PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

AGENCY.

In *Rickards* v. *Rickards,* 56 Atl. 397, the Court of Appeals of Maryland decides that a principal cannot repudiate, as beyond the agent's authority, a contract made and completely executed by the agent on Sunday in violation of the Sunday laws, the contract itself being within the agent's authority.

Sunday Contract

ASSIGNMENT FOR BENEFIT OF CREDITORS.

With two judges dissenting, the Court of Appeals of New York holds *In re Garber,* 68 N. E. 667, that where a judgment creditor sues to set aside an assignment for the benefit of creditors on the ground of fraud, and is successful as to a portion of the property transferred to the assignee but he obtains no benefit from the judgment, it is not an election by him to take in hostility to the assignment, and he may take under it, and his judgment constitutes no bar to such relief.

Action to Set Aside

BANKRUPTCY.

A liquor license, though transferable only with the approval of the Court of Quarter Sessions which granted it, and not subject to seizure on execution, is not only part of the bankrupt's assets but may be claimed by him as part of his exemption: *In re Olewine,* 125 Fed. 840. Compare this case with the principle laid down in *Mueller's Estate,* 190 Pa. 601, and see upon the subject of franchises and licenses as assets in bankruptcy the note to *Fisher* v. *Cushman,* 43 C. C. A. 389.

Assets: Liquor License

BANKRUPTCY (Continued).

Against the dissent of two judges, the Court of Appeals of New York holds in *Benedict* v. *Deshel,* 68 N. E. 999, that in an action by a trustee in bankruptcy under the Bankruptcy Act of 1898, Sec. 60, to recover moneys paid by an insolvent to a creditor in violation of the provisions relating to preferences, proof that an insolvent made a payment, the effect of which was to give one creditor a preference over others from the same class, where there is evidence from which a jury might find that such creditor had reasonable ground to believe it was intended as a preference, the intent of the debtor in making the payment need not also be shown. See *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438.

Preferential Payment

BANKS.

A depositor, desiring to withdraw his bank deposit and commit it to a trust company, received from the bank cashier a suggestion as to a particular trust company, and, drawing a check, delivered it to the cashier, with instructions to deposit the amount named with the company suggested. Instead of doing so, the cashier substituted the depositor's money for paid checks of his own on the bank, which he was carrying as cash. Under these facts the Appellate Court of Indiana, Division No. 2, holds in *Goshorn* v. *People's Bank of Washington,* 69 N. E. 185, that, even on the theory that the cashier was the depositor's agent for the transmission of the fund, the bank was liable for its misappropriation, the transaction amounting to a payment of the depositor's check merely with the evidences of the cashier's indebtedness, and the bank, moreover, being cognizant of the fraud through its cashier. Compare *Ziegler* v. *Bank,* 93 Pa. 393.

Transmission of Money

CARRIERS.

In *Mann* v. *Pere Marquette R. Co.,* 97 N. W. 721, the Supreme Court of Michigan decides that a contract between a railroad and a shipper by which the railroad builds a side track for the shipper's convenience and the shipper agrees to indemnify the railroad from all liability for loss by fire, though caused by the railroad's negli-

Liability for Negligence

CARRIERS (Continued).

gence, is not against public policy, as, in putting in such tracks, the railroad is not acting as a common carrier. See in connection with this case *Coup* v. *W., St. L. & P. Ry. Co.*, 56 Mich. 111.

Pullman Cars: Joint Liability

The Supreme Court of Michigan decides in *Robinson* v. *Chicago & A. R. Co.*, 97 N. W. 869, that a railroad company sued jointly with the Pullman Car Company for death of a passenger who was thrown through an open vestibule door between Pullman cars cannot complain of the directing of a verdict for the car company, it not being concerned with whether the car company was also liable to plaintiff, and the verdict and judgment not being conclusive as to the car company's liability to the railroad company under the contract between them for the furnishing of the cars. Compare *Moreland* v. *Durocher*, 129 Mich. 398.

CONSTITUTIONAL LAW.

