PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACTIONS.

The question as to the nature of an action founded on the alleged duty of a landlord to see that the premises are in repair becomes of special importance in its relation to the Statute of Limitations. Thus in *Altsheler* v. *Conrad*, 82 S. W. 257, the Court of Appeals of Kentucky decides that a petition alleging that defendant agreed to fix the premises plaintiffs leased of him, but did not do so, and that thereafter plaintiffs' employee was injured by the defect in the premises, and recovered judgment of them in a certain amount, which they seek to recover of defendant, is not founded on the personal injuries to the employee, to which the one-year Statute of Limitations applies, but on the breach of contract, to which the five-year statute applies.

Contract or Tort

ADVERSE POSSESSION.

In *Mass* v. *Burdetzke*, 101 N. W. 182, the Supreme Court of Minnesota decides that a person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the federal homestead law, may acquire title thereto by adverse possession as against the true owner. Compare *Altschul* v. *O'Neill*, 35 Or. 202.

Intent

In *Murphy* v. *Rony*, 82 S. W. 396, the Court of Appeals of Kentucky decides that admissions inconsistent with ownership made by one in possession of land after acquiring title by adverse possession do not constitute an estoppel, but may be considered on the issue of whether the possession was in fact adverse.

Admissions

ASSAULT.

Authority of School-Teacher

The Supreme Court of North Carolina decides in *State* v. *Thornton*, 48 S. E. 602, that when the correction administered by a school-teacher is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it is administered.

BANKRUPTCY.

Provable Debts: Discharge

An important decision in the United States Supreme Court interpreting the Bankruptcy Act of 1898 is found in *Crawford* v. *Burke*, 25 Sup. Ct. Rep. 9, where it is decided that only such debts created by the fraud of a bankrupt as were so created while he was acting as an officer or in a fiduciary capacity are excepted from the operation of a discharge in the Bankruptcy Act of 1898, Sec. 17, Subd. 4, since to hold that the language of this subdivision, making an exception in favor of debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity," includes all debts fraudulently contracted, would render meaningless the exception in Subd. 2 in favor of such claims for fraud as have been reduced to judgment.

Assets of Estate; Copyright

The United States District Court (S. D. New York) decides *In re D. H. McBride & Co.*, 132 Fed. 285, that a contract between author and publisher for the copyrighting, publication, and sale by the latter of a series of books salable only in Catholic schools and convents, and the payment of a royalty thereon to the author, is a personal engagement, although the publisher may be a corporation; and where it expressly provides that it shall not be transferred without the author's consent, and that, on a failure to carry out its provisions the copyrights shall revert to the author, such copyrights cannot be sold by a trustee in bankruptcy as an asset of the publisher's estate against the objection of the author, who is entitled, on petition therefor, to have them assigned by the trustee in accordance with the contract.

BANKRUPTCY (Continued).

The difficulty of defining precisely a non-legal term is appearing in the decisions of the courts with regard to the word "manufacturing" as used in the Bankruptcy Act of 1898. Thus *In re Troy Steam Laundering Co.*, 132 Fed. 266, it is decided by the United States District Court (N. D. New York) that a corporation conducting a laundry, the largest part of its business being the washing, starching, ironing, and polishing of collars, cuffs, etc., for manufacturers, before they are put on the market, is engaged principally in manufacturing, and is subject to proceedings in involuntary bankruptcy. See note to *Mattoon Nat. Bank* v. *First Nat. Bank*, 42 C. C. A. 4.

Manufacturing Corporations

BILLS AND NOTES.

