PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACCORD AND SATISFACTION.

In *Laughead* v. *H. C. Frick Coke Co.*, 58 Atl. 685, the Supreme Court of Pennsylvania, laying down the general principle that an accord is sufficiently executed when all is done which the party agrees to accept in satisfaction of his claim, and, when so executed, it is a bar to the remedy under the old contract, decides that where the plaintiff holds a disputed claim against the defendant for unliquidated damages, and he accepts a certain amount in cash and an agreement for employment in another company when a certain contingency arises which makes such employment possible, it is a complete accord and satisfaction, and the person who gave the receipt in full cannot recover on his original contract. Compare *Hasler* v. *Hursh*, 151 Pa. 415.

Performance: Conclusiveness

ATTACHMENT.

In *National Broadway Bank* v. *Sampson*, 71 N. E. 766, it is held by the Court of Appeals of New York that the personal service of a warrant of attachment on a nonresident partner of a foreign limited partnership for a debt due to a foreign corporation, and having a foreign situs, is invalid, the partner being temporarily in the state. Compare *Plimpton* v. *Biglow*, 93 N. Y. 592.

Validity

BANKRUPTCY.

The Supreme Court of Florida (Division A) decides in *Beasley* v. *Coggins*, 37 S. 213, that a trustee in bankruptcy appointed under the provisions of the Bankruptcy Act of 1898 occupies a relation similar to that of a judgment creditor of the bankrupt, and may file a bill in equity to set aside a fraudulent conveyance of real estate by the bankrupt, although neither he (the trustee) nor any creditor has reduced any claim against the bankrupt to judgment. See *In re Mullen*, 101 Fed. 413.

Trustee: Fraudulent Conveyance

BANKS.

In *Stone* v. *Rottman,* 82 S. W. 76, the Supreme Court of Missouri (Division No. 2), holding that the director of a bank is only required to act in good faith and to exercise such a degree of care as a reasonably prudent man would exercise under the same circumstances, not that which a prudent man would exercise in his own business, applies this principle to the following facts: A statute of Missouri declares that a bank may sell all kinds of property coming into its hands as collateral security for loans, but forbids an investment of funds in trade or commerce. A bank, on a sale of corporate stock of a corporation which it held as security, purchased the stock, and through its officers ran the company, which traded in coal, for four years at a continual loss: *Held,* that the directors of the bank were liable for the loss in a suit by the receiver. Compare *Swentzel* v. *Penn Bank,* 147 Pa. 140.

Directors: Negligence

It is held by the Supreme Court of South Carolina in *Callahan* v. *Bank of Anderson,* 48 S. E. 293, that where a bank refused to pay a check drawn by a depositor in favor of a third party, in the absence of notice to the depositor that the bank had applied the fund on deposit in extinguishment of past-due claims held against him by the bank when he had deposited with the bank a sum sufficient to make payment of the check, the bank was liable to the depositor for the resulting damages. The court is equally divided, however, upon the question, and seems to hold thus merely because the lower court so held. See *Hardware Co.* v. *Bank,* 41 S. C. 177.

Refusal to Pay Check

It is decided by the Court of Appeals of New York in *Hanna v. Lyon,* 71 N. E. 778, that though directors are liable to a bank which has suffered loss through their negligence, and any stockholder may prosecute an action for himself and others in a similar situation where the bank does not bring the action after demand, or without demand when the officers who committed the wrong are still directors, plaintiff must be a stockholder at the time of the commission of the acts complained of and at the time of the commencement of the action.

Action Against Directors

CODE PLEADING.

A decision of interest and importance in those states in which the code system of pleading is established is rendered by the Supreme Court of North Dakota in *Wrege* v. *Jones,* 100 N. W. 705. It is there held that the provision of the code, which is found in practically every code state, permitting a defendant to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," does not authorize one slander to be set up against another, although both are uttered at the same time and place and in the same conversation. Each slander constitutes a separate transaction within the meaning of the above section. Compare *Anderson* v. *Hill,* 53 Barb. 239.

Counter-claim

CONSIDERATION.

