PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMINISTRATION.

In *Cunnius* v. *Reading School Dist.*, 65 Atl. 16, the Supreme Court of Pennsylvania in an opinion by Chief Justice Mitchell gives a very interesting discussion of the act of June 24, 1885 (P. L. 155), providing for the administration of the estate of persons who have been absent from the state for seven years. The act is held constitutional, and the court decides that where administration under it had been taken upon the estate of a woman presumed to be dead in consequence of absence and she subsequently returned, she could not have dower assigned to her from the land of which her husband had died seized when payment in discharge of such dower interest had already been made to the administrator appointed. Compare with this case *Scott* v. *McNeal,* 154 U. S. 34, and *Devlin* v. *Commonwealth,* 101 Pa. 273.

Presumption of Death

ADULTERY.

The Supreme Court of North Carolina holds in *State* v. *Simpson,* 45 S. E. 567, that the fact that a woman has been acquitted of adultery with a certain man does not prevent that man from being found guilty of adultery with her on the same charge. This somewhat anomalous result is reached because the principal evidence against the man consisted of admissions made by himself which were inadmissible against the woman. The result is particularly striking in view of the fact that under the practice in North Carolina the man and woman were indicted together. One judge dissents.

Conviction of Man: Acquittal of Woman

BAILMENTS.

Illegal Use of Goods

The Supreme Court of Kansas holds in *Coppedge* v. *Goetz Brewing* Co., 73 Pac. 908, that where an action by a bailor for damages for the destruction of saloon fixtures and furniture did not involve an alleged transaction between plaintiff and the bailee for the use of such fixtures for the illegal sale of liquor, the fact that the bailment was for the purpose of enabling the bailee to carry on such business illegally was no defence. Compare *Falk* v. *Brewing Co.*, 10 Kans. App. 248.

BANKRUPTCY.

Discharge: Judgment in Slander

Under the bankruptcy act of 1898, providing that a discharge in bankruptcy shall release a bankrupt from all provable debts, except, among others, judgments in actions for wilful and malicious injury to the person of another, the Court of Appeals of Kentucky holds that a judgment in slander is, under the common law definition, an injury to the person, and within the bankruptcy act: *Sanderson* v. *Hunt*, 76 S. W. 179.

BREACH OF MARRIAGE PROMISE.

Liability of Parents

A parent is not liable to his son's fiancée for advising and inducing him to break his contract to marry her: Appellate Court of Indiana (Division No. 1) in *Leonard* v. *Whetstone*, 68 N. E. 198. Where the parents of plaintiff's intended husband induced him to break his contract by false and slanderous charges made against the plaintiff, the plaintiff's only remedy against such parents was, it is decided, an action for slander.

CARRIERS.

Obligation to Passenger

In *Penny* v. *Atlantic Coast Line R. Co.*, 45 S. E. 563, the Supreme Court of North Carolina holds that a railroad company owes to a passenger not only the duty of protecting him from the assaults of others, but also owes to him the duty of warning him, when in the act of alighting, of the dangers arising from persons armed with pistols engaging in an altercation immediately after having left the train at a station.

CONFESSIONS.

Admissibility

In *Commonwealth* v. *Antaya*, 68 N. E. 331, the Supreme Judicial Court of Massachusetts holds that where, on a trial for crime, a confession of defendant is offered in evidence, the question whether it is voluntary is in the first instance for the presiding judge, but after its admission the jury may disregard it if they are not satisfied that it is voluntary. See also *Commonwealth* v. *Reagan*, 175 Mass. 335.

CONSTITUTIONAL LAW.

Police Regulations

A law making it unlawful to refuse admission to any opera house, theatre, race course, or any place of public amusement to any person over twenty-one years of age who presents a ticket of admission, and providing that any person so refused admission shall be entitled to recover his actual damages and $100 in addition thereto, is held a valid regulation by the Supreme Court of California in *Greenberg* v. *Western Turf. Ass'n*, 73 Pac. 1050.

CONTRACTS.

