PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACTIONS.

Two Actions Pending

The United States Circuit Court of Appeals, Eighth Circuit, decides in *City of Mankato* v. *Barber Asphalt Paving Co.*, 142 Fed. 329, that the pendency in a state court of an action between the same parties involving the same issues is not ground for abatement of a subsequent action brought by the defendant therein in a federal court, where no conflict arises between the courts over the custody or dominion of specific property; nor is the defendant therein concluded by a judgment against him rendered after he has recovered a judgment in his favor in the federal court. With this case compare the very recent decision of the same court in *Barnsdall* v. *Waltermeyer*, 142 Fed. 415, and the note to *Bunkerhill and Sullivan M. & F. Co.* v. *Shoshone M. Co.*, 47 C. C. A. 205.

ARMY.

Arrest by Military Authorities

The United States Circuit Court, D. Maine, decides *In re Carver*, 142 Fed. 623, that a minor under the age of eighteen years, who unlawfully enlisted in the army without the consent of his father, cannot be discharged from the service on a writ of habeas corpus sued out by his father so long as he is under arrest for desertion nor until he has been discharged from such custody or has served the sentence imposed on him by the military tribunal. With this decision compare *U. S.* v.

ARMY (Continued).

Reaves, 126 Fed. 127, and *Solomon* v. *Davenport,* 87 Fed. 318.

BANKRUPTCY.

Liens of Attaching Creditors

An important rule in bankruptcy is laid down by the United States Supreme Court in *First National Bank of Baltimore* v. *William H. Staake,* 26 S. C. R. 580, where it is held that liens acquired by attaching creditors on real property which, but for such attachments, would have passed to a subsequent purchaser under an unrecorded deed, may be preserved for the benefit of the estate of the bankrupt debtor by a court of bankruptcy, in the exercise of its discretionary power under the Bankrupt Act of 1898, to preserve for the benefit of the estate rights under liens obtained against an insolvent within four months prior to the filing of a petition in bankruptcy against him; since to construe this provision as referring only to liens upon property which, if such liens are annulled, would pass to the trustee of the bankrupt, would restrict its application to a contingency already provided for by a prior clause in that section, annulling all such liens, and providing that property affected thereby shall pass to the trustee as a part of the estate. Compare *Hewitt* v. *Berlin Machine Works,* 194 U. S. 296.

Life Insurance Policies

The United States Circuit Court of Appeals, Second Circuit, decides *In re Mertens et al.,* 142 Fed. 445, that where a bankrupt is the holder of life insurance policies, which, although containing no provision for a cash payment on their surrender, possess an actual cash value, which, according to the uniform practice of the company, will be paid on their surrender, the bankrupt will be permitted to retain the same on payment to his trustee of such actual value. Compare *Holden* v. *Stratton,* 198 U. S. 214. The point decided seems to settle a question hitherto uncertain, though discussed by various courts in dicta.

BILLS AND NOTES.

In *Columbia Finance & Trust Co.* v. *Purcell,* 142 Fed. 984, the United States Circuit Court, E. D. Pennsylvania, decides that where a note was endorsed in Pennsylvania, although dated and delivered in another state, and therefore a contract of such state, the liability of the endorser is governed by the law of Pennsylvania, which requires protest and notice of dishonor to bind him, and when the evidence of such notice is conflicting, the question is one for the jury.

Liability of Endorser

BROKERS.

In *Yoder* v. *Randol et al.,* 83 Pac. 537, the Supreme Court of Oklahoma decides that where a broker has fully performed his undertaking by producing a person ready, willing, and able to purchase his employer's property at the price and upon the terms stipulated, and the landowner has accepted the purchaser so procured and entered into a binding and enforceable contract with him, the broker is entitled to his commission, and his right thereto is not defeated by the fact that the purchaser refuses to consummate the transaction because of a defect in the landowner's title to the property, where knowledge of such defect was not communicated by the employer to the broker at the time of entering into the contract of employment with him. Compare *Hammond* v. *Crawford,* 66 Fed. 425.

Right to Compensation

CARRIERS.

