PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACCORD AND SATISFACTION.

In *U. S. Bobbin and Shuttle Co.* v. *Thissell*, 137 Fed. 1, the United States Circuit Court of Appeals, First Circuit, decides that where an employer sent to an employee a check for wages, and a statement showing the rate at which they were computed, which was a matter in dispute between them, and a receipt in full to a date given to be signed and returned, directing that, if the account was not found correct, the check be returned, the acceptance and cashing of the check created an accord and satisfaction of the claim, and also determined the employee's wages for the future in the absence of further contract, although he did not return the receipt, but assumed to hold the matter open for future consideration. See also *Nassoiy* v. *Tomlinson*, 148 N. Y. 326.

Acts Constituting

BANKRUPTCY.

A rule of very practical importance in connection with bankruptcy proceedings is laid down by the United States District Court, E. D. Pennsylvania, *In re Saxton Furnace Company*, 136 Fed. 697, where it is held that to authorize an order for the sale of a bankrupt's property free of liens, the record should show affirmatively that every creditor whose lien will be discharged has received notice of the application therefor, and a general statement by the referee that such notice has been given is insufficient.

Sale of Property: Notice

The United States District Court, D. New Hampshire, decides *In re Peasley*, 137 Fed. 190, that in the absence of any authoritative state decision or statute governing the case, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money, on the bankruptcy of the

Secured Claim

BANKRUPTCY (Continued).

vendor without having conveyed, is entitled to prove his claim as one secured by an equitable lien on the land.

Insolvency

In *Upson* v. *Morris Bank*, 92 N. Y. Supp. 1101, the New York Supreme Court (Appellate Division, First Department) decides that on an issue as to whether a debtor was insolvent, within the meaning of the Bankrupt Act, at the time that he gave a certain transfer, the fact that late in the afternoon of the same day he conveyed nearly all his remaining property, thereby rendering himself insolvent within the meaning of the Bankrupt Act, did not, on the theory that fractions of a day are not to be considered, render him insolvent at the time of the former transfer.

Preference

The United States Supreme Court decides in *Guilford B. Keppel* v. *Tiffin Savings Bank*, 25 S. C. R. 443, that a creditor of a bankrupt, who has in good faith received a preference voidable under the Bankruptcy Act of 1898, Section 67e, solely because given within four months prior to the filing of the petition in bankruptcy, and who has in good faith retained the preference until deprived thereof by the judgment of a court in a suit by the trustee, still may prove the debt so voidably preferred, notwithstanding the provision of Section 57g that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Compare *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438.

Rents

In *Watson* v. *Merrill*, 136 Fed. 359, the United States Circuit Court of Appeals, Eight Circuit, decides that rents which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim under the Bankruptcy Act of 1898, because they are not a "fixed liability . . . absolutely owing at the time of the filing of the petition against him," and because they do not constitute an existing demand; but both the existence and the amount of the possible future demand are contingent upon future events, such as default of lessee, re-entry of lessor, and

BANKRUPTCY (Continued).

assumption by trustee, so that they neither form the basis of an unliquidated nor of a liquidated provable claim. See and compare *Deane* v. *Caldwell*, 127 Mass. 242.

Recording

It is decided by the United States District Court, N. D. Iowa, *In re Clifford*, 136 Fed. 475, that the Bankruptcy Act of 1898, Section 67d, providing that liens given or accepted in good faith, and not in contemplation of, or in fraud of, the act, and for a present consideration, which have been recorded according to law, shall not be affected by the act, is satisfied as to recording if the instruments be recorded before commencement of the bankruptcy proceedings. See *Bernhisel* v. *Firman*, 89 U. S. 170.

Secured Claims

The United States Circuit Court of Appeals, Fourth Circuit, decides in *Gorman* v. *Wright*, 136 Fed. 164, that the Bankruptcy Act of 1898, providing that the term "secured creditor" shall include a creditor who has security for his debt on the property of the bankrupt of a nature assignable under the act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security, a creditor, in order to be "secured," must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security.