Breach: Waiver

The Supreme Court of Iowa holds in *Medart Patent Pulley Co.* v. *Dubuque, &c., Co.*, 96 N. W. 770, that where plaintiff agreed to furnish certain machinery within a fixed time but failed to perform its contract in time, and defendant accepted the same when subsequently tendered, the fact of defendant's acceptance was not in itself a waiver of its rights to demand damages for the delay which it could insist on in reduction of the contract price. Compare with this case *Fraser* v. *Ross*, 41 Atl. 204.

Anticipatory Breach: Right of Action

The Supreme Judicial Court of Massachusetts holds in *Edwards* v. *Slate*, 68 N. E. 342, that where a servant, who has entered into a written agreement with her master to serve him as housekeeper during his lifetime in consideration of a legacy to be left her by the master, is unjustifiably discharged by the master, she can maintain an action during the master's lifetime to recover damages for being deprived of her board and lodging and right to earn the legacy. Compare *Daniels* v. *Newton*, 114 Mass. 530.

CONTRACTS (Continued).

Unlawful Competition

The New York Supreme Court (Special Term, New York County) holds in *American Law Books Co.* v. *Edward Thompson Co.*, 84 N. Y. Supp. 225, that where defendant fraudulently induced persons dealing with complainant to break their contract for the purchase of complainant's books, for the intended benefit of defendant and to the intended injury of complainant, and defendant agreed to indemnify any of complainant's subscribers against claim for damages for their breach of contract in declining to receive and pay for complainant's books, and for conducting and defraying the expenses of the defence of any actions brought against such subscribers by defendant for breach of such contracts, complainant was entitled to an injunction restraining defendant from making such agreements.

Cancellation: Mistake of Law

In *Norris* v. *Crowe*, 55 Atl. 1125, it appeared that an owner, under threat of payment of the principal, agreed to reduce a ground-rent from six to five per cent. Both of the parties were ignorant at the time of a decision of the State Supreme Court that such a ground-rent as was in question was an irredeemable one. On a bill brought by the owner of the ground-rent to cancel the agreement for mistake of law it was held by the Supreme Court of Pennsylvania that equity will not grant relief. However, it is suggested that notwithstanding the mistake is one of law the plaintiff has a good cause of action to recover at law according to the original agreement. See *Wilson* v. *Ott*, 173 Pa. 253.

CORPORATIONS.

Injunction against Dividends

A statute in New Jersey provides that if a corporation pay dividends which have not been earned in net profits the directors shall be liable to the corporation and its creditors for the dividends so paid. On a bill filed by a stockholder against the corporation to restrain the payment of the dividend on the ground that it had not been earned the Court of Chancery of New Jersey holds in *Schoenfeld* v. *American Can Co.*, 55 Atl. 1044, that relief will be denied where there is no showing that the directors are insolvent. There is, the court holds, an adequate remedy at law under the statute. See *Appleton* v. *American Malting Co.*, 54 Atl. 454.

CORPORATIONS (Continued).

Stock Subscription: Transfer of Shares

The Supreme Court of California holds in *People's Home Saving Bank* v. *Rickard*, 73 Pac. 858, that where, in an action to recover unpaid stock subscriptions on a call made to pay creditors after the corporation's insolvency, the court found that defendant had transferred her stock to an insolvent for the purpose of avoiding liability a finding that she was a stockholder at the date of the call was unnecessary to sustain a judgment against her for the unpaid balance. In such action, where it was shown that the defendant had transferred her shares to an insolvent for the purpose of avoiding liability and that such insolvent had transferred the stock to another, the burden of proving that such subsequent transferee was responsible, and that the defendant's liability was therefore destroyed, was on her. See *National, &c., Co.* v. *Storey & Co.*, 111 Cal. 537, and *Bowden* v. *Johnson*, 107 U. S. 257.

DAMAGES.