It is somewhat difficult to decide when it is proper to instruct a jury that a shipper has as matter of law consented to conditions in a bill of lading. A case dealing with this question and holding that under the circumstances appearing therein the question was for the jury, is the case of *Baltimore & O. R. Co.* v. *Doyle,* 142 Fed. 669. The United States Circuit Court of Appeals, Third Circuit, there lays down the general rule that a common carrier cannot relieve itself from any portion of

Limitation of Liability: Sufficiency

CARRIERS (Continued).

its common law liability for the loss or destruction of goods in shipment, except by express or implied contracts with the shipper, and in the absence of an express agreement no contract to that end will be implied from any condition or regulation contained in a bill of lading not within the general knowledge of the shipper, unless clearly and distinctly brought to his attention at the time of the shipment, and further decides that there is no presumption, either of fact or law, that he had knowledge of such condition, where there is nothing in its position or the color or style of type in which it is printed to render it conspicuous, and the question of actual knowledge in such case is one of fact for the jury. Compare *Calberon* v. *Atlas Steamship Co.*, 170 U. S. 272.

CONFLICT OF LAWS.

In *Martin* v. *Wabash R. Co.*, 142 Fed. 650, the United States Circuit Court of Appeals, Seventh Circuit, decides

Survival of Action

that whether a cause of action survived by law is not a question of procedure, but of right, and is determinable, when the action is one arising at common law, not by the law of the state where it arose, but by the law of the state where the action is brought. Compare *B. & O. R. R. Co.* v. *Joy*, 173 U. S. 226.

CONSTITUTIONAL LAW.

In *Seegers Bros.* v. *Seaboard Air Line Ry.*, 52 S. E. 797, the Supreme Court of South Carolina decides that a statute

Equal Protection of Laws

providing that every claim for loss or damage to property in possession of a common carrier shall be adjusted and paid within a specified time, and if not then paid the carrier should be liable to a penalty, is not unconstitutional as in violation of the equality clause of the fourteenth amendment of the United States Constitution. Compare *Atchison Ry. Co.* v. *Matthews*, 174 U. S. 96.

CONSTITUTIONAL LAW (Continued).

Legislative Powers

With two judges dissenting the Supreme Court of Illinois holds in *Chicago & E. I. R. Co.* v. *People ex rel. McCord,* 76 N. E. 571, that where the Supreme Court finally adjudges a particular tax to be invalid, the Legislature cannot thereafter validate the levy and make the tax collectible. Compare the very recent decision in *People* v. *Wisconsin Central Railroad Co.,* 219 Ill. 94.

Foreign Insurance Companies

The Supreme Court of Mississippi holds in *Swing* v. *B. E. Brister & Co.,* 40 S. 146, that the statute prescribing the conditions under which foreign insurance companies may do business in the state, if construed to prohibit a foreign insurance company, which has never transacted insurance business in the state and which has not complied with the prescribed conditions, from suing in the courts of the state for the collection of a premium on a contract of insurance, procured by a citizen of the state on property made in the state of the domicile of the company, is in conflict with the fourteenth amendment of the Federal Constitution with respect to due process of law. Compare *Commonwealth* v. *Biddle,* 139 Pa. 605, 11 L. R. A. 561.

Reasonableness of Regulation

In *Way* v. *Hygienic Fleeced Underwear Co.,* 142 Fed. 552, the United States Circuit Court, N. D. California, decides that a municipal ordinance which arbitrarily prohibits the burial of bodies within an entire county, embracing large tracts of land unoccupied and remote from human habitation, where the public health and safety could not possibly be endangered, is unreasonable and void. Compare *Los Angeles* v. *Hollywood Cemetery Ass'n,* 124 Cal. 344.

Due Process of Law

In *Chicago City Ry. Co.* v. *City of Chicago,* 142 Fed. 844, the United States Circuit Court, N. D. Illinois, N. D., decides that a city ordinance requiring a street railroad company to accept transfers issued to passengers by other companies, in no way connected with it,

CONSTITUTIONAL LAW (Continued).

and to carry such passengers over its lines without charge, is unconstitutional and void as depriving such company of its property without due process of law; and it is immaterial that the requirement is reciprocal and that in operation the effect of the ordinance might be to increase business to such an extent that the companies would suffer no loss.

