PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ASSAULT.

The Supreme Court of California decides in *People* v. *Sylva*, 76 Pac. 814, that pointing an unloaded gun at another, accompanied by a threat to discharge it, does not constitute an assault; nor does it constitute an assault if the gun is loaded, but there is no attempt to discharge it.

What Constitutes

BANKRUPTCY.

The United States District Court (E. D. Pennsylvania) decides *In re National Mercantile Agency*, 128 Fed. 639, that where a receiver was appointed for a bankrupt before the appointment of a trustee, and was given power to proceed forthwith to collect and take possession of all the assets of the bankrupt, he was not authorized to bring suit to collect such assets in a jurisdiction other than the one in which he was appointed. See in connection with this case note to the case of *J. I. Case Plowworks* v. *Finks*, 26 C. C. A. 49. Compare also the very recent decision of *Great Western Min. and Mfg. Co.* v. *Harris*, 128 Fed. 321 (U. S. C. C. A., Second Circuit).

Receivers: Right to Sue

CARRIERS.

The laws of North Carolina provide that if a common carrier charge any person a greater or less compensation than he charges any other person for a like service, the carrier shall be deemed guilty of unjust discrimination and liable to fine. In *McNeill* v. *Durham and C. R. Co.*, 47 S. E. 765, it appeared that the plaintiff was injured by the negligence of the railway company while riding on a pass which was void under the statute. The Supreme Court of North Carolina holds that he was a passenger and entitled to recover as such, not being

Pass: Negligence: Personal Injuries

CARRIERS (Continued).

in pari delicto with the company in the violation of law. Two judges dissent, and the prevailing and dissenting opinions contain an excellent review of the authorities in question.

Against the dissent of the chief justice, the Supreme Court of North Carolina decides in *McGraw* v. *Southern Ry. Co.*, 47 S. E. 758, that a person who, though having a ticket, boards a train by getting on the platform of the blind baggage car, has no right of action as a passenger because of the conductor's pulling him off the car, he not having told the conductor, when ordered to get off, that he had a ticket, and the conductor not having seen a ticket or supposed that he had one. The dissenting judge says, "Neither the carrier nor its employees can assume that a person in any car of a passenger train is a trespasser merely because he is not in one of the cars provided for, and usually occupied by, passengers." See on this point *Railroad* v. *Williams*, 40 S. W. 350.

Passengers

With two judges dissenting, the Supreme Court of the same state holds in *Clegg* v. *Southern Ry. Co.*, 47 S. E. 667, that where a railroad company refused to deliver a carload of fruit to the owner for the specific reason that he would not pay the amount of freight demanded, which was in excess of that due and offered by the owner, and the fruit was injured by being frozen before the railroad company discovered its error, the fact that at the time he demanded the goods the bill of lading had not been transferred to the owner by the bank to which the goods were consigned was not fatal to his right to recover for the injury to the fruit. Compare *Railroad* v. *Barkhouse*, 100 Ala. 543.

Refusal to Deliver

CONSTITUTIONAL LAW.

An act of the Legislature of Texas imposes upon railway companies alone a penalty in favor of contiguous land-owners for allowing Johnson grass and Russian thistle to mature and go to seed on their property. In *Missouri, Kansas and Texas Railway Company* v. *Clay May*, 24 S. C. R. 638, the Supreme Court

Equal Protection of the Laws

CONSTITUTIONAL LAW (Continued).

of the United States decides that such statute does not deny to such railway companies the equal protection of the laws.

Impairment of Contract Obligation

The Supreme Court of the United States decides in *Lydia Bradley* v. *H. W. Lightcap*, 24 S. C. R. 748, that the obligation of the contract of a mortgagee in possession after condition broken, who afterwards bid in the property for less than the mortgage debt on the sale in foreclosure proceedings initiated by her before the Illinois Act of March 22, 1872, Sec. 30, went into effect, is impaired by the change in the law made by the requirement of that section that the master's deed be taken out within a specified time after the expiration of the time for redemption, where failure to comply with this requirement is held by the highest state court to destroy the right of possession taken under the mortgage, to avoid the certificate of sale, and to entitle the mortgagor, without payment of the mortgage debt, to recover possession in ejectment on the strength of a perfect title. Compare *Varnitz* v. *Beverly*, 163 U. S. 118.