Double Taxation

The Court of Appeals of New York, with one judge dissenting, holds in *Woodruff* v. *Oswego Starch Factory*, 68 N. E. 994, that a law of New York, providing for the taxation of rents reserved in any lease in fee to the person entitled to receive the same as personal property, does not create double taxation, as they are severed from the real estate and taxed at their capitalized value as a new subject of taxation, while the real estate remains taxable to the lessee or tenant.

Transfer Tax

Against the dissent of two judges, the Court of Appeals of New York holds *In re Dellano's Estate*, 68 N. E. 871, that the fact that there was no statute imposing a succession tax when a power of appointment was created by will does not affect the liability of the estate to a transfer tax on the exercise of the power of appointment after the passage of an act imposing a charge or tax on the exercise of such appointment.

CONSTITUTIONAL LAW (Continued).

Freedom of Contract

It is decided by the Supreme Court of the United States in *Atkin* v. *State of Kansas,* 24 S. C. R. 124, that the freedom to contract guaranteed by the Federal Constitution is not infringed by the provisions of the Kansas statutes making it a criminal offence for a contractor for a public work to permit or require an employee to perform labor upon that work in excess of eight hours each day. It is likewise, it is said, not in conflict with the constitutional provision guaranteeing the equal protection of the laws. The Chief Justice and Justice Brewer and Justice Peckham dissent.

Equal Protection of the Laws

In *Atkinson* v. *Woodmansee,* 74 Pac. 640, the Supreme Court of Kansas decides that a provision of the mechanic's lien law of that state providing as follows, "In an action brought by an artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action," denies to persons within the jurisdiction of the state the equal protection of the laws, and is therefore unconstitutional and void. There is no reasonable basis of classification, it is decided, in such law.

CONTRACTS.

Marriage Brokerage

It is, of course, well established that a contract to assist in bringing about a marriage is invalid. The Supreme Court of Vermont extends this principle in *Jangraw* v. *Perkins,* 56 Atl. 532, by holding that a contract to hasten an intended marriage is as obnoxious to the objection that it is a marriage brokerage contract as a contract to bring about a marriage between strangers. See *Morrison* v. *Rogers,* 115 Cal. 252.

COPYRIGHT.

Production: Imitation

An interesting case on the question of copyright arises in *Bloom & Hamlin* v. *Nixon,* 125 Fed. 977, under the following facts: The plaintiffs were the owners and producers of a copyrighted song, which was rendered during the performance of an extravaganza by an actress who was required during the action to step to one of the

COPYRIGHT (Continued).

boxes, single out a particular person, and sing the song to him alone, accompanied by certain gestures, postures, and other artistical effects, she being assisted in the farce by a number of other actresses. The United States Circuit Court (E. D. Pennsylvania) holds that an imitation of the actress while singing such song by another actress in which she, in good faith, attempted to mimic the postures and gestures of the original actress, etc., and used the chorus of the song only as a vehicle for the imitation, was not prohibited by Rev. St., Sec. 4966, as amended in 1898 (3 U. S. Comp. St. 1901, p. 3415), prohibiting any person from publicly performing or representing any dramatic or musical composition for which a copyright had been obtained without the consent of the proprietor.

DEFENCES.

The Supreme Court of Montana holds in *Ball* v. *Gussenhoven*, 74 Pac. 871, that the defences of contributory negli-

Inconsistency

gence and assumption of risk are inconsistent with each other, do not rest upon the same principles, and the existence of one necessarily excludes the existence of the other.

EVIDENCE.

In *Trainor* v. *German-American, etc., Ass'n*, 68 N. E. 650, the Supreme Court of Illinois decides that the books of

Books of Corporation

a corporation are, as to matters pertaining to the dealings of a corporation with one of its members as an individual, not books of a public nature, and not admissible in evidence in a suit by the corporation against a member to enforce an indebtedness in favor of the corporation on that ground, but only when brought within the rule authorizing the introduction of private books of account in evidence. See *Rudd* v. *Robinson*, 126 N. Y. 113.

It will be remembered that in the recent case of *Davis* v. *State*, 35 Southern, 76, the Supreme Court of Florida ad-

Dogs

mitted testimony as to the action of dogs in following the trail of a supposed criminal from the scene of a crime. It is now decided by the Supreme Court of Nebraska in *Brott* v. *State*, 97 N. W. 593, that the con-

EVIDENCE (Continued).

duct and behavior of bloodhounds after being set upon the trail of a fugitive criminal may not be given in evidence by the state for the purpose of proving that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical.

