PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

Jurisdiction, Place of Injury, Action for Negligence

Judge Thomas, of the District Court for the Eastern District of New York, recently handed down a very interesting opinion: *The Strabo*, 90 Fed. 110. It is not often that a jurisdictional question arises now, as the limits of the admiralty jurisdiction are so well settled. In the present case a workman on a vessel lying at a dock fell from a ladder, which was not properly secured to the ship's rail, owing to the master's negligence, and struck on the dock. The claimant excepted to the court's jurisdiction on the ground that the injury was received on land. The court grouped the cases into two classes—the first, where the primal cause arises on the ship and is communicated to property on the land, the court of admiralty having no jurisdiction; and the second, where the conditions are just reversed and the jurisdiction of the court is conceded. The learned judge observed that the cases usually showed a negligent act or omission arising in one locality, and communicated to the libellant or his property in another, and did not think they had intended to decide that the injury must be *completed* on the water to give jurisdiction, irrespective of the locality where the breach of duty first operated upon the person injured. "The more consistent rule," said the court, "seems to be that a court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect and produces injury to the person or property of another on navigable waters. In that case it would be unimportant where the breach of duty occurred, or where the physical injury was completed." The admirable reasoning of the court very ably supports its conclusions, and, as they do not conflict with the cases of *The Plymouth*, 3 Wall. 20; *Johnson* v. *Elevator Co.*, 119 U. S. 388; *P., W. & B. R. R. Co.* v. *P. & H. de G. St. Towboat Co.*, 23 How. 209, and other decisions known as "mixed cases," this opinion may be regarded as a distinct contribution to the subject.

ADMIRALTY (Continued).

One of the results directly contemplated by Congress in the passage of the Harter Act was reached by Brown, J., in the case of *The British King*, 89 Fed. 872. The court held that the vessel was not liable for the negligence of her officers in failing to take soundings and apply the pumps, although it was known that there was a leak likely to cause damage to the cargo.

Harter Act, Leak, Sounding

The decision in the case of *Car Float No. 4*, 89 Fed. 877, should be called to the attention of the owners of all such floats. It imposes the duty of providing spare lines to secure them against any possible breaking away from their moorings. The court said: "The mere fact that similar floats have not been in the habit of carrying any spare lines cannot be admitted as a defence, or as dispensing with the requirements of reasonable prudence so long understood and recognized in navigation."

Spare Lines

ASSIGNMENTS FOR CREDITORS.

Assuming that the law of a given jurisdiction permits preferences in assignments for creditors, such preferences are still subject to attack precisely as if they had been given in the form of mortgages or judgments, prior to the assignments. So, in *Wells, Fargo & Co.* v. *Scott & Co.*, 55 Pac. (Utah) 81, such a preference was assailed on the ground that it secured the debt of a stockholder and officer of the company assigning; but, it appearing that the debt was really the company's, the officer merely signing the note for its accommodation, the preference was sustained.

Preferences

Clark v. *Richards Lumber Co.*, 77 N. W. (Minn.) 213, defines the extent of the authority of an assignee for the benefit of creditors. Shortly after such assignment by the lumber company, Clark claimed the ownership of a large amount of lumber, which was also claimed by the assignee; pending litigation, it was agreed that it should be sold and the proceeds treated as the original property. After final decision in Clark's favor it is now held that he is entitled to the whole fund, and that the assignee may not deduct therefrom his share as creditor of the company, of the expenses of administration. *Hooven* v. *Burdette*, 39 N. E. 1107, was distinguished on the ground that the plaintiff there had agreed that the disputed property should remain in assignee's hands.

Rights of Assignees

BANKRUPTCY.

Bankrupt Act, Time of Going Into Effect

The National Bankrupt Law of July 1, 1898, while it provides that it shall go into full force and effect upon its passage, nevertheless prohibits the filing of petitions for involuntary bankruptcy within four months. In *Blake* v. *Francis-Valentine Co.*, 89 Fed. 691, the company on August 31, 1898, had, while insolvent, permitted its property to be attached by one of its creditors; upon bill filed by one of the creditors to restrain a sale by the sheriff, it was held (1) that the relation of debtor and creditor was to be governed by the act from the date of its passage, and (2) that the general powers of the Court of Bankruptcy were sufficiently broad to protect this property, even though no bankruptcy suit was, or could be, pending in the court at that time.

Orders and Forms

General orders in bankruptcy have, in accordance with the provisions of the act, been published by the Supreme Court, 89 Fed. 769. The "Forms" mentioned in Order 38 are promised for January, 1899.

CARRIERS.

Additional Tickets, Sufficient Notice

The Supreme Court of Tennessee has decided that notice by printing a condition on the face of a ticket, *e. g.*, "Good for one continuous passage, beginning on day of sale only," with the date stamped on the back, together with placards posted up in the stations and elsewhere to the effect that "local tickets" would be subject to the before-mentioned condition, is not sufficient where the passenger paid the usual fare: *Louisville & N. R.* v. *Turner*, 47 S. W. 223.