Jurymen

The United States Circuit Court decides in *J. G. Rawlins &c.* v. *State of Georgia,* 26 S. C. R. 560, that excluding lawyers, ministers, doctors, dentists, and railway engineers and firemen from serving on either grand or petit juries does not deny a person convicted of crime in a state court the due process of law guaranteed by the fourteenth amendment to the Federal Constitution. Compare *People* v. *Jewett,* 3 Wend. 314.

CONTRACTS.

Agreement to Pay Debts

The Supreme Court of Pennsylvania decides in *Cox* v. *Phila. Pottery Co.,* 214 Pa. 373, that where a person indebted assigns all of his property and business to a corporation in consideration of the latter paying his debts, a creditor of the assignor may maintain an action against the corporation, and may prove the assumption of the debt by the corporation by showing that the corporation paid other debts of the assignor, had entered in its books his own debt as a liability against the company, and had made payments on account of it. Compare *Kountz* v. *Holthouse,* 85 Pa. 235.

COSTS.

Payment: Subsequent Action

In *Ex parte Mathews,* 40 S. 78, the Supreme Court of Alabama decides that when a party brings a second suit against the same defendant, on the same subject matter, and for the same purpose, without having paid the costs of the former suit, an order may be obtained, on motion and notice, staying further

COSTS (Continued).

proceedings until the costs of the first suit are paid within a reasonable time, and if plaintiff remains in default the cause may be dismissed. Compare *Buckles* v. *Chicago &c. Co.*, 47 Fed. 424.

EASEMENTS.

The Supreme Court of Errors of Connecticut decides in *Puroto* v. *Chieppa*, 62 Atl. 664, that the projection of the eaves of a house, and the extension of the window blinds a few inches over the divisional line, is not sufficient proof of such a visible adverse use of the adjoining land as to warrant the presumption of an implied grant, and thereby prohibit a bona fide purchaser of the adjoining land from building on the divisional line. Compare *Robinson* v. *Clapp*, 65 Conn. 365, 29 L. R. A. 582.

Implied Grant

In *Miller* v. *Hoeschler*, 105 N. W. 790, the Supreme Court of Wisconsin decides that where the owner of a house and lot used an adjoining strip of ground as a door-yard and acquired title thereto by adverse possession, the subsequent devise of the lot did not carry with it by implication an easement in the adjoining strip. Compare *Lampman* v. *Milks*, 21 N. Y. 505, and *Dillman* v. *Hoffman*, 38 Wis. 559.

Devise of Right

EMINENT DOMAIN.

In *Baltimore N. Y. R. Co.* v. *Bouvier*, 62 Atl. 868, the Court of Chancery of New Jersey decides that where a railroad entered on land under a right-of-way deed, wherein it covenanted among other things to erect a passenger station and double-track its road for a certain distance, which conditions it failed to fulfill, the improvements made by the railroad on the land were not to be considered in determining, in condemnation proceedings thereafter instituted, the damages suffered by the vendor. Compare *North Hudson County Railroad Co.* v. *Boorean et al.*, 28 N. J. Eq. 450. The case first cited presents a very excellent review of the questions involved.

Measure of Damages

FOREIGN CORPORATIONS.

Revocation of License

A very important decision of the United States Supreme Court occurs in *Security Mutual Life Insurance Company* v. *Henry E. Prewitt,* 26 S. C. R. 619, where it is decided that a state may provide by its legislation that if a foreign insurance company shall remove to a federal court a case which has been commenced in a state court, the license of such company to do business within the state shall thereupon be revoked. Two judges dissent. Compare *Home Insurance Company* v. *Morse,* 20 Wall. 445.

GIFTS.

What Constitutes

In *Northwestern Mut. Life Ins. Co.* v. *Collamore,* 62 Atl. 652, the Supreme Judicial Court of Maine laying down the general rule that to constitute a gift inter vivos or causa mortis, there must be a transfer of possession under circumstances indicating an intention thereby to at once transfer title as well as possession irrevocably, holds that inclosing the article in a sealed envelope, and handing the package to another with instructions to keep, but not to open it until after the death of the depositor, does not indicate such intention. Compare *Bath Savings Institution* v. *Hathorn,* 88 Me. 122, 32 L. R. A. 377.

