PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ALIENS.

The Court of Civil Appeals of Texas decides in *Petersen* v. *State,* 89 S. W. 81, that the right to make laws admitting aliens to citizenship being vested in Congress, and the State courts in enforcing such laws being mere Federal agents, the State is not entitled to intervene, after the admission of an alien to citizenship, and to procure a vacation of the judgment, because procured by fraud and perjury. See in connection herewith *In re McCarran,* 29 N. Y. Supp. 582, 23 L. R. A. 835.

Citizenship: Objection by State

BAGGAGE.

The Supreme Court of Michigan holds in *Withey* v. *Pere Marquette R. Co.,* 104 N. W. 773, that a father, paying full fare for himself, travelling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract of carriage for loss or injury of articles bought and used for the child which articles are a part of the father's baggage. See in connection herewith *Prentice* v. *Decker,* 49 Barb. 21.

What Constitutes

BUILDING AND LOAN ASSOCIATIONS.

The Court of Chancery of New Jersey decides in *Harrison et al.* v. *Fleischman et al.,* 61 Atl. 1025, that where a building association was charged with notice that money paid for certain of its stock was trust funds of the estate of a decedent, such association was

Trust Funds

BUILDING AND LOAN ASSOCIATIONS (Continued).

constructively guilty of a breach of trust in appropriating the money to its own use, entitling the estate to share in the association's assets as a creditor, and not as a stockholder. But where the money so paid could not be traced or identified, and it did not appear that it was still in the hands of the building association when it was adjudged insolvent, the estate was not a preferred creditor. See also *Hunt* v. *Smith,* 58 N. J. Eq. 35.

CARRIERS.

Transfer Tickets

In *Koch* v. *New York City Ry. Co.,* 95 N. Y. Supp. 559, the New York Supreme Court, Appellate Term, decides that a street railway company may, pursuant to its rules, refuse a transfer ticket mutilated after coming into the possession of the passenger receiving it, but cannot refuse a ticket mutilated before given him.

Receiving Overpacked Crates

It is decided by the New York Supreme Court, Appellate term, in *Cohn* v. *Platt,* 95 N. Y. Supp. 535, that a carrier is not negligent in receiving for shipment overpacked crates of fowls, the shipper, but not the carrier's servants, being expected to be expert on the question of how many fowl could be safely packed in a crate. Compare *Lambert* v. *Benner,* 31 N. Y. Supp. 665.

Authority of Conductor

The Supreme Court of Illinois decides in *Illinois Cent. R. Co.* v. *Jennings,* 75 N. E. 457, that where a contract for the shipment of stock entitled the shipper to free transportation in the caboose, the conductor of the train had no implied authority irrespective of circumstances to invite the shipper to ride on the engine. Whether he did have such authority in consequence of the surrounding circumstances, it is decided, is a question for the jury. See in connection herewith *Lake Shore and Michigan Southern Railroad* v. *Brown,* 123 Ill. 162.

CONSTITUTIONAL LAW.

Police Powers

The Supreme Court of California holds in *Ex parte Hayden,* 82 Pac. 315, that a statute, providing that all fruits, green and dried, contained in packages to be shipped or offered for shipment, shall have stamped on the outside of every such package, in legible letters of certain dimensions, a statement truly and correctly designating the county and immediate locality in which such fruit was grown, and providing a penalty of fine and imprisonment for violation, was not a proper exercise of the state's police power, but was invalid as an unlawful invasion of personal liberty. Compare *Los Angeles* v. *Spencer,* 126 Cal. 673.

Sale of Goods in Bulk

The Supreme Court of Oklahoma decides in *Williams* v. *Fourth Nat. Bank of Wichita, Kans.,* 82 Pac. 496, that the state statute regulating the sale of stocks of merchandise in bulk, is not unconstitutional. With this case should be compared the decision of the Court of Appeals of New York in *Wright* v. *Hart,* 75 N. E. 404, where a law of New York passed in 1902 relating to the same subject is held unconstitutional. The two decisions should be studied together and the terms of the two acts compared. In the New York decision the subject is very thoroughly canvassed and three judges dissent from the judgment of the court.