Death by Negligence

In *Watson* v. *Seaboard Air Line Ry.*, 45 S. E. 555, the Supreme Court of North Carolina lays down the rule for determining the measure of damages for death resulting from negligence. It is said to be as follows:

"The measure of damages for loss of life of a decedent is the present value of his net income, to be ascertained by deducting the cost of his living and expenditure from his gross income, and estimating the present value of the accumulation from such net income based on his expectation of life; and, in estimating the reasonable expectation of pecuniary advantage from the continuation of decedent's life, his age, habits, industry, skill, and reasonable expectation of life should be considered; and the court may properly instruct the jury that in ascertaining the present value of the net income they will first ascertain what one dollar, interest at six per cent., will amount to for the time found the decedent would have lived; that they will divide the net income by the amount found one dollar and interest will amount to, which amount will be the answer to the issue as to what damages plaintiff is entitled to recover."

See *Benton* v. *R. R.*, 122 N. C. 1007.

DAMAGES (Continued).

In *Barette* v. *Carr*, 56 Atl. 93, the Supreme Court of Vermont holds that in an action for an assault and battery actual damages cannot be reduced by any evidence of provocation that does not amount to a legal justification. In such action, it is decided, the authority of the court to set aside the verdict is not limited to excessive verdicts, but the verdict may be set aside on the ground that the damages are inadequate. "The authorities upon this subject," says the Court, "are collected and reviewed in a thorough note to *Benton* v. *Collins*, 47 L. R. A. 33, 39."

Assault: Provocation

DIVORCE.

The Court of Chancery of New Jersey holds in *Lister* v. *Lister*, 55 Atl. 1093, that where a wife is justified in leaving her husband on account of his cruelty, the separation is legally chargeable to the husband, and constitutes a legal abandonment or desertion upon his part. It is decided also that where a wife leaves her husband, and seeks to establish constructive desertion by him on account of cruelty, her testimony must be corroborated.

Cruelty: Constructive Desertion

ESTOPPEL.

The Court of Appeals of Kentucky holds in *O'Malley* v. *Wagner*, 76 S. W. 356, that a mere payment by one of part of a debt for which he is not legally bound, not prejudicing anyone, does not estop him to deny liability for the balance.

Payment of Part of Debt

FEDERAL COURTS.

The United States Circuit Court of Appeals (Eighth Circuit) decides in *Schurmeier* v. *Connecticut Mut. Life Ins. Co.*, 124 Fed. 865, that an action by a citizen of another State against executors in Minnesota, to enforce a claim against the estate of the decedent, cannot be maintained in a Federal court after the time limited by the state statute for presenting claims to the Probate Court for allowance has expired, where the claim was not so presented, and no excuse is alleged for the failure to present it. See in connection with this case *Griffin* v. *Overman Wheel Co.*, 9 C. C. A. 548, and the notes thereto.

State Decisions

GIFTS.

The Supreme Court of Georgia holds in *Evans* v. *Evans*, 45 S. E. 612, that where the husband is ignorant of the fact that his wife has already committed adultery, and in compliance with her importunity makes to her a gift of real or personal property, the sale may be revoked at his instance on his discovery of her previous criminal conduct. It is further decided that a like result will follow if at the time of obtaining the gift the wife has in contemplation subsequent adultery and elopement. Compare *Lister* v. *Lister*, 35 N. J. Eq. 49.

Revocation

HUSBAND AND WIFE.

In Texas a husband is not permitted to be the agent of his wife for the sale of her lands. The Court of Civil Appeals of Texas holds, therefore, in *Louis* v. *Hoeldtke*, 76 S. W. 30, that the wife is not bound by false statements and representations made by her husband to induce a sale of such land.

Representations by Husband

Against the dissent of Chief Justice Parker, the Court of Appeals of New York decides in *Wanamaker* v. *Weaver*, 68 N. E. 135, that where a husband furnishes his wife with necessaries suitable to her position, and money with which to pay cash therefor, he is not liable for the price of other goods, sold to her, in the absence of proof of prior authority or subsequent ratification. See *Debenham* v. *Mellon*, 6 App. Cas. 24, and the very recent decision in *Morel Bros. & Co.* v. *The Earl of Westmoreland*, 1 K. B. (1903) 64.

Wife's Necessaries

The Appellate Court of Indiana (Division No. 1) holds in *Robinson* v. *Foust*, 68 N. E. 182, that a wife is not bound to use her separate personal property for the support of her husband, nor to use the same for the payment of his funeral expenses and the expenses of his last sickness.