HUSBAND AND WIFE.

Injuries to Wife: Damages

The Supreme Court of Georgia holds in *Georgia R. & Banking Co.* v. *Tice et al.,* 52 S. E. 916, that the damages that may be recovered by the husband for the loss of the services of his wife by reason of personal injuries are not confined to the value of her services in the household, but may include the value of her services rendered in her husband's business, where she was thus engaged at the time of the injury without any contract or expectation of pay for the same.

INSURANCE.

The Supreme Court of Ohio holds in *State ex rel. Physicians' Defense Co.* v. *Laylin, Secretary of State*, 76 N. E. 567, that a foreign corporation, the sole business of which, as authorized by its charter, is that of defending physicians and surgeons against civil prosecution for malpractice, which, in the prosecution and conduct of said business, issues and sells to members of the medical profession a contract whereby it undertakes and agrees to defend the holder of said contract against any suit for malpractice that may be brought against him during the term therein specified, but does not assume, or agree to assume or pay, any judgment that shall be rendered against him in such suit, is not engaged in the business of insurance, nor is the contract so issued and sold an insurance contract.

What Constitutes

The United States Circuit Court, E. D. Pennsylvania, decides in *Clark* v. *Equitable Life Assurance Soc.*, 143 Fed. 175, that an insured in a life policy, who for a valuable consideration fills and duly assigns the policy, is thereby estopped as against the Company issuing the same to attack the validity of the assignment on the ground that the assignee had no insurable interest in his life. Compare *Insurance Co.* v. *Henessy*, 99 Fed. 64.

Sale of Policy

INTERSTATE COMMERCE.

In *Standard Oil Co.* v. *City of Fredericksburg*, 52 S. E. 817, the Supreme Court of Appeals of Virginia decides that a corporation engaged in the sale of oil, which brings its oil from a foreign state into this state, and mingles it with the general mass of property in the state, is not in selling oil in the state, either in original barrels or from wagons, engaged in interstate commerce in such sense as to preclude a city of the state from exacting a license tax from it. Compare *American Steel and Wire Co.* v. *Speed*, 192 U. S. 500.

What Constitutes

LANDLORD AND TENANT.

In *Paxson & Comfort Company* v. *Potter,* 30 Pa. Sup. Ct. 615, the Superior Court of Pennsylvania, though recognizing the well-settled rule that the destruction of a building by fire does not absolve the lessees from liability for rent, decides, however, that this rule does not apply to a case of a demise of an apartment in a building. "In such a tenancy" (says the court) "there is no understanding either by landlord or tenant that an estate in the land upon which the building is located is granted. By the destruction of the building the whole estate demised is extinguished. The thing demised is not a space in air but a portion of the building. When the building is destroyed nothing remains which the tenant can enjoy or claim." With this case compare *Ainsworth* v. *Mt. Moriah Lodge,* 172 Mass. 257.

Destruction of Premises

LARCENY.

Against the dissent of three judges the Supreme Court of Illinois decides in *Luddy* v. *People,* 76 N. E. 581, that where a constable, in conspiracy with a justice of the peace and a collection agent, seizes goods on a writ issued on a judgment for claims which had been paid, as shown by receipts filed with the justice, but destroyed by him, takes the goods away, and afterwards conceals himself so as to prevent the retaking of the goods, which were afterwards found where they had been hidden by the justice and constable after a pretended sale, he is guilty of larceny.

Evidence

MALICIOUS PROSECUTION.

In *Macdonald, Appellant,* v. *Schroeder,* 214 Pa. 411, the Supreme Court of Pennsylvania holds that a verdict of guilty returned by a jury, then set aside by the court, a new trial granted followed by a second trial, and a verdict of not guilty, is not conclusive evidence

Probable Cause

MALICIOUS PROSECUTION (Continued).

of probable cause. It is further decided that where one commences a criminal prosecution for the purpose of compelling his debtor to pay a just debt, it is prima facie evidence of want of probable cause and of malice, and shifts the burden of showing it was not so, on the defendant. Compare *Cooper* v. *Hart,* 147 Pa. 594.

