PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACT OF GOD.

The United States Circuit Court of Appeals, Third Circuit, decides in *Harrison* v. *Hughes,* 125 Fed. 860, that the extinguishment of the stake light by the wind due to its improper adjustment cannot be attributed to the act of God or *vis major,* so as to relieve the contractors from liability, being something which might reasonably have been anticipated, and could have been guarded against in the exercise of reasonable care and vigilance.

What Constitutes

BANKRUPTCY.

The United States District Court (W. D. New York) holds *In re Hawkins,* 125 Fed. 633, that a court of bankruptcy or a referee has discretionary power to order a private sale of a bankrupt's property, with or without notice, and the action of a referee in directing such a sale ought not to be disturbed unless it clearly appears that his discretion was improvidently exercised.

Private Sale

BANKS.

The Supreme Court of Kansas holds in *Hier* v. *Miller,* 75 Pac. 77, that the cashier of a bank organized under the laws of that state has no implied authority to pay his individual debts by entering the amount of them as a credit upon the pass book of his creditor, who keeps an account with the bank, and permitting the creditor to exhaust such account by checks which

Authority of Cashier

BANKS (Continued).

are paid, the bank having received nothing of value in the transaction. Consequently if the cashier of a bank, without actual authority so to do, should undertake to pay his individual debts in the manner stated, the bank may recover of his creditor the amount of money it may put out upon checks drawn upon the face of the unauthorized pass-book entries. See also *Wilson* v. *Railway Co.*, 120 N. Y. 125.

BENEFICIARY ASSOCIATION.

In *Littleton* v. *Wells, &c.*, 56 Atl. 798, the Court of Appeals of Maryland decides that the payment of his dues by a member of a beneficiary association, at the time required by its by-laws, to an officer not authorized to collect the dues, though he frequently did receive them from members, is not a compliance with the association's requirements, where the officer failed to pay the dues at the proper time to the person authorized to collect them.

Payment of Dues

BURGLARY.

One may not be convicted of breaking a warehouse, though he removes a window strip, where his action does not without additional effort make entry possible: Court of Appeals of Kentucky in *Gaddie* v. *Commonwealth*, 78 S. W. 162.

Breaking

BURIAL OF DEAD.

The Supreme Court of Pennsylvania reviews the law on the subject of legal rights in regard to the burial of the dead in the case of *Pettigrew* v. *Pettigrew*, 56 Atl. 878. Decedent left a widow and one child, and was buried in a lot belonging to his father's family. Decedent's child died a year later, and was buried in a lot purchased by the widow in another cemetery, the daughter desiring her father to be buried with her. The lot in which the father had been buried was not large enough for the

Right to Control

BURIAL OF DEAD (Continued).

bodies of his wife and daughter unless they were put in the same grave with the decedent, and the relations between the wife and her husband's family were strained. The court decides that the wife could remove the body of the husband to the lot purchased by her. See for references in regard to this matter a note to *Johnston* v. *Marinus,* 18 Abb. N. C. 75, and note the recent case of *Stewart* v. *Garrett,* 46 S. E. 427.

CARRIERS.

An invalid passenger injured by the negligence of a railway company is entitled to recover for an increase of her existing ailments thereby occasioned: Court of Appeals at Kansas City, Missouri, in *Matthew* v. *Wabash R. Co.,* 78 S. W. 271. But though an invalid passenger is entitled to receive the same high degree of care as other passengers, yet, in the absence of notice to the carriers of her condition, she is not entitled to special care.

Invalid Passenger

In *Missouri, K. & T. Ry. Co.* v. *Harrison,* 77 S. W. 1036, the Court of Civil Appeals of Texas holds that a carrier advertising to run an excursion train, without change of cars, from a point on its own line over the lines of connecting carriers, is liable for an injury to a passenger from negligently furnishing an unwarmed car, which occurs while the car is being operated by the connecting carriers, though the latter are also negligent in failing to inspect the car on receiving it.