CONSTITUTIONAL LAW.

War Revenue Act of 1898, Excise on Board of Trade Sales, Uniformity

That provision of the War Revenue Act laying an excise tax on board of trade sales was sustained by Showalter, Cir. J., in *Nicol* v. *Ames* (Northern District of Illinois), 89 Fed. 144. The provision in question, found in paragraph 2 of Schedule A of the act, reads: "Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars . . . one cent; provided that on every sale . . . there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence, . . . which shall

CONSTITUTIONAL LAW (Continued).

have upon it in stamps the amount of the tax." On *habeas corpus* by Nicol, a member of the Chicago Board of Trade, imprisoned for failure to comply with the act, it was contended that the provision requiring a written memorandum was in excess of Congressional power, as invalidating an oral contract made in the course of intrastate, as distinguished from interstate, commerce. But the judge points out that the law does not make the oral contract void; it simply provides a penalty for the absence of a document, leaving untouched the obligation of the contract. There was a further objection, that the tax, being on documents used in certain transactions only, violates the rule of uniformity laid down in Article 1, Section 8, of the United States Constitution. But the court considered that the tax is really on the transaction, not on the documents which evidence the transaction. The documents were held, quoting Marshall's historic language in *McCullough* v. *Maryland*, to be merely means appropriate to the end of taxation.

Intrastate Contract

A Wisconsin law (L. 1897, c. 334, § 3), providing that whenever the property of a debtor is levied on or attached by any process, the debtor may, within ten days, make an assignment for the benefit of his creditors, which shall dissolve absolutely the levy or attachment, was pronounced unconstitutional as to prior debts: *Peninsular Lead & Color Works* v. *Union D. & P. Co.* (Supreme Court of Wisconsin), 76 N. W. 359, following *Bank* v. *Schranck*, 97 Wis. 250, 73 N. W. 31. Cassoday, C. J., dissenting, said: "To my mind the obligations of the contract were not impaired by the mere modification of the statutory remedy, so far as to dissolve the attachment, if made within ten days prior to the debtor's assignment." The learned justice had dissented in the former case also.

Impairment of the Obligation of Contracts

CONTRACTS.

A very interesting case as to the granting of injunctions in cases of contracts for personal service, in restraint of trade, is *William Robinson & Co., Limited*, v. *Heuer* [1898], 2 Ch. 451. In this case, by an agreement in writing, H. agreed to serve the plaintiff company as confidential clerk for a term of five years, the company having the option to renew the engagement for five years more. The company could dismiss H. at

Contract for Personal Services, Restraint of Trade, Injunction

CONTRACTS (Continued).

any time by three months' notice. H. agreed that during the term he would devote his whole time and attention to the business of the company, and that he would not during the engagement, without the consent of the company, engage as principal or servant in any other business upon pain of dismissal. H. further agreed that if he should be so dismissed he would not at any time within three years from his dismissal be engaged as principal, agent or servant in the business of dealer of wares of the description made by the company within 150 miles of W. In 1898 H. left the service of the company without leave and became traveller to another firm carrying on the same business, and the company applied for an injunction to restrain him during the term of service from engaging in this employment. Held, that, during the continuance of the engagement, the agreement made by H. that he would not engage in any business relating to goods sold by the plaintiff, was valid, though not restricted in point of space, and that it was severable from the agreement not to engage in any other business, and should be enforced by injunction. The injunction was therefore granted, but limited to the first term of five years, the plaintiff waiving his option to retain H. in his service for another five years, and the court doubting whether the agreement for that term ought to be enforced.

CORPORATIONS.

Oppression of Minority Stockholders by Majority, Misjoinder

The Supreme Court of Arizona has lately been called upon to protect minority stockholders against a majority who, with the corporate officers, were controlling the corporation's business in the interest of a rival concern with which the officers and the majority were connected. The corporation was one formed to build a canal and deliver water to the stockholders. The complainants united in their bill prayers for relief, based upon their rights as stockholders, with others based upon their rights as original appropriators of water. The court below of its own motion dismissed the bill for this misjoinder; but on appeal the court leniently permitted an amendment and the filing of a supplemental bill inasmuch as the complainants, if driven to new suits, would have found themselves barred by the statute of limitations; *Henshaw* v. *Salt River Val. Canal Co.*, 54 Pac. 577.

CORPORATIONS (Continued).