MASTER AND SERVANT.

When Relation Exists

In *McColligan* v. *Pennsylvania Railroad Company,* 214 Pa. 229, it appeared that a railroad company owning cabs, by an agreement in writing, let them out to drivers in consideration of the payment of a fixed sum per day. The agreement provided that the driver was to assume all liability for damages to any person or property, that he should not use a horse longer than six and one-half hours without returning to the stable for exchange, that he should wear a uniform, abstain from the use of intoxicating liquors, present a neat and clean appearance, and conform to the prescribed rates and regulations. Upon failure to observe these conditions the company reserved the right to cancel the unexpired term of the lease. The regulations provided in detail the rates to be charged for various distances, limited the area beyond which the driver could not go without permission, and restricted the driver from performing other kinds of work. It also appeared that the company employed a cab agent to supervise the service, to secure men for the work, make contracts with the drivers, and enforce the terms and conditions of the lease. Under these circumstances the Supreme Court of Pennsylvania decides that (1) the contract between the railroad company and the driver was one of bailment, and not one creating the relation of master and servant; (2) that the railroad company was not liable for injuries sustained through the negligence of the driver. Compare *King* v. *London Improved Cab Co.,* L. R. 23 Q. B. Div. 281.

MINES AND MINING.

The Superior Court of Pennsylvania decides in *Russell* v. *Herbert,* 30 Pa. Sup. Ct. 591, that where iron ore is mined under a lease, the title to it vests absolutely as personal property in the lessee as soon as it is mined and removed from its original place, and it is immaterial as affecting the title that the lease was subsequently forfeited. Compare *Coal Co.* v. *Railroad Co.,* 187 Pa. 145.

Iron Ore: Title

MORTGAGES.

In *Shears et al.* v. *Traders' Bldg. Ass'n,* 52 S. E. 860, the Supreme Court of Appeals of West Virginia decides that where one executes to the same trustees two deeds of trust, at different times, conveying separate lots of land, to secure to the same person two distinct debts, and where default is made in the payment of the debts, and the trustees are required to make sale of the property, they should sell the same separately, and not jointly, and to sell it collectively will be an irregularity for which the sale, and deed made pursuant thereto, will be set aside, upon proper bill filed for that purpose.

Foreclosure: Separate Sales

NAVIGABLE WATERS.

The United States District Court W. D. Pennsylvania decides in *United States* v. *Union Bridge Co.,* 143 Fed. 377, that the right of the United States to require the removal or alteration of a bridge as an obstruction to navigation of an interstate waterway is not affected by the fact that it made no objection when the bridge was built, or that it was built under authority from the State, nor do such facts render the government liable to compensate the owner for his loss where the consent of Congress was not asked; the owner being chargeable with notice of its power over waters and its right to exercise the same at any time. Compare *Cardwell* v. *American Bridge Co.,* 113 U. S. 205.

Removal of Bridge

OFFICES.

Eligibility: Women

The Supreme Court of New Hampshire in replying to a question of the Governor of that State holds *In re Opinion of the Justices,* 62 Atl. 969, that since, under the common law, women are disabled from holding public office, they are disqualified from appointment as notaries public, unless some special statutory enactment authorizes their appointment as such.

PARTIES.

Chattel Mortgages

The Supreme Court of South Dakota decides in *Longerbeam et al.* v. *Huston,* 105 N. W. 743, that a mortgagor and mortgagee in a chattel mortgage may join in an action to recover the mortgaged chattels, though the possessory right to them is exclusively in the mortgagor; the seizure of the chattels constituting an infringement on the rights of the mortgagee. Compare *Lieberman et al.* v. *Clark,* 85 S. W. 258.

PLEDGES.