Class Legislation

The Supreme Court of Indiana holds in *City of Elkhart* v. *Murray,* 75 N. E. 593, that a city ordinance, providing that it shall be unlawful on and after a certain date to run any street car within the city without having securely fastened to its front end a proper automatic fender made by a particular fender company, or some other fender equally as good, to be approved by the common council or its street committee, was void for non-uniformity and as arbitrarily discriminating in favor of some manufacturers of fenders and against others. Compare *Bessonies* v. *City of Indianapolis,* 71 Ind. 189.

CONSTITUTIONAL LAW (Continued).

Due Process of Law

The New York Supreme Court (Appellate Division, First Department), decides in *McMillan* v. *Klaw & Erlanger Const. Co.*, 95 N. Y. Supp., 365, that a municipal ordinance authorizing, on the payment of a specified fee, the issuance of permits for the construction of ornamental projections beyond the building line not more than five feet, is in conflict with the constitutional provision that no person shall be deprived of his property without due process of law, because it permits a property owner to erect for his own benefit a structure in the public streets thereby interfering with the easements of adjoining property owners abutting on the street, consisting of the right of free access to and egress from their property, and of the rights to the free circulation of light and air over the open street to and from their property, which rights were acquired and paid for on the opening of the street. Compare *Talbot* v. *New York &c. Ry. Co.*, 151 N. Y. 160.

Trademarks: Penalties

In *The Bergner & Engel Brewing Company* v. *Koenig*, 31 Pa. C. C. R. 455, the Court of Common Pleas No. 2 of Philadelphia Co. makes an important decision holding that a statute which imposes a penalty of $200 upon any person, persons or corporation, violating its provisions in the use of registered trademarks, is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it imposes upon an individual or individuals a penalty for an act the damage resulting from which may be ascertained, and which is in no wise a menace to the Commonwealth, or an infringement of public rights. The decision is a very satisfactory review of the questions involved and although not the holding of an appellate court is worthy of reference. Compare *Coffey* v. *Wilson*, 65 Ia. 270.

CONTEMPT OF COURT.

In *Royal Trust Co.* v. *Washburn, B. & I. R. R. Co.,* 139 Fed. 865, the United States Circuit Court of Appeals (Seventh Circuit) decides that persons who instituted a suit in a State court to enjoin a receiver of a Federal court from enforcing its order directing him to tear up the track of a railroad of which it had acquired jurisdiction and possession in foreclosure proceedings did not thereby commit an act of contempt against the Federal court; the State court having a right to determine whether and to what extent it had jurisdiction and power to grant the relief prayed for, short of actual physical interference with the possession of a Federal court. See in connection with this case note to *Clapp* v. *Otoe County,* 45 C. C. A. 591.

Enjoining Execution of Decree

CONTRACTS.

In *Hudson River Water Power Co.* v. *Glens Fall Portland Cement Co.,* 95 N. Y. Supp., 421, the New York Supreme Court (Appellate Division, Third Department) decides that a contract whereby an electric company agrees to furnish a cement company with electrical power for a definite term is assignable by the cement company.

Assignments

CORPORATIONS.

The Court of Appeals of Kentucky decides in *Greene* v. *Middleborough Town, Lands Co.,* 89 S. W. 228, that a provision of articles of incorporation authorizing a corporation to make contracts, acquire, and transfer property, "possessing the same powers in such respect as private individuals now enjoy," is limited by another provision of the articles, defining the business of the corporation as the purchase and sale of lands, location of town sites, the platting and construction of streets and alleys, and the construction and maintenance of water works, lighting plants and street railways, and does not

Contracts: Guaranty

CORPORATIONS (Continued).

authorize the corporation to enter into a contract guarantying the stock of another corporation. See in connection herewith *Mining* v. *Milling Co.* 62 Fed. 356.