Unwarmed Car

CONSTITUTIONAL LAW.

In *People of the State of New York* v. *Night,* 24 S. C. R. 202, the Supreme Court of the United States holds that a franchise tax imposed under appropriate statutes of the state of New York upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state for the purpose of conveying its passengers to and from its ferry landing in New

Interstate Commerce

CONSTITUTIONAL LAW (Continued).

York City, the charges for which are entirely separate from those for other transportation, is not an unconstitutional burden on interstate commerce, but is a tax upon an independent local service, preliminary or subsequent to any interstate transportation.

Regulating Hours of Work

In an elaborate decision from which three judges dissent the Court of Appeals of New York holds in *People* v. *Lochner,* 69 N. E. 373, that a statute providing that no employee shall be required to work in a bakery or confectionery establishment more than sixty hours in any one week, nor more than ten hours a day, except for the purpose of making a shorter workday on the last day of the week, nor more hours in any one week than will make an average of ten hours per day for the number of days which the employee shall work, is an exercise of the police power relating to the public health, and is constitutional both under the state constitution and under the United States Constitution. It is not necessary to cite cases in relation to this subject. It is sufficient to say that the authorities are carefully and exhaustively collected in the several opinions rendered. It is worth while, however, to refer to a case decided by the same court less than three weeks later, where a regulation as to the wages for a legal day's work to all classes of laborers on public works is also held constitutional: *Ryan* v. *City of New York,* 69 N. E. 599. Three judges dissent.

Divorce: Full Faith and Credit

In *German Savings & Loan Society* v. *Dora May Dormitzer,* 24 S. C. R. 221, the Supreme Court of the United States holds that a decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the plaintiff's want of domicil, even when the record purports to show such jurisdiction and the appearance of the other party. Mr. Justice McKenna dissents. See the very recent case of *Andrews* v. *Andrews,* 188 U. S. 14, 39. (See Note, *infra,* 322ff., AMERICAN LAW REGISTER, vol. 52, p. 322.)

CONTRACTS.

Construction of Benefit Certificates

The Court of Appeals at St. Louis, Mo., holds in *Sisson* v. *Supreme Court of Honor,* 78 S. W. 297, that where a benefit certificate issued by a mutual benefit association provides that, if a member lose a hand, he shall receive a certain sum, the member may recover such sum if his hand is so injured as to be practically useless to him, though it is not entirely amputated.

CORPORATIONS.

Officers: False Representations

In *Stickel* v. *Atwood,* 56 Atl. 687, it is decided by the Supreme Court of Rhode Island that the president of a corporation, who participates in the issuance of bonds which falsely represent that they are secured by all the property of the corporation, is liable in an action for deceit by the purchaser of the bonds, though the president was ignorant of the sale in question. It is further held that a recital in a corporate bond that it is "secured by all the property and assets of the company" imports that the bonds are secured by some particular lien. See in connection with this case the interesting case of *Hempfling* v. *Burr,* 59 Mich. 294.

Purchase of Stock

The Supreme Court of Montana holds in *Porter* v. *Plymouth Gold Min. Co.,* 74 Pac. 938, that a private corporation may purchase its stock if the transaction is fair and in good faith, if it is free from fraud, actual or constructive, if the corporation is not insolvent or in process of dissolution, and if the rights of its creditors are in no way affected thereby. It is decided also in line with this holding that a contract for the sale of stock by a corporation, whereby the corporation agreed to take back the stock if the purchaser should become dissatisfied therewith, is not objectionable as a secret contract between a corporation and a subscriber, by which the subscriber is at liberty to withdraw his subscription, but is valid and enforceable. See *Clapp* v. *Peterson,* 104 Ill. 26, and 1 *Cook on Corporations,* sec. 311.

CORPORATIONS (Continued).