It should seem that the distinction is clear between the liability of the stockholder for unpaid balances on his stock and his statutory liability to contribute to pay the corporation's debts. In the one case the liability is an asset of the corporation which a creditor can enforce only in equity and upon the theory that his suit is a garnishment proceeding. In the other case, the right against the stockholder runs directly to the creditor and may be enforced by him in an action which is, in substance, an action against a guarantor or surety. The distinction is not affected by the fact that the fruits of the action to enforce the statutory liability belong to all creditors ratably, nor by the circumstance that all stockholders within the jurisdiction must be made parties defendant. Their liability is several in substance, though joint in form. Those not joined, are not released by a judgment against the rest. Therefore, those not joined, should not, in a subsequent proceeding, be concluded by the judgment previously rendered against their fellows. Yet, the Supreme Court of Minnesota in *Hanson* v. *Davison*, 76 N. W. 254, while admitting that a stockholder, not a party to the original action to enforce the statutory liability, is not released by the judgment rendered therein, has declared that he is concluded by it as respects the existence and amount of corporate debts. The dissent of Canty, J., points out the inconsistency.

Statutory Liability of Stockholders for Corporate Debts

The New Jersey Court of Chancery, in *Tennant* v. *Appleby*, 41 Atl. 110, permits itself to speak of the "rule in equity" that the directors of a corporation upon its insolvency become trustees for its creditors, citing *Montgomery* v. *Phillips*, 53 N. J. Eq. 203, and *Savage* v. *Miller*, 39 Atl. 665. The former was a case of fraudulent preference. The latter was a case in which the court permitted a preference in favor of creditors related to directors by "consanguinity, affection and professional relationship." There was, indeed, some ground for treating the preference of the director-creditor in *Tennant* v. *Appleby* as tainted with fraud; but the court preferred to base its decision on the so-called "rule" as above stated. This is unfortunate, for nobody has ever yet succeeded in working out a consistent and tenable theory of trusteeship for creditors, and it is safe to say that nobody can. Directors are not trustees of the corporate property for creditors either before or after insolvency. This is evident from the fact that

Insolvent Corporations, Preference of Directors

CORPORATIONS (Continued).

they do not hold the legal title to the property of the corporation—and no one ever heard of a trustee without a legal title. Sir George Jessel expressed his opinion of the so-called "rule" in *In re Wincham Shipbuilding Co.*, 9 Ch. Div. 322. Nor will it do to say that they are trustees, "metaphorically speaking." Mr. Justice Brewer assigns a suitable place to metaphor in the statement of a legal doctrine in *Hollins* v. *Brierfield Co.*, 150 U. S. 371. Preferences ought, perhaps, to be made void by statute in the case of individuals and of corporations too—except where the facts are like those in *Sanford Tool Co.* v. *Howe, Brown & Co.*, 157 U. S. 312. Corporate preferences were forbidden by statute in New Jersey prior to 1875 and since 1895. But unless some such statutes are passed, it is idle to attempt to invalidate *bona fide* preferences of corporate creditors, whether the creditors happen to be stockholders, directors or strangers. In the case of the stockholder-creditor, indeed, there is room for an argument against the preference on the partnership principle that a partner cannot compete with creditors in the distribution of the firm estate. This thought has not, so far as the writer knows, been developed by any court.

CRIMINAL LAW.

Arrest on Suspicion

The Supreme Court of Rhode Island, in *Wills* v. *Jordan*, 41 Atl. 233, decided that the statements of confessed principals in a felony, that another was also concerned, are not of themselves sufficient to justify a constable in arresting that other on the ground of suspicion.

ELECTIONS.

Party Conventions, Ballots

Where a contention arises between two conventions of the same political party as to which is entitled to have the ticket nominated by it placed upon the official ballot under the recognized party name, held, that that convention is entitled which has been called by the regular state central committee of the party: *Williams* v. *Lewis* (Supreme Court of Idaho), 54 Pac. 619.

EVIDENCE.

State v. *Burlingame*, 48 S. W. (Mo.) 72, an illustration of a type of criminal cases which is becoming too familiar, con-

EVIDENCE (Continued).

Insolvent Banks, Receiving Deposits with Knowledge of Insolvency

tains several interesting rulings: (1) That in a trial upon the charge of receiving deposits while the bank was insolvent, acquittal on a similar charge for receiving a subsequent deposit is no defence; (2) evidence of a financial panic at the time are properly excluded, as, if proved, it would be no excuse for the commission of the offence; (3) evidence as to the receipt of other deposits was immaterial, and should not have been received even for the purpose of showing knowledge by the defendant that the bank was receiving deposits.

In *Long* v. *State* (Criminal Court of Appeals, Texas), 47 S. W. 363, the defendant was accused of burglary, and evi-

Similar but Disconnected Offences

dence of his participation in another precisely similar burglary was held inadmissible, although it corroborated the testimony of an accomplice. The mere fact that the two offences are precisely similar do not make them parts of a system or comprehensive scheme of crime so as to render the one evidence of the other, nor will evidence inadmissible *per se* be admitted, because of its tendency to corroborate the testimony of an accomplice.

