PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACCORD AND SATISFACTION.

Against the dissent of two judges, the Court of Appeals of New York decides in *Bandman* v. *Finn*, 78 N. E. 175, that where defendant by a written contract agreed to pay plaintiff's assignor for a release of a certain claim $1000 on the passing of title to certain premises, and $8600 on the completion of a roof of a contemplated building on the premises, and afterwards, before the roof was completed, they entered into an agreement whereby defendant agreed to pay $2500 for the release of the claim and the surrender of the prior agreement, the subsequent agreement was binding, though not executed. Compare *Jaffrey* v. *Davies*, 124 N. Y. 164; 11 L. R. A. 710.

Validity

ANIMALS.

The Superior Court of Delaware decides in *Harrington* v. *Hall*, 63 Atl. 875, that a person is not justified in injuring or killing a dog which merely trespasses upon his premises, though notices have been posted forbidding trespassing. Where, however, defendant shot plaintiff's dog while plaintiff's dog was on defendant's premises killing defendant's turkeys, it was held that defendant's act was justifiable.

Trespass

ASSIGNMENT.

Checks: Effect

The Supreme Court of South Carolina decides in *Loan & Savings Bank* v. *Farmers & Merchants Bank*, 54 S. E. 364, that a check on a bank operates as an assignment pro tanto of the drawer's deposit account, and there is privity between the bank having the necessary funds on hand and the checkholder on presentation of the check for payment, so as to give the holder a right of action against the bank for wrongfully refusing to pay it. It is further held that the drawer of a check cannot countermand its payment, if the check has passed into the hands of a bona fide holder, by notifying the bank that the check was obtained by fraud and that there was a failure of consideration. Compare *Union Nat. Bank* v. *Oceana Co.*, 80 Ill. 212.

ATTORNEY AND CLIENT.

Employing Assistant

The Supreme Court of Illinois decides in *Chicago & S. Traction Company* v. *Flaherty*, 28 N. E. 29, that unless a client authorizes his attorney to employ assistant counsel, he is not liable for the fees of such assistant counsel. Compare *Price* v. *Hay*, 132 Ill. 543.

BANKRUPTCY.

Proof of Claim: Time

The United States Circuit Court of Appeals, Fourth Circuit, decides in *Norfolk & W. Ry. Co.* v. *Graham*, 145 Fed. 809, that the provision of the Bankruptcy Act of 1898 limiting the time for proving claims to one year has reference to the bankruptcy proceedings alone, and if the claim of a creditor, who is also a debtor, of the estate is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counter claim in an action by the trustee to recover his indebtedness to the estate as a claim "provable against the estate" within the meaning of section 68b of the Bankruptcy Act. Compare *Morgan* v. *Wordell*, 178 Mass. 350; 55 L. R. A. 33.

BILLS AND NOTES.

In *B. B. Ford & Co.* v. *People's Bank of Orangeburg,* 54 S. E. 204, the Supreme Court of South Carolina holds that to entitle the holder of a forged draft to retain the money obtained, he should be able to show that the whole responsibility of determining the validity of the signature was on the drawee, and that the negligence of the drawee was not lessened by any disregard of duty on the holder's part or by failure of any precaution which from his assertion in presenting the draft as a sufficient voucher the drawee had the right to believe he had taken. Compare *Bank of United States* v. *Bank of Georgia,* 10 Wheaton 333.

Forged Draft

BROKERS.

The Supreme Court of Mississippi holds in *Jayne* v. *Drake,* 41 S. 372, that a contract without consideration by a landowner, merely giving one the exclusive agency for a year to sell the land on commission, may be revoked prior to a sale, being without mutuality. Compare *Kolb* v. *Land Co.,* 74 Miss.

Exclusive Contract

CARRIERS.

In *Cleveland City Ry. Co.* v. *Conner,* 78 N. E. 376, the Supreme Court of Ohio decides that a passenger on a street railway, who has paid fare and is entitled to ride over another line belonging to the same company, and who, having asked for a transfer ticket over such other line, is given, by mistake of the conductor, a transfer which is not good over such other line, may, nevertheless, if he has exercised such care about the receiving and making use of the transfer ticket as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, lawfully insist upon being

Error in Ticket

CARRIERS (Continued.)

carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare other than by such transfer ticket, he may recover damages for the tort, and cannot be restricted to damages for breach of the contract to carry him. See in connection herewith the very recent cases of *Georgia Railway & Electric Co.* v. *Baker*, 54 S. E. 539 and *Norton* v. *Consolidated Ry. Co.*, 63 Atl. 1087.

