PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

In re Forbes, 128 Fed. 137, the United States District Court (District of Massachusetts) holds that where a petition has been filed by one partner to bring his firm and his co-partner into bankruptcy the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the Bankruptcy Act or by the practice thereunder, nor can he set up the want of such an act as a defence to the petition, but he may set up the defence of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury.

Partnership

BILLS AND NOTES.

In *National Bank of Commerce* v. *Kenney,* 80 S. W. 555, the Court of Civil Appeals of Texas decides that a provision in a note by which protest is waived in case of non-payment at maturity, and all extensions and partial payments before or after maturity are agreed to, without prejudice to the holder, introduces an element of uncertainty as to time of payment fatal to negotiability. See *City National Bank* v. *French & Son,* 72 Pac. 842.

Negotiability

CARRIERS.

In *Gillespie* v. *Brooklyn Heights R. Co.,* 70 N. E. 857, the Court of Appeals of New York holds that a street railway company is liable to a passenger for an injury to his feelings because of the insulting language used by a conductor. It is consequently decided under the facts of the case that where a passenger on a street-car tendered the conductor an amount more than the fare, and asked for a transfer, and

Insulting Language of Employee: Damages

CARRIERS (Continued).
after the conductor had attended to another passenger demanded her change, whereupon the conductor in an abusive manner refused to return any change, but called the passenger a dead beat and swindler, a directed verdict for plaintiff for the amount of the change as the extent of the carrier's liability is reversible error. Three judges dissent on the ground that it is unduly extending the doctrine of a common carrier's liability to make him answerable in damages for the slanderous words spoken by his agents. Compare *Chamberlain* v. *Chandler,* 3 Mason, 242.

Furnishing Cars: Discrimination

In *State ex rel. McComb* v. *Chicago, B. and Q. R. Co.,* 99 N. W. 309, the Supreme Court of Nebraska decides that during a temporary scarcity of cars a railroad company is entitled to consider, in apportioning cars among grain dealers, their relative volumes of business and facilities for the loading of cars. Though there may be a difference in the number of cars furnished different grain dealers at the same railroad station, still, if no favoritism or discrimination is shown, and the number of cars furnished each is in a fair proportion to his volume of business, facilities for loading, and grain in sight, no shipper has a right to complain of this difference, though he may not obtain all the cars he deems necessary for his business.

Termination of Liability

The Supreme Court of Mississippi, holding that the liability of a carrier does not terminate until the freight has reached the point of destination in good order, and notice of its arrival has been given to the consignee, and a reasonable time allowed for its removal, decides in *Gulf and C. R. Co.* v. *Fuqua & Horton,* 36 S. 449, that the liability of a carrier does not terminate until notice of the arrival of the goods at their destination has been given the consignee, irrespective of any custom on the part of the railroad not to give such notice. Compare *Alabama and V. Ry. Co.* v. *Bounder,* 35 S. 155.

CLERK OF COURT.

Failure to Issue Summons

The United States Circuit Court (Eastern District Pennsylvania) holds in *United States* v. *Bell,* 127 Fed. 1002, that a clerk of a court is essentially a ministerial officer and has nothing to do with the character or purpose of papers which are tendered to him to be filed. When suit is ordered or process directed to be issued, it is his duty to comply if the party is *prima facie* entitled to it, and for failure to do so he is liable for any loss, the measure of his responsibility being the damages which have resulted therefrom, but to maintain such action something more than nominal damages must be shown. See also *Stevens* v. *Rowe,* 3 Denio, 327.

CHECKS.

Illegal Consideration

In an action on checks against the drawer and the bank it appeared that the money for which the checks were given was borrowed for the purpose of betting on a game of cards participated in by the payee in a hotel controlled by him. Under these facts the Court of Civil Appeals of Texas decides in *Jones* v. *Akin & Aikin,* 80 S. W. 385, that there could be no recovery. Compare *Reed* v. *Brewer,* 90 Tex. 144.

