PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

Proof of Claim: Time

An important decision appears in *Powell* v. *Leavitt*, 150 Fed. 89, where the United States Circuit Court of Appeals of the First Circuit decides that where a claim secured by a mortgage on a bankrupt's stock in trade was attacked by the trustee as a preference, whereupon the creditor sued in a state court to establish the validity of the mortgage, in which action the mortgage was held to be invalid as a preference, the creditor's claim was thereby "liquidated by litigation," and provable as an unsecured claim within 60 days after the rendition of the judgment in the state court, as provided by the Bankruptcy Act of 1898. It is further held that the section with respect to the time within which claims must be proved should be construed to mean that if a final judgment be entered within thirty days before the expiration of a year after the adjudication or at any time thereafter the claim may be proved within sixty days after the rendition of the judgment. Compare *In re Kemper*, 142 Fed. 210.

Priority of Debts: Law Governing

In *Smith* v. *Mottley*, 150 Fed. 266, the United States Circuit Court of Appeals of the Sixth Circuit decides that whether a claimant is entitled to priority of payment from a fund which passes into the hands of a bankrupt's trustee on the ground that the claimant's money was held in trust by the bankrupt and passed into such fund is not a question to be determined by the priorities allowed under the insolvency laws of the state, which are superseded by the bankruptcy act.

BANKRUPTCY (Continued).

In *Henderson* v. *Henrie*, 56 S. E. 369, the Supreme Court of Appeals of West Virginia holds that where, under a decree in a bankruptcy proceeding in the United States court, land is sold and a deed is ordered to be made to the purchaser, a state court is without jurisdiction to enjoin the execution of such deed upon a bill filed therein by one claiming to be jointly interested with the purchaser in the purchase of said property. Nor can the purchaser be enjoined from acquiring the title to such land. Compare *Watson* v. *Jones* 80 U. S. 679.

Injunction in State Court

CEMETERIES.

In *Anderson* v. *Acheson et al.*, 110 N. W. 335, the Supreme Court of Iowa decides that where one is permitted to bury his dead in a public cemetery, even though this be by license or privilege, he acquires such a possession of the spot of ground in which the bodies are buried as will entitle him to maintain an action against persons who, without right, disturb it, and such right is not lost by the death of the licensee, but is transmitted to his heirs. Compare *Stewart* v. *Garrett*, 46 S. E. 427, 64 L. R. A. 99.

License to Bury

CONSTITUTIONAL LAW.

The Supreme Court of Georgia holds in *Kennedy* v. *Meara et al.* 56 S. E. 243, that when the state, as *parens patriæ*, in a proper case, through its constituted officers or agencies, takes under its control an infant, the law authorizing such child to be bound to service under proper instructions is not a violation of those provisions of the Constitution of this state and of the United States which prohibits slavery and involuntary servitude, except as a punishment for crime after conviction thereof. Compare *School* v. *Supervisors*, 40 Wis. 328,

Binding Children to Service

CORPORATIONS.

Application of Company's Funds

A very important decision of the Court of Appeals is found in *Peel* v. *London & North Western Ry. Co.*, L. R. (1907) 1 Ch., 5, where it appeared that a controversy had been going on for some years between the directors of a railway company and a body of shareholders with reference to questions of policy affecting the management of the company: previously to the half-yearly general meetings called for February and August, 1905, the directors sent to each shareholder a circular setting out the facts and views of the directors and asking for the support of the shareholders at the meeting; with this was enclosed a stamped proxy paper containing the names of three of the directors as proxies, with a stamped cover for return. The expenses of printing, posting, and stamping these documents were paid out of the funds of the company. Officers and servants of the company had also been directed to call upon some of the shareholders with a view to obtaining their votes for the directors. Under these facts the court decides in an action by the shareholders to restrain the company and the directors from such use of the funds of the company that it was the duty of the directors to inform the shareholders of the facts, of their policy, and the reasons why they considered that this policy should be maintained and supported by the shareholders, and that they were justified in trying to influence and secure votes for this purpose, and, accordingly that expenses which had been bona fide incurred in the interest of the company were properly payable out of the funds of the company. See in this connection *Studdert* v. *Grosvenor*, 33 Ch. D. 528.

CRIMINAL LAW.

Aiding and Abetting Act

In *Du Cros* v. *Lambourne*, L. R. (1907), 1 K. B., 40 it appeared that the appellant appealed to the quarter sessions against a conviction for unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the appeal there was a

CRIMINAL LAW (Continued).

conflict of evidence as to whether the car was being driven by the appellant or by a lady seated by his side in the car. The quarter sessions, without deciding whether the appellant was himself driving the car, dismissed the appeal, finding as facts that if the lady was driving she was doing so with the consent and approval of the appellant, who must have known that the speed was dangerous, and who, being in control of the car, could, and ought to, have prevented it. On these facts the King's Bench Division decides that there was evidence on which the appellant could be convicted of aiding and abetting the commission of the offence. Compare *Reg.* v. *Coney*, 8 Q. B. D. 534.