FOREIGN JUDGMENT.

In *Dunn* v. *Dilks*, 68 N. E. 1035, the Appellate Court of Indiana, Division No. 2, holds that a suit cannot be maintained in Indiana on the doctrine of comity on a judgment recovered in Pennsylvania without personal service on or appearance by the defendant on returns of nihil to two successive writs of scire facias issued to revive a previous judgment of the Pennsylvania courts, where the defendant at the time of the issue of the writs was a non-resident of the state of Pennsylvania and out of the jurisdiction of the court rendering the judgment.

Comity

FRAUDULENT CONVEYANCES.

In *Walker* v. *Harold*, 74 Pac. 705, the Supreme Court of Oregon holds that where the evidence shows a dishonest combination between the parties to a conveyance, the declarations and admissions of the grantor made after the execution of the deed are admissible against the grantee to prove a fraudulent intent. See in connection with this case *Horton* v. *Smith*, 42 Am. Dec. 628.

Evidence

JURISDICTION.

The Supreme Court of the United States, confirming the decision of the Pennsylvania Supreme Court in *Hughes* v. *Pennsylvania Railroad*, 202 Pa. 522, holds in *Pennsylvania Railroad Co.* v. *Hughes*, 24 S. C. R. 132, that whether the highest state court should apply the law of the place of contract to a controversy respecting the rights of a common carrier to limit its liability for negligence to the agreed valuation is not a Federal ques-

Federal Courts

JURISDICTION (Continued).

tion which will sustain the jurisdiction of the Supreme Court of the United States over a writ of error to the state court.

The Supreme Court of the United States holds in *Cable* v. *United States Life Insurance Co.*, 24 S. C. R. 74, that lack of an adequate remedy at law in the same jurisdiction cannot successfully be urged to sustain the equitable jurisdiction of a Federal court of a suit to cancel an insurance policy for fraud when the insurance company, because of diversity of citizenship, might have removed the action brought on such policy in a state court to a Federal court, where the fraud could have been set up as a defence, although by exercising this right of removal the company might have subjected itself to a revocation of its license to do business in the state, or, at least, to litigation to prevent the state authorities from revoking it. Two judges dissent.

Federal Courts: Remedy at Law

LANDLORD AND TENANT.

The Supreme Court of Rhode Island holds in *Whitehead* v. *Comstock & Co.*, 56 Atl. 446, that though a landlord agreed with the tenant to supply the dwelling with water, and the water was supplied in the cellar, which was dark, and by reason of defects in the pipes water escaped and formed ice from which an injury arose to the tenant, the landlord is not liable, there being, in the absence of any agreement and of any fraud and concealment, no duty on his part to keep the pipes in suitable condition. Compare *Royce* v. *Guggenheimer*, 106 Mass. 201.

Duty to Repair

In *Butler* v. *Newhouse*, 85 N. Y. Supp. 373, the New York Supreme Court (Appellate Term) holds that in an action for rent the defence of constructive eviction, caused by the landlord's failure to supply heat as agreed, supported by evidence that during October the apartment was insufficiently heated or not heated at all, that defendant repeatedly complained of that fact, but without effect, and that he was obliged to remove therefrom on October 29, should have been submitted to the jury. See *O'Gorman* v. *Harby*, 41 N. Y. Supp. 521.

Eviction: Question for Jury

LIBEL.

Publication of Photograph

With one judge dissenting, the New York Supreme Court (Appellate Division, First Department) holds in *De Sando* v. *New York Herald Co.*, 85 N. Y. Supp. 111, that one publishing a photograph in connection with a libellous article referring specifically to it is responsible for the libel to him whose likeness is published, though another's name be printed beneath it, and the article states facts tending to show he is not the person referred to. Compare with this case *Morrison* v. *Smith*, 82 N. Y. Supp. 166.

LIMITATIONS.

