PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports,

BANKS AND BANKING.

Right to Appropriate Deposit

With one Judge dissenting, the U. S. Circuit Court of Appeals of the Third Circuit holds in *Corn Exch. Nat. Bank* v. *Locher et al.*, 151 Fed. 764, that the right given to a bank by a contract with a depositing and borrowing corporation to declare any indebtedness of the corporation due and payable at once in case of its insolvency and to apply thereon any money, credits, or other property of the corporation then in the hands of the bank does not create a lien on any such funds or credits, but merely gives the bank an option which cannot be exercised after a receiver has been appointed for the corporation in insolvency proceedings.

Powers of Congress

The Court of Appeals of New York holds in *Schlesinger* v. *Gilhooly*, 81 N. E. 619 that National Banking Act Rev. St. U. S. §§ 5197, 5198, limiting the rate of interest national banks may charge, and providing for a forfeiture of all interest for usury, and superseding all state laws on the subject of usury as applied to such banks, is a valid exercise of the power of Congress. Three judges dissent from this view and the opinions filed furnish a most satisfactory review of the questions involved in the case.

Borrowing Money

The Court of Appeals of Kentucky holds in *Citizens Bank et al.* v. *Bank of Waddy's Receiver et al.*, 103 S. W., 249 that one lending money to a bank limited by its articles of incorporation to the borrowing of money not in excess of a specified sum, to an

BANKS AND BANKING (Continued).

amount less than the specified sum, without having reason to know that the limit has been exceeded by other loans made to it when added to the loan made, is not affected by the limitation in the articles.

It is further decided that it is within the apparent scope of the authority of a cashier of a bank to pledge its notes to secure money borrowed by him, for the bank in the regular course of the business. Compare *Davenport* v. *Stone*, 104 Mich. 521, 62 N. W. 722.

Collection of Draft

The Supreme Court of Nebraska decides in *Nebraska Hay & Grain Co.* v. *First Nat. Bank of Falls City*, 110 N. W. 1019 that a bank that, without notice or suspicion of wrongdoing, receives a draft from the drawer for collection, and demands and obtains payment of it from the drawee, and in good faith pays the proceeds over to its employer, is not liable to the payor in damages, because the latter made payment without consideration, and in reliance upon a forged bill of lading which the drawer had attached to and caused to be forwarded with the draft. Compare herewith *La Fayette* v. *Merchants' Bank*, 84 S. W. 700, 68 L. R. A. 231.

CARRIERS.

Ejection of Passengers

In *Missouri, K. & T. Ry. Co.* v. *Smith*, 152 Fed. 608 the United States Circuit Court of Appeals of the Eighth Circuit decides that where a passenger wilfully refused to establish his right to transportation or pay fare, his ejection from the train was not rendered wrongful because of a tender of his fare by a third person, with the passenger's consent, after the process of ejection had begun, laying down the general rule that tender of fare by a third person, with the passenger's consent, is effective, or otherwise, to prevent a rightful ejection in the same manner as if the tender had been made by the passenger himself. See in this connection *State* v. *Campbell*, 32 N. J. Law, 309.

In *Cohen* v. *Missouri, K. & T. Ry. Co.* 102 S. W.

CARRIERS (Continued).

1029 the St. Louis Court of Appeals decides that where a carrier holds goods for delivery to succeeding carriers, he holds them as a carrier, and not as an ordinary bailee or mere forwarder and although the connecting carrier refuses or unreasonably delays to receive them, the relation of common carrier continues until the carrier by warehousing the goods, or some other unequivocal act, indicates its purpose to changes its relation from that of carrier for transportation to that of a mere custodian for safe keeping or forwarding. Compare *Bennitt* v. *Mo. Pac. Ry. Co.*, 46 Mo. App. 656.

Delivery to Connecting Carrier

The Court of Civil Appeals of Texas decides in *St. Louis S. W. Ry. Co.* v. *Hill*, 103 S.W. 227 that where a pass issued by a railroad company to a prospective employe contained a stipulation reserving the right to cancel the pass at any time, plaintiff could not recover because it was canceled and taken up by one of the defendant's conductors while plaintiff was en route on the trip for which the pass was issued.

Passes: Cancellation

In *McKibbin et al.* v. *Wisconsin Cent. Ry. Co.*, 110 N. W. 964, the Supreme Court of Minnesota decides that a railway carrier is not as a matter of law liable, only as a gratuitous bailee of baggage which it has regularly checked, if the passenger does not come on the same train with it. Compare *Marshall* v. *Railway Co.* 126 Mich. 45.

