PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ANIMALS.

Liability for Injuries

The Supreme Court of New Jersey holds in *Emmons et al.* v. *Stevane et al.*, 64 Atl. 1014, that the owner of a dog is not liable for injuries inflicted by it upon a person who had cared for it for nearly four months, where the owner's knowledge of the dog's viciousness was limited to its propensity to attack strangers.

BANKRUPTCY.

Preferences: Stock Broker

The United States Circuit Court of Appeals, Second Circuit, decides in *Richardson* v. *Shaw et al.*, 147 Fed. 659, that where a broker buys stock for a customer on a margin, the title to such stock is in the customer and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase. Hence the customer is not a creditor of the broker with respect to the transaction within the meaning of the Bankruptcy Act of 1898 and its supplements, and the transfer of the stock to the customer on settlement of his account cannot be considered the giving of a preference by the broker upon his bankruptcy within four months thereafter. Compare also the very recent case *In re. Bolling*, 147 Fed. 786.

Election of Trustee: Vote

A very gratifying decision appears *In re Lloyd et al.*, 148 Federal 92, where the United States District Court, E. D. Wisconsin, decides that the giving out of a list of creditors by a bankrupt to attorneys before the filing of his schedule is a practice to be severely condemned, and no attorney should be permitted

BANKRUPTCY (Continued).

to vote any claim in the election of a trustee which has come to him through the instrumentality of the bankrupt; but the fact that he so received claims is not sufficient ground for excluding his vote on claims which came to him unsolicited. Compare *In re McGill*, 106 Fed. 57.

Contempt: Measure of Proof

The United States District Court, D. Maine, decides in *Moody* v. *Cole*, 138 Fed. 295, that a proceeding in bankruptcy to enforce obedience to an order requiring a bankrupt to surrender property or money to his trustee is criminal in character, and a finding that the bankrupt is in contempt should be reached only on evidence which induces belief beyond a reasonable doubt; but where it meets such requirement, the court should exercise the power of commitment expressly given by the statute and not compel the trustee to resort to a plenary suit.

BANKS AND BANKING.

Checks: Acceptances

The Superior Court of Pennsylvania decides in *Clark & Co.* v. *Savings Bank*, 31 Pa. Super. Ct. 647, that the act of a bank in paying a check on a forged indorsement and its subsequent act of charging the check against the account of the drawer, is not an acceptance in writing signed by the acceptor within the meaning of the Act of May 10, 1881, P. L. 17, which declares "that no person within this state shall be charged as an acceptor on a bill of exchange, draft, or order drawn for the payment of money, exceeding twenty dollars, unless his acceptance shall be in writing, signed by himself or his lawful agent." Compare *Seventh National Bank* v. *Cook*, 73 Pa. 483.

Inadvertent Payment of Check

In *Iowa State Bank* v. *Cereal Refund & Brokerage Co.*, 109 N. W., 719, it appeared that defendant, the secretary and manager of a corporation, drew a check in the name of the corporation, payable to himself, on plaintiff bank, with knowledge that the corporation had no funds on deposit. He

BANKS AND BANKING (Continued).

deposited the check with another bank, which presented it for payment. Payment was twice refused, and defendant was notified thereof. The check was presented a third time, when plaintiff inadvertently paid it and defendant received the money thereon. Under these facts the Supreme Court of Iowa decides that the plaintiff was entitled to recover the money from defendant as having been paid by mistake. See in this connection *Bank* v. *Bank*, 74 Fed. 276.

Separation of Funds

The Supreme Court of Pennsylvania decides in *Commonwealth ex rel.* v. *State Bank of Pittsburg*, 216 Pa. 124, that where a creditor draws upon a debtor and sends the draft for collection to a bank in which the debtor is a depositor, and the bank with the depositor's consent issues a draft to the creditor on a bank in another city, and charges the amount of the draft against the depositor's account and it appears that before such change was made the money was remitted to pay the draft, the creditor cannot claim, after the failure of the first bank, that the money sent to the second bank, was so separated from the general funds of the first bank that it should be applied to the payment of his draft. Compare *State* v. *Bank of Commerce*, 61 Neb. 181.

BREACH OF MARRIAGE CONTRACT.