Insolvency: Action by Creditors

The Supreme Court of Washington holds in *Childs* v. *Blethen,* 82 Pac. 405, that a judgment which determines the amount due to each of the creditors of an insolvent corporation, which adjudges that they are entitled to recover the same from the stockholders, and which fixes the sum due to the creditors, rendered in receivership proceedings against the corporation, in which a creditor intervenes on behalf of the creditors and impleads the stockholders as parties defendant for the purpose of enforcing their statutory liability to the creditors, is a judgment in favor of the creditors, on which they may sue though it authorizes the receiver to collect the sum due from the stockholders.

CRIMINAL LAW.

Reasonable Doubt

The Supreme Court of Alabama holds in *Smith* v. *State,* 39 S. 329, that in a prosecution for murder, an instruction that a reasonable doubt is a doubt for which a reason can be given is erroneous. It is apparently a perilous venture for a trial court to attempt to define reasonable doubt.

DAMAGES.

Elements of

The Supreme Court of California decides in *Kramer* v. *City of Los Angeles,* 82 Pac. 334, that where plaintiff maintained a building which he used as a residence, dancing school, and to rent for parties and entertainments, and he suffered a loss of engagements already made for dancing classes and receipts from rentals of the dancing hall by reason of the flooding of the building by a break in defendant's storm sewer, a recovery for the

DAMAGES (Continued).

loss of such receipts was not objectionable as an attempt to recover lost profits.

DECEDENTS' ESTATES.

The Superior Court of Pennsylvania decides in *Johnson's Estate,* 29 Pa. Super. Ct. 255, that the fact that a husband has murdered his wife will not prevent him from inheriting her estate under the intestate laws. Compare *Carpenter's Estate,* 170 Pa. 203.

Murder of Wife

EVIDENCE.

The Supreme Court of Pennsylvania, in applying the statutory rule with respect to the competency of the witness where the other party to the contract or thing in action is dead, holds in *Pattison* v. *Cobb, Appellant,* 212 Pa. 572, that in an action by the executor of the payee of a judgment promissory note against the maker, where there is a guaranty of the note indorsed on the back of it, and the contract of guaranty is solely between the guarantor and the payee, the guarantor of the note is a competent witness to prove payment of the note in the lifetime of the payee, if it appears that the guarantor had been discharged in bankruptcy after he made the guaranty and over five years after the obligation of the maker of the note had matured. The similarity of statutes in other states makes this decision of general interest.

Competency of Witness

In *State* v. *Powell,* 61 Atl. 966, the Court of Oyer and Terminer of Delaware holds that where, in a prosecution for homicide the accused admitted the killing, but claimed that she did so in self-defense, and whether accused or deceased was the aggressor was in doubt, evidence of uncommunicated threats made by deceased against defendant was admissible as tending to show that deceased may have been the aggressor. Compare *Wiggins* v. *People,* 93 U. S. 465.

Homicide: Threats by Deceased

EVIDENCE (Continued).

The Court of Appeals of Kentucky decides in *German-American Securities Co.'s Assignee* v. *McCulloch et al.* 89 S. W. 5, that where the bonds issued by a company to a bondholder, who executed his notes for the payment thereof, were actually the undertaking of the company, and had no value apart from its ability to perform its agreement, the bondholder, when sued on the note, was entitled to show by parol that the consideration of the notes was the undertaking of the company, and that it could not perform its agreement.

Parol

In *Chicago & A. R. Co.* v. *Walker,* 75 N. E. 520, the Supreme Court of Illinois decides that where a physician testifies as to an injury to plaintiff's ankle, he may use a skeleton for the purpose of explaining the same to the jury. The court says "the skeleton itself was not offered in evidence but was simply used by the expert witnesses to illustrate their testimony. The court might in its discretion have permitted the plaintiff to exhibit her injured ankle to the jury, and allowed physicians to explain from it the nature and character of the injury. It was equally proper to use the skeleton for the purpose of explaining the testimony." Compare *Swift & Co.* v. *Rutkowski,* 182 Ill. 18.