Baggage

In *Sullivan* v. *Southern Ry.*, 54 S. E. 586, the Supreme Court of South Carolina decides that where a passenger buys a ticket from a point on the carrier's line to a station on another line with which a connection is made at a junctional point, the carrier must check the baggage to the point of destination and cannot require the passenger to recheck at the junctional point.

Refusal to Deliver Freight

In *Atchison &c. Ry. Co.* v. *Bourdett*, 85 Pac. 820, it appeared that a railway company received a shipment of freight with the freight charges paid in advance. At the point of delivery its local agent demanded payment by the consignor of additional freight charges under a different classification, and also payment of a former freight bill which he conceived to be due to the company from the same consignor for a previous shipment of the same article, and refused to deliver the shipment unless these additional sums were paid. Under these facts the Supreme Court of Kansas decides that in an action for damages the demand for payment of charges for a former shipment and refusal to deliver unless such demand was complied with render the withholding unlawful, and preclude any inquiry into the merits of the other demand, and the company is liable for the value of the use of the shipment for the time it was unlawfully withheld.

CARRIERS (Continued.)

Failure to Stop Train

The Court of Civil Appeals of Texas holds in *International & G. N. R. Co.* v. *Addison,* 93 S. W. 1081, that a carrier failing to stop its train to permit plaintiff to board it is liable for the injuries received by him while proceeding to his destination, where he exercises ordinary care in choosing a means of transportation and in the prosecution of his journey; and where he procured a conveyance after the failure of a train to stop to permit him to board it, he did not, as a matter of law, assume the risk from injuries resulting from exposure to the weather while making the trip by means of the conveyance selected.

COMMERCE.

Interstate Regulation

The United States Circuit Court, N. D. Illinois, decides in *Interstate Commerce Commission* v. *Reichman,* 145 Fed. 235, that the constitutional power of Congress to regulate commerce among the several states includes the power to regulate freight rates by requiring that they shall be uniform to all shippers, and in construing statutes enacted to that end freight rates shall be construed to mean the net cost to the shipper of the transportation of his property, and such regulations may lawfully apply not only to common carriers but to all persons and corporations occupying such relation to transportation that the conduct of their business may operate to impair uniformity of rates. It is therefore held that a private car company which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such from the railroad company on a mileage basis, is within the regulating powers of Congress.

CONNECTING CARRIERS.

In *Atchison, T. & S. F. Ry. Co. et al.* v. *Nation & Slavens,* 92 S. W. 823, the Court of Civil Appeals of Texas decides that where a shipment of cattle over the lines of connecting carriers was an interstate shipment, and the liability of each carrier was limited by contract to the damage occurring on its own line, so that their liability was several and not joint, evidence of the amount paid by one of the carriers in compromise of a claim for damages resulting from its negligence was inadmissible in an action against the other carriers for injuries to the cattle caused by their negligence.

Settlement by One Carrier

CONSTITUTIONAL LAW.

An important holding of the Court of Appeals of Kentucky appears in *Berea College* v. *Commonwealth,* 94 S. W. 623, where it is decided that a statute prohibiting and imposing a punishment for maintaining and operating an institution of learning in which white and colored persons may be taught at the same time and in the same place, is within the police power, and valid; but that a prohibition against maintaining any institution of learning of separate and distinct branches for white and colored persons less than twenty-five miles distant from each other is unreasonable and not within the police power. One judge dissents. It seems not improbable that this case will go to the Supreme Court of the United States, as it undoubtedly upholds legislation with respect to the separate education of the races more far-reaching than has yet been sustained by that Court. Compare *Cisco* v. *School Board,* 161 N. Y. 598, 48 L. R. A. 113.

Schools for White and Colored Persons

The Supreme Court of Mississippi decides in *Hyland* v. *Sharp,* 41 Southern 264, that a statute imposing a privilege tax on those doing a money-lending business on personal securities, such as household furniture, wearing apparel, etc., is invalid as depriving one of property without due process of law, because it

Due Process of Law

CONSTITUTIONAL LAW (Continued.)
arbitrarily fixes the basis of the tax on the kind of security. Compare *Gundling* v. *Chicago,* 177 U. S. 183.