Baggage

The Supreme Court of Kansas holds in *Rodgers* v. *Missouri Pac. Ry. Co.*, 88 Pac. 885 that the negligent delay of a carrier in moving goods intrusted to it for transportation not so unreasonable as to amount to a conversion will not render it liable for the loss of such goods after they have been carried to their destination if they are there destroyed by an act of God before delivery. Compare *Morrison* v. *Davis* 20 Pa. 171.

Delay: Act of God

CHARITIES.

Hospitals: Neligence

In *Illinois Cent. R. Co.* v. *Buchanan*, 173 S.W. 272, it appeared that a railroad hospital organization was organized as a corporation independent of defendant railroad; its directors being certain officers of the railroad. All employes of the railroad were as such, members thereof, supporting the hospital by monthly contributions. No profit was derived by the railroad company from the conduct or operation of the hospital. The physicians, surgeons, and nurses in charge were selected by the directors and officers. Under these facts the Court of Appeals of Kentucky decides that for failure to select skillful and competent physicians and attendants the railroad was liable to an employe injured thereby; thus reversing the previous decision of the same case in 88 S.W. 512. Compare *Louisville & Nashville R. Co.* v. *Foard*, 47 S. W. 342, 104 Ky. 456.

CONSTITUTIONAL LAW.

Class Legislation

The Supreme Court of Minnesota holds in *Joyce* v. *Great Northern Ry. Co.*, 110 N. W. 975 that a statute declaring it unlawful for two or more employers of labor to combine or confer together for the purpose of preventing any person from procuring employment, is a valid legislative enactment.

State Police Power

The United States Supreme Court decides in *Amanda S. Whitfield* v. *Aetna Life Insurance Company of Hartford, Connecticut*, 27 S. C. R. 578 that the exclusion of suicide as a defense in suits on policies of life insurance which is effected by a statute of Missouri, unless such suicide was contemplated at the time application was made for the policy, is a legitimate exertion of power by the state. See in this connection *Ritter* v. *Mutual Life Insurance Company* 169 U. S. 139.

CONSTITUTIONAL LAW (Continued).

Obligation of Contract

A statute of Kansas passed in 1868 provided that on a return of *nulla bona* of an execution against a corporation, execution might be issued against any stockholder to an extent equal in amount to the stock held by him. An act was passed in 1899 amending a former statute and providing that on return of an execution *nulla bona* a receiver should be appointed who should sue all the stockholders for the benefit of all creditors. In *Pusey & Jones Co.* v. *Love et al.*, 66 Atl. 1013, the Supreme Court of Delaware decides that as against a creditor of the Kansas corporation who obtained a judgment prior to the latter statute and was seeking to satisfy his claim under the former statute, the latter was inoperative, as impairing the obligation of contract. See in this connection *Woodworth* v. *Bowles*, 61 Kan., 569, 60 Pac. 331.

CONTEMPT.

Review: Presumptions

The Court of Appeals of the First District, California, decides in *Ex-parte Shortridge*, 90 Pac. 478, that on proceedings to review a commitment for contempt, no intendments or presumptions may be indulged in against the prisoner, but the order must be strictly construed in favor of his liberty, and hence an attorney is entitled to discharge, where the order of commitment merely discloses that, while a witness was being examined, he persisted in addressing the court, although admonished not to do so; it not appearing that he was not rightfully and respectfully discharging his duty to the court and his client. See in this connection *Schwarz* v. *Superior Court.* 111 Cal. 106, 43 Pac. 580.

CONTRACTS.

Illegality: Parties in pari delicto

The Supreme Court of Oklahoma decides in *Falkenberg* v. *Allen*, 90 Pac. 415 that where a number of persons conspire together to perpetrate a confidence game and work a swindle upon a victim by pretending to bet upon a foot race, and they induce the victim to believe that the race is

CONTRACTS (Continued).

fixed, and that his money will only be used to put up against those who bet upon the opposite sides, and that the stakeholder will return it to him as soon as the opposite bettors put up their money, when in fact the runners and all the others connected with the conspiracy intend that the victim shall lose his money, and the fake race is only used and run to induce him to place his money in their possession so that they can pretend that he lost his money, and thus cheat and swindle him, although he may be a victim in *pari delicto* with the other conspirators, he may recover from the co-called stakeholder where he denounces the scheme and demands of the stakeholder his money before the race is run. See in this connection *Wright* v. *Stewart* 147 Fed. 321.