Certification: Bona Fide Holder

In *Union Trust Co.* v. *Preston Nat. Bank of Detroit,* 99 N. W. 399, the Supreme Court of Michigan decides that a certified check is valid in the hands of a bona fide holder, though the books showed no funds to the credit of the drawer when it was certified, and though the laws of Michigan declare it unlawful to certify a check under such circumstances and go so far as to make such certification a crime. The case presents an excellent review of the authorities in point.

COMPULSORY EDUCATION.

What Constitutes School

A parent in good faith employed a teacher formerly employed in the public schools to teach his child. It was arranged that the child should be taught all the branches taught in the public schools at the regular public school hours. The child attended the teacher's home regularly every school day, and received instruction equal to that which could have been received

COMPULSORY EDUCATION (Continued).

at the public schools. The teacher did not advertise herself as keeping a private school and had no regular tuition fixed, nor any school equipments, and made no arrangements to take other pupils. Under these facts the Appellate Court of Indiana (Div. No. 1) decides in *State* v. *Peterman,* 70 N. E. 550, that the Indiana law had been complied with which provides that every parent shall be required to send his child to a public, private, or parochial school each school year for a term not less than that of the public schools where the child resides. Compare with this case the Massachusetts decision of *Commonwealth* v. *Roberts,* 34 N. E. 402.

CONTRACTS.

Illegality: Restraint of Trade

Three coal-mining companies operating in the same vein or seam in close proximity to one another and just having commenced the development of that particular kind of coal, organized indirectly and nominally in the names of individuals a third corporation to act as their general sales agent, and each gave it by contract the exclusive right to sell its entire output of coal at prices uniform as to all three companies and not to be departed from without the consent of all the companies, and the said agent company was to advertise and introduce the coal in the markets, establish and control all agencies and sub-agencies, and make all sales and collections, and deduct for its compensation ten cents per ton out of the proceeds of sales. Under these facts the Supreme Court of Appeals of West Virginia decides in *Slaughter* v. *Thacker Coal and Coke Co.,* 47 S. E. 247, that the contract is illegal and void, its tendency being to suppress competition and restrain trade contrary to public policy. Compare *Horner* v. *Graves,* 7 Bing. 735.

CORPORATIONS.

Doing Business in the State

(Appellate Division, First Department) decides in *Penn Collieries Co.* v. *McKeever,* 87 N. Y. Supp. 869, that a foreign corporation, the office of which is in another state and which merely has an agent in this state who maintains an office for his own

With one judge dissenting, the New York Supreme Court

CORPORATIONS (Continued).

convenience and does not have exclusive control of the business in the state, and keeps no books nor bank account, and makes no contracts for the sale of goods, but reports everything to the home office, and who usually makes sales to parties outside the state, and, while a particular sale was made of coal situated in the state to a resident, it had been previously sold to a party without the state who had rejected it, is not doing business in the state within the meaning of the statutes. See also *Cummer Lumber Co.* v. *Associated Ins. Co.,* 67 App. Div. 151.

Receivership: Certificates: Priorities

A corporation issued bonds in the sum of $35,000 to secure which it executed a mortgage in the name of a trustee. Bonds to the extent of $17,000 were disposed of, the proceeds being applied to the satisfaction of the corporation's indebtedness. Subsequently a stockholder, on behalf of himself and all the other stockholders, made application to the court for the appointment of a receiver, no notice of such application being served upon either the trustee or any of the bondholders, who were not made parties to the proceedings. Under these facts the Supreme Court of Nebraska decides in *Smiley* v. *Sioux Beet Syrup Co.,* 99 N. W. 263, that the receiver's certificates issued for expenses incident to the receivership were not a lien superior to that of a mortgage.

CRIMES.

Theft of Public Records

In a very elaborate opinion and with two judges dissenting the Court of Appeals of New York decides in *People* v. *Mills,* 70 N. E. 786, that where the property of the state is delivered to anyone under any circumstances for the purpose of having him steal it, and he takes possession of it with intent to steal it, the attempt is a crime. Compare *State* v. *Hull,* 33 Or. 56. The dissenting judges held that the true principle, which, however, is not adopted by the majority, is that a person decoyed by others into the doing of some act that otherwise would be a crime is not criminal in the eyes of the law unless the persons inducing or procuring him to do the act were themselves criminals intending to commit the crime. There is a careful review of the cases in point and the questions are thoroughly canvassed.