CONTRACTS.

In *Hartman* v. *John D. Park & Sons Co.,* 145 Fed. 358, the United States Circuit Court, E. D. Kentucky, decides that a system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade, but is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same. The case presents a very full and satisfactory discussion of property rights in articles produced by secret process. Compare *Bement* v. *National Harrow Co.,* 186 U. S. 706.

Restraint of Trade

An interesting decision of the Court of Appeals of Kentucky appears in *Clemons* v. *Meadows,* 94 S. W. 13, where it is held that a contract between competing proprietors of hotels in a town whereby one of them agreed to keep his hotel closed for three years, reserving the right to rent the same for offices and to roomers, and whereby the other agreed to pay a specified sum monthly to the former during the three years, is in restraint of trade and illegal, since a hotel is a quasi-public institution and an agreement by a proprietor not to perform a duty imposed on him by law is in contravention of public policy. The application of this ancient theory of an innkeeper's business being a public calling seems somewhat novel. Compare *Chapin* v. *Brown,* 48 N. W. 1074, 12 L. R. A.

Restraint of Trade

CORPORATIONS.

Stockholders' Meeting

In *Germer* v. *Triple-State &c. Co.,* 54 S. E. 509, the Supreme Court of Appeals of West Virginia decides that a stockholder in a corporation, who is present and participates in a meeting of the stockholders thereof, is estopped to deny the legality of such meeting. Compare *Handley* v. *Stutz,* 139 U. S. 417.

COURTS.

Property in Custodia Legis

With two judges dissenting, the Supreme Court of North Carolina decides in *Coffin & McDonnel* v. *Harris,* 54 S. E. 437, that where property was attached in a suit against non-residents which was removed to the federal courts, the property was in custodia legis within the protection of the federal court, so that the plaintiffs were not entitled to maintain an original action in the state court against residents of the state to restrain waste on the property attached. Compare *In re Hall & Stilson Co.,* 73 Fed. 527.

Jurisdiction

In *Harris* v. *Rosenberger,* 145 Fed. 449, the United States Circuit Court of Appeals, Eighth Circuit, decides that a suit, although not one of diversity of citizenship, which, according to the complainant's bill, depends not only upon the construction and application of the Constitution of the United States and the constitutional validity of an act of Congress, but also upon the proper construction of the act of Congress, is one in respect of which the appellate jurisdiction of the Supreme Court is not exclusive, and an appeal from the final decree may be taken to the Circuit Court of Appeals. Compare *Spreckles Sugar Refining Co.* v. *McClain,* 192 U. S. 397.

CRIMINAL LAW.

In *State* v. *Logan,* 85 Pac. 798, the Supreme Court of Kansas decides that an instruction, relating to the individual responsibility of each juror in a criminal case, which implies that he is to act solely upon his individual judgment, and is silent as to his duty to consult with his fellow jurors, is erroneous.

Duty of Juror

DEATH BY WRONGFUL ACT.

In *Mills' Adm'r* v. *Cavanaugh* 94 S. W. 651, the Court of Appeals of Kentucky decides that in an action by an administrator for the death of an infant child, contributory negligence of the parents in failing to exercise in the care of decedent such ordinary diligence as persons of ordinary prudence usually exercise in the care of children of decedent's age, precludes recovery, where the amount sought to be recovered would go to the parents.

Contributory Negligence of Beneficiaries

DEEDS.

The Supreme Court of Illinois holds in *Jackson* v. *Jackson,* 78 N. E. 19, that where a man deeded land to a woman in consideration of marriage, and her promise to be a kind and dutiful wife, but she failed to so conduct herself, there was but a partial failure of consideration, and equity would not decree rescission as the wife could not be put in statu quo. Compare *Hursen* v. *Hursen,* 212 Ill. 377.

Consideration

EMINENT DOMAIN.