The Supreme Court of Oklahoma decides in *Cotton* v. *John Deere Plow Co.*, 78 Pac. 321, that a promissory note which contains the following stipulation in relation to attorney's fees, to wit: "It is stipulated by the parties to this note, that in event the same is collected by an attorney, or by any proceedings at law, an attorney's fee consisting of ten dollars and ten per cent. of the amount so collected shall be paid by the makers hereof to the holder of the same," destroys the negotiable character of the instrument, and thereby makes it non-negotiable, and the note is therefore subject in the hands of a *bona fide* purchaser for value to all the legal defences which might be interposed against the note in the hands of the original payee. Compare *Adams* v. *Leaman*, 23 Pac. 53, 7 L. R. A. 224.

Negotiability

CARRIERS.

The Supreme Court of New Jersey decides in *Murphy* v. *North Jersey St. Ry. Co.*, 58 Atl. 1018, that although it cannot be held, as a matter of law, that a person who attempts to board a trolley-car while it is in motion is negligent, yet, when the fact that the car is in motion is the sole producing cause of the injury sued for, the risk of its occurrence is one which the person making the attempt must be held to have assumed.

Boarding Moving Car

CARRIERS (Continued).

Protection of Passenger

An interesting decision in reference to the extent to which a carrier must protect a passenger from injury from his fellow travellers occurs in *Grogan* v. *Brooklyn Heights R. Co.*, 89 N. Y. Supp. 1027, where it is decided by the New York Supreme Court (Appellate Division, Second Department) that in an action against a carrier for injuries to a passenger, where it appeared that defendant exercised complete control over the platform from which a passenger entered its car through a window thereof, thereby inflicting injuries on plaintiff by kicking him in the face, when no reason appeared why the defendant could not have compelled its passengers, who had congregated on the platform with the purpose of taking passage on the train in which plaintiff sat, to enter the cars through the doors, the question of defendant's negligence was for the jury.

Responsibility for Goods of Consignee

The cases have not reached very satisfactory conclusions upon the question of to what extent a carrier may be relieved of liability for an act of the shipper in loading cars with his own goods. It has several times been pointed out that this is a duty which the carrier itself should perform and not entrust to a shipper, as knowledge of the care required in loading cars will frequently not be possessed by such shipper. However, the Supreme Court of Michigan, dealing with an analogous question, decides in *Edward Frohlich Glass Co.* v. *Pennsylvania Co.*, 101 N. W. 223, that where under an agreement between defendant railroad company and a consignor the latter was authorized to select cars for the transportation of its merchandise, and it selected a car which had been delivered to it loaded with sand for the shipment of a consignment of glass to plaintiff, and damage resulted by reason of the unsuitableness of the car, the railroad company was not liable to the consignee for negligently furnishing an unsuitable car, since as against the railroad company the consignee was bound by the consignor's selection under such agreement. Compare *Pratt* v. *Ogdensburg*, 102 Mass. 557.

CONSTITUTIONAL LAW.

The United States Supreme Court decides in *Dobbins* v. *Los Angeles*, 25 Sup. Ct. Rep. 18, that an arbitrary interference with property rights protected by the Fourteenth Amendment of the United States Constitution, which cannot be justified as an exercise of the police power, results from the narrowing by municipal ordinance of the limits within which gasworks may be erected and maintained, so as to include within the prohibited territory property purchased for that purpose within the district wherein the erection of such works was then permitted, and on which such erection was then proceeding in compliance with an existing ordinance and a permit of the Board of Fire Commissioners, where such change was not demanded by the public welfare, and seems rather to have been actuated by a purpose to perpetuate a monopoly enjoyed by a gas company whose works were still within the privileged district.

Due Process of Law

In *City of Mt. Vernon* v. *Kenlon*, 89 N. Y. Supp. 817, the New York Supreme Court (Appellate Division, Second Department) holds that the constitutionality of a law requiring the bond of an officer to be a lien on the real estate of the officer and his sureties cannot be attacked by persons voluntarily executing such bond. Compare *Village of Olean* v. *King*, 116 N. Y. 355.

Estoppel to Question Constitutionality

CONTEMPT.