EVIDENCE.

The Supreme Court of Mississippi holds in *Boyd* v. *State,* 36 S. 525, that on a prosecution for murder of defendant's wife, testimony of the physician, in connection with his testimony as to a dying declaration, that just before it was made he told deceased that her husband was under suspicion, and that she should state whether she had taken anything herself, should not have been admitted.

Dying Declarations

FALSE IMPRISONMENT.

Defendant B, a store-keeper, overtook A, a woman, after she had left the store, took her by the shoulder, falsely accused her of not having paid for something she had bought, and said to her and her sister, who was with her, "You will have to go back to the store." Under these facts the Kansas City Court of Missouri holds in *Dunlevy* v. *Wolferman,* 79 S. W. 1165, that the fright and fear it gave A authorized a finding that she was forcibly restrained of her liberty. See also *Brushaber* v. *Stegemann,* 22 Mich. 266.

What Constitutes

HUSBAND AND WIFE.

The New York Supreme Court (Appellate Division, First Department) decides in *Pache* v. *Oppenheim,* 87 N. Y. Supp. 704, that a husband has a right of recovery against the estate of his deceased wife for the reasonable expenses incurred and actually paid in connection with her burial, notwithstanding his common law obligation to see to the proper interment of the remains of the deceased. See *O'Brien* v. *Jackson,* 167 N. Y. 31.

Burial Expenses

INNKEEPERS.

The Supreme Court of California, holding that an innkeeper is not bound to protect his guests from acts of violence of his servants in the absence of negligence in employing a violent or disorderly person, decides in *Rahmel* v. *Lehnborff,* 76 Pac. 659, that an assault by a waiter in a hotel on a guest is not within the course of the waiter's employment or within the real or supposed scope of his duties, so as to render the innkeeper liable for the tort. There is a difference, it is held, between a common carrier and an innkeeper in this respect.

Assault on Guest

INNKEEPERS (Continued).

The court refers to the ancient decision of *Calye's Case* decided in the King's Bench in 26 Elizabeth (Coke, pt. 8, *33).

INTERSTATE COMMERCE.

Against the dissent of three judges the Court of Appeals of New York decides in *People ex rel. Connecting Terminal R. Co.* v. *Miller, Comptroller,* 70 N. E. 472, that where the entire business of a domestic corporation consists in the transportation of grain and other products from ports outside of the state to ports and places in the state, and of personal property from ports in the state to ports in other states, and its entire gross receipts from its business are derived from such transportation and not otherwise, are "earnings derived within the meaning of the statutes of New York which forbid the imposition of any tax on the business of interstate commerce." See, however, *Bridge Company* v. *Kentucky,* 154 U. S. 204.

Franchise Tax

The United States Circuit Court (Western District, Virginia) holds in *Interstate Commerce Commission* v. *Chesapeake and Ohio Ry.,* 128 Fed. 59, that it is not a violation of Section 2 of the Interstate Commerce Act for an interstate carrier to buy a commodity, and then sell the same, to be transported over its own line, at a price less than the aggregate of the cost, expense items, and its own published freight rates, unless such transaction was a mere device to cover an intentional giving of a less rate for carriage to some than to others, there being no legal ground for assuming that the loss was sustained by it as a carrier rather than as a dealer.

Unjust Discrimination

JURISDICTION.

It is decided by the United States Circuit Court of Appeals, Fifth Circuit, in *Louisville and N. R. Co.* v. *Smith,* 128 Fed. 1, that in a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands the value of the right sought to be protected, and not the value of the land constituting the right of way across

Federal Courts: Amount in Controversy

JURISDICTION (Continued).

the land of defendants, constitutes the value in controversy for jurisdictional purposes. See *Walter* v. *Northeastern Railroad,* 147 U. S. 370.

LARCENY.