The Supreme Court of Georgia decides in *Atlantic & B. Ry. Co.* v. *McKnight,* 54 S. E. 148, that the construction and operation of a railway in a public street is a physical invasion of the easement of access of abutting landowners, and is a damage to the property,

Railroads

EMINENT DOMAIN (Continued.)

within the meaning of the constitutional provision which declares that private property shall not be taken or damaged for public use without just compensation being first paid. Compare *Austin* v. *Terminal Ry. Co.,* 34 S. E. 852, 47 L. R. A. 755.

EVIDENCE.

Admissions

The Supreme Court of Vermont decides in *Phelps* v. *Root,* 63 Atl. 941, that the price at which a person offers to sell property is as against him evidence of its value.

General Reputation

In *Gilliand* v. *Board of Education, &c.,* 54 S. E. 413, the Supreme Court of North Carolina holds that upon an issue as to whether certain persons were of pure white blood or of African descent, evidence that one of their ancestors voted at a time when colored people were not allowed to vote was admissible as tending to show general reputation that the ancestor was a white person. Compare *Bryan* v. *Walton,* 20 Ga. 480.

HUSBAND AND WIFE.

Taxation

Against the dissent of two judges, the Supreme Court of Kansas decides in *Nagle* v. *Tieperman,* 85 Pac. 941 that a wife, not being in possession or receiving the rents and not being under any other legal or moral obligation to pay taxes, may acquire a title to land owned by her husband and others by purchase at a sale for taxes or by purchasing a tax sale certificate; provided, such purchase is made in good faith and with her own money. Compare *Munger* v. *Baldridge,* 41 Kansas 236.

INSURANCE.

Fidelity Insurance

The Supreme Court of Colorado decides in *American Bonding & Trust Company of Baltimore* v. *Burke,* 85 Pac. 692, that an instrument executed by a surety company indemnifying an employer against larceny or embezzlement by an employee, though denominated a bond is in legal effect analogous to a policy of insurance, and therefore the rules applicable to insurance policies should be applied in construing it so that it will be construed in favor of the insured, and statements or declarations by the insured will be regarded as representations, and not warranties, unless the contract makes them so. Compare *Rice* v. *Fidelity & Deposit Co.,* 103 Fed. 427.

JUDGMENT.

Res Judicata

The Supreme Court of Minnesota holds in *Woodman* v. *Blue Grass Land Company,* 107 N. W. 1052, that a final judgment in a former action to recover the earnest money paid, pursuant to a contract for the purchase of land, is not a bar to a subsequent action between the same parties to recover damages in deceit for fraudulently inducing the plaintiff to enter into that contract and for subsequent, fraudulent representations in connection with its title. Compare *Wanzer* v. *De Baum,* 1 E. D. Smith 262.

LANDLORD AND TENANT.

Distress

The Supreme Court of Georgia holds in *Sapp* v. *Elkins,* 54 S. E. 98, that when a contract creating the relation of landlord and tenant embraces a sum to be paid as rent of land, and another sum as hire of animals to be used on the rented premises, the whole sum due is rent, and may be collected by distress. Compare *Lathrop* v. *Clewis,* 63 Ga. 282.

LANDLORD AND TENANT (Continued.)

In *McCourt* v. *Singers-Bigger,* 145 Fed. 103, the United States Circuit Court of Appeals, Eighth Circuit, decides that a tenant under a lease, while having no absolute right to a renewal as against the landlord, in the absence of provision therefor, has a reasonable expectancy of renewal which is regarded in equity as property, and, if one standing in a fiduciary relation to him secures a renewal to himself, a court of equity will treat him as holding the new lease in trust for the original lessee. This rule is applied to the case where an officer of a corporation in charge of the premises leased organized a new corporation and procured a lease of such premises for such new corporation, it being held that such action was a clear breach of his duty to the old corporation and to the stockholders thereof, giving them right to redress. Compare *Robinson* v. *Jewett,* 116 N. Y. 40.

Renewal of Lease

LIMITATIONS.

In *Scallon* v. *Manhattan Ry. Co.,* 78 N. E. 284, the Court of Appeals of New York holds that where infancy exists when a cause of action accrues, the time for commencing the action is extended for a certain period after the infant becomes of age; but, if the statute has already begun to run against the ancestor, it is not interrupted by his death and the supervening disability of his infant heirs, in the absence of provisions to the contrary. Compare *Lewis* v. *New York & Harlem R. R. Co.,* 162 N. Y. 202.

Suspension of Statute

MORTGAGES.

