and three judges dissent. Compare *Pollard* v. *Photographic Co.*, 40 Ct. Div. 345, and *Harvard Law Review,* Vol. IV, p. 193.

JOINT TORT FEASORS.

In *Abb* v. *Northern Pacific Ry. Co.*, 63 Pac. 954, the Supreme Court of Washington holds that the person injured by joint tort feasors, by releasing and discharging from all damages done him one of the joint tort feasors, releases the other, though the release expressly stipulates that it shall not: See *Ellis* v. *Bitzer,* 2 Ohio, 89, and compare *Chamberlin* v. *Murphy,* 41 Vt. 110.

Release of One

LANDLORD AND TENANT.

Where one of two co-tenants in possession of leased premises surrenders possession to the landlord who places a third person in possession as sole tenant, it is an ouster, entitling the other co-tenant to maintain trespass *quare clausum fregit* against the landlord, even though the lease is surrendered by the first co-tenant: Supreme Judicial Court of Massachusetts in *Harford* v. *Taylor,* 63 N. E. 902. See *Byam* v. *Bickford,* 140 Mass. 31.

Co-Tenants, Ouster

LANDLORD AND TENANT (Continued).

Liability to Persons Visiting Tenant

The same court holds in *Jordan* v. *Sullivan,* 63 N. E. 909, that where an owner of a building let a hall for the installation of a lodge, agreeing to light and heat the same, and a person, in entering the building to attend the ceremonies, fell and was injured, owing to the insufficient lighting of the entrance thereto, she could not recover for her injury from the owner, being at most an invited guest of the lodge, and as such having only the rights against the owner which the lodge itself would have had, and that the lodge did not have any right to complain that a gas jet should have been put in to light the entrance, since it had rented the building without such jet being in: Compare *Roche* v. *Sawyer,* 176 Mass. 71.

LEASES.

Forfeiture, Tender of Rent

The Supreme Court of Pennsylvania holds in *Pershing* v. *Feinberg,* 52 Atl. 22, that forfeiture of a lease, because rent was not paid in time, will not be sustained where there was a timely tender of payment by check, and checks had before been tendered for rent, and while refused, had not been refused because the tender was illegal, but for other reasons stated.

MARSHALLING OF ASSETS.

Successive Mortgages

A creditor having a mortgage on real estate levied execution on the personal property of the debtor in a suit to recover the same debt, when another creditor, having a chattel mortgage subsequent to the levy, procured an assignment of the judgment and real estate mortgage of the first creditor, and released the levy, though a third creditor had procured a second mortgage on the land. Under these facts the Supreme Court of Iowa holds in *Valley Nat. Bank* v. *Des Moines Nat. Bank,* 90 N. W. 342, that the mortgage to the third creditor became the prior lien on the land, the creditor taking the assignment having no right to release the execution levy and hold the personal property under its chattel mortgage, and make its assigned claim out of the real estate under the assigned mortgage.

MASTER AND SERVANT.

Assumption of Risk

Against the dissent of four judges the Court of Errors and Appeals of New Jersey holds in *Hesse* v. *National Casket Co.*, 52 Atl. 384, that an employe, although a minor, in accepting service, assumes the risk of such dangers connected with his employment as are obvious to him, and cannot hold his employer responsible for injuries resulting therefrom, notwithstanding the latter has failed to point out such dangers to him. See *Dunn* v. *McNamee,* 59 N. J. Law, 498.

MORTGAGES.

Purchase of Equity of Redemption

In *De Lancey* v. *Finnegan,* 90 N. W. 387, the Supreme Court of Minnesota holds that the doctrine "Once a mortgage always a mortgage" has no application to a future contract between the mortgagor and the mortgagee for the purchase of the mortgagor's right of redemption. The mortgagee may always purchase the mortgagor's right of redemption, for a fair consideration, if the transaction is untainted by any oppression or advantage taken of the necessities of the mortgagor. But equity, it is said, will scan such sales with jealous care, and require their fairness to be clearly established.

NAVIGABLE RIVERS.

Riparian Owners

The Supreme Cour of Missouri, discussing the rights of riparian owners, holds in *State* v. *Longfellow,* 69 S. W. 374, that the erection by a riparian owner on a fresh water navigable stream of a permanent building between high and low water mark is not unlawful as a material interference with navigation.

NEGLIGENCE.

Discharge of Water on Sidewalk

In *Tremblay* v. *Harmony Mills,* 64 N. E. 501, the Court of Appeals of New York holds that where the owner of a building negligently maintained a leader from the roof of a building so as to discharge water on the sidewalk, by which ice accumulated thereon, and the walk became dangerous, he was liable to any person injured thereby. Three judges dissent. The majority

NEGLIGENCE (Continued).

regard the case as falling within the principle that "At common law any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance." Compare the earlier New York case of *Wenzlick* v. *McCotter,* 87 N. Y. 122, which tends to support the contention of the dissenting judges.