Transfer of Property

The same court decides in *Forrester* v. *Boston, &c., Co.*, 74 Pac. 1088, that a transfer by the directors of a corporation of all its property to a foreign corporation organized by the directors of the former for the purpose of receiving its property, the scheme being to have its stockholders sell to or exchange their stock with the new company, is not voidable only but void.

DIVORCE.

Cruelty: Constructive Desertion

It is held by the Court of Chancery of New Jersey in *G*—— v. *G*——, 56 At. 736, that the statutory remedy for the wife for extreme cruelty of the husband is divorce *a mensa et thoro* and permanent alimony; but, if the cruelty is sufficient to warrant a divorce *a mensa,* she may separate herself from her husband, and such separation will constitute constructive desertion on his part, and if continued for the statutory period will entitle her to a divorce *a vinculo.* It is also decided that when a wife voluntarily separated herself from her husband on the ground of his cruelty, but received from him a competent monthly support, there was no such desertion on his part as entitled her to a divorce *a vinculo.* Compare *Kyle* v. *Kyle,* 52 N. J. Eq. 710.

Desertion: Computation of Time

In *Johnson* v. *Johnson,* 56 Atl. 708, the Court of Chancery of New Jersey, holding that it is a justifiable separation and not an obstinate desertion for married persons to live separately during the pendency of a suit between them for a divorce, if the suit is prosecuted in good faith, decides that in ascertaining and computing the term of two years of defendant's desertion in a petition for divorce, no part of the time during which a previous suit for divorce was pending between the same parties can be estimated as part of the period of desertion, because during that time the separation is not obstinate. See *Weigel* v. *Weigel,* 63 N. J. Eq. 677.

EQUITY.

The Supreme Court of Ohio in *Kinner* v. *Lake Shore & M. S. Ry. Co.*, 69 N. E. 614, holds that the maxim, "He who comes into equity must come with clean hands," requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject matter of his suit, and decides that a railroad company, having sold tickets with return coupons to a large number of persons who desired to attend a convention, the tickets, by their terms, being nontransferable, and the purchasers being required, on returning, to show their identity as the original purchasers, the contract resting upon a substantial reduction in the price of carriage, is entitled to an injunction against persons acquiring the return portions of such ticket from the original purchasers and selling them to others to be used by them in violation of the terms of such contract, and the maxim referred to will not justify a denial of that relief because the plaintiff had agreed with other carriers with respect to the reduction of rates and the condition of tickets for such occasion.

"Clean Hands"

FINDING.

The Supreme Court of Oregon decides in *Danielson* v. *Roberts*, 74 Pacific, 913, that plaintiffs, who, while working for defendants, unearthed money on defendant's premises, which the evidence tended to show had been buried for some considerable time by the owner, who was probably dead or unknown, were entitled to possession of the money as against defendants, and could maintain trover therefor.

Right to Possession

HUSBAND AND WIFE.

The Supreme Court of Pennsylvania holds *In re Fennell's Estate*, 56 Atl. 875, that under the Act of June 8, 1893, P. L. 344, giving to married women a right to make any necessary contracts for the enjoyment of the powers given them to acquire and possess real estate, a postnuptial agreement entered into by a wife with her husband, by which she releases her inchoate right of dower for an adequate consideration, is binding upon her, though there is no intention to suspend the marital relation.

Postnuptial Contracts

HUSBAND AND WIFE (Continued).

In *Chicago & E. I. R. Co.* v. *Driscoll*, 69 N. E. 620, the Supreme Court of Illinois holds that in an action by a wife to recover for the wrongful killing of her husband the re-marriage of the wife cannot be considered in mitigation of damages. See *Philpott* v. *Penna. R. R. Co.*, 175 Pa. 570.

Damages for Death of Husband

INJUNCTIONS.