Foreign Corporations

The Supreme Court of Kansas in *Williams* v. *Metropolitan St. Ry. Co.*, 74 Pac. 600, holds that a foreign corporation is "out of the state" within the meaning of the local statute of limitations, and for that reason cannot avail itself of such statute. This decision is reached notwithstanding the possibility of serving such corporation with process.

Action for Tort

A railway company which held goods in its warehouse for a consignee at the place of their destination was induced by the wrongful act of the consignor to deliver them to a person other than the owner. Under these facts the Supreme Court of Kansas decides in *Nashville, C. & St. L. Ry.* v. *Dale & Nessly Milling Co.*, 74 Pac. 596, that the statute of limitations began to run on the cause of action in favor of the railway company against the wrongdoer (the consignor) at the time his tortious act was committed, and not at a later time, when the company was compelled to pay the owner and consignee the value of the goods. Compare *Morton* v. *City of Nevada*, 41 Fed. 582.

MASTER AND SERVANT.

Discharge of Servant

Where one is employed as a salesman for a year, his wages to be paid by the month, and he is discharged after a month's wages are due, and he has performed several days' work on the next month, he can recover the month's wages, subject to any counter claim of the employer; but for the subsequent days he can recover only

MASTER AND SERVANT (Continued).

if his discharge was wrongful, and then only as damages. New York Supreme Court (Appellate Division, First Department) in *Walsh* v. *New York & Kentucky Co.*, 85 N. Y. Supp. 83.

MORTGAGES.

The Supreme Court of Pennsylvania holds in *Saint* v. *Cornwall*, 56 Atl. 440, that where one of two joint mortgagors of real estate pays off the mortgage and takes an assignment of it to himself, and conveys his interest, subject to the mortgage, it will be presumed that the lien of the mortgage was not intended to be merged with the fee. Evidence is admissible, it is decided, to show that the satisfaction of a mortgage was made by mistake, misrepresentation, or fraud, so as to relieve the mortgagee from the effect of such satisfaction. See *Moore* v. *Harrisburg Bank*, 8 Watts, 138.

Satisfaction: Evidence

Defendant placed notes secured by mortgage in plaintiff's hands to collect interest. Afterwards she borrowed money of plaintiff and assigned the notes and mortgages to it as collateral. Subsequently she instructed it to foreclose, bid in the property for its value, and take judgment against the makers of the notes for any deficiency. It foreclosed, bidding in the property in its own name for the full amount of the notes, interest, and costs, which was more than its value. Under these facts the New York Supreme Court (Appellate Division, Fourth Department) holds in *Minneapolis Trust Co.* v. *Mather*, 85 N. Y. Supp. 510, that having bid more than authorized, the plaintiff became liable as a purchaser in its own interest and was bound to account to the defendant to the extent of the purchase price. Two judges dissent. See the case of *Laverty* v. *Snethen*, 68 N. Y. 522.

Assignment as Collateral

NATIONAL BANK.

A customer of a national bank, being largely indebted to the bank, and being in failing circumstances, and being the owner of nine shares in a partnership consisting of forty shares, each evidenced by a certificate transferable on the books of the partnership, transferred his nine shares to the bank to secure payment of his indebted-

Powers

NATIONAL BANK (Continued).

ness, the bank becoming the owner of such shares. Under these facts the Supreme Court of Ohio decides in *Merchants' Nat. Bank* v. *Wehrmann,* 68 N. E. 1004, that such transfer did not, in legal effect, make said bank a partner, but a part owner in severalty of the property then owned by the partnership, and, as such, liable for nine-fortieth parts of the debts and expenses incurred in purchasing, holding, handling, managing, improving, and disposing of said property. A national bank, it is said, established under the act of Congress providing for such banks, cannot be a member of a partnership and cannot become liable as a partner. See *California Bank* v. *Kennedy,* 167 U. S. 362.

NONSUIT.

Against the dissent of three judges, the Court of Appeals of New York holds in *Bopp* v. *New York Electric, etc., Co.,* 69 N. E. 122, that where, on trial of an action for negligence against two defendants, one of them moves for a nonsuit, and, on denial of the motion, excepts thereto, but puts in its evidence, and again makes the motion, and again excepts on its denial, and cross-examines the witnesses of its co-defendant to show that it was free from all responsibility, the refusal to grant the nonsuit is waived if at the close of the whole case the evidence presents a question for a jury. See *McMartin* v. *Taylor,* 2 Barb. 356.

