PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADOPTION.

The Supreme Court of Washington holds in *James* v. *James*, 77 Pac. 1082, that neither the false statement made by the natural father of an adopted boy at the time of the adoption concerning the death of the boy's mother, nor the fact that plaintiff would not have adopted the boy had he known that his mother was living, nor that the boy thereafter became incorrigible, and was sent to a reform school from which he was subsequently taken by his natural mother, nor that plaintiff after removing from the state in which the boy was adopted to Washington took no steps there to adopt the boy, renders the adoption invalid.

Validity

ALIENS.

In *Hopkins, United States Marshal, et al.* v. *Fachant*, 130 Fed. 839, the United States Circuit Court of Appeals (Ninth Circuit) holds that where an alien woman who has come into this country pending proceedings for her deportation under the immigration laws marries a citizen of the United States, she at once takes the status of her husband, and, unless released from custody, is entitled to be discharged on a writ of habeas corpus. See also *City of Minneapolis* v. *Reum*, 6 C. C. A. 37 and note thereto.

Marriage to Citizen

ATTORNEYS-AT-LAW.

In *Lathrop* v. *Hallett*, 77 Pac. 1095, the court of Colorado, holding that retainer of counsel in a suit is not implied authority to him to employ associate counsel therein at the expense of his client, decides that knowledge by a client that his counsel is being assisted in the case by another attorney is not enough to show that the client ratifies the employment on his behalf by his counsel of such

Employing Assistant

ATTORNEYS-AT-LAW (Continued).

attorney, the fact of such assistance being consistent with the employment of the attorney to assist the counsel at the latter's expense. It is further held that an attorney employed by counsel to assist him in a case at his own expense is not entitled to a lien on the judgment therein. Compare *Northern Pac. Ry. Co.* v. *Clarke*, 106 Fed. 794.

Authority after Judgment

In *Brown* v. *Arnold*, 131 Fed. 723, the United States Circuit Court of Appeals (Eighth Circuit) decides that while the general rule is said to be that the authority conferred upon a lawyer by his retainer in an action or suit ceases when the judgment or decree is rendered, there are many exceptions to this rule, and in the actual practice of the law it is frequently disregarded. Some of the established exceptions are that after judgment or decree the authority of the attorney for the prevailing party to collect or enforce it, his authority to receipt for its proceeds and to discharge it, his authority to admit service of a citation to review it, and his authority to oppose any steps that may be taken within a reasonable time to reverse it, continue. Compare *Berthold* v. *Fox*, 21 Minn. 51.

Compensation

The Supreme Court of New Mexico in *Johnston* v. *Board of Bernalillo County Com'rs*, 78 Pac. 43, decides that the personal representative of an attorney who performed services under a contract for fees, but died before full performance, can recover only such reasonable proportion of the contract price as the services performed bear to the whole services contracted for, or, as otherwise stated, the reasonable value of the services performed. See *Gordon* v. *Miller*, 14 Md. 204.

BANKRUPTCY.

Appointment of Receivers

The United States District Court (E. D. Tennessee, S. D.) decides *In re Douglas Coal and Coke Co.*, 131 Fed. 769, that under the Bankruptcy Act of 1898, as amended by the Act of 1903, in order that the appointment of a receiver at the instance of another shall constitute an act of bankruptcy, the appointment must have been made "because of insolvency," and the appointment of a receiver for the property of a corporation in a suit to foreclose a mortgage, in which the bill does not allege in-

BANKRUPTCY (Continued).

solvency, but a breach of the covenants of the mortgage, does not authorize an adjudication of bankruptcy against the corporation, although it may in fact have been insolvent, and such insolvency may have caused its default. Compare with this case *Blue Mountain Iron and Steel Co.*, 131 Fed. 57.

Unliquidated Claim

It is decided by the United States Circuit Court of Appeals (Second Circuit) *In re Frederick L. Grant Shoe Co.*, 130 Fed. 881, that a creditor having a provable claim, although the amount is unliquidated, may file a petition in bankruptcy against his debtor, and further, that a claim for damages for breach of a contract is one founded "upon a contract" within the meaning of the Bankruptcy Act of 1898 and is consequently provable in bankruptcy. Compare *In re Stern*, 116 Fed. 604.