In *Simpson* v. *Moorhead*, 56 Atl. 887, the Court of Chancery of New Jersey holds that where lands subject to ebb and flow of tides are usable only for shooting of ducks and other game, intrusions day by day upon such lands for the purpose of shooting will be enjoined. The injury suffered by the owner, in the lessening the quantity of game, increasing the danger of accidental shooting, and interfering with his exclusive shooting rights, is not adequately remediable in damages.

Trespass

In *Packard* v. *Thiel College*, 56 Atl. 869, it appeared that certain citizens of a borough, thirty years after the location of a college there, sued to restrain its removal to another town, on the ground that they, with certain other citizens, had subscribed a fund with which land was bought and given to the trustees of the college, for building purposes, after which the trustees permanently located the college in the borough. Under these facts the Supreme Court of Pennsylvania decides that an injunction to restrain the removal would be continued until final hearing.

Removal of College Buildings

INSANITY.

The Court of Appeals of Kentucky decides in *Irvine* v. *Gibson*, 77 S. W. 1106, that total mental derangement, or an insane delusion on the subject to which slanderous words relate, is a complete defence to an action therefor. The case contains an interesting discussion of the liability of lunatics for torts. See *Bryant* v. *Jackson*, 6 Humph. (Tenn.) 199.

Defence to Action for Slander

LANDLORD AND TENANT.

Defective Premises

In *Franklin* v. *Tracy*, 77 S. W. 1113, the Court of Appeals of Kentucky decides that a landlord is not liable to a tenant for injury to his property from a collapse of the building owing to inherent defects in the construction of the building at the time it was rented, of which the landlord did not have notice, but which he might have known by the exercise of reasonable diligence and which the tenant did not know and could not have discovered by ordinary diligence. See *Doyle* v. *Union Pacific Railway Co.*, 147 U. S. 413.

LIMITATIONS.

Corporations: Stockholder's Action

The Supreme Court of Michigan decides in *Bates* v. *Boyce's Estate*, 98 N. W. 259, that where the majority stockholder in a corporation sells all the company's property to himself, paying the other stockholders nothing, an action by the administratrix of a defrauded stockholder for the conversion of his interest is an action on behalf of the company, and for the benefit of all stockholders, and hence is barred by limitations in the same manner as if brought by the company itself, so that the administratrix's failure to discover for a time that her intestate had an interest in the corporation would not affect the case. *See Wallace* v. *Bank*, 89 Tenn. 630.

MASTER AND SERVANT.

Domestic Servant

The Supreme Court of Rhode Island decides in *Collins* v. *Harrison*, 56 Atl. 678, that the failure of an employer to furnish a domestic servant with a lodging in such repair as not to endanger her health is a violation of his legal duty to furnish safe appliances. It is further held that such servant's right of action for sickness resulting from the leaking of the roof on her bedding is not destroyed by her failure to leave the employment for seven days after discovering the condition of the room, where her employer had promised that if she would remain he would repair the roof and provide suitable bedding. See *Mahoney* v. *Dore*, 155 Mass. 513.

PARTNERSHIP.

The Supreme Court of California holds in *Willey* v. *Crocker-Woolworth Nat. Bank of San Francisco,* 75 Pac. 106, that there being no law preventing the use of a trade-name by an individual, the use by him of the term "& Co." after his name does not import the existence of a partnership, or that any other person than the individual named is interested in the business.

Use of Phrase "& Co"

PHYSICIANS.

Interesting questions are constantly arising in connection with the right of persons who claim to be able to cure disease to practise without a license from the state. A recent decision bearing upon osteopathy is found in *State* v. *Herring,* 56 Atl. 670, where the Supreme Court of New Jersey holds that an osteopathic physician, whose treatment of his patient consists simply of the manipulation of the body, does not violate a statute which forbids the applying of "any drug, medicine or other agency or application" by a non-licensed person. Compare with this case *State* v. *Liffring,* 61 Ohio St. 39, and the very recent decision of *State* v. *Biggs,* 46 S. E. (N. C.) 401.