Refusal: Waiver of Objections

PHYSICIANS.

The Supreme Court of Minnesota decides in *Henslin* v. *Wheaton,* 97 N. W. 882, that in an action against a physician and surgeon for negligence and unskilfulness in applying to the plaintiff's body a device known as "Roentgen's X-rays" for the purpose of locating a foreign substance thought to be in his lungs, the rule of liability is the same as that applied in other actions for malpractice, and is one of ordinary care and prudence. The court holds that the use of the X-rays was not in this case an act of the physician in his professional capacity, and that therefore he was not entitled to have the question of his care

Malpractice: Evidence

PHYSICIANS (Continued).

and skill in applying them determined by the opinions of physicians of his own school. It is on this ground that the case of *Martin* v. *Courtney*, 77 N. W. 813, is distinguished.

PRINCIPAL AND AGENT.

In *Beugot* v. *Tremoulet*, 335 Southern, 362, the Supreme Court of Louisiana holds that a person intrusted by the mother of a minor living with her mother in Germany, with the interests of the minor in Louisiana, who deposits confusedly with his own the funds of the minor to his own account in the local banks, checking against the same at will, obtained a basis for credit therefrom, and is chargeable with interest thereon. Legally considered, he uses the money for his own purposes, though the amount checked out may have left on deposit an amount sufficient to cover the funds belonging to the minor.

Use of Principal's Money

RES JUDICATA.

The Supreme Court of California in *Curtin* v. *Salmon River, etc., Co.*, 74 Pac. 851, decides that a judgment denying foreclosure of a mortgage on the ground that the mortgage was invalid is no bar to a subsequent action to recover on the note secured by the mortgage. See *Powell* v. *Patterson*, 100 Cal. 236.

Judgment Foreclosure of Mortgage

SALES.

It is decided by the Supreme Court of Arkansas in *Whitmore* v. *State*, 77 S. W. 598, that where one pretends to purchase liquor for another, his guilt as to making a sale instead of a purchase depends on his own good faith, and not that of the person ordering. The fact that one who purchases whiskey for another pays for it before he receives pay is decided not to render it a sale in violation of the liquor law. The court further holds that the fact that one solicits another to permit him to order whiskey for him, though it is competent evidence of a sale, does not constitute a sale, it being lawful for him to solicit others to join with him in giving an order.

Intoxicating Liquors

SPECIFIC PERFORMANCE.

In *Hunter* v. *McDevitt*, 97 N. W. 869, the Supreme Court of North Dakota holds that one who purchases real estate with notice of an outstanding contract of sale takes it subject to such contract, and may be compelled, in an action of specific performance, to convey the same upon the performance of the conditions of the contract. The decree in such a case should require the purchaser to pay to the vendee, from the unpaid purchase price, a sufficient amount to reimburse the latter for payments made to his vendor. See in connection with this case *Veith* v. *McMurtry* (Neb.), 42 N. W. 6.

Outstanding Contract

TRUSTS.

It is decided by the Supreme Court of Pennsylvania *In re Lee's Estate*, 56 Atl. 425, that where a testator left a certain sum to his daughter in trust, the trust to terminate on the death of the husband, and the evident intent of the trust was to protect the property from her husband, a divorce obtained by the daughter ends the trust. Compare *Koenig's Appeal*, 57 Pa. 352.

Termination

WATER AND WATERCOURSES.

In *Lonsdale Co.* v. *City of Woonsocket*, 56 Atl. 448, the Supreme Court of Rhode Island decides that where, in a suit against an upper riparian proprietor for an injunction against the diversion of water by the defendant, it appeared that defendant had filled a reservoir from the stream during months when the rainfall was excessive, and that it amounted to simply a retaining of excess water, which would otherwise have gone to waste, defendant was chargeable only in damages for the available amount actually diverted. Compare with this case *Tolle* v. *Correth*, 31 Tex. 362.

Riparian Proprietors