PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BILLS AND NOTES.

M, the father of A, was indebted to B. M had, owing to some financial trouble, placed a large amount of property in A's name. M requested A to execute and deliver to B a note for the amount of his, M's, debt. B sued A on the note and A defended on the ground of want of consideration. The court upheld a judgment for plaintiff, asserting that an extension of time of payment of a debt was sufficient consideration for a note of a third person for the amount of the debt, and that the acceptance of the note in payment of a debt, due from one who is not the maker, was likewise a good consideration: *Harris* v. *Harris*, 54 N. E. 180 (Illinois).

Consideration

CONSTITUTIONAL LAW.

The legislature of Nebraska passed an act (Comp. Stat. c. 93 a., Art. 2, §§ 66, 67), authorizing certain corporations to levy assessments on their shares of capital stock to defray running expenses, such assessments to be a lien upon the said stock and to render it liable to forfeiture for non-payment thereof. The A company was formed prior to this enactment and its stock was full paid and non-assessable. After the passage of the act the company levied certain assessments in accordance with its provisions, and the stockholders refused to pay the assessments and moved for injunctions to restrain the forfeiture and sale of their stock under the act. A decree was entered in their favor on the ground that they were parties to a contract giving them rights which the legislature could not infringe: *Enterprise Ditch Co.* v. *Moffitt*, 79 N. W. 560. The decree was manifestly right: See 1 Cook, Stock & Corp. Law, § 492; *Detroit* v. *D. & H. Plank Rd. Co.* (Mich.), 5 N. W. 279.

Corporations, Stock Assessments, Obligation of Contracts

CONTRACTS.

A was in the habit of insuring the fidelity of his employes in the B Industrial Guaranty Company. A person applied to

CONTRACTS (Continued).

Construction

A for employment and A then sent to the B company an application for insurance against loss by reason of the employment. The B company sent A a contract in which was set forth that in consideration of a certain sum it guaranteed the fidelity of the employe to the extent of $500, a bond to that effect to be issued and this paper to stand in place of the bond until the same should be issued. Across the face of this was written, "subject to result of investigation." In a suit by A against B, on the alleged contract of guaranty, B contended that it was not a contract, but that the words written across its face made it a mere proposal on the part of the company to make a contract if the investigations proved satisfactory. The court held it would have no meaning unless it amounted to a binding acceptance, since it could not operate as a proposal, A having made the proposal for a contract. It was said that the words written across the face of the instrument must be taken to mean that the B company reserved the right to rescind the contract in case the investigations proved the risk undesirable.

CORPORATIONS.

Minority Stockholder, Sale of Business

Decisions are rapidly being added by the courts to the list of cases dealing with the rights of a minority stockholder to interfere by injunction with the expressed will of the majority in a matter pertaining to the business management of the corporation. In *Philips* v. *Providence Steam Engine Co.*, 43 Atl. 598, the Supreme Court of Rhode Island has followed the principle recognized by it in *Hodges* v. *Screw Co.*, 1 R. I. 312, to the effect that where a sale of the corporation's business is necessary because no longer profitable, a private sale agreed to by a majority of the stockholders will not be enjoined at the suit of the minority stockholder because he considers the price inadequate, where there is no claim of unfairness, oppression or fraud. These cases recognize the principle that within the scope of its chartered authority the corporate will, as expressed by the vote of the majority, is supreme. The question of whether the business is profitable or not is clearly one of business policy and rests solely with the stockholders. The court cites in support of its decision also the case of *Treadwell* v. *Manufacturing Co.*, 7 Gray, 393. In that case a majority of the stockholders voted to sell the corporate assets and franchises to another corporation and to distribute to the stockholders of the retiring corporation stock of the corpora-

CORPORATIONS (Continued).

tion purchaser in payment for their shares in the old company. The court refused to interfere at the instance of a minority stockholder who was dissatisfied with the arrangement. This case, while a sufficient authority for the decision in the principal case, seems to go rather too far, as it involves not only the question of business policy, whether the corporation should be dissolved or sold as being no longer profitable, but also sanctions the right of the majority to launch a dissenting stockholder into a new and different business from that which he contracted to enter when he purchased his stock. The principal case is, however, clearly sound: See *Lauman* v. *Railroad Co.*, 30 Pa. 42; *Sewell* v. *Beach Co.*, 50 N. J. Eq. 717.

Minority Stockholder

Burden v. *Burden*, 54 N. E. 17 (New York), holds that a by-law passed by the trustees of a corporation will not be set aside on the suit of a minority stockholder, on the ground that its provisions are unreasonable and in excess of the powers of the trustees, so long as the trustees act within their charter powers.

Promotors' Agreements

Plaintiff and defendant, partners, being unable to agree in the management of their business, formed a corporation, it being expressly agreed that defendant, who was manager of the business, should have a controlling interest. A promotors' agreement was executed, providing that defendant was "to take, own, and hold" 1000 shares, plaintiff 998 shares, and a third person the remaining two shares; the profits to be equally divided between plaintiff and defendant. The agreement also provided that defendant, "if he shall at any time sell or assign 998 shares of his said stock, then, and in such case, he will, without any consideration for the same, transfer the other two shares of his said stock" to plaintiff. Held, that the last provision did not prevent defendant from selling portions of his stock less than 998 shares, without transferring the two shares to plaintiff: *Burden* v. *Burden*, 54 N. E. 17 (New York).

CRIMINAL LAW.