License: Osteopathy

PRINCIPAL AND AGENT.

The Court of Appeals of Kentucky holds in *Day* v. *Exchange Bank of Kentucky,* 78 S. W. 132, that while knowledge acquired by an agent in purchasing bank stock from a bank, of the institution's impaired condition will be imputed to his principal so as to start limitations against an action for false representations inducing the purchase, similar knowledge acquired some years later, where the same person became agent to effect the stock's sale to third persons, will not be so imputed, the transactions being separate and distinct. See *Bramblett* v. *Henderson,* 41 S. W. 575.

Imputed Knowledge

RAILROADS.

The Court of Chancery of New Jersey holds in *West Jersey & S. R. Co.* v. *Atlantic City, &c., Co.,* 56 Atl. 890, that jurisdiction to determine how conflicting easements of way across the same place shall be occupied and used by two or more holders of such easements is vested in the Court of Chancery. It is further decided that where a newly organized company is authorized to lay its railroad tracks at grade across the existing tracks of another railroad, and the construction proposed involves only such a crossing, the new company should pay the expenses incident to the safe construction of its tracks across those of the senior company. See for a case where the dispute was between two railroad companies concerning the use of the same tunnel, *Del., Lack. & Western R. Co.* v. *Erie R. Co.,* 21 N. J. Eq. 304.

Equity: Jurisdiction

The Supreme Court of New Jersey decides in *McClosky* v. *Atlantic City R. Co.,* 56 Atl. 669, that if a railroad company has the right to maintain its railroad longitudinally upon a public street, and there is no law controlling the grade at which its tracks shall be laid, it cannot be held responsible for damage done by surface diverted from its roadbed, merely because its track is higher than the established grade of the street. "The grade fixed by the city for the curb and side-walk bore no legal relation to the grade of the track, in the absence of any legal regulation enjoining conformity between them." See in connection with this case *Bowlsby* v. *Speer,* 31 N. J. Law, 351.

Maintenance in Public Street

REASONABLE DOUBT.

The frequent attempts to have a court make a construction of a reasonable doubt favorable to the defendant are constantly appearing. Thus in *Cook* v. *State,* 35 Southern, 665, the following instruction was asked, that: "Before the jury can convict the defendant the evidence must be so strong as to convince each juror of his guilt beyond a reasonable doubt; and if, after considering all the evidence, a single juror has a reasonable doubt as to the defendant's guilt, arising out of any part of the evidence, then the jury cannot convict him." This instruction was refused and the Supreme Court of Florida holds properly so.

What Constitues

RECEIVERSHIPS.

The Court of Chancery of New Jersey decides in *Nessler* v. *Industrial Land Development Co.*, 56 Atl. 711, that an order of the court to that effect, and also one for authority to incur indebtedness, are necessary to entitle receivers to retain their salary or compensation as a preferred claim as against claimants who have, at the request of the receiver, advanced money or performed services for the trust; and, where the fund in hand is not sufficient to pay all the receivers' debts and their compensation, the distribution must be made pro rata.

Salary of Receiver: Preferred Claims

RECORDS.

The Supreme Court of Louisiana decides in *Agurs* v. *Belcher & Creswell*, 35 Southern 607, that where a man was unable to write his name and merely made his mark, and where the notary erred as to the vendor's name and wrote it "Willie Jones" instead of "Willie Johnson" and the error was carried into the index to the conveyance records, it cannot have the effect of depriving the vendee of his property, since the index was no part of the record, but merely for the convenience of those examining the record.

Notice

STREET RAILROADS.

The Supreme Court of Indiana decides in *Indiana Ry. Co.* v. *Hoffman*, 69 N. E. 399, that a street railroad operating its lines in a city under a contract to issue transfer tickets free of charge to all passengers requesting the same, who might board its car at any point on any of its lines in the city, and whose destination might be to any other point on any other line of the company's road in the limits of the city, is bound to transport a passenger tendering such transfer to his destination on the company's line, though that be in territory annexed to the city after the contract was made, and on its interurban line, on which it had a franchise entitling it to charge an additional fare outside the city as its limits were before the annexation of territory.