Defences: Ill Health

A somewhat remarkable decision of the Supreme Court of Washington appears in *Grover* v. *Zook*, 87 Pac. 638, where it is held that on grounds of public policy a man is not liable for breach of a marriage promise where the woman was suffering from pulmonary tuberculosis, although he knew that she had the disease at the time of the engagement. The agitation in certain quarters for legislation in regard to qualifications for marriage renders this decision of special interest. Compare *Shackleford* v. *Hamilton*, 39 Ky. 80, 15 L. R. A. 531.

CARRIERS.

Limiting Liability

The Supreme Court of Iowa holds in *Pennsylvania Company* v. *Shearer*, 79 N. E. 431, that a common carrier and a shipper may, in the absence of fraud, imposition, or deception, enter into a valid and enforceable special agreement requiring the shipper, in case of loss or damage, to make verified claim for damages in writing, within a specified time, and, in default thereof, that the carrier shall not be liable, provided that the period of time within which such claim shall be made is, under all the circumstances of each case, a reasonable one. Compare *Pittsburgh etc. Rd. Co.* v. *Sheppard*, 56 Ohio St. 68.

Liability or Delay

In *Green* v. *Missouri, etc. Ry. Co.*, 97 S. W. 646, the Kansas City Court of Appeals of Missouri decides that the fact that a passenger is riding on a freight train does not relieve the carrier from liability for injuries to him owing to negligent delay in transportation. Compare *Whitehead* v. *Railway Co.*, 99 Mo. 263, 6 L. R. A. 409.

CONSTITUTIONAL LAW.

Equal Protection of the Law

It is decided by the Supreme Court of Mississippi in *Bradford Construction Company* v. *Heflin*, 42 So. 174, that a partial abrogation of the fellow-servant law as to "railroad corporations" which excludes railroads operated as an adjunct to the main business of the corporation, rather than as common carriers, is not obnoxious to the Fourteenth Amendment of the Constitution of the United States. Compare *Beeson* v. *Busenbark*, 44 Kan. 673, 10 L. R. A. 839.

CONTEMPT.

Act in Vicinity of Court

The United States District Court, D. Montana, decides in *United States* v. *Carroll*, 147 Fed. 947, that a direct attempt by a person to bribe or persuade a witness to testify contrary to the truth in a cause pending and then on trial, or to influence the jury

CONTEMPT (Continued).

or any member thereof to find a verdict in favor of one party or the other, made on the street in the immediate vicinity of the court, constitutes a direct contempt, and the mere denial of the charge by the accused under oath is not sufficient to exonerate him, but the matter should be heard and determined upon all the testimony produced.

CONTRACTS.

The Supreme Court of Nebraska in *Grochowski* v. *Grochowski et al.*, 109 N. W. 742, that a promise made in consideration of an agreement to refrain from resisting the probate of a will is not void as against public policy where no persons or interests other than the persons and interests of the contracting parties are prejudicially affected thereby.

Public Policy

An interesting decision presenting a very novel rule appears in *Klug* v. *Sheriffs*, 109 N. W. 656, where it is decided by the Supreme Court of Wisconsin that where defendant left two photographs of his deceased wife with an artist to aid him in painting a portrait of her, and the artist after completing the portrait painted a second one without the authority or consent of defendant this constituted a breach of implied contract to use the photographs only for the purpose for which they were furnished, so that defendant, though receiving the second portrait, and refusing to return it to the artist, was not liable to the artist for its value. One judge dissents. Compare *Pavesich* v. *New England L. Ins. Co.*, 50 S. E. 69, and *Schulman* v. *Whitaker*, 42 So. 227, cited *infra*.

Use of Portrait

CORPORATIONS.

In *Dunbar et al.* v. *American Telephone & Telegraph Co. et al.* 79 N. E. 423, it appeared that minority stockholders in a suit to restrain another corporation from purchasing the majority of the stock in their company alleged that the purpose of the trade was to stifle competition; that such purchasing company intended to acquire stock,

Purchase of Stock of Competing Company

CORPORATIONS (Continued).

and through such ownership to select directors, who should act in the interest of the purchasing company and free it from competition, and that its ultimate purpose was to destroy finally the complainants' company. Under these facts the Supreme Court of Illinois holds that such conduct of the purchasing company was fraudulent as against such minority stockholders, entitling them to maintain their suit for release. The case is a very excellent review of the authorities. Compare *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197.