In Kansas there is a constitutional provision similar to the provision existing in many states by statute that the real and personal property of a *feme covert* acquired before or after marriage shall remain her separate property, and may be devised and conveyed by her as if she were unmarried. The Supreme Court of the state in construing this provision holds that under it a husband may be guilty of larceny of his wife's property. *Hunt* v. *State,* 79 S. W. 769. Compare *Beasley* v. *State,* 139 Ind. 552.

Stealing of Wife's Property

LIFE INSURANCE.

In *Hatch* v. *Hatch,* 80 S. W. 411, the Court of Civil Appeals of Texas decides that as an assignee of a life policy, to be entitled to hold an interest therein, must have an insurable interest in the life insured, a wife's interest as assignee of a policy on her husband's life ceases on the divorce of the parties, except so far as she has paid premiums. It is further held that a judgment of divorce which adjudicates the property rights of the wife is not *res judicata* on an issue involving the wife's rights as assignee of a policy on the life of the husband, under an assignment executed during the existence of the marriage relation, where such issue was not involved in the divorce proceedings nor adjudicated therein. Compare *Schonfield* v. *Turner,* 75 Tex. 324, 7 L. R. A. 189.

Divorce of Parties

MASTER AND SERVANT.

In *Shaffer* v. *Union Brick Co.,* 128 Fed. 97, the United States Circuit Court (District of Kansas, Third Division) holds that to constitute a joint liability of master and servant for the negligence of the servant there must be actual negligence, as contradistinguished from imputed negligence, of the master concurring with an act negligently committed by the servant. The case contains

Joint Liability

MASTER AND SERVANT (Continued).

an interesting review of the authorities in point. See in connection with it *Chesapeake and Ohio Ry. Co.* v. *Dixon,* 179 U. S. 131.

NEGLIGENCE.

The Supreme Court of Pennsylvania decides in *Daltry* v. *Media Electric Light, Heat and Power Co.,* 57 Atl. 833,

Injury to Trespasser

that where an owner of a house procured defendant electric company, at his own expense, to introduce electric light into the house by running a wire from its line at the gateway across the lawn to the building, and on the removal of such person from the house the company cut off electrical connection, but left the wire hanging in connection with the feeder line to the street, it was not relieved from liability to a boy injured by coming in contact with such wire by the fact that it was not the owner. This liability exists although the boy who was injured by coming in contact with the wire was at the time a trespasser on the land of the person who owned the house. No authority is cited for this decision.

NUISANCE.

In *Longtin* v. *Percell,* 76 Pac. 699, the Supreme Court of Montana decides that the carrying on of blasting on prem-

Injuries: Care

ises platted as city lots continuously for over a year constitutes a nuisance *prima facie* irrespective of the care exercised, and a recovery may be had for injury to property owing to concussions of the air from the blasting.

PHYSICIANS.

The Supreme Court of Wisconsin lays down an important limitation as to the scope of questions which may be asked

Expert Testimony

of an expert medical witness when it holds in *Kath* v. *Wisconsin Cent. Ry. Co.,* 99 N. W. 217, that an expert medical witness may not state what he learns entirely from medical works unsupported by practical experience of his own. See in connection with this case *Zoldoske* v. *State,* 82 Wis. 580.

PLEDGES.

Collateral Security

It is decided by the Court of Appeals of Kentucky in *Roberts* v. *Farmers' Bank,* 80 S. W. 441, that a pledgee of a note assigned as collateral security is liable when by the exercise of ordinary diligence he could have collected the same at maturity, and not only failed to do so, but refused to turn it over to the pledgor, so that he might enforce payment, and in consequence thereof, the makers subsequently becoming insolvent and removing from the state, the note became worthless. See also *Noland* v. *Clark,* 10 B. Mon. 239.

POWERS.

Substituted Trustee

A deed of trust provided that in case of the refusal or neglect of the trustee to act, the beneficiary or any holder of the notes secured, "or their legal representatives," might appoint another trustee. In *Allen* v. *Alliance Trust Co., Limited,* 36 S. 285, the Supreme Court of Mississippi decides that the attorney in fact of the beneficiary had no right to appoint a substituted trustee, so that a sale by a trustee appointed by him was void.

PRINCIPAL AND SURETY.