Trial: Exclusion of Public

The Supreme Court of Minnesota holds in *State* v. *Callahan*, 110 N. W. 342, that when the spectators at a criminal trial of lascivious or immoral character are so obtrusive as to embarrass a witness during the examination, and it becomes apparent to the trial court that the due administration of justice is being impeded, the court may temporarily clear the court room of all persons except court officers, counsel, and witnesses, and the defendant, without infringing upon defendant's right to a public trial. Although the record does not expressly show a withdrawal or limitation of the order, it will be inferred that it was made for a temporary purpose only, and that it was not enforced after the reason calling it into existence ceased to exist. Compare *Seaboard Air Line Railway* v. *Scarborough*, 42 S. W. 706, referred to *infra*.

DUE PROCESS OF LAW.

Street Railway Property

It is decided by the Supreme Court of the United States in *Cleveland Electric Railway Company* v. *City of Cleveland &c.*, 27 S. C. R. 202, that the right to take possession of the property of a street railway company remaining in the streets at the

DUE PROCESS OF LAW (Continued).

expiration of its franchise cannot, consistently with due process of the law, be conferred by municipal ordinance upon another street railway company.

EQUITABLE DEFENSES.

In *State ex rel. American Freehold Land Mortgage Co. of London, Limited*, v. *Tanner et al., Councilmen, et al.* 88 Pac. 321, the Supreme Court of Washington decides that the fact that a city's right to affirmatively attack judgments obtained against it by collusion was barred by the statute of limitations did not prevent it from impeaching the judgments in defense of an action founded upon them, since equitable defenses are barred by neither the statute of limitations nor laches. See in this connection *Hart* v. *Church*, 126 Cal. 479.

City's Right to Impeach Judgments

INJUNCTION.

The Supreme Court of Texas decides in *Lytle et al.* v. *Galveston, H. & S. A. Ry. Co. et al.*, 99 S. W. 396, that a carrier which has determined to sell tickets at a reduced rate for a particular occasion, good for a return trip, but not transferable, and which has so advised the public, and which has placed such tickets on sale, is entitled to an injunction restraining any dealing in the return tickets, but it is not entitled to an injunction enjoining a dealing in such tickets as may thereafter be issued as occasion may arise. With this case compare *Schuback* v. *McDonald*, 179 Mo. 163, 65 L. R. A. 136.

Sale of Excursion Tickets

INSURANCE.

The Supreme Court of Iowa decides in *Arispe Mercantile Co.* v. *Capital Ins. Co.*, 110 N. W. 593, that where the recording agent of an insurance company, who, as such agent, issued a fire policy, was one of the incorporators of insured, and at the date of

Powers of Agent

INSURANCE (Continued),

the policy was a member of its governing body, and did not advise the insurer of these facts or obtain its consent to insure the property, and it had no notice of the facts, the policy is void, under the principle that one cannot as agent transact business for his own benefit, though the agent acts in good faith, and the contract is fair and equitable. Compare *Central Ins. Co.* v. *National Ins. Co.* 14 N. Y. 85.

Clause Imported From Original Policy

In *Home Insurance Company of New York* v. *Victoria-Montreal Fire Insurance Company* (1907) A. C. 59, it appeared that in a contract of re-insurance which was engrafted on an ordinary printed form of fire insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire. Under these facts the Privy Council decides that having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to re-insurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy where the assured can sue immediately on incurring loss; it cannot apply where the insured is unable to sue until the direct loss is ascertained between parties over whom he has no control. Compare *Provincial Insurance Company* v. *Aetna Insurance Company*, 16 U. C. R. 135.

Insurable Interest

In *Lenagh et al.* v *Commercial Union Assur. Co.*, 110 N. W. 740, the Supreme Court of Nebraska holds that husband and wife have each and both a pecuniary and insurable interest in all articles comprised in the furniture of their household, or which are necessary or convenient and actually in use in the maintenance of their domestic relation, regardless of whose money paid for them, or by what means or from what sources they were obtained.

LANDLORD AND TENANT.

In *Mitchell* v. *Brady et al.*, 99 S. W. 266, the Court of Appeals of Kentucky decides that where an iron water pipe constructed on the side of a building which abutted upon the sidewalk falls by reason of the fastenings of the pipe getting out of repair and pulling out of the wall, the owner of the building is liable for the death of a person struck by the pipe while rightfully on the walk, though the building is leased to another and the tenant had obligated himself to keep the property in repair. It is held, however, that the tenant also is liable. Compare *Murray* v. *McShane*, 36 Am. Rep. 367.