Demonstrations

In *Lexington St. Ry.* v. *Strader,* 89 S. W. 158, the Court of Appeals of Kentucky decides that the statement of the motorman of a car which had collided with a traveller that the reason he did not sound the gong or stop the car was because the gong and brake were out of repair, made immediately after the accident and before he had time to manufacture a false statement with regard to the cause of the accident, was a part of the res gestae. Compare *L. & N. R. R. Co.* v. *Foley,* 94 Ky. 220.

Res Gestae

FEDERAL COURTS.

Jurisdiction: Removal of Cases

The United States Circuit Court (D. South Carolina) decides in *Robert et al.* v. *Pineland Club et al.,* 139 Fed. 1001, that where the parties to a suit in a state court are citizens of different states, and the other conditions necessary to make the cause one of federal cognizance exist, it is removable by the defendant, although neither party is a citizen or resident of the state in which suit is brought. Compare *Rome Petroleum &c. Co.* v. *Hughes Co.,* 130 Fed. 585.

HOMICIDE.

Nature of Offense

The Supreme Court of North Carolina in *State* v. *Horton,* 51 S. E. 945, lays down the general rule that where one engaged in an unlawful act is free from negligence, and the act is not in itself dangerous, an unintentional homicide in the commission of the act is a criminal offence only where the act is *malum in se,* and not merely *malum prohibitum,* and applying this rule the court holds that a statute prohibiting hunting on another's land in certain counties without the owner's consent, is *malum prohibitum,* or wrong because made so by statute, and not *malum in se,* or an offence naturally evil as adjudged by the sense of a civilized community; and so an unintentional homicide, committed while so hunting, is not criminal where there was no negligence and that act was not in itself dangerous. See in connection herewith *State* v. *Vines,* 93 N. C. 493.

INJUNCTIONS.

Boycott

In *Gladish* v. *Bridgeford,* 89 S. W. 77, the Kansas City Court of Appeals of Missouri holds that where a member of a voluntary association, organized to promote the welfare of dealers in live stock in a certain place, was expelled from the association for miscon-

INJUNCTIONS (Continued).

duct, he was not entitled to an injunction to restrain the association and its members from refusing to have further dealings with him, as provided by the association's by-laws, on the ground that such refusal constituted an illegal boycott. Compare *Ertz* v. *Produce Exchange of Minneapolis,* 79 Minn. 140, 48 L. R. A. 91.

JUDGMENT.

The Supreme Court of Illinois holds in *City of Chicago* v. *McCartney,* 75 N. E. 117, that where a petition for condemnation of land to widen a street prayed that the just compensation to be paid for private property for the improvement should be ascertained by the jury, the jury, though authorized to consider benefits to land not taken, for the purpose of setting off such benefits against damages, had no power to award a judgment for benefits in excess of such damages, and hence a judgment that the land was not damaged was not res judicata of the question of benefits, precluding an assessment of such land for benefits accruing from the improvement. One judge however dissents. Compare *Goodwillie* v. *City of Lake View,* 137 Ill. 51.

Res Judicata

LANDLORD AND TENANT.

In *Schwoebel* v. *Fugina,* 104 N. W. 848, the Supreme Court of North Dakota decides that if a tenant denies his landlord's title, the latter may at his election treat it as a disseisin, and the tenancy is thereby terminated without notice to quit.

Denial of Title

LIMITATION OF ACTIONS.

The Court of Civil Appeals of Texas holds in *Elcan et al.* v. *Childress et al.* 89 S. W. 84, that the disability of minority cannot be tacked on to the disability of coverture of the ancestor of the minors.

Tacking Disabilities

NEGLIGENCE.