In *Presbyterian Board of Foreign Missions* v. *Smith,* 58 Atl. 689, the following facts appear: Defendant's testator promised in writing to give a certain sum to a foreign missionary society, the sum to be expended in foreign mission work in a particular field in memory of the donor's mother. The society accepted the obligation, received a payment on account, and sent missionaries to the particular field designated, and did not attempt to raise funds for the prosecution of missionary work in such particular province. Under these facts the Supreme Court of Pennsylvania decides that a sufficient consideration was present to render the contract binding. Compare with this decision *Maine Central Institute* v. *Haskell,* 73 Me. 140.

Subscription

CONSPIRACY.

In *State* v. *Stockford,* 58 Atl. 759, the Supreme Court of Errors of Connecticut deals with the questions so frequently arising when a strike is ordered, and announces a decision which will undoubtedly become a precedent of importance. Too many matters are passed upon to permit a full statement of the case in this part of the REGISTER, but the case is of such importance as not to allow reference to it to be omitted.

Strikes

CONSTITUTIONAL LAW.

Due Process of Law

It is decided by the New York Supreme Court (Appellate Division, First Department) in *People* v. *Beattie,* 89 N. Y. Supp. 193, that a statute regulating the business of horse-shoeing, and requiring a person practising such business to be examined and to obtain a certificate from a board of examiners and file the same with the court clerk where the person proposes to practise such trade, is not a valid exercise of the state's police power, but is an arbitrary interference with personal liberty and private property without due process of law. Compare the Illinois decision in *Bessette* v. *People,* 193 Ill. 334.

Police Power

A statute of California passed in 1903 provided that the compensation which an employment agent might receive should be limited to ten per cent. of a month's wages in the employment furnished. In *Ex parte Dickey,* 77 Pac. 924, the Supreme Court of that state decided that such statute is not within the police power but contravenes the constitutional guaranty of protection in the possession of property. One judge dissents. Both opinions refer to the decision in *Holden* v. *Hardy,* 169 U. S. 366, but apply its principle in different ways. The dissenting judge regards the matter as one within the discretion of the legislature to decide whether the public welfare required such limitation of the right of contract, and there being nothing to show an abuse of such discretion on the part of a legislature, contends that the court has no power to interfere.

Uniformity of Taxation

In *State* v. *Ide,* 77 Pac. 961, the Supreme Court of Washington holds an act of the legislature empowering a city to impose on and select from every male inhabitant between the ages of twenty-one and fifty years an annual street poll-tax not exceeding two dollars, but exempting from liability for such tax members of volunteer fire companies, and an ordinance of such city passed in pursuance thereof, and limiting such taxes to the persons contained in such class, to be unconstitutional on the ground of non-uniformity. The Chief Justice dissents.

CONTRACTS.

In *Hines* v. *Union Savings Bank and Trust Co.*, 48 S. E. 120, the Supreme Court of Georgia decides that mere knowledge by a lender of money that the borrower intends to use it for an illegal or immoral purpose will not prevent a recovery of the money loaned. It is therefore held that a plea to an action to foreclose a mortgage on realty given to secure the payment of a note, which sets up that the money loaned was used for an illegal and immoral purpose, to wit, the suppression of a threatened criminal prosecution of the defendant's husband, and that the bank knew, or had reasonable grounds to suspect, the purpose for which the money was borrowed, but which does not charge that the lender participated in the illegal transaction, or did anything to further the consummation of the unlawful design, sets forth no valid defence and is properly stricken off on demurrer. With this case should be compared the decision of the same court in *Jones* v. *Dannenberg Co.*, 112 Ga. 426.

Loan: Illegal Purpose of Borrower

DAMAGES.

In *E. W. Bliss Co.* v. *Buffalo Tin Can Co.*, 131 Fed. 51 the United States Circuit Court of Appeals (Second Circuit) decides that in an action for breach of a contract for the manufacture and sale of machinery the buyers' measure of damages was the difference between the contract price and the market value of the machinery at the time and place where it was to be delivered, or, if there was no market value, then the difference between the contract price and what it would have cost the buyer to have the machinery manufactured; and this though the plaintiff did not attempt to have equivalent machinery made. With this case compare *Star Brewery Co.* v. *Horst*, 58 C. C. A. 363, and note thereto.

Manufacture of Machinery

EASEMENTS.