New Promise

In *Sundling* v. *Willey*, 103 N. W. 38, the Supreme Court of South Dakota decides that a promise to pay "as soon as possible," made after a discharge in bankruptcy, is not a conditional promise, and is not, as such, insufficient to support an action on the original demand. Compare *Norton* v. *Shepard*, 48 Conn. 141.

Fire Insurance

A decision of great practical importance is reached by the Supreme Court of the United States in *Daniel L. Holden* v. *J. A. Stratton*, 25 S. C. R. 656, where it is held that the exemption of policies of life insurance under the Bankruptcy Act of 1898, Section 6, where they are exempted from execution by the state law, is not qualified by the proviso in Section 70a of that act (which vests the trustee with the title of the bankrupt, "except in

BANKRUPTCY (Continued).

so far as it is to property which is exempt," to certain enumerated classes of property), that a bankrupt having an insurance policy which has a cash surrender value payable to himself, his estate, or his personal representatives may prevent the policy from passing to the trustee by paying such surrender value. See *Steele* v. *Buel*, 44 C. C. A. 287.

BILLS AND NOTES.

The Supreme Court of Iowa decides in *City Deposit Bank Co. of Columbus, Ohio*, v. *Green*, 103 N. W. 96, that a bank, by discounting a note for a depositor, and giving him credit for the proceeds on his deposit account, does not, so long as the deposit is not drawn out, become a bona-fide purchaser, so as to be protected against infirmities in the paper. "By giving credit to the indorser of the note on his deposit account the bank in effect agrees to pay him that amount of money on demand by check or order, and parts with nothing of value. When it receives notice of defences to the note, it is still in a situation, provided the amount thus credited has remained undrawn by the depositor, to return the note to him and cancel the credit." See also *Manufacturers' Nat. Bank* v. *Newell*, 71 Wis. 309.

Bona-Fide Purchaser

In *Harnett* v. *Holdrege*, 103 N. E. 277, the Supreme Court of Nebraska decides that persons who write their names in blank on the back of a promissory note payable to the order of the maker, which is indorsed by such maker and afterwards delivered to a third person, in the absence of any special agreement to the contrary become liable thereon as indorsers and not as joint makers, and their liability cannot be varied by parol evidence. It is further held that evidence of a custom or course of dealing previously pursued by the maker with regard to other notes of a like character is not admissible for the purpose of showing inferentially that the indorsers were joint makers and thus change and enlarge their liability. Compare *Biglow* v. *Colton*, 13 Gray, 309.

Indorsers: Parol Evidence

CARRIERS.

Loss of Goods: Presumption

In view of the difficulty experienced by a shipper of goods in securing evidence as to how damage to them or loss of them may have occurred, legal presumptions in reference to such facts become very important. The presumptions as to damage have been fairly well worked out. In *Everett* v. *Norfolk and S. R. Co.*, 50 S. E. 557, the Supreme Court of North Carolina, dealing with the presumption in cases where goods received by a carrier for transportation are lost, holds that the presumption is that the loss occurred through negligence. Compare *Mitchell* v. *Railroad*, 124 N. C. 236.

COAL LANDS.

Support

With two judges dissenting, the Supreme Court of Pennsylvania decides in *Youghiogheny River Coal Co.* v. *Allegheny Nat. Bank*, 60 Atl. 924, that where a defendant owned coal under land, the surface of which was owned by another, and conveyed the coal to a third person, giving an obligation to indemnify the grantee for any damage resulting to the surface of the land by reason of skilful and careful mining, such third person was not compelled under the agreement, in operating the coal, to leave supports for the surface, but where he exercised skill in his mining operation he could remove all the coal, and the grantors must indemnify him against any damage resulting from injury to the surface which he may be compelled to pay to the owner thereof. Compare *Noonan* v. *Pardee*, 200 Pa. 474.