DAMAGES.

Inability to Perform Contract

With one judge dissenting, the Supreme Court of Wisconsin decides in *Arentsen* v. *Moreland*, 99 N. W. 700, that where at the time defendants contracted to sell certain land to plaintiffs they had sold to another all the timber thereon, and only held an option to purchase the land, and for this reason knew that they would not be able to comply with their contract to sell both the land and the timber to plaintiff, plaintiff was entitled to recover not only the amount paid, but damages for the loss of his bargain, without regard to the fact that, at the time the contract was made, plaintiff had knowledge of the sale of the timber.

DEEDS.

Reformation

In *Slack* v. *Craft*, 57 Atl. 1014, the Court of Chancery of New Jersey decides that where a purchaser of certain lots was aware that his deed and a deed to certain adjoining lots have been mistakenly drawn so as to leave a strip between the same unconveyed, but he made no effort to have the mistake corrected, and destroyed his line

DEEDS (Continued).

fence, and erected a barn on foundations which were in fact on complainant's lot as defined by such fences, he took the risk of a subsequent reformation.

ELECTION.

A note and mortgage on personalty belonging to a wife purported to be signed by the husband and wife, and the payee sued on the note on the theory that the husband signed as an authorized agent for the wife, and that it was to her that the loan represented by the note and mortgage was made. Plaintiff was unsuccessful as against the wife, it appearing that the loan was not to the wife alone and took no judgment. Under these facts the Supreme Court of Michigan decides in *First Nat. Bank of Reed City* v. *Sweet*, 99 N. W. 861, that the plaintiff was not precluded from maintaining replevin for the mortgaged property. See *Morris* v. *Robinson*, 3 Barn and C. 196.

Mistake of Remedy

ELECTRIC LIGHT COMPANIES.

In *Brown* v. *Radnor Tp. Electric Light Co.*, 57 Atl. 904, the Supreme Court of Pennsylvania decides that under the Pennsylvania Act of May 8, 1889, P. L. 136, providing that every electric light company shall have power to erect the necessary buildings and apparatus, with a right to enter upon any public street, lane, alley, or highway to inspect, alter, and repair its system of distribution, an electric light company has power to enter upon the bed of a turnpike road and erect its poles and string its wires notwithstanding the objection of abutting owners owning the fee in the bed of the road. One judge dissents.

Eminent Domain

EMINENT DOMAIN.

Against the dissent of three judges the Supreme Court of Kansas decides in *McCann* v. *Johnson County Telephone Co.*, 76 Pac. 870, that the construction and maintenance of a telephone line upon a rural highway is not an additional sevitude for which compensation must be made to the owner of the land over which the highway is laid. Compare *Eels* v. *American Telegraph and Telephone Co.*, 143 N. Y. 133.

Telephone Line: Additional Servitude.

EVIDENCE.

The Supreme Judicial Court of Massachusetts decides in *McCarthy* v. *Peach*, 70 N. E. 1029, that testimony of a witness, who was present in the room with plaintiff while the latter was telephoning to defendant as to what witness heard plaintiff say during the course of the conversation, was admissible to show the conversation, although the witness had no personal knowledge as to whom plaintiff was talking with, and did not hear anything that defendant said, and did not know that defendant heard anything that plaintiff said, plaintiff testifying that the conversation was with defendant. See also *Lord Electric Co.* v. *Morill*, 178 Mass. 304.

Telephone Conversations

FELLOW-SERVANTS.