It is decided by the Supreme Court of Ohio in *Gibbons* v. *Ebding*, 71 N. E. 720, that the owner of the servient estate may use the land for any purpose that does not interfere with the easement, and in the absence of anything in the deed or in the circumstances under which it was acquired or used showing that a way is to be an open one, he may put gates or bars across it unless they would unreasonably interfere with its use.

Interference with Easements

EQUITY.

In *McKee* v. *City of Grand Rapids,* 100 N. W. 580, the Supreme Court of Michigan decides that though water in a channel of a stream constitutes a nuisance because of its stagnant condition, one will not be compelled to undo his work in preventing certain water flowing into it, such relief being ineffectual.

Jurisdiction: Impracticable Remedy

EVIDENCE.

It is decided by the Supreme Court of Errors of Connecticut in *State* v. *Kelly,* 58 Atl. 705, that where the defendant, accused of poisoning his wife, claimed that she committed suicide, evidence of her declaration of a purpose to take her own life, made within two months before her death, was admissible, but that some similar declarations made by deceased from eleven months to three or four years before her death were inadmissible as too remote. Compare *State* v. *Fitzgerald,* 130 Mo. 407.

Suicide: Intent

HUSBAND AND WIFE.

Against the dissent of one judge, the United States Circuit Court of Appeals (First Circuit) decides in *James* v. *Gray,* 131 Fed. 401, that a loan made by a wife to her husband from her separate estate is provable as a debt against his estate in bankruptcy without regard to its enforceability under the law of the state, the contract being valid in equity, by the principles of which courts of bankruptcy are governed; and there is no distinction in such respect between an estate to the wife's separate use as known to equity and a separate estate created by statute. Compare *In re Talbot,* 100 Fed. 924.

Debts Provable in Bankruptcy

LIBEL.

In *Starr Pub. Co.* v. *Donahoe,* 58 Atl. 513, the Supreme Court of Delaware decides that if allegations of fact in a newspaper, charging a candidate for office with a criminal offence, are false, they are not privileged, and good faith and probable cause are not a defence. The case is a very excellent and exhaustive discussion of the question involved and is well worthy of study.

Privilege

MORTGAGES.

Priority: Foreclosure: Limitations

Where a second mortgagee was not made a party to a suit to foreclose the first mortgage, and at the time suit was brought to foreclose the second mortgage the time limited by law for suing on the first mortgage had fully elapsed, the second mortgagee was entitled to plead the Statute of Limitations as a complete defence to any rights acquired under the first mortgage: Supreme Court of California in *Frates* v. *Lears,* 77 Pac. 905. Compare *Carpentier* v. *Brenham,* 40 Cal. 221.

MUNICIPAL CORPORATIONS.

Powers: Opening of Streets

The Supreme Court of Michigan decides in *Leggett* v. *City of Detroit,* 100 N. W. 566, that a city in accepting a deed of land for part of a street acts for the general public or state, and has no power to agree that in consideration therefor the other land of the grantor in the addition in which is the land deeded shall be exempt from any future assessment for opening or extending the street. This decision is interesting in connection with the cases bearing upon the right of a legislature to contract with a corporation for a limited power of taxation. Compare *Township* v. *Supervisors,* 117 Mich. 217.

Public Works: Negligence

A case growing out of the construction of the New York Subway is found in *Haefelin* v. *McDonald,* 89 N. Y. Supp. 395, where the New York Supreme Court (Appellate Division, First Department) lays down the general rule that where a city does not construct certain public work through its agents or servants, but contracts for the performance thereof, it could not be made liable for negligence in the manner in which the work was performed, but holds, nevertheless, that, since under the New York laws providing for the construction of a subway in the city of New York, the city was required to approve the plans and specifications prepared by the board of rapid transit railway commissioners, the city was bound to exercise reasonable care, to adopt plans and specifications which could be performed without injury to adjoining property, which duty could not be delegated. One judge dissents. Compare *Vrooman* v. *Turner,* 69 N. Y. 280.

NEGLIGENCE.

Electricity

The Supreme Court of South Carolina holds in *Parsons* v. *Charleston Consol. Ry., Gas and Electric Co.*, 48 S. E. 282, that where an electric company negligently fails to insulate its wires, so that an adjacent fallen telephone wire becomes charged with a deadly current and causes death, the electric company is liable without regard to its actual knowledge of the fallen wire or its diligence in discovering it. See also *McKay* v. *Southern Bell Tel. Co.*, 31 L. R. A. 589, and note thereto.