This is a striking instance of the rule that mere similarity cannot render the fact of commission of one crime admissible to prove the commission of another, nor will the greatest similarity in details, without more, render the one evidence of a general system of crime, in the execution of which the other was committed. The similar offence must clearly show some general comprehensive scheme of crime, in the execution of which each separate offence became necessary, as in the Molly Maguire cases in Pennsylvania. See *Com.* v. *Carroll*, 84 Pa. 107.

GUARANTY.

In *Fulton Grain Swill Co.* v. *Anglim*, 54 N. Y. Suppl. 32, it was properly held that a guarantor of the price of goods sold

Defences by Guarantor

and delivered could not defend on the ground that the purchaser had in turn sold them to others than those he had agreed to sell them to. Failure of consideration as between principal and guarantor is a matter of no moment to the creditor.

Of a different character was the defence in *United States to use* v. *American Bonding and Trust Co.*, 89 Fed. 921. Here the defendant became surety for Minor & Bro., upon the assurance, *inter alia*, by the use plaintiff that Minor & Bro.

GUARANTY (Continued).

were under no liability, whereas at that very time they were indebted to the plaintiff for a considerable sum. Of course, the defendant was discharged from liability. Contrasting it with the previous case, it is obvious that, whether one calls it lack of consideration, misrepresentation or fraud, we have here a positive piece of misconduct by the creditor himself for which he should be held responsible. Besides, the receipt by the creditor of the principal's note would in itself have discharged the surety: *Rees* v. *Barrington*, 2 Ves. Jr. 540.

GUARDIAN AND WARD.

Of interest at this time is the decision of the District Court, N. D. of California, in *In re Perrone*. 89 Fed. 150, where construing § 1117, Rev. St., requiring the consent of the parents or guardians of a minor to his enlistment in the military service of the United States, "provided that such minor has such parents or guardian entitled to his custody and control," the court holds that it does not authorize a court to discharge from such service a minor whose parents are non-resident aliens, and who at the date of his enlistment had no guardian, on the application of a guardian since appointed.

Army, Enlistment of Minor, Right to Discharge

HUSBAND AND WIFE.

Jones v. *Gutman*, 41 Atl. (Md.) 192, is an illustration of the constantly recurring question as to the wife's agency to represent her husband and purchase on his credit. *Debenham* v. *Mellon*, 6 App. Cas. 24, has gone a long way to clear up the law by deciding that marriage itself creates no agency, and if the husband is to be held, an authority to the wife, express or implied, must be proved. For failing to recognize this principle, the judgment of the lower court was reversed.

Wife's Agency to Bind Husband

Mills v. *Mills* [1898], 2 Ch. 504, is an unusual case. On March 15, 1879, a man and woman executed a marriage settlement, containing a covenant to settle certain after-acquired property on the wife. On May 7, 1879, another settlement was made, also containing an after-acquired property clause more liberal to the wife. Upon petition filed by wife against her husband's executors, she claiming under the second settlement, it was held that, though the first settlement might have been varied by the parties, yet, in the absence of all evidence as to why it had

Marriage, Ante-nuptial Settlements

HUSBAND AND WIFE (Continued).

been executed, the second settlement, in so far as it contradicted the first, was not a revocation of it.

Separate Suits for Injuries to Wife

A rather unexpected construction was put by the Supreme Court of Pennsylvania in *Rockwell* v. *Waverly Traction*, 41 Atl. 324, upon the Act of May 8, 1895, P. L. 54. For an accident happening after that date to a wife, her husband and herself brought separate suits; upon the trial of her suit, he asked to be made a party—a request which upon defendant's objection was refused by the court. In spite of the apparently mandatory provisions of the Act that the suit shall be joint, it was held that plaintiffs could recover.

INSOLVENCY.

Insolvent Corporations, Preference

The Illinois Supreme Court has adopted the wholesome modern rule that while an insolvent corporation may, unless forbidden by statute, prefer an ordinary creditor by judgment or otherwise, yet such preference cannot be given to one of its own directors. It was held, in *Rockford Grocery Co.* v. *Standard Grocery Co.*, 51 N. E. (Ill.) 642, that this rule does not invalidate a preference given to a creditor whose debt was guaranteed by a director, the right of the *bona fide* creditor being emphasized by the court.

LIBEL AND SLANDER.

Resolution of City Council, Privileged Communications

An interesting case on the question of privileged communications was *Trebb* v. *Transcript Pub. Co.*, 76 N. W. 961. In this case a city council passed a resolution in which they characterized the plaintiff as a disreputable person; that he maliciously and knowingly published in a newspaper a false report of a certain suit in which the city had been interested, and they condemned his conduct as execrable and odious, and as having caused the city irreparable damage. The defendant published this resolution in its newspaper, and the plaintiff sued it for libel. Held, that it was libelous *per se;* that councils have no more right to traduce a man's private character than any other body of private citizens; that the resolution was outside of the duty of councils, and the fact that it was published in good faith as a matter of news would not excuse the defendant.