Contract with Municipal Corporations: Construction

TELEGRAPHS.

In *Western Union Telegraph Co.* v. *Anderson*, 78 S. W. 34, it is decided by the Court of Civil Appeals of Texas, that a telegraph company in Texas is liable for damages for mental suffering resulting from its negligence in failing to deliver promptly a message sent from there to a non-resident plaintiff, although the jurisdiction in which the latter resides does not authorize recovery in such cases. The Texas rule allowing damages for mental anguish in such cases is well known.

Mental Anguish: Conflict of Laws

TELEPHONES.

In *Meyer* v. *Standard Telephone Co.*, 98 N. W. 300, it is decided by the Supreme Court of Iowa that the measure of damages for unreasonable cutting of trees for the erection of a telephone is the difference between the value of the land as it would have been if the cutting had been reasonable and what it was after the cutting, not the difference between the value before and after the cutting.

Cutting trees: Damages

TRESPASSERS.

In *Sigur* v. *Burguieres*, 35 Southern, 823, the Supreme Court of Louisiana decides that one who occupies no better position than that of trespasser may yet claim reimbursement of the cost of clearing land whereby such land is brought into cultivation, and when to cultivate it is its chief value. And it is further held that he may also claim for such ameliorations as have added to the permanent value of the land.

Improvements

WILLS.

In *Burroughs* v. *Cutter*, 56 Atl. 649, the Supreme Judicial Court of Maine, decides that when an executor is given power in the will to apply the property of the testator to the support and education of a minor child, and is authorized to sell and convey property for that purpose, and dies without having done so, the power and authority do not pass to the minor, nor to his

Power of Sale: Construction

WILLS (Continued).

guardian, unless expressly so stated in the will. Compare with this case *Clifford* v. *Stewart,* 95 Me. 41.

Construction: Life Estate

A testator devised to his wife for her natural life "all of my property and estate, real, personal and mixed, whenever found and however situated, during the term aforesaid, my said wife to use and expend what may be necessary for her maintenance and support during said term." The Supreme Court of New Hampshire, construing this clause in *Barker* v. *Clark,* 56 Atl. 747, holds that the will gave the wife not only a life estate, but also empowered her to dispose of the same for her maintenance when necessary. See *Burleigh* v. *Clough,* 52 N. H. 267.

Mutilation: Presumption

There is no presumption of revocation of a will by mutilation where the will was not shown to have been in testator's possession, or to have been found among his papers after his decease in the condition in which it was offered for probate: Supreme Court of New Jersey in *Stevens* v. *Stevens,* 56 Atl. 916.

Validity

In re Redhead's Estate, 35 Southern 761, the Supreme Court of Mississippi holds that an instrument beginning, "Realizing the uncertainty of life at all times, and the dangers incident to travel, I leave this as a memoranda of my wishes should anything happen to me during my proposed trip," is a valid will, though the testator did not die till after his return from the trip referred to.

WITNESS.

Competency: Transactions with Decedent

The general rule preventing testimony by an interested party as to transactions with decedents makes the decision of the Supreme Court of Pennsylvania *In re Allen's Estate,* 56 Atl. 928, of more than local interest. It is there held that where a father transferred property to his son as an advancement or gift, on the father's death, under act of May 23, 1887, sec. 4, P. L. 159, providing that no interest, merely,

WITNESS (Continued).

shall make a person incompetent as a witness, and declaring that if any party to a contract or a thing in action is dead, and his right thereto has passed, a surviving party to such contract shall not be a competent witness, unless the contest be between the parties respectively claiming such property by devolution on the death of such owner, the son is not competent to testify as to matters occurring in his father's lifetime in connection with the advancement.