It is held by the Supreme Court of South Carolina in *Lorick & Lowrance* v. *Motley*, 48 S. E. 614, that on disobedience of an order of court by trespassing on lands adjudged to belong to another, the trespasser may be required by the court to pay damages suffered by reason of the trespass in contempt proceedings or suffer imprisonment. Compare *Ex parte Thurmond*, 1 Baily, 608.

Sentence

CORPORATIONS.

Pleading: Corporate Existence

In *Boyce* v. *Augusta Camp, No. 7429, M. W. A.*, 78 Pac. 322, the Supreme Court of Oklahoma decides that the words "a corporation," appearing in the title of a case after the name of a plaintiff, are descriptive of the plaintiff, and cannot be construed to be an allegation of incorporation. Compare *Leader Printing Co.* v. *Lowry*, 59 Pac. 242.

Powers

An interesting decision in regard to the right to petition for observance of the Sunday laws appears *In re New York Sabbath Committee*, 89 N. Y. Supp. 992. In that case the New York Sabbath Committee, "a domestic corporation, duly organized" under the laws of the state, applied under the New York charter to revoke the license issued to respondent for a theatre in New York. It was not shown in the application that the right to apply for such revocation was within the corporate powers of the petitioner. Under these facts the New York Supreme Court (Special Term, New York County) holds that the motion would be denied. Compare with this case *Ancient City Sportsman's Club* v. *Miller*, 7 Lans. 412.

Liability of Directors to Stockholders

In *Lyon* v. *James*, 90 N. Y. Supp. 28, it appeared that a pamphlet falsely stating the financial condition of a corporation was issued and distributed in the name and under the sanction of defendants, the directors, whereby plaintiff was induced to become and remain a stockholder, to her financial injury; but of defendants only X, the active manager, knew of the falsity of the representations, and the others did not make them recklessly, not caring whether they were true or not, but they merely relied on the fidelity and truthfulness of X, and neglected their duty, in the proper discharge of which they would have learned the truth. Under these facts the New York Supreme Court (Appellate Division, Second Department) holds that relief by way of compelling the directors to take plaintiff's place as a stockholder, returning to her her entire investment, could be had only against X, actual and intentional fraud being necessary therefor; and that the others were merely liable, on account of their neglect of duty, for whatever losses plaintiff sustained

CORPORATIONS (Continued).

thereby. With this case compare *Kountze* v. *Kennedy*, 147 N. Y. 124, 29 L. R. A. 360.

DAMAGES.

The Court of Civil Appeals of Texas decides in *Rapid Transit Ry. Co.* v. *Smith*, 82 S. W. 788, that where an accident occurred in June, which caused plaintiff's wife to miscarry the following day, a second miscarriage the following November, resulting from the same injury, is not too remote for a recovery in the same action.

Remoteness

DEEDS.

In *Bosea* v. *Lent*, 90 N. Y. Supp. 41, the New York Supreme Court (Trial Term, Schenectady County) holds that where a husband executed a deed of property to his wife, and placed it in escrow to be delivered to the grantee if the grantor got drunk again, there was no consideration for the deed; and where at the time of his death it had not been delivered, he was the owner of the property though he had been drunk. See also *Crain* v. *Wright*, 36 Hun. 74, and *Hamer* v. *Sidway*, 124 N. Y. 538.

Consideration

DIVORCE.

In *Rogers* v. *Rogers*, 58 Atl. 822, the Court of Chancery of New Jersey decides that sexual intercourse by husband and wife after he has knowledge and means of proving her adultery is condonation, and that real forgiveness is not necessary. Compare *Todd* v. *Todd*, 37 Atl. 766.

Adultery: Condonation

In *Cochran* v. *Cochran*, 101 N. W. 179, the Supreme Court of Minnesota decides that condoned cruelty will be revived by subsequent misconduct of the guilty party of such a nature as to create a reasonable apprehension that the cruelty will be repeated, even if such misconduct be not in itself sufficient to warrant a divorce. The application of an analogous rule to divorce granted on the ground of adultery is well settled, and it is natural

Cruelty

DIVORCE (Continued).

to find it applied where the divorce is granted on the ground of cruelty.