MASTER AND SERVANT.

The so-called "carriage cases," *Laugher* v. *Pointer*, 5 B. & C. 547, and *Quarman* v. *Burnett*, 6 M. & W. 499, receive an interesting addition in *Jones* v. *Scullard* [1898], 2 Q. B. 565. An accident occurred on the day of the Queen's jubilee, by the hired driver of defendant's brougham, with defendant inside, negligently losing control of defendant's horse. The brougham and horse were kept at a livery stable, whose owner, as in this instance, provided the driver. It was held by Russell, C. J., that there was evidence from which a jury might find that the driver was at the moment acting as servant of the defendant. And this would seem to be the sensible solution of the difficulty, rather than attempting to lay down as matters of law that certain varying facts do or do not constitute the relation of master and servant.

What Constitutes the Relationship

It is hardly necessary at the present day to cite authorities to show that a servant engaged for a term renders himself liable to discharge before the expiration of the term by disobedience to orders. *Gallagher* v. *Wayne Steam Co.*, 41 Atl. (Pa.) 294, is the most recent case of the kind.

Discharge, Disobedience

MORTGAGES.

The claim of the holder of a chattel mortgage, given as security for the payment of purchase money, may be defeated by the mortgagor's proving a breach of warranty which damaged the mortgagor to a greater extent than the unpaid purchase money: *Hennessey* v. *Barnett*, 55 Pac. (Colo.) 197.

Chattel Mortgage, Breach of Warranty

American Baptist Union v. *Weeks*, 77 N. W. (Minn.) 36, reversing same case, 75 N. W. 713, presents a great variety of judicial opinion on the subject of the duty of a junior mortgagee. W, as second mortgagee, in order to save the property, paid the taxes for 1889, taking an assignment certificate; subsequently he obtained both by foreclosure, subject to plaintiff's mortgage. In 1895 plaintiff foreclosed, and had to pay delinquent taxes of 1893–4. In 1896 plaintiff, under protest, redeemed from sale for 1889 taxes and sued Weeks for reimbursement; he proved that he had paid out more than he had received during his occupation. Upon the first argument judgment for plaintiff was affirmed on the theory that he stood in the shoes of the original mortgagor, having taken an assignment of mortgage

Payment of Taxes by Junior Mortgagee

MORTGAGES (Continued).

from him; and, further, that though he had originally the right to reimbursement, he lost it by his failure to pay the taxes of 1894–5.

Start, C. J., and Buck, J., dissented on the ground that, though he did not have to pay the taxes of 1889, yet the payment enured to the protection of the first mortgagee, who, if he wants the benefit of it, must pay for it. This is practically the view now adopted by the court, per Mitchell, J., who held that W had no duty to pay these taxes, and as owner in possession had performed his obligation. Canty, J., while agreeing that the former opinion was wrong, dissents on the ground that the second mortgagee has the same duties as the original owner.

The latter opinion is cited with approval in *Darelins* v. *Davis*, 77 N. W. (Minn.) 214, holding that, as there is no duty on the second mortgagee to pay the interest on the first mortgage, he may as creditor redeem the land from purchaser at sheriff's sale under first mortgage; also that a foreclosure for one installment of the mortgage debt exhausts the lien of the mortgage.

Increase, Chattel Mortgage

A calf is a curious kind of after-acquired property; yet in *Bank* v. *Baker*, 41 Atl. (N. J.) 704, it was held, on the faith of the maxim *partus sequitur ventrem*, that a chattel mortgage of a cow, as against subsequent mortgagees, covered her after-born calf, even though not mentioned in the mortgage. It was intimated by the court that the mortgagee's title would not have prevailed as against a *bona fide* purchaser for value.

Power of Trustees to Mortgage

The cases are numerous which discuss under what circumstances a trustee of real estate has power to mortgage it, though it is really in each case simply a question of the construction of the language of the will. In *Durell* v. *Bellinger* [1898], 2 Ch. 534, a general power of sale or postponement, and to make outlays from income or capital for improvements, repairs, etc., was held to confer, by implication, a power to mortgage for the purposes for which outlays were authorized.

Satisfaction, Mistake in Filing

B, holding a mortgage on A's land, which had been subsequently, without B's knowledge, conveyed to C, delivered to C who was his financial agent, a satisfaction of the mortgage, to be filed when the mortgage was paid off. C, through inadvertence, filed it of

MORTGAGES (Continued).

record and subsequently made assignment for creditors to D. Upon bill by B's executors to have satisfaction cancelled, D defended on ground that rights of C's creditors would be thus impaired. There was a decree for plaintiff, there being no equitable estoppel because it was not proved that C's creditors knew of or suffered by the satisfaction: *Wilson* v. *Kelly*, 76 N. W. (Minn.) 258.