CONSTITUTIONAL LAW.

Liquor Laws

The Supreme Court of North Carolina decides in *State* v. *Barrett*, 50 S. E. 506, that a statute of the state making it unlawful for any person, etc., other than licensed retail dealers to sell or dispose of, for gain, or to keep for sale, within the county of Union any spirituous, vinous, malt, or intoxicating liquor, etc., and providing that the keeping by any person in his possession of liquor to the quantity of more than one quart, within such county, shall be prima-facie evidence of his keeping it for sale,

CONSTITUTIONAL LAW (Continued).

within the meaning of the act, is not unconstitutional as an invasion by the legislative of the judicial department of the government. Nor is it unconstitutional as depriving the accused of the presumption of innocence, since it is within the legislative power to change the rules of evidence and declare that certain facts or conditions, when shown, shall constitute prima-facie evidence of guilt. Compare *Commonwealth* v. *Williams*, 6 Gray, 1.

Jury Trial in Alaska

In view of the Insular Decisions the case of *Fred Rassmussen* v. *United States*, 25 S. C. R. 514, is of special interest. It is there held by the United States Supreme Court that Alaska was so incorporated into the United States by the treaty under which it was acquired, and by such subsequent Congressional legislation as the act of Congress concerning internal revenue taxation, and the act extending the laws of the United States relating to customs, commerce, and navigation over Alaska and establishing a collection district therein, as to render repugnant to the Sixth Amendment to the Federal Constitution the provision of an act that in trials for misdemeanors in Alaska six jurors shall constitute a legal jury. Compare with this decision *Hawaii* v. *Mankichi*, 190 U. S. 197.

Street Assessments

In *Louisville and Nashville R. R. Co.* v. *Barber Asphalt Paving Company*, 25 S. C. R. 466, the United States Supreme Court decides that the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid under the Fourteenth Amendment of the Federal Constitution, for lack of benefits, an assessment thereon for the grading, curbing, and paving, made under the area rule. See *Seattle* v. *Kelleher*, 195 U. S. 351.

Regulation of Hours of Labor

The United States Supreme Court renders a decision of great public importance in *Lochner* v. *People of the State of New York*, 25 S. C. R. 539, where it is decided that the limitation of employment in bakeries to sixty hours a week and ten hours a day, attempted by the New York statute law, is an arbitrary interference with the freedom to contract guaranteed by the Fourteenth Amendment to the Federal Constitution,

CONSTITUTIONAL LAW (Continued).

which cannot be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. With this decision should be compared the previous decision of *Holden* v. *Hardy*, 169 U. S. 366, where legislation limiting the length of time per day during which miners should work in underground mines or workings was upheld.

CONTRACTS.

In *Edward H. Harriman* v. *Northern Securities Company*, 25 S. C. R. 493, the United States Supreme Court decides that the rule that property delivered under an illegal contract cannot be recovered back by parties in pari delicto prevents the original stockholders in two competing interstate railway companies from reclaiming the specific shares of stock which they deliver to a stockholding corporation in exchange for its capital stock, pursuant to a combination subsequently adjudged illegal, under which the corporation was to acquire a controlling interest in the capital stock of each of such railway companies, and they must be content with the ratable distribution of the corporate assets resolved upon by the stockholding corporation. See *St. Louis R. Co.* v. *Terre Haute, etc., R. Co.*, 145 U. S. 393.

In Pari Delicto

The New York Supreme Court (Appellate Division, First Department) decides in *Butler* v. *Wright*, 92 N. Y. Supp. 113, that where defendant agreed to deliver to plaintiff certain corporate stock in consideration of shares of the stock of another corporation, together with the resignations in writing of all the latter's directors or trustees, on the breach of such contract by defendant plaintiff had an adequate remedy at law for the recovery of damages, and could not, therefore, sue for specific performance, though defendant owned ninety-two per cent. of the stock of the corporation to be delivered to plaintiff, which stock was not listed on any stock exchange nor purchasable in the market. One judge dissents. See *Johnson* v. *Brooks*, 93 N. Y. 337.