EMBEZZLEMENT.

The Court of Criminal Appeals of Texas decides in *Wilson* v. *State*, 82 S. W. 651, that where an employer sends an employee to get some medicines, intrusting a horse to him to ride for such purpose, there is a bailment of the horse, so as to make the employee on conversion of it guilty of embezzlement. This case is interesting in view of the important line of cases distinguishing between a transfer of the possession of property and a transfer merely of its custody, when it is necessary to distinguish between embezzlement and larceny.

Bailment: What Constitutes

FEDERAL COURTS.

Since the passage of the Act of Congress of August 13, 1894, c. 280 (U. S. Comp. St. 1901, page 2523), a number of cases have arisen construing it and there seems some doubt under it as to the jurisdiction of federal courts. A new decision dealing with this matter is the case of *United States* v. *Churchyard*, 132 Fed. 82, where it is held that under this act requiring contractors for government work to give bonds conditioned, first, for the performance of the contract, and second, for the prompt payment of all persons supplying labor or materials in the prosecution of the work, and authorizing such persons in case of non-payment "to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties," such a suit is one in which the United States is plaintiff within the meaning of Section 1 of the Judiciary Act of August 13, 1888, c. 866, and of which a federal court has jurisdiction regardless of the citizenship of the parties or the amount in controversy. With this decision should be compared *United States* v. *Henderlong*, 102 Fed. 2, and *United States* v. *Sheridan*, 119 Fed. 236.

Jurisdiction

GAMING.

Playing pool under an agreement that the one losing shall pay for the table is betting within the statute prohibiting the keeping and exhibiting of a gaming table for the purpose of gaming: Court of Criminal Appeals of Texas in *Mayo* v. *State,* 82 S. W. 515.

What Constitutes

GOVERNMENT LANDS.

It is decided by the United States Circuit Court of Appeals (Eighth Circuit) in *United States* v. *Detroit Timber and Lumber Co.,* 131 Fed. 668, that the title of a *bona fide* purchaser of lands subsequent to the issue of the patents is superior to the equitable claim of the United States to avoid the patents and the title under them for fraud or error in the issue of the former. There is the further holding that purchasers in good faith, without notice, for value, of the equitable title evidenced by receivers' final receipts upon which patents subsequently issue, have a complete defence of a *bona fide* purchase unassailable by a suit of the United States to avoid the patents and the titles under them for fraud, perjury, or error in the procurement of the former. Compare *Guaranty Savings Bank* v. *Bladow,* 176 U. S. 448, 453.

Bona Fide Purchaser

HUSBAND AND WIFE.

In *Powell* v. *Benthall,* 48 S. E. 598, the Supreme Court of North Carolina decides that an action to recover damages for harboring plaintiff's wife after defendants were notified by the plaintiff not to do so cannot be predicated of the act of a sister and brother-in-law of the plaintiff's wife in good faith harboring her, without having actively procured the separation or counselling and advising its continuance. And it is further held that in an action to recover damages for harboring plaintiff's wife after defendants were notified by plaintiff not to do so, the relation of the defendants to plaintiff's wife is relevant and material on the question of motive. Compare *Turner* v. *Estes,* 3 Mass. 317.

Harboring Married Women

HUSBAND AND WIFE (Continued).

In *Hubbard* v. *Hubbard*, 58 Atl. 969, the Supreme Court of Vermont decides that since a husband has a freehold estate in the land of his wife, where such land is not held by her for her sole and separate use, an act authorizing the Court of Chancery "in its discretion" on the wife's petition to convey her real estate by separate deed is unconstitutional, as depriving the husband of his property without due process of law. Compare *In re Mary Ann Alexander*, 53 N. J. 96.

Conveyance by Wife

ILLEGITIMACY.