Maintenance of Husband

INSOLVENT DEBTORS.

With one judge dissenting, the Supreme Court of Ohio holds in *State Nat. Bank* v. *Esterly*, 68 N. E. 582, that where the property of an insolvent debtor, by order of court, is placed in the hands of a receiver to be administered upon for the payment of the insolvent's debts, a creditor who holds collaterals taken to secure his claim, and upon which he has realized before a dividend declared, is entitled to a dividend on only so much of his debt as remains after deducting proceeds of the collateral; and this sum may be ascertained at the time the dividend is declared, although the claim had formerly been proven and allowed for the full amount. See *Bank* v. *Armstrong*, 59 Fed. Rep. 372, 28 L. R. A. 231.

Dividends

LANDLORD AND TENANT.

In *Godfrey* v. *India Wharf Brewing Co.*, 84 N. Y. Supp. 90, it is held by the New York Supreme Court (Appellate Division, Second Department) that the measure of damages in a lessee's action for breach of a covenant to repair is the difference between the rental value of the premises as guaranteed and as they really were, and anticipated profits from the business conducted therein cannot be recovered.

Covenant to Repair: Damages

The Appellate Court of Indiana (Division No. 2) holds in *La Plante* v. *La Zear*, 68 N. E. 312, that the owner of a building, with a single stairway leading thereto for common use of the tenants, who leased it to two tenants, was to be deemed as in possession of the stairway, and bound to keep it in repair, and was liable to a tenant for an injury received by the tenant without his fault from a defect in the stairway. See in connection with this case a very recent decision of the New York Supreme Court (Appellate Division, First Department) in *Levine* v. *Baldwin*, 84 N. Y. Supp. 92.

Repairs

LEASE.

Where one of the essential considerations of a lease was the adding of two stories by the lessee, without which he could not afford to pay the rent stipulated, and the lessor honestly represented, and the lessee believed, that the building would support the addition, but when, after the execution of the lease, plans were drawn it was discovered that such was not the case, the lessee was entitled, in equity, to a rescission: Supreme Court of Illinois in *Barker* v. *Fitzgerald,* 68 N. E. 430.

Decision

LIMITATIONS.

The law of Iowa, similar to that of most, if not all, jurisdictions, provides that the times limited for actions shall be extended in favor of insane persons, so that they shall be permitted to sue within a reasonable time after the termination of the disability. In *Roelefsen* v. *City of Pella,* 96 N. W. 738, the Supreme Court of Iowa holds that this statute applies only where the plaintiff is insane when the cause of action accrued and not where he becomes insane a few hours after the injury for which he sues, though on the same day and as a result of the injury. The court, even in the face of these unusual circumstances, adheres to the general rule that where the statute has begun to run it will be stopped by facts subsequently arising. See *Bishop* v. *Knowles,* 53 Iowa 268.

Tolling of Statute: Insanity

MASTER AND SERVANT.

The obligation of a master to exercise reasonable care to provide his servants with reasonably safe instrumentalities with which to perform their work embraces the obligation to provide a sufficient number of servants to perform the work safely. Supreme Court of Minnesota in *Peterson* v. *American Grass Twine Co.,* 96 N. W. 913.

Negligence of Master

MUNICIPAL CORPORATIONS.

Action by Tax-payer

The Supreme Court of Oklahoma holds in *Kellogg* v. *School Dist.*, 74 Pac. 110, that a resident tax-payer, although he shows no special private interest, may invoke the interposition of a court of equity to prevent an illegal disposition of the money of the municipality or the illegal creation of a debt which he, in common with other property owners, may otherwise be compelled to pay. See *Crampton* v. *Zabriskie,* 111 U. S. 601.

MUTUAL BENEFIT SOCIETIES.

Rules: Right of Action

One who has become a member of a benevolent order is entitled to appeal to the courts for redress only after adopting the procedure and exhausting the remedies prescribed by the constitution and by-laws of the order, in case the regulations are not violative of the law. *Schou* v. *Sotoyome Tribe,* 73 Pac. 996.

