PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

Defective Mortgage

The United States Circuit Court of Appeals, Second Circuit, holds *In re International Mahogany Co.* 147 Fed. 147 that where a bankrupt corporation prior to its bankruptcy, to secure an issue of bonds had executed a mortgage on lands in Cuba which had there been filed for registry but not recorded owing to a technical defect, the court will not enjoin the directors from authorizing the execution and delivery of a curative mortgage after bankruptcy, it appearing that under the law of Cuba the mortgage will be valid from the date of the entry in the recorder's books of the fact of its presentation, if the defect is corrected and the instrument is thereafter duly recorded; the trustee in bankruptcy having no greater right to object to the correction than the general creditors would have had if the bankruptcy had not intervened. Compare *In re New York Economical Printing Co.*, 110 Fed., 514.

Withholding Discharge

The United States District Court, S. D., New York, decides *In re Tiffany*, 147 Fed., 314, that where a state statute gives judgment creditors the right to proceed in equity to reach surplus income of the debtor in case of certain trusts, which cannot be reached by execution, but does not give such right to a trustee in bankruptcy, a court of bankruptcy may, in its discretion, when equity requires it, delay the granting of a discharge to a bankrupt and permit judgment creditors, whose judgments would be extinguished by the discharge, to institute and prosecute suits under such

BANKRUPTCY (Continued).

statute, to reach income derived by the bankrupt from a trust estate, for their own benefit. Compare *Lockwood* v. *Exchange Bank*, 190 U. S., 294.

Discharge: Refusal to Answer Questions

The United States Circuit Court of Appeals, Second Circuit, decides *In re Dresser*, 146 Fed., 383, that the fact that the refusal of a bankrupt to answer material questions in the course of the proceedings which were approved by the referee was based on the claim of his constitutional privilege not to incriminate himself does not deprive the court of the right to deny him a discharge because of such refusal, under the Bankruptcy Act of 1898 and its amendments.

BANKS AND BANKING.

Repayment of Dividends

In *Daugherty et al* v. *Poundstone*, 96 S. W., 728, the Kansas City Court of Appeals of Missouri decides that the Trustees of a dissolved banking corporation cannot maintain a suit against a stockholder to recover a dividend, which should have been applied to a judgment obtained against the trustees by a depositor for the amount of a deposit paid by the disbursing officers on unauthorized checks, until they have exhausted their remedy against the culpable officers and their securities.

Certificates of Deposit: Interest

It is decided by the Supreme Court of North Dakota in *First Nat. Bank of Portage* v. *State Bank of Northwood et al.*, 109 N. W., 61, that although a certificate of deposit payable on demand after a stated period contains a stipulation that it shall not bear interest after maturity, the holder thereof is entitled to legal interest thereon from the date when the bank fails or refuses to meet a demand of payment when payment is due.

BANKS AND BANKING (Continued).

The United States Circuit Court, E. D., Pennsylvania, decides in *Eastern Milling & Export Co.* v. *Eastern Milling & Export Co. of Pennsylvania*, 146 Fed., 761, that the right given to a bank by a contract with a depositing and borrowing corporation to declare any notes of the corporation held by the bank due in case the corporation became insolvent, and to apply thereon any sum then on deposit to the corporation's credit, cannot be exercised after a receiver has been appointed for the corporation, since title to the deposit passed to him at once on his appointment. Compare *Chipman & Holt* v. *Ninth National Bank*, 120 Pa., 86.

Application of Deposit: Receivership

The Supreme Court of Iowa decides in *Sherwood* v. *Home Saving Bank*, 109 N. W., 9, that where, in an action against a bank for loss of securities intrusted to it for safe-keeping, the bank pleaded that the securities had been misappropriated by its cashier, without fault on its part, and that it was beyond the bank's powers so to receive the securities, evidence that it was the local custom of banks to receive valuable papers for customers was admissible as bearing on the bank's powers as well as on the cashier's authority so to act for the bank. Compare *Wing* v. *Commercial & Savings Bank*, 61 N.W., 1009.

Local Custom: Evidence

CARRIERS.

The Court of Appeals of Kentucky decides in *Illinois Cent. R. Co.* v. *Cruse*, 96 S.W., 821, that it not being the duty of the employees of a carrier to assist a passenger in alighting, because of her sickness or other misfortune, unless such condition is known to them, it is error to charge that it was their duty to assist her if her feebleness was known to them, "or was apparent," this implying that it was their duty to observe her condition to see whether she needed assistance. Compare herewith *Yarnell* v. *Kansas City &c. R.R. Co.*, 113 Mo., 570, 18 L.R.A., 599.