Insolvency Proceedings

The United States Circuit Court, S. D. New York, decides in *Bowker* v. *Haight & Freese Co.*, 147 Fed. 923, that a federal court which is in charge of the assets of an insolvent corporation by its receivers will not interfere with an action in a state court in which a judgment has been rendered against the corporation by directing it not to appeal therefrom, where such appeal will not involve expense to the estate.

CRIMINAL LAW.

Trial: Exclusion of Public

The Supreme Court of Ohio decides in *State* v. *Hensley*, 79 N. E. 462, that an order made by the Court of Common Pleas during the trial of an indictment for a felony, to the effect that in view of the testimony expected to be given by witnesses next to be called the court would continue the trial during the taking of the testimony of witnesses likely to give immoral or obscene testimony in the small courtroom, that the sheriff should admit no one to said room except the jury, defendant's counsel, and members of the bar and newspaper men and one other person, a witness for defendant, exceeds the power of the court in the premises, and its enforcement is a denial to defendant of his constitutional right to a public trial. Compare *Grimmett* v. *State* 22 Tex. App. 36.

CRIMINAL LAW (Continued).

Photograph of Accused

A very interesting decision with respect to the right of the State to take photographs of persons accused of crime appears in *Schulman* v. *Whitaker*, 42 So. 227, where it is held by the Supreme Court of Louisiana that unless it be evident that a picture should be taken to identify the person or to detect crime, it cannot be taken; the purpose not being detection or identification. If a person is under arrest or within the court's jurisdiction, generally there arises no necessity for the exercise of the photographer's art before his trial and conviction. Compare also the case immediately following of *Itzkovitch* v. *Whitaker*, 42 So. 228. The importance of the decisions is obvious.

Accused as Witness

In *State* v. *Bursaw*, 87 Pac. 183, the Supreme Court of Kansas holds that when an accused becomes a witness in his own behalf it is not error for the court to call attention to his testimony and to advise the jury that it may consider his interest in the result of the trial as affecting his credibility.

DAMAGES.

Mental Anguish

The Supreme Court of Minnesota decides in *Lindh* v. *Great Northern Ry. Co.*, 109 N. W. 823, that an action ex delicto to recover damages for injured feelings lies at the suit of the husband against a common carrier for soiling and ruining the casket containing the body of his dead wife, and for mutilating and disfiguring the corpse by negligently and wilfully exposing it to rain.

Sales

In *Rhind* v. *Freedley et al.*, 64 Atl. 963, the Supreme Court of New Jersey holds that where a vendor fails to deliver goods in accordance with his contract, and they cannot be procured in the market, and the vendee is obliged to procure other goods, the measure of damages is the difference between the contract price and the price of the nearest substitute procurable.

DAMAGES (Continued).

See in this connection *Hinde* v. *Liddell*, L. R. 10 Q. B. 265.

In *Pittsburg &c. R. Co.* v. *Wakefield Hardware Co.*, 55 S. E. 422, the Supreme Court of North Carolina decides that where cars are wrongfully attached, evidence of profits which the owner might have made during the period of their detention from hiring them out, as was its custom, may not be shown, as this would be speculative damages, but the true measure of damages is the interest on their value, increased or diminished, as the case may be, by the difference between their deterioration if in daily use, and their deterioration while wrongfully tied up, provided the owner was not able to avoid all injury from the attachment by simply giving bond. Compare *Sharpe* v. *Railroad*, 130 N. C. 614.

Wrongful Attachment

DIVORCE.

An important decision occurs in *Mutter* v. *Mutter*, 97 S. W. 393, where it appeared that a husband sought a divorce in the ground of the wife's malformation, preventing sexual intercourse. The evidence showed that they lived together but three days; that the wife was not a normally formed woman; that it was impossible for her to have sexual intercourse; that she knew the facts before her marriage, but concealed them from the husband until after marriage. Under these facts the Court of Appeals of Kentucky decides that the husband was entitled to a divorce though surgery might remove the malformation.

Physical Incapacity

FEDERAL COURTS.