Validity of Irregular Corporation Mortgage

The question involved in *Bishop* v. *Kent & Stanley Co.*, 41 Atl. (N. J.) 255, was the validity of a corporate mortgage, which had been executed without the consent of the 75 per cent. of the stockholders required by charter. It does not appear that the holder of the mortgage had any knowledge of this defect; and if so, in accordance with the weight of authority (see *Bank* v. *Turquand*, 5 E. & B. 248, 6 E. & B. 327; *Webb* v. *Commissioners*, L. R. 5 Q. B. 642; *Hackensack Co.* v. *DeKay*, 36 N. J. Eq. 548), he is not bound to investigate the indoor management of the company, and may assume that the requirements of the charter have been complied with. For some reason, not apparent, the court did not place its decision on this ground, but held that, as the provision was intended only for the benefit of stockholders, the mortgage was not void, but voidable by them. It followed that, as they had not attacked it, but on the contrary had acquiesced in it by allowing the payment of interest upon it, the unsecured corporate creditors could not attack it.

NEGLIGENCE.

Electricity, Exposed Wire Within Reach of Child, Attempt at Rescue

The Court of Appeals of Colorado, in *Walters* v. *Denver Consol. Electric Light Co.*, 54 Pac. 960, decided that a mother who voluntarily takes hold of her child in an endeavor to remove him from contact with a live electric wire is not negligent, whether she is aware of the danger or not, and that she can recover from the company for her injuries if the latter has been negligent. In this case, which was an action by a boy and his mother, a naked wire was placed on a house near a window and within reach of it. The room in which the window was placed was occupied by a child of twelve years. The insulator became detached from the wire and the boy attempted to replace it, whereby he was injured. Held, whether putting an exposed live wire in such a place was negligence was for the jury, and that whether the boy was

NEGLIGENCE (Continued).

negligent in taking hold of it was also for the jury. Held, also, that the mother in taking hold of him, whereby she also was injured, was not negligence, the court saying: "To say that an act to which her affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind."

PARENT AND CHILD.

The fallacy of the rule which imputes the negligence of a father or attendant to an infant of tender years is demonstrated in a singularly well-reasoned opinion of the Kentucky Court of Appeals, in the case of *Ry. Co.* v. *Herrklotz*, 47 S. W. 265, where the child injured was under four years of age, and where they refused to allow the doctrine of imputed negligence to be imported into the case, holding that the right of the infant to recover damages for an injury was as much his own as an estate conferred by a gift, and a third person's wrong or delinquency should not be allowed to affect one any more than the other.

Contributory Negligence of Parents, Children of Tender Years

PARTNERSHIP.

In *Hoopes* v. *Hartwell* (Colorado Court of Appeals), 54 Pac. 64, the plaintiffs sued B, C and D, as partners, for goods sold and delivered. It appeared that the plaintiffs had made a number of sales to the defendants at a time when they were doing business under a firm name; but the goods, for the price of which the suit was brought, were sent to a new branch establishment at a different town, and the plaintiffs were directed to bill goods so sent to B alone. The question was whether B alone was liable or whether the debt in suit was a partnership debt. On such an issue it seems clear that the plaintiffs should have been given an opportunity to prove admissions by C and D that the branch establishment was a firm enterprise and that their only desire was to keep the accounts separate. Evidence of such an admission was, however, excluded by the trial judge, as was also the testimony of one familiar with the creditors' business, as to who was understood to be the purchaser of the goods and on what credit they were delivered. Moreover, the trial judge, in charging the jury that all the defendants were liable for the debt unless they had notified the plaintiffs of a dissolution of the firm, qualified his

Notice of Dissolution, Rights of Creditors

PARTNERSHIP (Continued).

charge that this was true unless the plaintiffs had *waived* their rights against the defendants. The judgment was reversed for the improper exclusion of evidence, and also on the ground that the jury was very probably misled by the use of the word "waiver" in a case in which the right of the plaintiffs could have been extinguished only by a *release*. The court has done a service to legal progress in insisting upon an accurate use of legal terminology. The term, "waiver," is almost as much abused as "estoppel" and "trust."

Marshaling, Joint and Separate Creditors

A and B, partners, made a general assignment of firm and separate estate for the benefit of creditors. The firm estate was exhausted before the firm debts were paid, and certain firm creditors, who had not yet reduced their claims to judgment, obtained nothing. The assignee was discharged; B acquired real estate and died, leaving separate debts, incurred subsequent to the assignment, which exceeded the amount of the property so acquired. The question was whether unpaid firm creditors should be excluded from competing with the separate creditors in the distribution of the proceeds of the sale of the real estate. The surrogate properly applied the principle that there can be no marshaling in favor of the separate creditors in a case where there are not two funds. In other words, on such a state of facts, no good reason could be assigned for exercising equitable control of the firm creditor's legal right to satisfaction out of the separate estate of the individual partners: *In re Striker: In re Ives's Estate*, 53 N. Y. Suppl. 732.