Duty to Assist Passengers

CARRIERS (Continued).

Acceptance of Freight

In *Gray* v. *Wanash R. Co.*, 95 S.W., 983, the Kansas City Court of Appeals, decides that proof that cars containing plaintiff's property were placed on defendant railroad's connecting track, the usual place of delivery of freight destined for it as connecting carrier, under an arrangement with other roads that freight so placed would be accepted for further transportation, did not amount to an acceptance until defendant took actual charge of the property, accepted the bill of lading, or performed some other acts amounting in law to an acceptance.

CONSTITUTIONAL LAW.

Unjust Discrimination

The Supreme Court of South Carolina holds in *Laurens* v. *Anderson*, 55 S. E., 136, that a statute exempting Confederate veterans who enlisted from the state from any license for carrying on business within the state, is unconstitutional, as providing only for soldiers and sailors who enlisted from the state, and ignoring veterans of other wars, as well as soldiers of the confederacy who enlisted from other states, in that it deprives persons within the jurisdiction of the state of the equal protection of the laws.

Municipal Contracts

In *Omaha Water Co.* v. *City of Omaha et al.*, 147 Fed., 1, the United States Circuit Court of Appeals, Eighth Circuit, decides that the power of a city to regulate or fix the rates which a water, gas, or railway company may collect of private consumers partakes of the nature of a governmental power and also of the nature of a business power and that, therefore, the Legislature of a state unless prohibited by its Constitution may empower a city to suspend by contract, and a city may suspend in that way for a reasonable term of years, its power to fix or regulate the rates which a third party may collect of private consumers. An

CONSTITUTIONAL LAW (Continued).

agreement as to the schedule of rates for an unreasonable time could it seems be modified without violation of the constitutional inhibition against impairing the obligation of contracts.

Judgments: Full Faith and Credit

In *Northern Assurance Company of London* v. *Grand View Building Association*, 27 S.C.R., 27, the United States Supreme Court decides that a judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. Compare *Fireman's Fund Ins. Co.* v. *Norwood*, 16 C.C.A. 136.

CONTEMPT.

Commitment: Expirat on of Order

In *United States* v. *Collins*, 146 Fed., 553, the United States District Court, D. Oregon, decides that where accused was committed for contempt for his refusal to appear as a witness before a grand jury and there produce certain records, etc., in response to a subpœna duces tecum, the term during which he could be imprisoned under such order expired on the discharge of the grand jury. It is held, however, that where accused was in prison for his refusal to obey a subpœna requiring him to appear and produce records before a grand jury, and he remained recalcitrant until after the grand jury was discharged, he was not thereby purged of his contempt and was subject to sentence to imprisonment for a specified term. Compare *Ex parte Maulsby*, 13 Md., 625.

CONTRACTS.

In *Rathfon* v. *Locher*, 215 Pa., 571, the Pennsylvania Supreme Court decides that a promissory note given by a married woman as surety for her husband's debt, although legally invalid, imports a moral consideration, which will be sufficient to support a renewal note given by the married woman after her husband's death; and this is the case although the renewal note was of a date prior to the husband's death, if it appears that there was no fraud in the transaction. In this connection see *Brooks* v. *Merchants' National Bank*, 125 Pa., 394.

Notes: "Moral" Consideration

CRIMINAL LAW.

In *Wooley* v. *State*, 96 S. W., 27, the Court of Criminal Appeals of Texas decides that comments by jurors in a prosecution for seduction on the failure of the defendant to take the stand as a witness in his own behalf are ground for new trial. Compare *Thorpe* v. *State* 40 Tex., Cr. R., 346.

Misconduct of Jury

DEEDS.

The Supreme Court of Michigan in *Leonard* v. *Leonard et al.*, 108 N.W., 985, decides that where a deed in the form of a statutory warranty deed contained a clause that it was not to be operative until after the death of the grantors, and the depositary was instructed to care for the deed until after the grantors' death and then deliver the same to the grantee, it was a testamentary instrument, and subject to revocation during the life of either of the grantors. Applying this general rule it is decided that where such a deed was placed in the hands of a depositary for safe keeping, to be delivered on the grantors' death, the record of the deed by such depositary after the death of one of the grantors only did not change the character of the instrument, so as to make it effective to pass a present interest in the property. See in this connection *Pennington* v. *Pennington*, 75 Mich., 600.