In *Gaddie* v. *Mann et al.*, 147 Fed. 960, the United States Circuit Court, S. D. Georgia, W. D., decides that where one partner has committed acts which render the continuation of the partnership impossible, all of the other partners are not required to join as complainants in a suit for dissolution; but such

Jurisdiction

FEDERAL COURTS (Continued).

suit may be maintained by one joining the others as defendants, and the fact that the interest of others may be similar to his own, and that they are citizens of the same state as the offending partner, will not defeat the jurisdiction of a federal court, where the complainant is a citizen of another State. See in this connection notes to *Shipp* v. *Williams*, 10 C. C. A. 249, and to *Mason* v. *Dullagham*, 27 C. C. A. 298.

IMPROVEMENTS.

Building on Land of Another

In *Collins* v. *Taylor*, 64 Atl. 946, the Supreme Judicial Court of Maine decides that when one builds a house upon the land of another, with the consent of the landowner, or the landowner subsequently assents to its remaining there as the property of the builder, in either event the house is the personal property of the builder. Compare *Fuller* v. *Tabor*, 39 Me. 519.

INJUNCTION.

Protection Pending Litigation

The Supreme Court of North Carolina decides in *Singer Mfg. Co.* v. *Summers et al.*, 65 S. E. 522, that where an agent deposited the principal's money in a bank, and with intent to embezzle it obtained a cashier's check in his own name and indorsed it to a third person, the agent being insolvent, and the third person a nonresident, in an action by the principal against the bank, and the other parties to the check to recover the deposit, it was proper to restrain payment of the check until the rights of the parties could be determined. Herewith compare *Edwards* v. *Culberson*, 111 N. C. 342, 18 L. R. A. 204.

INSURANCE.

Subrogation: In Case of Negligence

In *Haldeman* v. *Dublin Mutual Insurance and Protective Co.*, 16 Dis. R. 61, the Pennsylvania Common Pleas Court of Bucks County decides that where property insured is destroyed by the negligence of a third person, so that the insured has a remedy against him, the insurer, by the pay-

INSURANCE (Continued).

ment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid on the policy. A settlement between the assured and the wrongdoer, releasing the latter from all liability, destroys the insurer's right to subrogation and thereby discharges him from liability. See in this connection *Packham* v. *German Fire Insuranre Co.*, 91 Md. 515, 50 L. R. A.

JUDGMENTS.

Res Judicata

The United States Circuit Court of Appeals, First Circuit, decides in *Coram et al.* v. *Ingersoll*, 148 Fed. 169, that where an ancillary administrator brings an action on a chose in action properly deemed assets of the estate in his jurisdiction, and a judgment is rendered against him on the merits, such judgment is conclusive in favor of the defendants everywhere, and a second suit cannot be maintained against them on the same cause of action by an ancillary administrator of the estate in another jurisdiction. The case is a very thorough review of the question involved. Compare the decision below in *Ingersoll* v. *Coram*, 136 Fed. 639, where the contrary view was taken.

LIENS.

Equitable Lien

The Appellate Court of Indiana, Division No. 2, decides in *Reardon* v. *Higgins*, 79 N. E. 208, that the advancement of money by defendant to plaintiff with an agreement that plaintiff's horse would be security therefor, and should be delivered to defendant to hold such security, and to sell if the money was not paid in a reasonable time, gives an equitable lien. The court further holds that an equitable lien based on an agreement to give one possession of a horse as security for money advanced is a good counterclaim in replevin for the horse, though replevin sounds in tort. Compare *Lapham* v. *Osborne*, 20 Nev. 168.

MARRIAGE.

First Cousins

Since the passage by the Pennsylvania Legislature of the act of June 24, 1901, Pamphlet Laws, 597, prohibiting the marriage of first cousins, it has been a mooted question as to whether if such a marriage is celebrated outside the state between citizens of Pennsylvania the marriage will be recognized within the state. In *Commonwealth* v. *Isaacmann*, 16 Dis. Rep. 18, the Court of Quarter Sessions of Philadelphia County dealing with this question holds that such a marriage will be recognized where the parties in celebrating the marriage outside the state do not appear to have intended to evade the provisions of the Act. What the result would be in case there has been an effort to evade the statutory enactment is not decided, but it is believed that in view of the peculiar language of the Act the same result would be reached.

MASTER AND SERVANT.