The Court of Appeals of Kentucky holds in *Hall* v. *Hall*, 82 S. W. 300, that a statute providing that if a man, having had a child by a woman, shall afterwards marry her, such child or its descendants, if recognized by him before or after marriage, shall be deemed legitimate, does not apply to a case where the father was the husband of another woman when the child was begotten. The fact that similar statutes exist in almost all the states makes this case of more than local interest.

Statutes

INSURANCE.

The Supreme Court of Errors of Connecticut decides in *Vincent* v. *Mutual Reserve Fund Life Ass'n*, 58 Atl. 963, that in an action on a life policy the presumption that the declarations of deceased in the application are true, while sufficient to make a *prima facie* case for plaintiff on the introduction of the policy, is not entitled to be considered as having probative force, requiring such presumption to be weighed as evidence in the final determination of the issue of fact as to whether the representations are true. Compare *Barber's Appeal*, 63 Conn. 973, 22 L. R. A. 90.

Presumption of Truthfulness of Representations

The similarity in their main outlines of the various policies of life insurance makes of general interest the decisions of the Supreme Court of Tennessee in *Childress* v. *Fraternal Union of America*, 82 S. W. 832. It is there decided that a clause in an insurance policy making the same incontestable after the expiration of two

Construction of Policy

INSURANCE (Continued).

years, except as to agreements, representations, and warranties in relation to age, occupation, and use of alcohol, and a clause reducing the indemnity in case of suicide to one-third of the amount otherwise due, are separate and independent, and in no wise affect each other; and the beneficiary cannot recover more than one-third the policy in case of suicide, although death occurs after the expiration of two years and the policy has become incontestable.

MARRIED WOMEN.

With one judge dissenting, it is decided by the Supreme Court of South Carolina in *Pierson* v. *Green*, 48 S. E. 624, that where a wife executed a mortgage to raise money to pay her husband's debts and to compromise a criminal prosecution against him, and the mortgagee assisted in such compromise, the mortgage is valid as to the sum used in payment of the debts, but invalid as to the amount used in compromising the prosecution. See *Wallace* v. *Lark*, 12 S. C. 578.

Mortgages

MASTER AND SERVANT.

The Supreme Court of Tennessee decides in *Chattanooga Electric Ry. Co.* v. *Moore*, 82 S. W. 478, that a street railroad company is not chargeable with negligence in permitting telephone poles to be erected on land not owned or controlled by it so near the track as to be dangerous to employees operating cars. See also *Lucas* v. *St. Louis Railway Company*, 73 S. W. 589, 61 L. R. A. 452.

Negligence; Street Railway Company

A decision of importance to telephone and telegraph companies is found in *Britton* v. *Central Union Telephone Co.*, 141 Fed. 844, where the court holds that where a telephone lineman was injured by the falling of a defective pole from which he was removing the wires prior to the demolition of the pole, such pole was an appliance only, and not a place to work which plaintiff's employer was required to make safe for him to work on. Compare

Telephone Poles

MASTER AND SERVANT (Continued).

Chambers v. *American Tin Plate Co.*, 129 Fed. 561, and *Maxfield* v. *Graveson*, 131 Fed. 841, two recent cases bearing upon the same general matters.

MORTGAGES.

Co-Bondholders

It is decided by the United States Circuit Court of Appeals (Eighth Circuit) in *Booker* v. *Crocker*, 132 Fed. 7, that one of several holders of bonds secured by a common mortgage, who purchases superior liens upon or titles to the mortgaged property, takes them in trust for his co-bondholders upon condition that within a reasonable time after they receive notice of his purchases they contribute to him their proportionate shares of the amounts he paid for them. A community of interest in a common title or security involves a mutual obligation not to impair it. See also *Jackson* v. *Ludeling*, 21 Wallace, 616.

PARENT AND CHILD.