CORPORATIONS.

Ultra vires acts

The Supreme Court of Minnesota decides in *Burns* v. *St. Paul City Ry. Co.*, 112 N. W. 412, that where the publisher of a weekly newspaper, containing, among other things, advertisements, sought to enjoin a street railway company from placing advertisements on the upper inside parts of its cars, because as a result, that company diverted a large and lucrative business, which otherwise he might have been able to secure, was not sufficient to entitle plaintiff to litigate the question whether the acts of the defendant were *ultra vires* or not. Compare *Colman* v. *Eastern Counties Ry. Co.* 10 Beav. 1.

Expenses

The Court of Appeals of New York decides in *Lawyer's Advertising Co.* v. *Consolidated Ry. Lighting & Refrigerating Co.* 80 N. E. 199 that the directors, in control of a corporation and engaged in a contest for the continuance of their control, have no authority to impose on the corporation the expenses of publishing notices urging stockholders to execute proxies to them and replying to a circular issued in behalf of an officer seeking to oust the directors from

CORPORATIONS (Continued).

their control. It is interesting to compare with this decision the recent English decision upon the same question referred to in the Progress of the Law, in the May issue of the LAW REGISTER.

COURTS.

Jurisdiction

The United States Circuit Court of Appeals of the Eighth Circuit decides in *Armour Packing Co.* v. *United States*, 153 Fed. 1, that the giving or receiving of a rebate or concession, whereby property in interstate or foreign commerce is transported at a less rate than that legally filed and published, denounced by the Elkins act, is a continuous crime judicable in any court of the United States having jurisdiction of crimes through whose district the transportation is conducted.

Jurisdiction of Federal Courts

The U, S. Circuit Court (S. D. Iowa, Central Division) decides in *Des Moines City Ry. Co.* v. *City of Des Moines*, 151 Fed. 854 that a suit by a street railway company claiming in good faith to have a contract with a city giving it a perpetual right to operate its cars in the streets of the city to enjoin the city from impairing such contract by enforcing an enactment of its council treating the company as a trespasser and requiring the removal of its tracks from the streets is a suit arising under the Constitution of the United States of which a federal court has jurisdiction regardless of the citizenship of the parties.

DAMAGES.

Christian Science

An interesting decision of the Court of Civil Appeals of Texas appears in *Ft. Worth & D. C. Ry. Co.* v. *Travis*, 99 S. W. 1141 where it is held that in an action for physical and mental suffering sustained by a woman incident to her expulsion from a passenger train, evidence as to her being a Christian Scientist, and as to her belief that she only suffered when she thought she suffered, and did not suffer when she thought

DAMAGES (Continued).

she did not, and that it was only a question with her whether she suffered or not, was not immaterial, but was pertinent as to the issue of the existence of mental or physical suffering. It is worthy of note that the decision arises in the jurisdiction which gives special consideration to mental suffering as an element of damage. Compare *T. & P. Ry. Co.* v. *Lynch*, 87 S. W. 884.

DIVORCE.

In *Taber* v. *Taber*, 66 Atl. 1082, the Court of Chancery of New Jersey decides that condonation is the forgiveness of the offense followed in fact by a reconciliation, in which the wife is reinstated to such conjugal cohabitation as may be adapted to the circumstances of the parties. Compare *Bernstein* v. *Bernstein*, Pro. Div. (1893), 302.

Defences: Condonation

ESCROWS.

The Supreme Court of Vermont decides in *Wilkins* v. *Somerville et al.*, 66 Atl. 893 that where a grantor deposited a deed in escrow for delivery to the grantee, he was competent to annex such conditions to its delivery as he saw fit, and the fact that in doing so he violated the terms of his contract does not give the deed any force which it would not otherwise have, and hence title could not pass by it without a compliance with the conditions of the deposit. See also *Stanton* v. *Miller*, 58 N. Y. 192.

Conditions: Performance

EVIDENCE.

The Supreme Court of Minnesota decides in *Int. Harvester Co. of America* v. *Elfstrom*, 112 N.W. 252 that the different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals, and either may be introduced in evidence without accounting for the non-production

Carbon Copies

EVIDENCE (Continued).

of the other. Compare herewith *Chesapeake &c. Ry. Co.* v. *Stock*, 51 S. E. 161, 104 Va. 97 and *Menasha Ware Co.* v. *Harmon*, 107 N.W. 299, 128 Wis. 177.