It is decided by the Supreme Court of the United States in *Northern Pacific Railway Company* v. *Alline A. Dixon*, 24 S. C. R. 683, that negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the death of a fireman on such railway, without any fault or negligence the train dispatcher, is the negligence of a fellow-servant of the fireman, the risk of which the latter assumes.

Telegraph Operator: Firemen

FOREIGN CORPORATIONS.

In *John Deere Plow Co.* v. *Wyland*, 76 Pac. 863, the Supreme Court of Kansas decides that a single transaction by a foreign corporation may constitute a doing of business in this state within the meaning of the state law making certain requirements of foreign corporations doing business in the state, where such transaction is a part of the ordinary business of the corporation, and indicates a purpose to carry on a substantial part of its dealings there. The decision cites the statement in 13 American and English Encyclopædia of Law (2d edition), 869, which is directly to the contrary and refers to the cases there cited, but refuses to adopt this view, holding that these cases "turn rather upon the character than upon the amount of business done."

Doing Business In State

FRANCHISES.

The Supreme Court of Nebraska holds in *Nebraska Telephone Co.* v. *City of Fremont*, 99 N. W. 811, that forfeiture of the franchises and easements of a public service corporation in the streets can be declared and enforced only by a court of competent jurisdiction. The city claiming a forfeiture cannot be a judge in its own cause, or invade the privileges or destroy the property of such a corporation in the absence of judicial warrant for so doing.

Forfeiture of Grant

INSURANCE.

In *Malin* v. *Mercantile Town Mut. Ins. Co.*, 80 S. W. 56, the St. Louis Court of Appeals decides that a failure to comply literally with a requirement in a fire-insurance policy that insured shall keep a set of books, presenting a complete record of business transactions, does not work a forfeiture of the policy; but its purpose is accomplished when insured produces data from which the amount and value of the goods in stock at the time of the fire can be reasonably estimated.

Keeping Set of Books

INTOXICATING LIQUORS.

The Act of June 9, 1891, Sec. 5, P. L. 259 (Penna.), requires a certificate signed by at least twelve reputable qualified electors of the county to be annexed to a petition for liquor license. The Supreme Court of the state, with two judges dissenting, holds *In re Forst's License*, 57 Atl. 991, that a certificate is fatally defective where five of the signatures are those of partnerships or trading companies.

Licenses

JOINT TORT-FEASORS.

A recovery against one only of several defendants charged with joint and concurring negligence does not deprive such defendant of any federal right because, if it had been sued alone, the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the state court to a Federal Circuit Court: United States Supreme Court in *Southern Railway Company* v. *James L. Carson*, 24 S. C. R. 609. See in connection with this case *Powers* v. *Chesapeake and O. R. Co.*, 169 U. S. 92.

Removal of Causes

JURORS.

In *Baldwin* v. *State,* 47 S. E. 558, the Supreme Court of Georgia decides that a juror is not disqualified for serving on a case by reason of the fact that his wife is a second cousin of the wife of one of the parties in interest. Compare, however, the very recent Louisiana decision of *State ex rel. Ribbeck* v. *Foster,* 36 Southern, 554, where the husbands of two sisters are held to be "brothers-in-law" within the meaning of the law providing for the recusation of judges.

Disqualification

MASTER AND SERVANT.

In *Holder* v. *Cannon Mfg. Co.,* 47 S. E. 481, the Supreme Court of North Carolina holds that one who causes the discharge of another from the service of a third person maliciously and wilfully is liable to the injured party in damages; and to show malice it is not necessary to show actual ill-will or hatred, but it is sufficient if the act be done without legal excuse. It is further decided that the conduct of a servant in going on a strike and refusing to make up for lost time cannot rightfully be used by his employer to effect his discharge from a subsequent employment. Two judges dissent.