The Supreme Court of Michigan holds in *Dohn* v. *City of Detroit,* 104 N. W. 626, that in an action for injuries to a child by falling through a defective sidewalk while walking with his father, who was holding the child by the hand, the father's negligence, if any, could not be imputed to the child. With this case compare *Waite* v. *Northeastern Railway Co.,* E. B. & C. 719.

Imputed Negligence

PARENT AND CHILD.

In *Morgan* v. *Reel,* 213 Pa. 81, the Supreme Court of Pennsylvania decides that where a grandfather adopts a grandchild, daughter of a deceased daughter, and dies intestate, the adopted grandchild inherits as a child only, and not in a double capacity as child and grandchild. It is held that the act allowing the adopted child to inherit as though an actual child is intended to put the adopted child on the same footing as actual children if such there should be, but not on any more favorable footing. The case seems to be one of novel impression and reaches a very satisfactory conclusion.

Adoption: Intestacy

RAILROADS.

The Superior Court of Pennsylvania decides in *Bigham* v. *Pittsburgh Construction Company,* 29 Pa. Super. Ct. 86, that where a railroad deposits large quantities of earth, rock and waste matter, brought from other portions of its right of way, upon land beyond the line of the slope or embankment contemplated by the owner's grant to the railroad company, the owner may maintain an action of trespass, and in this action elect to treat the injury as permanent in its nature, and to ask that his entire damages be assessed accordingly. In such a case in the absence of sufficient and competent evidence relative to the depreciation in value as a measure of damages, the jury should be instructed that, subject to their finding as to the relation of the part occupied by the deposit

Lands Outside of Right of Way

RAILROADS (Continued).

to the rest of the lot, the cost of removing the material wrongfully deposited on the plaintiff's land, and putting it in as good condition as if the railroad company's rights as to the slope had not been exceeded, would be the proper measure of damages, provided such cost would not be greater than the value of the land injuriously affected, and in the latter case the value of such land would be the measure. See also *Duffield* v. *Rosenzweig,* 144 Pa. 520.

Motive Power

The Supreme Court of Pennsylvania in rendering a decision under a local statute lays down an important rule in *Howley* v. *Central Valley R. R. Co.,* 213 Pa. 36, which is of general interest. Although the act under which railroads are incorporated was passed at a time when electricity was not used as a motive power the court decides that a railroad company incorporated under such act is not thereby restricted to the motive power in use at that time but may use electricity. It is said that in the absence of a limitation upon the power of a railroad company to use any appliances, or of a prohibition as to the use of any particular one, it is the duty of the company to use what, in the light of its observation and experience, is best and most convenient for it in the operation of its road, having at all times due regard to the safety of the public which it was created to serve. In such a case its duty fixes the measure of its powers in performing it. What it manifestly ought to do in exercising its franchises it may do, unless forbidden by its supreme law—the will of its creator as expressed in the words giving it life. Compare *Potter* v. *Scranton Traction Co.* 176 Pa. 271.

REMOVAL OF CAUSES.

Diversity of Citizenship

The United States Circuit Court (D. South Carolina) holds in *Lucas* v. *Milliken,* 139 Fed. 816, that a bill for specific performance of a contract for the sale to complainant of certain shares of the issued stock of a corporation, and to recover damages for its

REMOVAL OF CAUSES (Continued).

breach, which does not allege the insolvency of the other party to the contract, nor that he is about to dispose of the stock, does not state any cause of action against the corporation, which is not an indispensable nor a necessary party. If joined, it is merely a formal party, and its presence, although a citizen of the same state as complainants, will not defeat the right of the real defendant to remove the cause, where it is otherwise removable. See in connection herewith notes to *Shipp* v. *Williams* 10 C. C. A. 249, and *Mason* v. *Dullagham,* 27 C. C. A. 298.