Testamentary Instruments

DIVORCE.

Adultery: Condonation

In New Jersey it is provided by statute that if in a suit for divorce for adultery it appears that both parties have been guilty of adultery, no divorce should be decreed. In *Storms* v. *Storms*, 64 Atl., 700, it is held, however, by the Court of Chancery of New Jersey, that, where a husband had commited adultery and his offense had been condoned, he was not "guilty of adultery" within the law referred to, so as to preclude him from a divorce for the subsequent adultery of his wife. The propriety of the decision is obvious.

Imprisonment: Pardon

In *Halloway* v. *Halloway*, 55 S.E., 191, the Supreme Court of Georgia decides that the conviction of a married person of an offense involving moral turpitude, followed by a sentence of imprisonment in the penitentiary of two years or longer, gives to the other party to the marriage a right to a divorce; and this right is not affected by an executive pardon granted after the sentence has been imposed. Compare *State* v *Duket*, 63 N.W., 83, 31 L.R.A., 515.

EVIDENCE.

Opinion: Speed of Automobiles

In *Porter* v. *Buckley et al.*, 147 Fed., 140, the United States Circuit Court of Appeals, Third Circuit, decides that it is competent for an ordinary witness to express an opinion as to the speed an automobile was making at a given time, which is not, strictly speaking, a scientific inquiry, the weight of such opinion being for the jury.

EXCHANGES.

Property in Market Quotations

The United States Circuit Court of Appeals, Eighth Circuit, decides in *McDearmott Commission Co. et al.* v. *Board of Trade of City of Chicago*, 146 Fed., 961, that a board of trade, which has a right of property in market quotations collected in its exchange, does not surrender or dedicate them to

EXCHANGES (Continued).

the public by permitting subscribers, to whom they are communicated upon condition that they shall not be made public, to post them upon blackboards in their places of business, where the posting is done for the advantage of the subscribers, and not of the public, and does not make knowledge of the quotations general, or make them accessible to the public as of right, or render them of no further value. See note to *Sullivan* v. *Postal Tel. Cable Co.*, 61 C.C.A., 2.

GARNISHMENT.

In *Davis* v. *Cleveland C., C. & St. L. R. Co.*, 146 Fed., 403, the United States Circuit Court, N.D. Iowa, W.D., holds that sums due to a railroad company from other companies as its share of freight collected by them as the terminal or final carriers on continuous interstate shipments are not subject to attachment by garnishment of the debtors under the foreign attachment laws of another state in which the defendant cannot be personally sued. The case presents also an interesting discussion of the attachment of railroad cars. Compare *Central Trust Co.* v. *Railway Co.*, 68 Fed., 685.

Freight Money Due Nonresident Carrier

GRAND JURY.

In *Lyon* v. *Commonwealth*, 96 S.W., 857, the Court of Appeals of Kentucky decides that a statutory provision that no person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge, and no person whatever while they are deliberating or voting on a charge, does not prohibit the admission of an interpreter before the grand jury for the examination of witnesses, whose evidence could not be otherwise made intelligible to the grand jury.

Secrecy

INSURANCE.

The Supreme Court of Georgia holds in *Ogletree* v. *Hutchinson*, 55 S.E., 179, that a stipulation in a policy of life insurance that payment of the amount of the policy to any relative of the insured belonging to a designated class will discharge the company from liability is valid, but such a stipulation does not have the effect to make the person actually receiving the money thereunder the beneficiary of the policy. It is merely an appointment, by the parties to the contract, of a person who may collect the amount due under the policy for the benefit of the person ultimately entitled thereto. Compare *Metropolitan Life Ins. Co.* v. *Schaffer*, 50 N.J. Law, 72.

Stipulations: Beneficiary

The Supreme Court of Mississippi holds in *Grand Lodge &c.* v. *Smith et al.*, 42 So., 89, that where insured was coerced into a marriage, and never thereafter cohabited or visited his pretended wife, she was not his widow, within the terms of an insurance certificate, payable to insured's "widow or other heirs."

Beneficiaries

LANDLORD AND TENANT.