Discharge from Employment

In *Bryson* v. *Philadelphia Brewing Co.,* 57 Atl. 1105, the Supreme Court of Pennsylvania holds that where, in an action to recover for damages sustained by the alleged negligence of a driver of a beer wagon, the evidence showed that the employer of the driver was in fact the owner of the wagon, which he had bought from the defendant brewing company, and that he was engaged in buying beer from the brewing company and selling it to his own customers, no recovery could be had against the brewing company, although it permitted its initials to remain on the wagon. In this connection compare the cases of *Staples* v. *Ely,* 1 C. and P. 614, and *Howard* v. *Ludwig* (N. Y.), 57 App. Div. 94.

Relation: Evidence

NEGLIGENCE.

Sales: Injuries to Third Persons

It is decided by the Supreme Court of South Dakota in *Fish* v. *Kirlin-Gray Electric Co.*, 99 N. W. 1092, that where an electric company sold an arc light to a church under a contract by which the company was bound to furnish electricity and keep the light in repair, and by reason of its negligence in failing to properly repair the light, after notice, it fell, and injured plaintiff while attending services, defendant was liable for such injury. The court distinguishes the case from the well-known line of decisions which define the liability of the vendor of personal property to third persons sustaining injuries from a defect in such property, on the ground that in the present case there were continuing duties to be performed. Compare *Thomas, Adm'r,* v. *Maysville Gas Co.,* 56 S. W. 153, 53 L. R. A. 147.

RAILROADS.

Branch Tracks

By the great weight of authority, the decisive tests as to whether a branch railroad track is for public or private purposes are these: Is the track to be opened to the public, on equal terms to all having occasion at any time to use it, so that all can demand that they be served without discrimination, as of right? If so, and the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is public and the case a proper one for the exercise of the right of eminent domain. Supreme Judicial Court of Maine in *Ulmer* v. *Lime Rock R. Co.,* 51 Atl. 1001.

TAXATION.

Bankruptcy

In *Solomon L. Swarts* v. *L. F. Hammer, Jr.,* 24 S. C. R. 695, the Supreme Court of the United States holds that property in the hands of a trustee in bankruptcy is not exempted from liability to state taxation by the Bankruptcy Act of 1898 or by any of its amendments. This question had been passed on by some of the lower federal courts, but this is the first time the Supreme Court has had occasion to deal with it.

TELEGRAPH COMPANIES.

Delivery of Message: Damages

A telegraph message signed by plaintiff's mother, directing him to "come at once," was delayed in transmission by the telegraph company, so that plaintiff missed the train on which he might have gone to his mother, and the next train which he took did not make connection, so that plaintiff, in order to hasten his arrival, walked nine miles. His mother was not seriously ill when the message was sent, but wished to see plaintiff on business. Under these facts the Supreme Court of North Carolina in *Bowers* v. *Western Union Telegraph Co.*, 47 S. E. 597, although holding that recovery may be had for mental anguish occasioned by the negligence of another, decides that it was plaintiff's own misapprehension which caused him any mental anguish he might have suffered, and not the negligence of the telegraph company.

TRUSTS.

Constructive Trusts

The Court of Errors and Appeals in New Jersey decides in *Johnston* v. *Reilly*, 57 Atl. 1049, that a constructive trust will arise against a person who by falsely representing to B that he is acting in the interest of C obtains from B property which B intended to give to C, and the trust may be enforced by C irrespective of the question whether C had an enforceable claim against B.

WILLS.

Alteration: Lead Pencil

In *McIntyre* v. *McIntyre*, 47 S. E. 501, the Supreme Court of Georgia holds that the rule of the English courts that cancellations with a lead pencil are presumed to have been deliberative, and not final, has not been generally adopted by the American courts. It is decided that the general rule that a presumption arises that cancellations or obliterations found upon a will offered for probate were made by the deceased, and were intended to operate as a revocation where the paper offered for probate was found among decedent's papers, applies where the cancellations were made with a lead pencil, but the fact that they are so made may be considered by the jury with other evidence in determining whether the presumption of revocation has been rebutted.