The Supreme Judicial Court of Massachusetts in *Libbey* v. *Tidden,* 78 N. E. 313, holds that where one entered into an agreement for the erection of a building on a lot of which he was not then the owner, but which he afterwards purchased, and a deed to him and the mortgage by him on the lot were delivered simultaneously, in order to render his seisin in-

Priority: Instantaneous Seisin

MORTGAGES (Continued.)

stantaneous in law, so as to prevent a mechanic's lien from attaching prior to the mortgage, the deed and the mortgage must have been part of the same transaction. Compare *Holbrooke* v. *Finney*, 4 Mass. 566.

Foreclosure: Limitations

With three judges dissenting the Court of Appeals of New York decides in *House* v. *Carr*, 78 N. E. 171, that though limitations have run against a mortgage a court of equity will not restrain a sale under the power of sale contained in the mortgage. With this decision compare *Hulbert* v. *Clark*, 128 N. Y. 295, 14 L. R. A. 59.

NEGLIGENCE.

Res ipsa loquitur

An important rule is laid down by the Supreme Court of Pennsylvania in *Delahunt* v. *United Telephone & Telegraph Company*, 215 Pa. 241, where it is held that in an action to recover damages for the death of a person killed by an electric current from a telephone on his premises, the rule *res ipsa loquitur* applies, and this notwithstanding the fact that the deadly current was not generated by the telephone company. Though the wire which connects with a telephone, says the court, is intended to conduct only a harmless current of electricity, the telephone company is bound to know that it can become the conductor of a deadly one, and that such a current will pass over it if it is not properly insulated and should come in contact with a wire heavily and dangerously charged. It is as much the duty of the telephone company to see that no such current shall thus pass over its wires as it is to send only a harmless one from its own exchange. Compare *Alexander* v. *Nanticoke Light Co.*, 209 Pa. 571.

RAILROADS.

Regulations: Stopping Trains

The Supreme Court of South Carolina holds in *Railroad Com'rs* v. *Atlantic Coast Line R. Co.*, 54 S. E. 224, that where the railroad commissioners have determined that the accommodations furnished citizens of the state at a station in the state by an interstate railroad company are inadequate, its order requiring the company to stop two of its fast mail trains transporting interstate passengers at such station on flagging is not a burden on interstate commerce, and mandamus will issue to compel the trains so to stop, the writ being so framed as to give the railroad company the alternative right to provide facilities substantially the same as would be afforded the people at such station by stopping the fast mail trains on flag. Compare *Lake Shore Co.* v. *Ohio*, 173 U. S. 285.

Connecting Lines

The United States Circuit Court of Appeals, Second Circuit, decides in *Lehigh Valley R. Co.* v. *Delachesa*, 145 Fed. 617, that where one railroad company controls others through the ownership of their stock and operates the lines of all as a single system, though the general management of each road is retained by the corporation owning it, the relation between the dominant and subordinate companies with respect to traffic originating on the lines of the former is that of principal and agent, and the dominant company is directly liable for an injury to one employed in unloading one of its own cars on the tracks of a subordinate company through the negligence of the employees of the latter. Compare *Lehigh Railroad Co.* v. *Dupont*, 138 Fed. 840.

RECORDING ACTS.

Names: Christian Names

In *Burns* v. *Ross*, 215 Pa. 293, the Supreme Court of Pennsylvania decides that when it is commonly known that certain first, or Christian, names are interchangeably used, and the initial and dominant letters of each are identical, indicating to the eye that they are the same, and giving the same sound and substance

RECORDING ACTS (Continued.)

to each, the judgment index must be searched for each; the rule being applied to the particular case where a decedent's name was Francis Ross and the court holding that a purchaser from his heirs is bound to look for liens indexed in his lifetime against Frank Ross. Compare *Crouse* v. *Murphy,* 140 Pa. 335.

TELEGRAMS.

Delay in Delivery

The Supreme Court of South Carolina holds in *Roberts* v. *Western Union Telegraph Co.,* 53 S. E. 985, that where a telegram is received outside of office hours by an operator who happens to be in the office, which announces the serious illness of a relative, and death occurs before succeeding office hours, the telegraph company is not liable for mental anguish caused by not being with deceased before his death. Compare *Bonner* v. *Telephone Co.,* 71 S. C. 303.