GARNISHMENT.

In *Pugh* v. *Jones, et al.*, 112 N.W. 225 the Supreme Court of Iowa decides that a guardian remains such after the death of his ward, and he holds the funds for the ward's administrator, and not for his heirs; and in the absence of a statute authorizing it he cannot be summoned as a garnishee by judgment creditors of the heirs. Compare *State Fair Association* v, *Terry*, 85 S.W. 87, 74 Ark. 149.

Liability of Guardians

INJUNCTIONS.

In *Geo. Jonas Glass Co.* v. *Glass &c. Ass'n. of U. S. & Canada*, 66 Atl. 953, the Court of Chancery of New Jersey decides that a combination or agreement to picket a manufacturing plant for the purpose of interfering with the free flow of labor to an employer, to whom labor is a necessity for the carrying on of his business, which, if successful, will prevent him from obtaining the means of pursuing a lawful occupation, and the sole purpose of which is to compel him to comply with the demands of an antagonistic power, is a conspiracy against the property rights of the employer, subjecting his property to an irreparable injury, and all parties to such compact, actors as well as abettors, will be restrained from establishing and maintaining such picket service. Compare *Atchison T. & S. F. Ry. Co.* v. *Gee*, 139 Fed. 582.

Boycotting: Picketing

LIBEL.

In *Nixon* v. *Dispatch Printing Co.*, 112 N. W. 258, the Supreme Court of Minnesota decides that a publication of judicial proceedings, if fair and impartial, is privileged; but a complaint or other pleading in a civil action, which has never been presented to

Judicial Proceedings

LIBEL (Continued).

the court for its action, is not a judicial proceeding within the rule, and its publication, if it contains libelous matter, can only be justified by showing that it is true. Compare *Parker* v. *Free Press Co.*, 72 Mich. 560, 1 L.R.A. 599.

LIMITATION OF ACTIONS.

In *Ramsden* v. *Knowles*, 151 Fed. 721 the United States Circuit Court of Appeals of the First Circuit, laying down the general principle that the exceptional rule that, where a statutory right is given subject to a special limitation, such limitation inheres in the right and follows it into another jurisdiction where it is sought to be enforced to the exclusion of the statutes of limitation of the forum, cannot be extended to make the general statute of limitation of the state, where the liability arose operate extra-territorially, holds, applying the same, that an action brought in Massachusetts to enforce the statutory liability of a stockholder in a Kansas corporation is governed as to limitation by the general Massachusetts statute of six years. See in this connection *Company* v. *Railroad* 144 Mass. 341, 11 N. E. 540.

Law Governing

MARRIAGE.

The Court of Chancery of New Jersey holds in *Mick* v. *Mart.* 65 Atl. 851 that where, in a suit by a husband to annul a marriage, it appeared that at the time of the ceremony between the parties defendant had a living husband, which was known to both parties, but that as soon as complainant and defendant learned that defendant's husband had divorced her, defendant asked complainant whether she was his wife to which he replied, "Yes, you are before God," and that they continued to live as husband and wife, the bill would be dismissed.

Cohabitation

MECHANICS' LIENS.

In *Prescott Nat. Bank* v. *Head*, 90 Pac. 328, the Supreme Court of Arizona decides that a surety on a building contractor's bond, requiring the contractor to discharge all material liens, is not estopped to assert such a lien held by him. Compare *McHenry* v. *Knickerbocker*, 27 N.E. 430.

Estoppel to Claim Lien

MUNICIPAL CORPORATIONS.

In *Cook* v. *Inc. Town of Hebrick*, 112 N. W. 157, the Supreme Court of Iowa decides that where a city is negligent in failing to keep the sidewalks in repair, and a traveler is injured while walking over the same in the exercise of due care, it is insufficient to bar a recovery that the traveler knew of the defect, unless he knew of the particular danger he encountered, and that it was imprudent to attempt to use the defective way as he did. See also *Kendall* v. *Albia*, 73 Iowa 241, 34 N.W. 833.

Dangerous Sidewalk: Knowledge

NEGLIGENCE.