Bankruptcy

A very excellent discussion of the law of pledges as related to bankruptcy appears in *Love* v. *Export Storage Co.,* 143 Fed. 1, where the United States Circuit Court of Appeals, Sixth Circuit, decides that where certain warehouse receipts were pledged to a bank by a corporation, while insolvent, to secure a certain note then executed and any liability thereafter contracted, and there was no evidence to impugn the good faith of the bank, it was entitled to maintain its right to the property so pledged, not only for the payment of such note, but for other notes subsequently discounted, as against the corporation's trustee in bankruptcy, though the pledge was made within four months prior to the filing of the petition in bankruptcy. Compare the very recent decision of the United States Circuit Court of Appeals, Seventh Circuit, in *Security Warehousing Co.* v. *Hand,* 143 Fed. 32.

SHIPPING.

Demurrage: Delay: Strikes

An important rule with respect to strikes as relating to liability for demurrage due to delay appears in *W. K. Niver Co.* v. *Cheronea S. S. Co., Limited,* 142 Fed. 402, where it is held by the United States Circuit Court of Appeals, First Circuit, that where, in consequence of a strike of the anthracite coal miners of Pennsylvania, large quantities of coal were brought to American ports from Wales and other coal-mining regions by vessels, and because of the arrival of a large number of such vessels at a given port at about the same time, and the further requirement of consignees that they should discharge at certain railroad docks to facilitate the shipment of the coal to interior points by rail, delay was caused to many of the vessels in discharging, the strike cannot be held a proximate cause of such delay, within the meaning of a charter provision exempting the charterer from liability for demurrage on account of delay caused by strikes.

TAX SALES.

Right to Redeem

In *Philadelphia* v. *Unknown,* 30 Pa. Sup. Ct. 516, the Superior Court of Pennsylvania decides that the right to redeem land sold for taxes, vested in a dissolved corporation, is an interest in real estate which may be sold by a trustee appointed by the court under the Act of April 15, 1891, P. L. 15, to sell the property of such a corporation.

TRADEMARKS.

Colors: Unfair Competition

In *Diamond Match Co.* v. *Saginaw Match Co.,* 142 Fed. 727, the United States Circuit Court of Appeals, Sixth Circuit, decides that a manufacturer, without a patent, of tipped matches, in which it is essential that the head and tip should be of different colors to enable users to distinguish the tip on

TRADEMARKS (Continued).

which the match should be struck, is not entitled to maintain a monopoly in the use of any two particular colors, merely because he used them first, and their use by another manufacturer without any simulation of packages calculated to deceive purchasers as to the origin of the goods does not constitute unfair competition. With this case compare notes to *Scheuer* v. *Mueller,* 20 C. C. A. 165; and *Lare* v. *Harper & Bros.,* 30 C. C. A. 376.

WILLS.

The Supreme Judicial Court of Massachusetts holds in *Hardy* v. *Roach,* 76 N. E. 720, that where a will directs the division in equal portions of the balance of testator's estate between legatees, who are designated by name, such legatees take per capita, and not per stirpes, although they are further described as a brother and as children of deceased brothers and sisters of testator, and are grouped according to families.

Construction: Interest of Legatees

WITNESSES.

The Supreme Court of Illinois decides in *Hoch* v. *People,* 76 N. E. 356, that where, in a criminal prosecution, a second wife of defendant is offered as a witness against him, and it is claimed that his former wife is still living and undivorced, the question of the competency of the witness, as dependent both on the law and on the facts, is for the court.

Competency: Question For Court

In *State* v. *Woodrow,* 52 S. E. 545, the Supreme Court of Appeals of West Virginia, decides that a wife is not a competent witness against her husband in a prosecution against him for the murder of his infant child, of the age of fourteen months, though the same pistol-

Murder of Child

WITNESSES (Continued).

ball killed the child and wounded the wife while the child was in her arms. Two judges dissent, and the opinions delivered present a very careful discussion of the principles involved. Compare *Clarke* v. *State,* 117 Ala. 1.

Competency: Attorney

In *Inlow et al.* v. *Hughes et al.,* 76 N. E. 763, the Apellate Court of Indiana, Division Number One, decides that in a suit for the establishment and probate of a lost will, the attorney who drew the will is competent to testify as to its provisions.