Condition of Premises

MORTGAGES.

The United States District Court, S. D. New York, decides *In re Banner*, 149 Fed. 936, that a provision in a mortgage, following the usual one giving the mortgagee a right to a receiver of rents and profits in case of default, that "the said rents and profits are hereby, in the event of any default or defaults in the payment of said principal or interest, assigned to the holder of this mortgage," operates merely as a pledge of the rents, to which the pledgee does not become entitled until he asserts his right in some legal form, as by an application for a receiver and a demand by such receiver. See *Frank* v. *New York etc. Railroad Co.*, 122 N. Y. 221.

Right of Mortgagee to Rents

NUISANCE.

The Supreme Court of Iowa decides in *Spiker et al.* v. *Eikenberry*, 110 N. W. 457, that where persons played ball on an uninclosed lot without the authority or consent of defendant, the owner thereof, an injunction would not lie restraining him from permitting the use of his lot for the playing of ball, as the result of which the ball would probably be batted upon the premises of neighboring residents. Compare *Seastream* v. *New Jersey Exhibition Company*, 58 Atl. 532.

Injunction: Grounds

NUISANCE (Continued).

In *Brown et al.* v. *Town of Carrollton et al.*, 99 S. W. 37, the Kansas City Court of Appeals decides that where wooden awnings over a city sidewalk did not constitute a public nuisance per se, whether they were so constructed and maintained as to interfere with the public use of the street, or whether they had become a menace to the public safety, was a question of law for the courts; the city having no authority to declare the same a nuisance and require the summary abatement thereof.

Question of Law

PARENT AND CHILD.

The Supreme Court of Mississippi decides in *Fortinberry* v. *Holmes*, 42 Southern 799, that where a mother left her child with a person who was to support, educate, care for, and treat it as his own child, such person stood in loco parentis, and hence could not be sued by the child for a whipping inflicted on it, even though the mother stated, when she gave the child, that it was not to be whipped.

Persons in Loco Parentis

PARTITION.

In *Kinkead* v. *Maxwell et al.*, 88 Pacific, 523, the Supreme Court of Kansas holding that, as a general rule, every adult owner of an undivided fee-simple estate in real property is entitled to partition, as a matter of right, decides further that in such a case, the fact that the co-tenant holds an estate for life only in the property will not defeat the action. Compare *Johnson* v. *Brown*, 86 Pac. 503.

Life Estate

POLICE POWER.

The Supreme Court of Colorado holds in *City and County of Denver* v. *Frueauff*, 88 Pac., 389, that a city ordinance forbidding any gift enterprise, defined to include the giving of any trading stamp or other device which shall entitle the purchaser of property to receive from any person or corporation

Regulations of Occupations

POLICE POWER (Continued).

other than the vendor any property other than that actually sold, is not justifiable as an exercise of the police power. Compare *State* v. *Dalton*, 22 R. I. 77, 48 L. R. A., 775.

PRINCIPAL AND SURETY

Release of Surety

The Supreme Court of Kansas holds in *Diehl* v. *Davis et al.*, 88 Pac. 532, that if, as surety for her husband, a wife sign his note and secure it by a mortgage of her real estate, an agreement extending the time for the payment of the note, which discharges her personal liability, will discharge the mortgage security also. Compare *Wheatley* v. *Bastow* 7 D. M. & G. 261.

Discharge of Surety

The Court of Appeals of Kentucky decides in *Planters' State Bank* v. *Schlamp et al.*, 99 S. W. 216 that where a bank accepted a note signed by a principal and two sureties, without knowing to whom the proceeds were to be paid, but knowing that they were wanted for a particular purpose, and that purpose was not the payment of a debt due the bank, and it retained the proceeds of the note assuring the principal maker that it would be paid out on his check, but it afterwards appropriated a part of the proceeds to a payment of the debt due it, the sureties were released to the extent of such appropriation.

RAILROADS.