CARRIERS.

Reasonable Time to Receive Goods

The Supreme Court of Washington holds in *Normile* v. *Northern Pac. Ry. Co.*, 77 Pac. 1087, that in an action against a carrier for the loss of goods, where there is no dispute about the material facts, the question what is a reasonable time in which the goods should have been removed by a consignee is for the court. Compare *Hedges* v. *Hudson River Rd. Co.*, 49 N. Y. 223.

CONSPIRACY.

Conspiracy to Defraud

In *Wright* v. *Stewart*, 130 Fed. 905, the United States Circuit Court (District of Missouri, S. W. D.) considers a case in which the plaintiff had been defrauded by certain professional swindlers, the method used being of such a nature as to convince the person defrauded that he was to be successful by swindling another man. The plaintiff having lost considerable money in consequence of the scheme sued to recover it back and secured judgment. The case presents a most interesting and thorough review of the questions involved, and the cases bearing upon the legal principles controlling the decision are exhaustively reviewed. Compare *Catts* v. *Phalen*, 2 Howard, 376. The court in the principal case above holds that although the plaintiff was *in delicto* he was not *in pari delicto* with the others, whose real aim was to defraud him.

CONSTITUTIONAL LAW.

Due Process of Law

Another decision dealing with the constitutionality of a statute prohibiting the use of trading stamps occurs in *State* v. *Ramseyer*, 58 Atl. 958, where it is held that a statute prohibiting the giving away of trading stamps with articles of merchandise purchased, entitling the purchaser to other articles on exhibition at the store of the trading-stamp company, and making a violation thereof punishable by fine, etc., is unconstitutional, as depriving a citizen of the means of acquiring and possessing property, and is not sustainable as within the police power of the state on the ground that it was a proper regulation for the promotion of the public welfare. Compare *State* v. *Dodge*, 56 Atl. 983.

CORPORATIONS.

Loan of Directors

In *Schnittger* v. *Old Home Consol. Min. Co.*, 78 Pac. 9, the Supreme Court of California, laying down the general principle that where a proposition to borrow money from certain directors of a corporation was carried by sufficient votes of other members of the board of directors to render the same valid without the votes of the lending directors, the fact that such lending directors were present at the meeting and voted for the transaction did not invalidate the same, holds under the facts of the case that the fact that directors of a corporation loaning money to it did not disclose to the other members of the board of directors the fact that they were the real parties who were loaning the money, or that the person in whose name the transaction was had was merely a figurehead, did not invalidate it, in the absence of a showing that the corporation sustained some loss by reason thereof, or that the loaning directors thereby obtained an undue advantage over the corporation.

DAMAGES.

Manufactured Articles: Speculative Damages

Uncertainty as to the profits which might have been made if a given contract had not been broken frequently results in denying a plaintiff any substantial recovery. Circumstances are presented in *Lazier Gas Engine Co.* v. *DuBois*, 130 Fed. 834, under which the court decides that sufficient certainty is produced to enable such profits to be estimated. It is there held that where, in an action for breach of a contract to manufac-

DAMAGES (Continued).

ture and sell certain machinery, plaintiff showed that the average profit made during the sixteen months in which the contract was performed was $911 per month, a verdict allowing plaintiff profits at that rate during the eight remaining months of the contract period after the breach was not objectionable on the ground that such profits were remote and speculative. Compare *United States* v. *Behan*, 110 U. S. 339.

DEATH BY WRONGFUL ACT.

In re Burnstine, 131 Fed. 828, it is decided by the United States District Court (E. D. Michigan, S. D.) that under the Michigan act relating to death by wrongful act, providing that an action may be brought by an administrator, but that the recovery shall pass to decedent's next of kin, a father being entitled to the entire recovery for the wrongful killing of his son, his right thereto constituted assets belonging to his estate in bankruptcy within the Bankruptcy Act of 1898. Compare *Findlay* v. *Chicago Railroad Co.*, 106 Mich. 700.

Claims: Assignability

EMINENT DOMAIN.