Specific Performance

CRIMINAL LAW.

In *State* v. *Price*, 103 N. W. 195, the Supreme Court of Iowa decides that under a statute providing that a verdict of not guilty imports an acquittal on every material allegation in the indictment, an acquittal under an indictment charging rape on a female under the age of consent is a bar to a subsequent proceeding under an indictment charging incest with the same female at the same time, although in the latter prosecution the state elected to rely on an act committed on a different date from that relied on in the prosecution for rape. Two judges dissent. See and compare *State* v. *Hornsby*, 8 Rob. 583.

Former Acquittal

EASEMENTS.

In *Clark* v. *Strong*, 93 N. Y. Supp. 514, the New York Supreme Court (Appellate Division, Third Department) decides that an instrument conveying the right to lay pipes over real property, and convey water from a spring thereon, so long as the grantee or any of his family occupies certain lands, conveys a freehold estate in an interest in the land, and is within the statute law, providing that a grant of a freehold estate not acknowledged before delivery must be attested by at least one witness in order to take effect as against a subsequent purchaser.

Freehold Estate

EMINENT DOMAIN.

The Supreme Court of the United States holds in *Lee L. Clark* v. *E. J. Nash*, 25 S. C. R. 676, that the peculiar local conditions in Utah justify, as authorizing condemnation for a public use, a statute of that state under which an individual landowner may condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch therein, in order to enable him to obtain water from a stream in which he has an interest to irrigate his land, which otherwise would remain absolutely valueless. See also *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112.

Public Use

FEDERAL COURTS.

Questions of General Law

The doctrine of *Swift* v. *Tyson* seems to be gaining ground and decisions applying it to new cases are being constantly handed down. In *Spinks* v. *Mutual Reserve Fund Life Ass'n*, 137 Fed. 169, the United States Circuit Court, E. D. Kentucky, decides that whether a provision in an insurance policy that no action shall be brought after the lapse of a year from the date of insured's death is valid is one of general public policy, as to which Federal courts will follow Federal decisions, though in conflict with the decisions of the highest courts of the state. See in connection herewith note to *Wilson* v. *Perrin*, 11 C. C. A. 71.

FOREIGN CORPORATIONS.

Preferred Debts

The Supreme Court of North Carolina holds in *J. A. Holshouser Co.* v. *Gold Hill Copper Co.*, 50 S. E. 650, that the statute of New Jersey declaring that the annual franchise or license fee imposed on corporations chartered by that state should be a preferred debt in case of insolvency can have no extraterritorial effect, and such claim is not entitled to preference in insolvency proceedings against such corporations in another state. Compare *Willitts* v. *Waite*, 25 N. Y. 577

HABEAS CORPUS.

Chinese Exclusion

In *United States* v. *Ju Toy*, 25 S. C. R. 644, the United States Supreme Court decides that habeas corpus should not be granted in favor of a person of Chinese descent detained for return to China by the steamship company which brought him to an American port, where his petition alleges nothing but citizenship as making his detention unlawful, and he has been denied admission to the United States by the immigration officers after examination, and such denial has been affirmed on appeal by the Secretary of Commerce and Labor. Such procedure, it is held, constitutes due process of law and the judicial power may not interfere. Compare *United States* v. *Sing Tuck*, 194 U. S. 161.

INFANTS.

Citizenship: Divorce of Parents

It is decided by the United States Circuit Court of Appeals, Sixth Circuit, in *Toledo Traction Co.* v. *Cameron*, 137 Fed. 48, that where the father and mother of an infant plaintiff had been divorced, and he had been awarded to the custody of his mother, his domicile and place of citizenship, for the purposes of the jurisdiction of a Federal court, are determined by hers so long as he remains with her and in her care; and the fact of the divorce decree does not prevent her from acquiring citizenship in another state for herself and him. See *Barber* v. *Barber*, 21 How. 582.