The Supreme Court of Delaware decides in *Wilmington City Ry. Co.* v. *White*, 66 Atl. 1009, that in an action for injuries to the driver of a coach in a funeral procession, caused by a collision with a street car, evidence that for a long time prior thereto it had been the custom of the operators of street cars as a matter of privilege to permit funeral processions to pass without a break in the line, and that plaintiff, with knowledge of such custom, relied thereon at the time he crossed the track in front of the car, was admissible, though not pleaded. See also *Foulke* v. *Wilmington City Ry. Co.*, 5 *Pennewill* 363, 60 Atl. 973.

Evidence: Custom

In *Hollis* v. *Kansas &c. Ass'n.*, 103 S.W. 32, the Supreme Court of Missouri, Division No. 2, decides that where an association gave a street fair and carnival, in which an amusement company furnished their appliances for amusements, including gondolas, similar to a merry-go-round, under

Liability: Interest in Place

NEGLIGENCE (Continued).

contract by which the fees for riding on the gondolas collected by the company, were divided between the association and the company, and the association had general charge of all the grounds, and took an active part in distributing advertisements of the amusements, the association, as well as the company, was liable for injury to one riding on the gondolas, caused by negligence in the construction, operation, and management thereof. Compare herewith *Thompson* v. *Street Railway Co.*, 170 Mass. 577, 40 L.R.A. 345.

RAILROADS.

The Supreme Court of Utah decides in *Teakle* v. *San Pedro, L. A. & S. L. R. Co.*, 90 Poc. 402, that where, for a considerable period of time, numerous persons had been accustomed to walk along or across a railroad track in a populous city, such persons were licensees, whose presence the railroad's train operatives were bound to anticipate, and observe a reasonable lookout in order to prevent injury to them, when their attention was not directed to the performance of other duties. Compare herewith *Corbett* v. *Oregon Short Line R. Co.*, 26 Utah 449, 71 Pac. 1065.

Persons on Track: Licensees

It is held by the Supreme Court of Arkansas in *St. Louis, I. M. & S. Ry. Co.* v. *Chappell & Billingsley*, 102 S. W. 893 that a railroad company, which permitted a log company to make a joint use of its tracks, but not under a lease, was liable for a loss by fire caused by sparks negligently permitted to escape from an engine of the log company. See also *L. R. & Ft. S. Ry. Co.* v. *Daniels*, 68 Ark. 171, 56 S.W. 874.

Use of Roads by others

TAXATION.

In *Mint Realty Company* v. *Philadelphia, Appellant*, 218 Pa. 104 the Supreme Court of Pennsylvania decides that where the United States government has sold real estate under articles of agreement reserving the legal title to itself until all payments are made and conditions performed, such

Real Estate owned by United States

TAXATION (Continued).

real estate is not taxable by municipal authorities until the vendee has made all the payments and performed all the conditions of the articles of agreement. Two judges dissent.

National Securities

In *Home Savings Bank* v. *City of Des Moines*, 27 S. C. R. 571 the Supreme Court of the United States holds that the immunity of national securities from state taxation is violated by a tax imposed under the authority of the Iowa Code, directing that shares of stock of state banks shall be assessed to such banks, and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. Three of the Justices dissent.

TRUSTS.

Annuities: Reduction of Fund

The Court of Appeals of New York holds in *Griffin et al* v. *Keese et al.* 80 N. E. 367 that where executors were directed to invest a fund sufficient to produce certain annuities, the will providing for the distribution of the fund, and its unappropriated income among testator's living grandchildren as the annuitants should, respectively, die; as the annuitants die the fund may be reduced to a sum sufficient to pay the remaining annuities and the excess transferred to the residuary estate. Three judges dissent. Compare *In re Willets*, 112 N. Y. 289.

WATERS AND WATER COURSES.

Flowage

The Supreme Court of Appeals of Vermont holds in *Cook* v. *Seaboard Air Line Ry.*, 57 S.E., 564 that where an owner of a tract of land diverted a stream passing through the land from its natural channel, but returned the waters to such natural chan-

WATER AND WATER COURSES (Continued).

nel, both the point of diversion and that of return being within his boundaries, and thereafter a railway acquired a right of way through the tract and along the new channel, and so constructed its road that in times of freshets the water was thrown upon the land of the owner of the tract, the railroad was liable for ensuing damages, irrespective of whether the diversion was intended as a permanent one. Compare *Miss. Cent. R. Co.* v. *Mason* 51 Miss., 234.