Sale of Business by Firm to Single Partners, Rights of Creditors

In *Weil* v. *Jaeger*, 51 N. E. 196, a banking business was carried on by six partners. A made deposits with them. Subsequently four sold out to two, the two executing the usual bond of indemnity to the four. On the entity theory, this was obviously a sale by the firm to the remaining partners. The two then continued in business and A continued his deposit account (which at that date amounted to about fourteen hundred dollars), and afterwards deposited a little less than five hundred dollars more. The two then made an assignment for the benefit of creditors, and in their schedule of liabilities they put down A's entire deposit as a claim against them. A filed his claim for this amount with the assignee and afterwards brought suit against the six and

PARTNERSHIP (Continued).

recovered judgment. Upon these facts it seems sufficiently clear that A was a separate creditor of the two, and not their partnership creditor, as respects the amount of his claim against the old firm. It seems equally clear that he was a partnership creditor of the two as to the amount of his deposit subsequent to the original dissolution. As to the former sum, he should have been permitted to prove with the separate creditors of the two. As to the latter sum, he should have been permitted to prove with their partnership creditors. For reasons which are not satisfactorily stated, the court permitted A to prove for his whole claim with the firm creditors of the two. It is, however, noted in the report that a re-hearing is pending.

PLEADING AND PRACTICE.

Removal of Causes for Prejudice or Local Influence, Limit of Time

Two decisions upon the removal of causes from a state court by Simonton, Cir. J., in the Circuit Court of the United States for the Western District of North Carolina, appeared in the same publication on December 27, last: (1) Under the Acts of 1887–88 (March 3, 1887, re-enacted August 13, 1888, 25 Stat., c. 866, 433, 435), prejudice or local influence must be shown to the "legal satisfaction" of the Circuit Court. The amount and manner of the proof required in each case must be left to the discretion of the court; (2) after the term has expired, at which an order for removal on such ground was made, it cannot be reviewed; (3) such a proceeding may be *ex parte* without notice of the application to the adverse party: *Crotts* v. *Southern Ry. Co.*, 90 Fed. 1. As to 2 see, also, *Parks* v. *Ry. Co.*, Ibid, 3.

Contributory Negligence, Binding Instruction

The Circuit Court of the United States for the Eighth Circuit has recently stated the familiar rule that if, in an action for personal injury, the undisputed facts establish the existence of contributory negligence on the part of the plaintiff, it is the duty of the trial court to instruct the jury to find for the defendant. The only question, in the Appellate Court, is whether the trial court ruled rightly in holding that the defence of contributory negligence was conclusively proven by the evidence in the case: *Claus* v. *Steamship Co.*, 89 Fed. 646.

The test of the jurisdiction of the Federal Court in a suit to enjoin the further infringement of a trade-mark and for an

PLEADING AND PRACTICE (Continued).

Jurisdiction, Federal Court, Trade-mark

accounting, is the value of the trade-mark to be protected, and not the amount of damages which may have been sustained, as decided by the United States Circuit Court, Northern District of California: *Hennessy* v. *Hermann*, 89 Fed. 669.

It is often interesting to study questions of pleading and practice that differ from any that could arise in one's own state.

Code Pleading, "Non est Factum" to Promissory Note, Issue Thereon

The following syllabus is from a case in the Supreme Court of Tennessee: Bill in Chancery upon a Note.—Defence was a plea by defendant of "*non est factum*," in the code form . . . "the note was not executed by him, or by any one authorized to bind him." Under direction of the court, issues were made as to whether defendant signed the note himself or authorized it to be signed. Held, that the issues were not equivalent to the plea, since a party by ratification might be held to have executed the instrument which he never signed or authorized to be signed, and estoppel would have prevented his denying it to be his own, though, in fact, it were not: *Furnish* v. *Burge*, 47 S. W. 1095.

PRINCIPAL AND AGENT.

The importance of care in the preparation of a power of attorney is well shown in *Tyrrell* v. *O'Connor*, 41 Atl. (N. J.) 674, where it was held that a power to sell bonds did not of itself include the power to bind his principal to convey. The difficulty was, however, cured by the ratification clause of the power, which expressly mentioned sales.

Construction of Power of Attorney

Although the act of an agent be beyond the authority conferred by his principal, yet the principal, by ratifying his act, either expressly or impliedly, becomes responsible for it. See *Laudin* v. *Moorhead Bank*, 77 N. W. (Minn.) 35, where bank was held liable for the proceeds of the sale of plaintiff's wheat, unlawfully sold by its cashier—the bank having received the proceeds.