JUDGMENTS.

Full Faith and Credit

The United States Supreme Court holds in *Edward Jaster* v. *F. M. Currie*, 25 S. C. R. 614, that the refusal of the Nebraska courts to permit an action to be maintained on an Ohio judgment denies the full faith and credit guaranteed by the Federal Constitution when based on the alleged fraud in acquiring jurisdiction of the defendant in the Ohio suit, in that the service of process therein was only made possible by giving defendant notice in Nebraska that plaintiff's deposition would be taken in Ohio for use in an action for the same cause then pending in Nebraska, in the hope that defendant would attend, and would delay his return to Nebraska after the deposition was taken long enough to permit service. See and compare *Jacobs* v. *Marks*, 182 U. S. 583.

Full Faith and Credit

It is decided by the Supreme Court of the United States in *Adelaide M. Harding* v. *George F. Harding*, 25 S. C. R. 679, that an Illinois decree for the separate maintenance of the wife cannot be denied conclusiveness in the courts of another state on the question of her desertion, on the theory that it was rendered by consent, where to assume that it was a consent decree disregards the rule of public policy of Illinois and the express terms of the decree, and gives to the ex parte stipulation of the husband that the wife was living separate and apart from him without her fault the effect of a consent to the decree, while the Illinois courts regarded it as an admission concerning the state

JUDGMENTS (Continued).

of the proof on the record, which, though rendering it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact.

JURISDICTION.

The Federal courts have concurrent jurisdiction with the courts of the states to hear and allow claims against the estates of deceased persons which involve controversies over the requisite amounts between citizens of different states, notwithstanding the fact that the states have by their legislation conferred exclusive jurisdiction to hear and adjudge such claims upon their probate or other state courts: United States Circuit Court of Appeals, Eighth Circuit, in *Schurmeier* v. *Connecticut Mut. Life Ins. Co.*, 137 Fed. 42.

Executors and Administrators

LIMITATIONS.

The United States Circuit Court of Appeals, Eighth Circuit, decides, in *Schauble* v. *Schulz*, 137 Fed. 389, that the exemptions from the operation of statutes of limitation usually accorded to infants do not rest upon any fundamental doctrine of the law, but only upon express provision therefor in such statutes. It is competent for the Legislature to put infants and adults upon the same footing in this respect, and this is the effect of a statute containing no saving cause exempting infants. See *Vance* v. *Vance*, 108 U. S. 514.

Infants

MASTER AND SERVANT.

The New York Supreme Court (Appellate Division, First Department) decides in *Stewart* v. *Baruch*, 93 N. Y. Supp. 161, that evidence that defendant was the owner of the automobile which ran over plaintiff, and that the chaffeur operating the automobile was employed by defendant, is sufficient to establish prima facie that the chaffeur was acting within the scope of his employment at the time of the collision.

Torts of Servant

MUNICIPAL CORPORATIONS.

Liabilities: Prisons

The Supreme Court of Appeals of West Virginia decides in *Shaw* v. *City of Charleston*, 50 S. E. 527, that a municipal corporation is not liable for injuries to a person occasioned by the unsanitary condition of its prison while he is confined therein for violation of a city ordinance, the maintenance of such prison being the exercise of a purely governmental power. See also *Gibson* v. *Huntington*, 38 W. Va. 177.

PLEADING.

Affidavit of Defence

In *Kinney* v. *Mitchell*, 136 Fed. 773, the United States Circuit Court of Appeals, Third Circuit, decides that a statement of claim, in form assumpsit, but which seeks to recover damages for acts of defendant done in his judicial capacity, does not set up a cause of action requiring an affidavit of defence under the Act of Assembly of the state of Pennsylvania of May 25, 1887 (P. L. 271). The general rule is laid down that the actions of assumpsit in which judgment may be taken for want of an affidavit of defence are limited to such as are founded on contract alone, and do not include cases in which the cause of action is ex delicto or of a mixed character of contract and tort. Compare *Corry* v. *Pennsylvania R. R. Co.*, 194 Pa. 516.