In *Grunnell* v. *Welch*, L.R., (1906), 2 K. B., 555, it appeared that a bailiff, employed to levy a distress for rent in arrear, illegally broke in the front door; he then seized the furniture, but before selling it left the house, and, being refused admittance on his return, made no attempt to regain possession. Subsequently the landlord put in a fresh distress in respect of the same rent by a different bailiff acting under a fresh distress warrant, who seized the furniture, which was replevied before sale by the owner. Under these facts the Court of Appeals decides that the proceeding under the first distress warrant was a trespass ab initio and void as a distress, and that the landlord, having had no opportunity of satisfying his claim for rent by means of that proceeding, could lawfully distrain under the second

Distress: Trespass ab Initio

LANDLORD AND TENANT (Continued).

warrant for the same rent. Compare with this decision *Attack* v. *Bramwell*, 3 B. & S., 520.

MAINTENANCE.

What Constitutes

The Kansas City Court of Appeals of Missouri decides in *Phelps* v. *Manicko et al.*, 96 S.W., 221 that where plaintiff, who was not an attorney, agreed to take up plaintiff's cause of action against defendant, employ lawyers, get up evidence at his own expense and conduct the litigation to a termination, the contract was void for maintenance. See also *Gilbert* v. *Holmes*, 64 Ill., 548.

MASTER AND SERVANT.

Fellow Servants

The Supreme Court of Washington decides in *Berg* v. *Seattle R. & S. Co.*, 87 Pac., 34, that the motorman and conductor of one car on a street railroad, the cars of which run on schedule time, are fellow servants of the motorman and conductor of another car on the line, so that one of the motormen injured through the negligence of the other motorman in not performing his duty of turning on the lights of a block-light system, and of the conductor of the other car in not performing his duty to see that his motorman performed such duty, cannot recover from the company. Compare *Grimm* v. *Olympia Light & Power Co.*, 84 Pac., 635.

MERGER.

Ground Rents: Mortgages

The Supreme Court of Pennsylvania decides in *Frank* v. *Guarantee Trust & Safe Deposit Co.*, 216 Pa., 40, that where an owner of a ground rent purchases the ground itself and subsequently executes a mortgage without indicating an intention in the mortgage to prevent a merger of the rent in the title to the land, and thereafter executes an assignment of the ground rents to another person, one who takes

MERGER (Continued).

title under foreclosure of the mortgage takes the fee in the land with the ground rents extinguished, and the assignee of the ground rents takes nothing by his assignment. Two judges dissent. Compare *Ames* v. *Miller*, 91 N.W., 250.

MUNICIPAL CORPORATIONS.

Negligence

In *Wheeler* v. *City of Ft. Dodge*, 108 N.W., 1057, the Supreme Court of Iowa decides that a wire stretched from the roof of a building downward and outward across the street, and ending at a pole to which it is fastened, though stretched pursuant to the consent of the municipality, and though through most of its course it is high above the heads of people using the walks and carriageways, is a nuisance because an obstruction of the street, the public right extending indefinitely upward, especially in view of the fact that it was stretched for the purpose of using it for a dangerous performance. It is further held that where a city permitted a wire to be so stretched it became chargeable with notice of the nuisance created by the wire the moment of its erection, and became in legal effect the creator of the nuisance substantially the same as if the structure was one of its own making. See *Callanan* v. *Gilman*, 14 N.E., 267.

PARTIES.

Pleading: Amendment

An interesting decision as to the limits within which a cause of action may be amended appears in *Hackett et al.* v. *Van Frank*, 96 S.W., 247, where the St. Louis Court of Appeals of Missouri, decides that where suit on a cause of action in favor of a corporation was commenced in the names of the owners of all the corporate stock, an amendment substituting the corporation as party plaintiff should have been allowed, and was not objectionable as changing the cause of action. See also *Lilly* v. *Tobbein*, 103 Mo., 447.

PRINCIPAL AND AGENT.

In *Berry et al.* v. *Chase*, 146 Fed., 625, the United States Circuit Court of Appeals, Sixth Circuit, decides that one who has dealt with an agent cannot upon discovery of an undisclosed principal hold both the agent and the principal liable on the contract, but must elect between the two, and, an election once made, he must abide by it. Compare *Fradley* v. *Hyland*, 37 Fed., 49.

Liability to Third Party

RECORDS.

An interesting case with respect to the publication of the decision of appellate courts appears in *Ex parte Brown*, 78 N.E., 553, where it is held that a publisher has not the unrestricted and unconditional right of access to the opinions and decisions of the Supreme Court to make copies for publication, the clerk having the right and duty to control by reasonable rules the inspection and handling of the records of his office. Compare *Banks & Bro.* v. *West Publishing Co.*, 27 Fed., 50.

Court Opinion

REMOVAL OF CAUSES.