Custody of Child

Against the dissent of three judges, the Supreme Court of Illinois decides in *Cormack* v. *Marshall*, 71 N. E. 1077, that, since a habeas corpus proceeding to obtain the custody of a child is in the nature of a private suit, in which the public is not concerned, a judgment in such proceeding before a court or judge having competent jurisdiction is a final order, and, when unappealed from, is *res judicata* as between the parties so long as the same conditions exist as obtained at the time of the hearing and order. The decision presents a very careful and satisfactory review of the principles and decisions involved. Compare *In re King*, 66 Kans. 695.

Necessaries: Burden of Proof

The Supreme Court of Michigan in *McCrady* v. *Pratt*, 101 N. W. 227, holds that in an action for boarding the defendant's son, the burden was on the plaintiff to prove by a preponderance of the evidence that when the son came to her to board he was authorized to procure board upon the father's credit, and that the plaintiff boarded the son, relying solely upon such credit.

SETTLEMENT.

Promise of Immediate Payment

The question when a promise of immediate payment which is broken may be considered sufficient evidence of fraud to avoid an agreement made in consideration thereof is considered by the Supreme Judicial Court of Massachusetts in *Wood* v. *Sherer*, 71 N. E. 947. It there appeared that plaintiffs and defendant made a settlement, upon which defendant agreed to give plaintiffs a check for a certain amount immediately. Neither party having a blank check, this was not done, but for a number of days thereafter plaintiffs continued to expect the check. Defendant made other promises to send it, and only four days before an action by the plaintiffs against defendant the former notified the latter that, unless they received the check by a certain day, they would sue. Under these facts it is decided that it could not be said as a matter of law that the settlement was conditional upon defendant's giving a check at the time, or that it was procured by a fraudulent promise by defendant to give a check then.

TAXATION.

Situs of Promissory Notes

The difficult questions which arise in determining the situs of personal property for the purposes of taxation give rise to a valuable decision by the Supreme Court of Indiana in *Buck* v. *Beach*, 71 N. E. 963. In that case the following facts appear: A resident of New York for many years kept a large amount of money loaned in Ohio, the notes being payable there, and secured by mortgages on property there situated. The loans were made, and the interest and principal collected, by a permanent agency in Ohio. By direction of the owner, for a series of years certain of such notes and mortgages were kept by another agent of his in Indiana in an office belonging to such owner. Such agent took the notes and mortgages at once after they were given and recorded, and kept them at all times, except that he sent them to the Ohio agent to have payments made endorsed thereon, and also each year a few days prior to April 1, which was the day fixed by law for assessment in Indiana, they being returned to him shortly thereafter. The purpose of such arrangement was to escape their taxation in Ohio, and they

TAXATION (Continued).

were not returned for taxation either there or in New York. Under these facts it is decided that under ordinary laws, such as might be presumed to be in force, such notes were not properly taxable in either of such states, but their proper situs for taxation was in Indiana, where they were permanently kept in the regular course of the owner's business, and that they were taxable by the proper officers of the county where they were so kept.

TELEGRAMS.

The Supreme Court of Oregon holds in *Frazier* v. *Western Union Telegraph Co.*, 78 Pac. 330, that the addressee of a telegram can maintain an action for failure to deliver it only when the company has knowledge that it is for his benefit. Compare *Playford* v. *United Kingdom Tel. Co.*, L. R. 4, Q. B. 705, but see 2 Shearman and Redfield, Negligence (5th ed.), Sec. 543.

Right of Addressee to Action

WATER AND WATER-COURSES.

It is decided by the Supreme Court of Illinois, in *Beidler* v. *Sanitary Dist. of Chicago*, 71 N. E. 1118, that where canals from a river were constructed for the purpose of navigation, the owner of each lot abutting thereon acquired by prescription the same riparian rights in the water therein that he would have had if the canals had been natural waterways. Compare *City of Reading* v. *Althouse*, 93 Pa. 400.

Riparian Rights