NEGLIGENCE.

Duty to Licensees

In an electric storm a man took refuge under the porch of a store. He placed his back against an iron grating over the window, and was subsequently killed by lightning, which struck one of the defendant's telephone poles near the store and was conducted to the porch by a wire negligently maintained over the metal roof thereof, and from the roof to the iron grating, and thence to this person. Upon these facts the Court of Appeals of Kentucky holds in *Cumberland Telegraph & Telephone Co.* v. *Martin's Adm'n,* 76 S. W. 394, that the deceased was a bare licensee in the place where he was killed, and that defendant owed him no duty to properly maintain the wire.

PROCEDURE.

Affidavit of Defence: Executors

In *Helfrich* v. *Greenberg,* 56 Atl. 45, the Supreme Court of Pennsylvania holds that a rule of a court of common pleas requiring executors, administrators, guardians, committees, and others sued in a representative capacity to file affidavits of defence and directing judgment to be entered by default is valid. See *Mutual Life Insurance Co.* v. *Tenan,* 188 Pa. 239.

PROCESS.

In *Greenleaf* v. *People's Bank of Buffalo,* 45 S. E. 638, the Supreme Court of North Carolina holds that a managing officer of a foreign corporation, who is in the state to attend to a sale of land under a decree of the Federal court in an action in which the foreign corporation is a party, is not in an attendance on a judicial proceeding so as to exempt him from service of a summons in an action against the corporation. See *Cooper* v. *Wyman,* 122 N. C. 784.

Privilege from Service

RAILROADS.

The Supreme Court of North Carolina decides in *Hodges* v. *Western Union Tel. Co.,* 45 S. E. 572, that where a deed to a railroad company granted a right of way and easement for the purpose of "surveying, building, constructing, and repairing the road," the railroad acquired the right to erect and use, so far as reasonably necessary for the operation of the road, a telegraph line, but was not authorized to erect and maintain a line of telegraph poles and wires for general commercial purposes. As a consequence of this it is held that a railroad company which has cleared a right of way over certain land by conveyance from the owner cannot grant a telegraph company such right of way so as to enable it to maintain a line for general commercial purposes.

Right of Way for Telegraph Poles

The Supreme Court of Pennsylvania decided in *Keck* v. *Philadelphia & Reading R. R. Co.,* 56 Atl. 48, that where a railroad employee is working on a train on the track of another road, he accepts the risk of his employment in regard to his own road, but not those risks incident to the operation of the other road, unless engaged at the time in work for such road or for both roads jointly. The court discusses the effect of the Act of April, 1868, P. L. 58, which provides that any person who sustains injury while engaged in railroad work about any train of the company of which he is not an employee shall have the same right of action as if he were an employee, but holds it inapplicable to the case of an engineer who is running a train over the tracks of another company under permission given to his employer to use such road, and is injured by the em-

Employees Another Railroad

RAILROADS (Continued).

ployees of the other company. Compare with this case the very recent decision of *Kelly* v. *Union Traction Company*, 199 Pa. 322.

RECEIVERS.

In *Townsend* v. *Onconta, &c., Co.*, 84 N. Y. Supp. 427, the New York Supreme Court (Appellate Division, Third Department) holds that a receiver of a railway corporation, the operating expenses of which about equal its income, in the absence of any expectation of a larger income in the future cannot be authorized to issue certificates of indebtedness, constituting a prior lien on all the property of the corporation, for the purpose of paying past due interest on first mortgage bonds and thereby preventing the bondholders from declaring the bonds due, as authorized by the mortgage, where the trustee in the mortgage and the holders of the legal title to a majority of the bonds object thereto.

Certificates: Authority to Issue

RES JUDICATA.

With one judge dissenting, the Supreme Court of Utah holds in *State* v. *Mortensen*, 74 Pac. 120, that the decision of the Supreme Court on appeal from a judgment denying a motion for a new trial based on the ground of the misconduct of the jury is res judicata on a subsequent application for a new trial based on the same ground, though the affidavits supporting the second motion show more in detail the misconduct complained of.