PARENT AND CHILD.

Custody of Child: Religion

The Supreme Court of Wyoming decides in *Jones* v. *Bowman*, 77 Pac. 439, that since the provisions of the statutes of Wyoming prohibit any distinction being made on account of religious belief, the courts will give no weight to evidence of religious opinions in a proceeding to determine the custody of a minor child, the difficulties and disagreements as to which arose between those concerned from their differences in religious matters. This case also contains an interesting discussion of the extent to which a foreign judgment in regard to the custody of a child will be considered by the court of another state in which the question is raised. *People ex. rel. Lucy Allen* v. *William H. Allen*, 105 N. Y. 628.

PARTNERSHIP.

Dissolution: Liability for Debts

In *Preston* v. *Garrard*, 48 S. E. 118, the Supreme Court of Georgia decides that where a partnership is dissolved by the retirement of one of the partners, and the continuing partner agrees to assume the debts of the firm, the retiring partner becomes a surety for his copartner. It is accordingly held that a creditor of the partnership, who has notice of the dissolution and of the agreement by the continuing partner to assume the debts, is bound thereafter to accord to the retiring partner all the rights of a surety. Hence, if, without his knowledge or consent, the creditor takes from the continuing partner a renewal of the firm indebtedness, and extends the time of payment thereof, the retiring partner is released from the in-

PARTNERSHIP (Continued).

debtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner. Compare *First National Bank* v. *Ells,* 68 Ga. 192.

PRINCIPAL AND SURETY.

The United States Circuit Court of Appeals (Third Circuit) decides in *Zeigler* v. *Hallahan,* 131 Fed. 205, that in determining whether a surety is discharged by an alteration of the principal's contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it effected a material alteration of the agreement. and, if it did, he is discharged, though the change was beneficial to him. See *Guaranty Company* v. *Pressed Brick Co.,* 191 U. S. 416.

Alteration of Contract

RAILROADS.

The Supreme Court of Pennsylvania decides in *Hendler* v. *Lehigh Valley R. Co.,* 58 Atl. 486, that a railroad company can use without further compensation all suitable material, except timber, on the right of way which it has acquired for the construction of its road through the property of the landowner, but where it takes material for its own use from a point outside of its right of way it is liable to the landowner for the value.

Rights in Right of Way

TRUST.

The Court of Appeals of New York holds *In re Totton,* 71 N. E. 748, that where a person deposited his own money in a savings bank in his own name as trustee for another, it did not establish an irrevocable trust during the lifetime of the depositor, but is revocable at will unless the depositor completes the gift by some unequivocal act during his lifetime, or unless the depositor dies before the beneficiary without revocation. This question, which has more than once been considered by courts, is discussed with great care, and former cases reviewed. Compare *Martin* v. *Funk,* 75 N. Y. 134.

Sufficiency of Act Creating

WILLS.

The Supreme Court of Ohio in *Bodmann German Protestant Widows' Home* v. *Lippardt,* 71 N. E. 770, decides that a will reading, "I give and bequeath to my beloved wife . . . all my estate, both real and personal, of which I am now possessed, or shall afterwards come into my possession, or under my control, by deed or otherwise, in fee simple, with power to sell or dispose of it as she may see fit: and that after the death of my wife, if there is anything remaining of my personal or real estate, it shall be distributed in the following manner, to wit," gives the widow power to convey the fee of the whole or any part of the real estate; and a deed making such a conveyance, good as against the widow, is good against the second devisee. The case is a valuable review of the principles involved.

Consideration of Devise

An interesting case in regard to specific legacies is found in the decision of the New York Supreme Court (Appellate Division, Fourth Department) in *Waldo* v. *Hayes,* 89 N. Y. Supp. 69, where it is held that where testatrix's will gave a legatee her "diamond brooch" and gave another "jewelry not otherwise disposed of," and the brooch testatrix had when the will was executed was subsequently disposed of, but at her death she had another, it passed to the one to whom the brooch was given in the will, and not as jewelry "not otherwise disposed of." See also *VanVechten* v. *VanVechten,* 8 Paige 104.

Specific Legacy