In *Atlanta, K. and N. Ry. Co.* v. *Southern Ry. Co.*, 131 Fed. 657, the United States Circuit Court of Appeals (Sixth Circuit) decides that a statutory proceeding for the condemnation of a right of way for railroad purposes is but a substitute for its acquisition by contract, and the filing of a petition for condemnation by a railroad company gives it no right as against another company which previously obtained a deed from the owner for the same purpose, although such deed was not recorded. It is further held in the same case that a contract for the sale or conveyance by a landowner of a right of way to a railroad company, although in parol and executory, is good as against another company which subsequently institutes proceedings for condemnation of the same land, with notice that such an agreement had been made, such company not being an innocent purchaser protected by the Statute of Frauds. With this decision compare *M. and St. P. R. Co.* v. *Chicago, etc., R. Co.*, 116 Iowa, 611.

Priority of Right

FOREIGN CORPORATIONS.

The Supreme Court of Oklahoma decides in *Myatt* v. *Ponca City Land and Improvement Co.*, 78 Pac. 185, that a foreign corporation acting in excess of its conferred authority may be questioned as to its authority only by the state. But where, in an action by a foreign corporation, there is an attempt on the part of such corporation to acquire title to property vested in an individual, such individual may deny its corporate capacity as a defence to its right of recovery. It is indispensable, the court says, that a corporation, seeking to invoke the doctrine of comity, must first be possessed of some right, power, or privilege in the country of its domicile, and unless it has both existence and some right or power there, it cannot be awarded any in a foreign state.

Corporate Authority

FRAUDULENT CONVEYANCES.

In *Annis* v. *Butterfield*, 58 Atl. 898, the following facts appeared: The grantor in a conveyance fraudulent as to creditors was afterwards adjudged a bankrupt. His trustee in bankruptcy sold and assigned to the plaintiff all the right, title, and interest which vested in him as trustee for the premises fraudulently conveyed, "together with any right to bring action, at law or in equity, to enforce any claim against said premises which was vested in said trustee in the interest" of the bankrupt's creditors. The plaintiff was one of the creditors of the bankrupt, and as such might have maintained proceedings to have the fraudulent conveyance set aside. It is decided under these facts by the Supreme Judicial Court of Maine that a mere naked right to set aside a fraudulent conveyance is not assignable, and an attempted assignment thereof to such a creditor could not be enforced. See *Prosser* v. *Edmund*, 1 Young and Coll. 481.

Right of Action: Assignment

HUSBAND AND WIFE.

It is decided by the Court of Chancery of New Jersey in *Brady* v. *Brady*, 58 Atl. 931, that where a husband received from his wife money from her separate estate to improve his lands, the burden of proof in partition between the representatives of the husband and the wife, after his death, is on his representatives to show that the advances were a gift. Compare *Adone* v. *Spencer*, 62 N. J. Eq. 782, also reported 56 L. R. A. 817.

Advances by Wife: Presumption

HUSBAND AND WIFE (Continued).

Antenuptial Contract: Homestead

The Supreme Court of California holds in *Warner* v. *Warner*, 78 Pac. 24, that an antenuptial contract by which the woman relinquishes all right, claim, and interest in and to the property of the man, either as heir or otherwise, does not preclude her after their marriage from filing a declaration of homestead on property of his, the marriage imposing on him the obligation to furnish her a home, and the only effect of a declaration of homestead being to exempt the property from execution and restrain him from alienating it without her consent. Compare *Keyes* v. *Cyrus*, 100 Cal. 322.

INJUNCTION.

Mandamus to State Treasurer

The Supreme Court of Pennsylvania holds in *Newlin* v. *Harris*, 58 Atl. 925, that a private citizen has no standing to file a bill to restrain the enforcement of a writ of mandamus against the State Treasurer to pay the salary of a judge under an act providing such salary, the constitutionality of which act was attacked but which was upheld in such court of Common Pleas.

INN-KEEPERS.