Ratification

It is well settled that A, an undisclosed principal, cannot recover from B, the third party, the price of goods sold to B by C, A's agent, if B, not knowing that C was acting for A, has in the meantime paid C. *A fortiori*, if C was not A's agent at all, but simply employs A to

Undisclosed Principal

PRINCIPAL AND AGENT (Continued).

fulfill his (C's) contract with B, A has no action against, because no contract with, B: *Carroll* v. *Benedictine Society*, 41 Atl. (Md.) 784.

REAL PROPERTY.

In *Waterworks Co.* v. *Ry. Co.*, 54 Pac. (Mont.) 963, occurs an exhaustive discussion of the distinction between an easement and a mere license. In this case a town granted a waterworks company a certain right of way through its streets, and afterwards the officers of the town agreed verbally to a change in route. The pipes were laid in accordance with the change of route, and, after more than six years of user, the owners of the property through which the lines ran tore up the pipes, whereupon the water company asked an injunction, claiming an easement in the land. The court held that the company held but a mere parol license, which was revocable though executed, and though its revocation would cause the company great loss. This is the generally accepted doctrine. See *Laurence* v. *Springer*, 49 N. J. Eq. 289; Jones on Easements, § 70 ff. The rule that an executed license on which a party has acted is irrevocable is adopted in many states—in Pennsylvania, *Resick* v. *Kern*, 14 S. & R. 267; in Indiana, *Robinson* v. *Thrailkill*, 110 Ind. 117; in Alabama, *Rhodes* v. *Otis*, 33 Ala. 578.

Easement, License, Distinction

The question whether a mortgage covers, or rather how far it covers, subsequently erected fixtures erected on the mortgaged premises by the mortgagor, is one of much importance, and one of its most interesting variations is where the fixtures are erected by a lessee of the mortgagor. *Belvin* v. *Raleigh Paper Co.*, 31 S. E. (N. C.) 655, is a case of this class, with the not unusual additional complication that, by a provision of the lease, the fixtures were to remain the property of the lessee. Following the modern thought (see *Teaff* v. *Hewitt*, 1 Ohio St. 511) that the intention of the parties is the main criterion, the court held that such fixtures were not subject to the mortgage, either as against the lessee or his creditors who had retained liens thereon. Montgomery, J., dissented.

Mortgage on Fixtures, What Constitutes

SURETYSHIP.

The equitable right of contribution between cosureties is subject to any equitable counterclaim, even though that coun-

SURETYSHIP (Continued).

Contribution, Equitable Counter-Claims

ter-claim might not amount to a set-off at law. This is well illustrated when cosurety for payment of corporate note defends upon ground of insolvency of maker and indebtedness of plaintiff to it. While admitting this principle fully in *Smith* v. *Dickinson*, 76 N. W. (Wis.) 766, the court held it inapplicable because the defendant had proved that the corporation was insolvent only in the technical sense of not being able to pay its debts as they matured, and not (as was necessary to his case) that upon final accounting it would not be able to pay all of its creditors.

WILLS.

In re Scowcraft [1898], 2 Ch. 638, decides that a gift by the vicar of a parish, by his will, to the vicar for the time being of the parish, of a building to be used as a village club and reading room, "to be maintained for the furtherance of conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing," was a good charitable gift. It was argued that a gift for the furtherance of the political principles of any one party was not for the benefit of the public generally, and was, therefore, not charitable. On the other side it was said that a gift for religious purposes is good, and is not vitiated by being intended to promote particular views: *West* v. *Shuttleworth*, 2 M. & K. 684.

Gift to Charity, Validity

In the case of *In re Hocking* [1898], 2 Ch. 567, the Court of Appeal has decided again that the legal possibility of child-bearing continues up to the moment of death. There it appeared that A, by will, gave all his property to trustees for the children of B and C, his sisters, to be equally divided amongst them on the attainment of twenty-one years by the youngest. And he further provided that should either of them marry and die without children the property was all to go to the other, and he gave his trustees power to make advancements to any child of any part of its prospective share, not exceeding one-third thereof. B had children; C was fifty-four years old and had no children. The trustees applied to know whether the fact of C's being beyond the age of child-bearing ended their discretion as to advancements under the will. It was held that so long as C lived there was, in contemplation of law, a possibility of her having children, and the

Gift on Failure of Issue, Impossibility of Child-bearing

WILLS (Continued).
trustees' discretion was exercisable up to the time of her death, at which time only the children of A would take a vested interest in the property given to C's children, should she have any. The court followed *In re Lowman* [1895], 2 Ch. 348 and *In re Dawson*, 39 Ch. D. 155. The case of *Jee* v. *Audley*, 1 Cox, 324, was one dealing with the rule against perpetuities. In that case it was held that a gift over on an indefinite failure of issue of A and B, his wife, it being shown that A and B were both over seventy years old, was nevertheless bad as too remote, for the court refused to consider it legally impossible for these two old persons to have issue.