RECEIVERS.

Appointment

The United States Circuit Court, E. D. Pennsylvania, decides in *Columbia Nat. Sand Dredging Co.* v. *Washed Bar Sand Dredging Co.*, 136 Fed. 710, that where the majority stockholders of a corporation, who are also the directors, are clearly violating the charter rights of the minority, as by diverting all the earnings of the company to themselves, either directly or indirectly, a court of equity will appoint a receiver at suit of a minority stockholder, although the company is solvent, there being no complete, prompt, and efficient remedy at law. See also *State of Montana* v. *Second Judicial District*, 39 Pac. 316.

RELEASE.

In *Great Northern Ry. Co.* v. *Fowler,* 136 Fed. 118, it appeared that plaintiff, a railroad brakeman, after being injured, was solicited by defendant's claim agent to make a settlement, and went with him to the office of defendant's physician, who, after an examination, either through mistake or to deceive complainant, minimized his injuries, and stated that he would be able to work in a week or two, whereupon plaintiff, without other advice, was induced to sign a release of all damages and demands on account of his injuries in consideration of payment of doctor's and nurse's bill and his wages for such period of time. It developed, however, that plaintiff was seriously injured, requiring a subsequent hazardous and delicate surgical operation on the skull, and that he would probably never be able to resume his vocation. Under these circumstances, the United States Circuit Court of Appeals, Ninth Circuit, decides that the release was executed by mutual mistake of the parties and was subject to vacation. See *Chicago N. W. Ry. Co.* v. *Wilcox,* 116 Fed. 913.

Vacation: Mutual Mistake

SALES.

The Supreme Court of Wisconsin decides in *Van Doren* v. *Fenton,* 103 N. W. 228, that standing timber is real estate within the rule that there can be no warranty of title to real estate by parol. It is further held that there is no implied warranty of title in a sale of standing timber, it being real estate.

Standing Timber

TAXATION.

In *Delaware, Lackawanna and Western R. R. Co.,* 25 S. C. R. 669, it is decided by the Supreme Court of the United States that, including in the appraisement of the capital stock of a domestic corporation, for purposes of taxation, under the Pennsylvania taxing laws, the value of coal mined by it within the state, but situated in other states, there awaiting sale when the appraisement was made, deprives the corporation of its property without process of law. With this decision see and compare *Bank Tax Case,* 2 Wall. 200.

Stock of Domestic Corporation

TAXATION (Continued).

In *Old Dominion Steamship Co.* v. *Commonwealth of Virginia*, 25 S. C. R. 686, the Supreme Court of the United States decides that vessels which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, are subject to taxation in that state, although they may have been registered or enrolled under the United States statutes at a port outside the limits of the state. Compare *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.

Interstate Commerce

UNFAIR COMPETITION.

A very interesting decision on the question of the use of one's family name in business occurs in *Howe Scale Company* v. *Wyckoff, Seamans & Benedict*, 25 S. C. R. 609, where the Supreme Court of the United States holds that a manufacturer of typewriters under the names "Remington" and "Remington Standard" is not entitled to protection against the adoption by persons bearing respectively the surnames "Remington" and "Sholes" of the name "Remington-Sholes" for their typewriters, and the giving of that name to the corporation formed for their manufacture and sale, where the only confusion in the minds of the public as to the original of the product results from the similarity in names, and not from the manner of their use. The general rule is laid down that unfair competition does not arise out of the use in a corporate name of the surnames of one or more of the incorporators where such use by the individuals themselves or in a partnership would not be open to that charge. See and compare *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665.

Use of Family Name