Liability to Guests

In *Clancy* v. *Barker*, 131 Fed. 161, the following facts are presented: A boy about six years of age, a guest of the defendants at their hotel, wandered out of the room assigned to him, and into a room in which a bell-boy or porter of the defendants was engaged in playing a harmonica for his own amusement, and the latter accidentally or wilfully shot the former with a pistol. Upon these facts the United States Circuit Court of Appeals (Eighth Circuit) holds that the bell-boy was not acting within the course or within the apparent or actual scope of his employment at the time of the shooting, and the inn-keepers were not liable for the injury he inflicted. One judge dissents. The case is particularly interesting in view of the rules established with regard to the liability of common carriers for similar injuries sustained by passengers. In such cases the carrier becomes liable not because its employee was acting within the scope of its authority in doing the passenger an injury, but because

INN-KEEPERS (Continued).

the carrier owes to the passenger a duty to protect him against injury and insult, and when it fails to afford him this protection through the fault whether wilful or otherwise of its own employee it is liable. It would have been natural to expect a similar result in the case of inn-keepers, but the decision in the present case is otherwise. Compare *Kraker* v. *Chicago and Northwestern Ry. Co.*, 36 Wis. 657. In this case, however, it is contended that as far back as *Calye's Case*, 4 Coke, 202, 206, the rule has been otherwise. The prevailing and dissenting opinions are well worthy of study.

JURORS.

The Supreme Court of Kansas decides in *State* v. *Kelley*, 78 Pac. 151, that one who is otherwise qualified is not disqualified as a juror because he is more in favor of the enforcement of the law that the appellant is charged with having violated than of any other law. See *State* v. *Child*, 40 Kansas, 485.

Disqualification

JURY.

In *Commonwealth* v. *Williams*, 58 Atl. 922, it appeared that a juror at an adjournment of court, during a trial for murder, separated from his fellows thinking he was allowed to go home. He was brought back in a few minutes, before he left the court-house, and testified that he had talked to no one while absent, nor had he heard any talk by any one about the case. Under these facts the Supreme Court of Pennsylvania decides that a verdict of guilty would not be set aside therefor. Compare *Commonwealth* v. *Cressinger*, 193 Pa. 326.

Separation

LIMITATION OF ACTIONS.

The United States Circuit Court of Appeals (Eighth Circuit) decides in *Patillo* v. *Allen-West Commission Co.*, 131 Fed. 680, that an amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already pro-

Amendment of Pleading

LIMITATIONS OF ACTION (Continued).

pounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the action, and the statute continues to run until the amendment is filed; and this rules applies although the two causes of action arise out of the same transaction, and by the practice of the state a plaintiff is only required in his pleading to state the facts which constitute his cause of action. See also *Whalen* v. *Gordon*, 95 Fed. 305.

MARRIED WOMEN.

Securing Husband's Debt

The Supreme Court of Pennsylvania, laying down the general proposition that the Act of June 8, 1893 (P. L. 344), forbidding a married woman from becoming "an accommodation indorser, maker, guarantor, or surety for another," applies only to the technical contracts included in the words of the act, and does not prevent the pledge of specific property to secure a debt of the husband, holds in *Herr* v. *Reinoehl*, 58 Atl. 862, that a married woman may assign her interest in a life insurance policy on her husband's life to secure her husband's debt. Compare *Dusenberry* v. *Insurance Company*, 188 Pa. 454.

MUNICIPAL CORPORATIONS.

Grade of Street

In *Moore* v. *City of Lancaster*, 58 Atl. 890, the Supreme Court of Pennsylvania decides that where a city engineer gave a property-owner an erroneous grade, and the owner built a house according to the grade, and some six years thereafter sold the property to another, and the city subsequently cut down the street to the legal grade, the purchaser had no right of action against the city, as its liability would only be to the property-owner to whom the erroneous information was given. Compare *O'Brien* v. *Railroad Co.*, 119 Pa. 184.

PATENTS.

Conditional License to Users

The United States Circuit Court of Appeals (Sixth Circuit) holds in *Rupp & Wittgenfeld Co.* v. *Elliott*, 131 Fed. 730, that it is within the right of the owner of patents for machines, used by retail dealers to fasten buttons on shoes for customers, to furnish such machines to users, without charge, under a license which permits their use only with wire purchased from such owner; and one who, with knowledge of such restriction, manufactures and sells to such users wire put up on spools in the exact form required for use on such machines, and which is suitable for no other use, with the intention that it shall be used on such machines, is liable as a contributory infringer. See also *Peninsular Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288.

PROCESS.