Railroad Employees

The Supreme Court of Kansas decides in *Atchison &c. Ry. Co.* v. *Fronk*, 87 Pa. 698, that a student brakeman, who, in consideration of being permitted to ride on a railway company's freight train to observe and learn the duties of a freight brakeman, agrees to perform service on its engines, trains, and cars, while learning such duties, is an employe of the company. Compare *Huntzicker* v. *Illinois C. R.R. Co.*, 129 Fed. 548.

Fellow Servants

A very interesting decision in relation to the fellow-servant rule occurs in *Ricker* v. *Central R. Co. of New Jersey*, 64 Atl. 1068, where it is held that a train despatcher of a railroad company, whose duty it is to issue telegraphic orders for the movement of trains upon a single-tracked road, in the name of the superintendent, and to see that they are transmitted, is not a fellow servant of a fireman upon one of the locomotives of the company. Seven judges dissent. Compare *Belleville Stone Co.* v. *Mooney*, 61 N. J. Law 253, 39 L. R. A. 834.

MONOPOLIES.

Restraint of Trade

In *Mines* v. *Scribner et al.*, 147 Fed. 927, it is decided by the United States Circuit Court, S. D. New York, that an agreement by the members of a publishers' association controlling ninety per cent. of the book business of the country, under which all agreed not to sell to anyone who would cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices, etc., was an agreement relating to interstate trade or commerce within the Anti-trust Act.

MUNICIPAL CORPORATIONS.

Sewerage: Liability

The Supreme Court of Mississippi decides in *Mayor etc. of Vicksburg* v. *Richardson*, 42 So. 234, that a city which after notice does not prevent connection of private sewerage with its gutters along the sides of streets, whereby the offal is carried to a vacant lot, creating a nuisance rendering an adjoining house uninhabitable, is liable for the damage. Compare *Demby* v. *City of Kingston*, 133 N. Y., 538.

Public Improvements

The Supreme Court of New Jersey holds in *Bye et al.* v. *Atlantic City*, 64 Atl. 1056, that a municipal council may determine, in the exercise of the discretion vested in it, to pave a public highway with a special or patented material, and to ask for bids upon such material alone, when the price at which any one may obtain the patented material is definitely fixed and known to be obtainable by all at such price before the bids are asked for. See also *Newark* v. *Bonnell*, 57 N. J. Law 424.

NEGLIGENCE.

Contributory Negligence

An important principle is laid down by the Common Pleas Court No. 2 of Philadelphia County, Pennsylvania, in *Weir v. Haverford Electric Light Company*, 16 Pa. C. C. R. 1, where it is held that when a defendant by wanton and reckless negligence has

NEGLIGENCE (Continued).

caused injury to a plaintiff the fact that the plaintiff has been guilty of mere negligence will not justify the court in entering a non-suit. Compare *Mulherrin* v. *Railroad Co.*, 81 Pa. 366.

RAILROADS.

The Court of Errors and Appeals of New Jersey decides in *Johanson et al.* v. *Atlantic City R. Co.*, 64 Atl. 1061, that where a railway company builds its road upon the land of another without other authority than the parol license of the owner, the latter may ordinarily revoke such parol license at any time, and bring suit to recover possession of the premises. Herewith compare *Hetfield* v. *C. R. R.*, 29 N. J. 571.

Right of Way: License

REMOVAL OF CAUSES.

In *Knuth et al.* v. *Butte Electric Ry. Co. et al.*, 148 Fed. 73, the United States Circuit Court, D. Montana, decides that an action to recover damages for the negligent injury of a person while a messenger on a street car is one ex delicto, and not on the contract of carriage, and the plaintiff may join as defendants the street railroad and an employe, where the joint negligence is alleged to have been the cause of the injury; and in such case the cause of action is not separable for the purpose of removal. See in this connection notes to *Robbins* v. *Ellenbogen* 18 C.C.A. 86.

Separable Controversy

SPECIFIC PERFORMANCE.

In *Kittredge et al.* v. *Kittredge*, 65 Atl. 89, the Supreme Court of Vermont decides that where, by agreement between a husband and wife, the wife was to convey a portion of her farm to the husband in consideration of his joining with her in deeding the remainder to her children, the conveyance having been made to him, she was entitled to maintain a bill to enforce specific performance on his part notwithstanding the marital relation. Compare *Pinny* v. *Fellows*, 15 Vt. 525.

Wife vs. Husband