Citizenship: States

The Supreme Court of Indiana decides in *Southern Ry. Co.* v. *State,* 75 N. E. 272, that a state not being a citizen of any state, an action in which a state is the real party in interest cannot be removed from a state to a federal court solely on the ground of diverse citizenship. See in connection herewith *Upshur County* v. *Rich,* 135 U. S. 170.

STATES.

Action to Cancel Tax Deed

The Court of Appeals of New York decides in *Sanders* v. *Saxton,* 75 N. E. 529 that in an action by an owner of certain land against the commissioner of the land office and the comptroller of the state to have certain deeds of land sold for delinquent taxes declared void, the state is a necessary party, and, as there is no statute authorizing suit against the state for such purpose the action cannot be maintained. Compare *Louisiana* v. *Jumel,* 107 U. S. 711.

THEATRES.

Tickets

In *Horney* v. *Nixon,* 213 Pa. 20, the Supreme Court of Pennsylvania holds that a theatre ticket is a license revocable at the pleasure of the proprietor of the theatre and upon so revoking it he is responsible only to answer in damages for the broken contract. The court holds that no action lies against him for refusing

THEATRES (Continued).

even without cause to admit an individual into the theatre. The proprietor of a theatre, it is said, is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theatre proprietor has acquired no peculiar rights and privileges from the State, and is, therefore, under no implied obligation to serve the public. When he sells a ticket he creates contractual relations with the holder of it, and whatever duties on his part grow out of these relations he is bound to perform, or respond in damages for the breach of his contract, as it is of that only that complaint can be made. Of course the decision does not touch the case where the proprietor excludes some person on the ground of race or color or other reasons prohibited by statute. Compare *McCrea* v. *Marsh,* 78 Mass. 211.

TORRENS LAW.

Tax Liens

The Supreme Court of Minnesota decides *In re National Bond and Security Co.,* 104 N. W. 678, that tax liens held by the State of Minnesota are within the terms of an act providing that it shall be joined as a party defendant in proceedings under the Torrens law whenever it has "an interest in or lien upon" the land in suit. Compare *Webb* v. *Bidwell,* 15 Minn. 479.

TRADING STAMPS.

Occupation Tax

The effort to combat the use of trading stamps in business appears in a new form in *Gamble* v. *City Council of Montgomery,* 39 S. 353. The cases have apparently agreed that statutes forbidding the use of trading stamps are unconstitutional. In the case under consideration the attack seemed to take the form of unusually high taxation. The Supreme Court of Alabama

TRADING STAMPS (Continued).

holds however that an ordinance imposing an occupation tax of $400 on merchants issuing trading stamps is not shown to be unreasonable by proof which does not show how many of the stamps have been redeemed after a buyer of goods has preserved the stamps to the amount of $500; it being presumed that the ordinance is reasonable until the contrary appears on its face or is shown by evidence.

TRUSTS.

In *Holbrook's Estate,* 213 Pa. 93, the Supreme Court of Pennsylvania decides that where a cestui que trust is given the income of a fund "during the term of her natural life or so long as she remains unmarried," with a gift over "in case of her death or marriage," the gift is upon a limitation in favor of the cestui que trust during the period she remains unmarried, and is valid. Such a provision is not to be construed as an unlawful condition in restraint of marriage. With this case compare the recent decision of the Supreme Judicial Court of Massachusetts in *Harlo* v. *Bailey,* 75 N. E. 259.

Restraint of Marriage

WILLS.

In *Fralich* v. *Lyford,* 95 N. Y. Supp. 433, the New York Supreme Court (Appellate Division, Third Department) decides that a pecuniary bequest to an unincorporated society, to be used by it in such manner as it may deem most expedient for the development and advancement of Spiritualism in a certain town, was an absolute gift to the society, and did not create a trust for the benefit of the object specified, of which the society was trustee. It is further held that an unincorporated voluntary association, organized for the furtherance of Spiritualism, is incapable of taking a direct bequest, and therefore the legacy in this case entirely failed. Compare *Murray* v. *Miller,* 178 N. Y. 316.

Testamentary Trust