Privilege from Service

That a defendant cannot claim exemption from the service of process on the ground that he was within the jurisdiction as a witness in a suit in a state court in which he was a plaintiff, where such suit was in furtherance of the alleged actionable wrong for which the plaintiff sues, is decided by the United States Circuit Court (D. Oregon) in *Iron Dyke Copper Min. Co.* v. *Iron Dyke R. Co.*, 132 Fed. 208.

STATUTE OF FRAUDS.

Consideration of Marriage

In *Austin* v. *Kuehn*, 71 N. E. 841, the Supreme Court of Illinois holds that a promise to give one a certain amount of money by will if she would marry a certain suitor and refrain from marrying another, and subsequent contracts which were the outgrowth of such promise, were within the Statute of Frauds, providing that no action shall be brought to charge any person on an agreement made upon consideration of marriage unless the promise or agreement shall be in writing.

Suretyship

In *James W. Scudder & Co.* v. *Morris*, 82 S. W. 217, the St. Louis Court of Appeals holds that though the contract of suretyship, to be binding, must be in writing, under the Statute of Frauds, the plea of the statute is not available to a stranger to the contract.

TELEPHONE COMPANIES.

Contracts: Public Policy

It is decided by the Supreme Court of South Carolina in *Gwynn* v. *Citizens' Telephone Co.*, 48 S. E. 460, that a contract by a telephone company with a customer to put in a telephone on condition that the customer will not use another system is against public policy.

TRUST DEED.

Construction

In re Miskey Estate, 58 Atl. 847, it appeared that a husband conveyed to his wife certain real estate in trust, and directed his wife during her lifetime to use the net income for the support of herself and her two children and such other children as might thereafter be born. Under these facts the Supreme Court of Pennsylvania decides that the widow could use the whole income, at her discretion, for the support of herself and children, and where a child had left home she could not demand a portion of the income from her mother. Compare *Bowden* v. *Laing*, 14 Sim. 113.

WILLS.

Provision for Afterborn Child

The questions that have arisen under the statutes requiring a testator's will to contain some provision for an afterborn child, or else the will to be effective as to such child, have given rise to varying decisions. A new holding by the Supreme Court of Pennsylvania appears *In re Newlin's Estate*, 58 Atl. 846, where it is held that a contingent interest is a sufficient provision under the following facts: A testator's will gave the estate to trustees to pay the income to his wife during the minority of the children and while his wife remained unmarried, and to convey to trustees the share of his daughter on reaching the age of twenty-one. It is decided that an afterborn daughter is sufficiently provided for, although she may possibly never reach the age of twenty-one and, consequently, will never receive anything under the will. The court adheres to the general principle heretofore adopted that as to the adequacy of a provision it has nothing to do, this way differing from the decisions of some other states. The present decision presents a good review of the Pennsylvania authorities. With it should be compared the earlier Pennsylvania case of *Williard's Estate*, 68 Pa. 327.

WITNESSES.

Transaction with Party since Deceased

The Supreme Court of Georgia decides in *Bank of Southwestern Georgia* v. *McGarrah*, 48 S. E. 393, that one whose only interest in the litigation is as stockholder of a corporation, which is a party thereto, is not thereby incompetent to testify as to transactions and communications with a deceased opposite party in interest. See in connection with this decision *Cody* v. *First National Bank*, 103 Ga. 789.

Privilege of Physician

In re Hunt's Will, 100 N. W. 874, the Supreme Court of Wisconsin holds that under the statute of that state giving the privilege of secrecy to all information acquired by a physician from a patient in attending the patient professionally in a proceeding contesting the probate of an alleged will of decedent, it is further held that under the said statute the testimony and opinion of decedent's attending physician as to her mental capacity, based entirely on information derived from her statements or the physicians' observation while treating her professionally and for the purpose of such treatment, are properly excluded.

Testimony in Former Proceeding

In *Meekins* v. *Norfolk and S. R. Co.*, 48 S. E. 501, the Supreme Court of North Carolina decides that where on a former trial of an action for death a witness was permitted without objection to testify to intestate's hearsay and unsworn declaration as to the circumstances attending the injury, and prior to a retrial of the case the witness died, such fact did not authorize plaintiff to introduce the testimony of the witness given on the first trial as evidence of such declaration on the second trial over objection as to its competency. See also *Garrett* v. *Weinburg*, 54 S. C. 127.