NUISANCE.

The Supreme Court of California holds in *Kleebauer* v. *Western Fuse and Explosives Co.,* 69 Pac. 246, that a corporation keeping five thousand pounds of gunpowder in a magazine is liable for the damages occasioned to nearby dwellings by an employe maliciously setting fire to the gunpowder. The ground of the decision is that the maintenance of the magazine is a nuisance. The court refers among other cases to the celebrated case of *Rylands* v. *Fletcher,* 3 H. L. Cas. 330, and also to *Heeg* v. *Licht,* 80 N. Y. 581, but no case seems to go as far as this one where the loss is occasioned by the immediate voluntary and malicious interference of a third person. It may be questioned whether the maintenance of the nuisance is the proximate cause and not rather the act of the third party.

Powder Magazine

PARENT AND CHILD.

In *Harris* v. *State,* 41 S. E. 983, the Supreme Court of Georgia holds that a mother who has the right to control and correct her child may authorize another in her presence to chastise the child for disobedience, and if he do so in a proper manner, he is not guilty of an assault and battery upon the child. Just how far parental authority may be delegated is not discussed.

Assault on Child

PARTNERSHIP.

The Supreme Court of Pennsylvania holds in *Duffy* v. *Gilmore,* 51 Atl. 1026, that an agreement between A. and B. in forming a partnership, B. contributing the greater amount of capital, that at the end of each year A. shall pay to B. 10 per cent interest on the difference in the capital is not usurious, but is merely an arrangement regulating the sharing of the profits. *Scott* v.

Usury, Share of Profits.

PARTNERSHIP (Continued).

Kennedy, 51 Atl. 384, is cited in which it was said: "Whether the sum to be paid was fixed in advance or left to be determined by a fixed percentage is unimportant, as long as it was a share of the profits only."

Where all the partners entitled to use the firm name die or retire without assigning the right to use the firm name, such right dies and does not pass to the personal representatives of the last survivor: New York Supreme Court (Special Term, New York County) in *Fisk* v. *Fisk,* 76 N. Y. Supp. 482. The personal representatives of the last survivor of a firm are not entitled to an injunction to prevent the use of the firm name as a designation for a corporation about to engage in a similar business, where there would be no competition by the corporation with the settlement of the estate of the last survivor.

Death of Partners, Firm Name

RAILROADS.

A woman with her children purchased tickets and boarded a train to go to a certain "crossing" where there was no station. The train was a long freight train with a passenger coach in the rear. The conductor was unable to communicate the signal to the engineer in time to stop at their destination, and stopped at another crossing three-quarters of a mile beyond, where he assisted them to alight. A shower had come up, and it was raining when they got off the train and they were wet when they reached a farm residence nearby. The woman was not put to any extra expense and would have been wet if let off at her destination. The Supreme Court of North Carolina holds that a judgment of nonsuit was properly ordered: *Smith* v. *Wilmington & W. R. Co.,* 41 S. E. 481. The court cites no authority for this position, and there is a strong dissent by two of the justices.

Taking Passenger beyond Destination

In *People* v. *Feitner,* 63 N. E. 786, the Court of Appeals of New York holds that where one domestic railroad corporation leases the properties and franchises of another for the entire life of the lessor's charter and renewals thereof, the lessee acquires merely a lessee's interest, with the right to use the leased properties upon payment of the rentals reserved, and is not taxable as the owner of such properties. In assessing the lessee, the value of

Taxation

RAILROADS (Continued).

the leases, exclusive of the right to use the leased franchises, should be ascertained, and added to the value of the real estate and personal property of the lessee, deducting from this total whatever deductions are allowed by statute.

REFORMATION OF INSTRUMENTS.

Evidence to Vary Contract

The Supreme Court of Iowa holds in *Hausbrandt* v. *Hofler,* 90 N. W. 494, that where the parties to a demand note execute it through the mistaken understanding that it only operates as a receipt for an advancement from the payee to his daughter, who is the maker's wife, the note will be reformed in equity to conform to the intention of the parties in an action on the note, and that parol evidence that the note was so intended as a receipt is admissible in the action in which the reformation of the note so sought.

STATUTE OF FRAUDS.

Sale of Land, Part Performance

Where in a contract for the sale of land difficulty arises in consequence of the absence of the memorandum required by the Statute of Frauds it is usually the vendee who seeks to secure specific performance of the contract on equitable grounds of part performance, etc. But in *Johnson* v. *Puget Mill Co.,* 68 Pac. 867, it is the vendor who wishes to resist a repudiation of the contract by the vendee, and the Supreme Court of Washington holds that there having been a part performance of an oral contract for the sale of land, so as to enable the vendee to enforce it in equity, he cannot repudiate it, and recover, as for money had and received, payments made; she not having offered to make remaining payments and the vendor being ready and able to perform: See *Ketchum* v. *Evertson,* 13 Johns. 359-364.