Omnibus Service: Ultra vires

In *Attorney-General* v. *Mersey Railway Co.*, L. R. (1907), Ch. D. 81, it appeared that a railway company owned a railway which ran from Liverpool to Birkenhead. For the convenience of passengers and intending passengers by the railway the company provided a service of motor omnibuses running between their Central Station at Birkenhead and the residential part of the town. They ran these omnibuses exclusively to and from the station in con-

RAILROADS (Continued).

nection with their train service, but they picked up passengers on the way and carried them for any distance they pleased on the line of route, and charged separate fares for journeys between intermediate stopping places. The company had no express power under their special Acts to run omnibuses. In an action by the Attorney-General at the relation of the corporation of Birkenhead, Warrington J. granted an injunction restraining the railway company from carrying on the business of omnibus proprietors in Birkenhead. Under these facts the English Court of Appeals with one judge dissenting decides that the omnibus business as carried on by the Company was not incidental to the undertaking of the railway and was ultra vires; but, the defendants undertaking (1) to run their omnibuses exclusively to or from a railway station on their line and in connection with their trains, and not to hold themselves out as carrying on a general omnibus business, (2) not to charge separate fares for intermediate journeys, and (3) as far as practicable to confine their omnibus service to or from a station on their line, the Court discharged the injunction. The case is very carefully considered and the importance of the decision is obvious. Compare *London County Council* v. *Attorney-General* (1902) A. C. 165.

SPECIFIC PERFORMANCE.

Contract for Adoption

In *Chehak et al.* v. *Battles et al*, 110 N. W., 330, the Supreme Court of Iowa holds that an instrument whereby, in consideration of the surrender to them of a child, parties accept the duties of parents to the child, and agree that it shall have all the rights of inheritance by law, may be specifically enforced as a contract as to the right of the child to receive a share of the estate, though it is invalid as an instrument of adoption because not acknowledged and recorded as required by the laws in force at the time of its execution. Compare *Wright* v. *Wright*, 58 N. W. 54, L. R. A. 196.

SUBROGATION.

Surety

The Court of Chancery of New Jersey decides in *Union Stone Co. et al.* v. *Board of Chosen Freeholders of Hudson County et al.*, 65 Atl. 466, that where a contractor for the erection of a building for a county defaulted and his sureties completed the performance of the contract, they were entitled to subrogation to the rights of the owner against the contractor and against persons claiming liens for materials furnished to the original contractor, to the extent necessary to reimburse them for their necessary outlay, but no further. Compare *Prairie State Nat. Bank* v. *U. S.* 164 U. S. 227.

TAXATION.

Stock Transfer Tax

In *People of the State of New York, ex rel. Albert J. Hatch, Plff. in Err.*, v. *Edward Reardon*, 27 S. C. R. 188, the Supreme Court of the United States upholds the validity of the New York stock transfer tax law of 1905, holding it valid even as applied to shares of foreign corporations owned by nonresidents and though the tax is based on the face value of the shares. Furthermore it is decided that it is not an arbitrary discrimination in favor of sales of other kinds of personal property, such as corporate bonds. Compare *Foppiano* v. *Speed*, 199 U. S. 501.

Private Alleyway

In *Hill* v. *Williams*, 65 Atl. 413, the Court of Appeals of Maryland holds that a private alleyway is subject to taxation, and further decides that where one conveys lots describing them as bounded on one side by an alley of a certain width to be left open for use in common, the alley, which is but a private way, is properly assessed to the grantor in whom the fee-simple title remains, it being no part of the duty of the assessor or the appeal tax court to separately value the interests in the alley of the grantor and grantee. Such private alleyway, it is said, may be sold for non-payment of taxes thereon though the easement of passage thereover given an adjoining owner be thereby destroyed.

TRIAL.

In *Seaboard Air Line Ry.* v. *Scarborough*, 42 Southern 706, the Supreme Court of Florida, Division A., decides that parties to a cause, who are also witnesses therein, should not be excluded from the courtroom during the trial of such cause, since it is their right to be present and to aid in or observe the progress of the trial. The only person, however, who would be in a position to complain of this action, would be the party to the cause so excluded, and no error is committed by the trial court in refusing to order the party so excluded to come into the courtroom, at the instance of the opposing party, for the purpose of identification by a witness.

Exclusion of Witnesses

WATER AND WATER COURSE.

In *McCarter Atty. Gen.* v. *Hudson County Water Co.*, 65 Atl. 489, the Court of Errors and Appeals of New Jersey decides that an act of the legislature whereby it is made unlawful for any persons or corporation to transport through pipes, conduits, etc., the waters of any fresh-water lake, pond or stream of the state into any other state, is constitutional. Compare *State* v. *Indiana &c. Co.*, 120 Ind. 575, 6 L. R. A. 579.

Diversion

WRIT OF ERROR.

The United States Court of Appeals of the Third Circuit decides in *Cassatt et al.* v. *Mitchell Coal & Coke Co.*, 250 Fed. 32, that where, in an action against a railroad company alone for alleged violation of the interstate commerce act, plaintiff applied for and obtained an order entered against certain of the railroad officers and employes, requiring production before and at the trial of books and papers alleged to contain information relative to the granting of rebates, such proceeding was collateral to the main action, and the order, in so far as it required production before the trial, constituted a "final decision," and was reviewable on a writ of error.

Discovery: Final Decision