Motion for a New Trial

STATUTE OF FRAUDS.

In *Jones* v. *Comer*, 76 S. W. 392, the Court of Appeals of Kentucky holds that where a mother surrenders her child to a third person under his agreement to rear and educate him and pay him a certain sum at his majority, the agreement, having been performed by her, cannot be defeated because it was not reduced to writing or to be performed within a year. Compare *Benge* v. *Hiatt's Administrator*, 82 Ky. 667.

Part Performance

STATUTE OF FRAUDS (Continued).

The fact that possession taken under a parol contract for the sale of land is sufficient part performance of such contract to avoid the operation of the statute of frauds is, of course, well settled. In *Pugh* v. *Spicknall,* 73 Pac. 1020, the Supreme Court of Oregon extends this principle and holds that the fact that plaintiff's possession of the land antedated the parol agreement was immaterial where the consideration of the contract was the care and attention plaintiff was able to bestow on a mother in consequence of her adjacent residence, and where the improvements had not been made until after the agreement was entered into.

Part Performance: Possession

In *Alerding* v. *Alison,* 68 N. E. 185, the Appellate Court of Indiana (Division No. 1) holds that a parol contract for services to be paid for by a testamentary bequest is within the statute of frauds.

Promise of Bequest

TESTAMENTARY DISPOSITION.

A depositor in the savings fund of the Pennsylvania Railroad Company at the time of opening his account therein directed the company to pay to his wife, in the event of his death, all deposits which should then be standing to his credit in the fund. This the company agreed to do. In *Stevenson* v. *Earl,* 55 Atl. 1091, the Court of Errors and Appeals of New Jersey holds that the disposition thus made of the moneys remaining to the depositor's credit at his death was testamentary in its character, and was invalid because not made in the manner prescribed by the statute of wills. The court declines to regard the transaction as a declaration of trust, relying upon the principle of *Richards* v. *Delbridge,* L. R. 18 Eq. Cas. 13.

Validity

TRADE NAMES.

In *Davenport Gas & Electric Co.* v. *Reimers,* 96 N. W. 1084, it appeared that the defendant, J. N. R., had been conducting a business under the name of J. N. R. Printing Company. He subsequently leased the business, and after such lease an indebtedness for light and power was incurred by the lessee without notice to the

Liability for Debts

TRADE NAMES (Continued).

creditor of the defendant's retirement. The Supreme Court of Iowa holds that upon these facts, the defendant, having permitted his name to be retained in the designation of the company, is liable to the creditor.

TRUSTS.

In *Jones* v. *Jones,* 74 Pac. 143, the Supreme Court of California holds that where a wife conveys land to her husband, without consideration, for the purpose of a suit for her benefit to oust the tenant—she being advised that such conveyance is necessary for the suit—a violation of the implied promise to re-convey constitutes a constructive fraud, creating an involuntary trust in her favor and entitling her to a re-conveyance. Compare the case of *Alaniz* v. *Casenave,* 91 Cal. 41.

Constructive Trusts: Re-conveyance

WATERCOURSES.

In *Barclay* v. *Abraham,* 96 N. W. 1080, the Supreme Court of Iowa holds that a landowner who digged a well obtaining a supply from percolating waters, thereby cutting off the supply of an adjoining owner, must be enjoined from wasting the full flow obtained by him for the mere purpose of injuring his neighbor, the supply being more than adequate for both. Compare the recent case of *Stillwater Water Co.* v. *Farmer,* 93 N. W. 907, 60 L. R. A. 875.

Percolating Water: Waste: Injunction

WITNESSES.

The constitution of New York provides that one's opinions or beliefs on religious subjects do not affect his capacity as a witness. Under this provision the Court of Appeals of New York decides in *Brink* v. *Stratton,* 68 N. E. 148, that for the purpose of affecting the credibility of a witness he cannot be interrogated as to his belief in the existence of a Supreme Being who would punish him for false swearing. See *Gibson* v. *American Mutual Life Insurance Co.,* 37 N. Y. 580.

Impeachment