In *McMillan et al.* v. *Noyes et al.*, 146 Fed., 926, the United States Circuit Court, D. New Hampshire, decides that in a suit to enjoin the destruction of a water privilege by diverting water from a stream, the complainant may properly join as defendants the persons who are undertaking such diversion and one with whom they have contracted to do the work, and ask for a common injunction against all, and in such case there is no separable controversy which entitles the former to remove the cause when the contractor could not. See notes to *Robbins* v. *Ellenbogen*, 18 C.C.A., 86 and to *Mecke* v. *Valleytown Mineral Co.*, 35 C.C.A., 155.

Separable Controversy

TAXATION

In *Buckner* v. *Sugg*, 96 S.W., 185, the Supreme Court of Arkansas decides that in taxation proceedings the description of the land must be such as fully apprises the owner without recourse to the superior knowledge peculiar to him as owner that the particular tract of his land is sought to be charged with a tax lien. It is held, however, that in determining the sufficiency of the description of land in tax proceedings, extrinsic evidence is admissible to connect the land with the description used in the assessment list and other tax proceedings. Compare *Keely* v. *Sanders*, 99 U. S., 441.

Description of Land

TRADE-MARKS AND TRADE NAMES.

Two interesting cases relating to the "Buster Brown" illustrations in newspapers appear in *New York Herald Co.* v. *Star Co.* 146 Fed., 204, and *Outcalt* v. *New York Herald*, 146 Fed., 205. In the first of these cases it is held that complainant is entitled to protection in the trade-mark "Buster Brown" as the title of a comic section of a newspaper, it being shown that it was the first to use the title, and that it was so used exclusively by complainant and its licensees for such length of time as to give it a proprietary right therein. Whereas in the second case the same Court (United States Circuit Court, S. D. New York) decides that an artist has no such common-law right in pictures drawn by him and sold to another, who published and copyrighted the same, as to render it unfair competition in trade for the latter to afterwards publish other pictures depicting different scenes merely because they contain characters in imitation of those in the earlier ones. Compare notes to *Scheuer* v. *Muller*, 20 C.C.A. 165, and to *Lare* v. *Harper & Bros.*, 30 C. C. A., 376.

Unfair Competition

TRADES UNIONS.

Insanity of Member

An interesting decision is made by the English Court of King's Bench, in *Burke* v. *Amalgamated Society of Dyers*, L.R., (1906), 2 K.B., 583, where it is held that the alteration by a trades union, during the insanity of a member, of a rule as to sick benefits, to the prejudice of that member, is binding upon him if made in accordance with the rule authorizing and regulating the alteration of the rules of the union. Compare *Smith* v. *Galloway*, L.R. (1898) 1 Q.B., 71.

TRESPASS.

Punishment

In *State* v. *Shevlin-Carpenter Co.*, 108 N.W., 935, the Supreme Court of Minnesota, construing a statute of the State declaring certain acts of trespass upon state lands a crime, imposing a penalty therefor and fixing the measure of damages to be recovered in a civil action, construes the statute as intended to impose upon a casual or involuntary trespasser criminal punishment and also double damages for his wrongful acts, and so construed holds the statute not a deprivation of property without due process of law. Compare *Clark* v. *Field*, 42 Mich., 342.

TRIAL.

Misconduct of Jurors

The Court of Appeals of Kentucky holds in *Louisville Ry. Co.* v. *Masterson*, 96 S. W., 534, that where, during an adjournment of court during the trial of a cause, counsel for plaintiff took a drink with two of the jurors at the invitation of one of them, but nothing was said with reference to the case in question, and defendant's counsel, though he had knowledge of such fact, proceeded with the trial until near its completion before he moved that the jury be discharged because of misconduct, the motion was properly denied. The case, as will be noted, arose in Kentucky.

TRUSTS.

Constructive Trusts

In re Berry et al., 147 Fed., 209, the United States Circuit Court of Appeals, Second Circuit, decides that where bankrupts deposited money which they had received from petitioners, under a mistake of fact to the credit of their general bank account, and though subsequent to such deposit and prior to the intervention of bankruptcy, withdrawals were made from the account, the balance was never below the amount which they received through mistake, it would be presumed that the amounts withdrawn were not those impressed with the trust, and that so long as the bankrupt's account equalled or exceeded the amount erroneously received that such amount constituted the trust fund. Compare *Standard Oil Co.* v. *Hawkins*, 74 Fed., 395. 33 L.R.A., 739.