Limitations

In *Reed* v. *Humphrey,* 76 Pac. 390, the Supreme Court of Kansas decides that a surety, who under legal compulsion, pays a judgment against his principal and himself, may maintain an action against his principal for reimbursement, although at the time of such payment the judgment could not in any manner have been enforced against the latter on account of its having been dormant as to him for more than a year. See *Faires* v. *Cockerall,* 88 Tex. 428.

PUBLIC OFFICE.

Legislative Control: Property Rights

With two judges dissenting, the Supreme Court of North Carolina holds in *Mial* v. *Ellington,* 46 S. E. 961, that an officer appointed for a definite time to a public office has not a vested property interest therein, or contract right thereto, of which the Legislature cannot deprive him. The case contains a full discussion of the principles involved and a complete citation of authorities in point. The dissenting opinions are

PUBLIC OFFICE (Continued).

well worth noting, both for their discussion of the matter and also for the references to previous North Carolina judges.

PUBLIC SCHOOLS.

The vexed question as to religious exercises in the public schools is constantly recurring. A new illustration of it is found in *Villard* v. *Board of Education*, 76 Pac. 472, where the Supreme Court of Kansas holds that a public school teacher who, for the purpose of quieting the pupils and preparing them for their regular studies, repeats the Lord's Prayer and the Twenty-third Psalm as a morning exercise, without comment or remark, in which none of the pupils are required to participate, is not conducting a form of religious worship or teaching sectarian or religious doctrine. A very thoughtful and dispassionate article on this subject occurs in the issue of the *Atlantic Monthly* for September, 1903, entitled "The Bible in Public Schools," by Herbert W. Horwill, which may be interesting to readers of the AMERICAN LAW REGISTER.

Religious Exercises

RAILROADS.

In *Missouri Pac. Ry. Co.* v. *Bradbury*, 79 S. W. 966, the Kansas City Court of Appeals of Missouri holds that where a railroad has been granted a right of way, laid track thereon, and afterwards abandons the road without removing the rails, they become the property of the owner of the land through which the right of way was granted.

Abandonment of Track

RECEIVERS.

It is decided by the Court of Chancery of New Jersey in *Cooper* v. *Philadelphia Worsted Co.*, 57 Atl. 733, that while no person can sue a corporation after a receiver has been appointed without the consent of the court, actions pending at the time of the appointment may be prosecuted to judgment, in the absence of an injunction or a legislative act to the contrary, even without making the receiver a party, though he may be substituted for the corporation on his application therefor.

Suit Against Corporation

SLANDER OF TITLE.

In *Butts* v. *Long,* 80 S. W. 312, the St. Louis Court of Appeals decides that plaintiff, to recover in an action for slander of title, must show that the words were maliciously published. It is a good defence that the defendant supposed, in good faith, that he had title.

Malice

TAXATION.

Against the dissent of two judges the Court of Appeals of Kentucky decides in *German Gymnastic Ass'n of Louisville* v. *City of Louisville,* 80 S. W. 201, that a gymnastic association where regular gymnastic exercises are taught and a teacher in physical culture is constantly employed, is an institution of education within the meaning of the Kentucky laws. Compare *Mt. Hermon Boys' School* v. *Gill,* 145 Mass. 146.

Educational Institution

TELEGRAPH COMPANIES.

The Supreme Court of Alabama decides in *Western Union Telegraph Co.* v. *Young,* 36 S. 374, that a telegraph company agreeing to transmit a telegraph message to which the sender had not attached the revenue stamp required by the United States Revenue Act of 1898, notwithstanding that the act prohibits under penalty a company from transmitting a message without an adhesive stamp being affixed, is not liable for the negligent or intentional failure to transmit and deliver the same, nor did the subsequent repeal of the act validate a contract whereby a company agreed to transmit a message to which no stamp had been affixed by the sender. Two judges dissent. See *Youngblood* v. *Birmingham Trust and Savings Co.,* 95 Ala. 526, and the case of *Union Trust Co.* v. *Preston Nat. Bk. of Detroit,* 99 N. W. 399, referred to *supra.*

Unstamped Messages