Larceny, Bailment or Sale

The Supreme Court of Minnesota has been recently called upon to distinguish between a bailment and a sale, in order to determine the validity of an indictment for grand larceny. In *State* v. *Barry*, 79 N. W. 656, it appeared that wheat was deposited with the defendant

CRIMINAL LAW (Continued).

who gave a receipt for the same containing this clause: "Which amount, and the sum calculated by grade, will be delivered to the owner of this receipt or his order." The receipt also provided that the grain was insured for the benefit of the owner, and that the latter should pay a certain rate of storage. The defendant sold and shipped the wheat, and upon demand for the sum or an equivalent amount of grain was unable to furnish the same. He was indicted for larceny and contended that the transaction amounted to a sale. He relied upon the case, *State* v. *Rieger*, 59 Minn. 151. That case was distinguished by the court on the ground that the receipt there contained an option to the warehouse man to pay the bearer thereof the market price in money, less elevator charges, or to deliver the requisite quantity of the grain, and conviction was sustained.

DAMAGES.

Injury to Property, Mental Suffering

The Supreme Court of New Hampshire, in the case of *Friel* v. *Plumer*, 43 Atl. 618, has decided that a debtor may recover damages for mental suffering occasioned by his creditor's malicious attachment of his exempt household furniture. The question whether a person may recover for mental suffering caused by malicious injury to his property, has been a mooted one. The same court, in *Kimball* v. *Holmes*, 60 N. H. 163, has held, that for an injury to a pet animal of a plaintiff, there may be a recovery for the mental suffering occasioned by reason of the attachment borne for the animal. The case was put on the ground that such mental suffering was the natural and proximate result of such an injury. The court in the present case very properly says, that there can be no distinction between the cases on the basis of any supposed difference between animate and inanimate objects, the question being simply one of proximate result.

In most jurisdictions practically the same result is reached through the doctrine of exemplary damages, which doctrine is not recognized in New Hampshire. See *Fay* v. *Parker*, 53 N. H. 342; *Bixby* v. *Dunlap*, 56 N. H. 456. A somewhat similar case was decided similarly in Massachusetts: *Meagher* v. *Driscoll*, 99 Mass. 281. The doctrine of exemplary damages does not prevail in Massachusetts: *Smith* v. *Holcomb*, 99 Mass. 552. In states where the doctrine of exemplary damages is recognized, mental suffering is said not to be a subject for compensation when it results from an injury to property: *Smith* v. *Grant*, 56 Me. 255.

DAMAGES (Continued).

In the same connection we may note the case of *Deyo* v. *Clough*, 43 Atl. 653, in which the New Jersey Supreme Court says, "The question of punitive damages is not raised. The libel was gross and the jury were properly told that they could give compensation for the wounded feelings of the libeled plaintiff." It is hard to see any distinction between the kind of mental suffering here compensated, and the sort occasioned by an injury to a plaintiff's property, for which so many courts refuse a recovery.

Libel, Wounded Feelings

EVIDENCE.

In *People* v. *Rice*, 54 N. E. 48, the Court of Appeals of New York holds that the fact that a witness has pursued for an indefinite time a study of medicine and of nervous diseases, in connection therewith, that he is a manufacturer of medicines, and the publisher of medical books, and the author of one, the subject of which does not appear, does not qualify him to testify as an expert on insanity; though the court is careful to say that if he be in reality an expert on any subject coming within the domain of medicine, he is entitled to testify as such, though he be not licensed to practice medicine.

Witness, Expert

In *Johnson* v. *Opfer*, 79 N. W. 547 (Nebraska), each party to a suit upon a promissory note testified of one, and only one conversation in regard to the matter in issue —the execution of the note. They differed, however, as to the time and place of the conversation. The one gave testimony of admissions made by the other; the latter offered to show what he said at the time and place when and where he claimed to have talked with the former concerning the issuable matter. The rejection of this offer was properly held error. See *Nesbit* v. *Stringer*, 2 Duer, 26.

Witness, Competency

HUSBAND AND WIFE.

A lived apart from B, his wife. Some years before his death he put all his personal property in trust for and in the names of relatives and friends, and also made a deed of all his real estate, whose value was less than $5000, without consideration, reserving therein to himself during his life the use and income of the land, with power to sell or mortgage and dispose of the proceeds as he might choose. A died intestate and without issue. By the Massachusetts

Fraudulent Deed, Interest of Widow in Husband's Land

HUSBAND AND WIFE (Continued).

statutes the widow of such a decedent may take one-half of the lands for life, and is entitled to take his real estate absolutely, not exceeding $5000. In a bill to set aside the conveyance, a decree was entered for the plaintiff on the ground that it was a fraud on the wife's rights: *Brownell* v. *Briggs*, 54 N. E. 251 (Massachusetts). The same court has held void the deed of a husband made to prevent his wife from recovering alimony: *Chase* v. *Chase*, 105 Mass. 385; and has allowed a wife to recover lands, which her husband had procured, to be sold upon mortgage, in order to evade his liabilities to his wife and to deprive her of her dower: *Gibson* v. *Hutchinson*, 120 Mass. 27.

INSURANCE.

Accident Insurance, Over-Exertion

In the case of *Rustin* v. *Standard Life and Accident Co.*, 79 N. W. 702 (Nebraska), it appeared that the plaintiff, the holder of an accident policy issued by the defendant company which exempted the company from liability for any accident caused by "voluntary over-exertion;" in the performance of his duties and while attending to his work, had attempted to lift a heavy weight, and in so doing had incurred the injury for which he sought to recover under the policy. He testified that he did not estimate that the weight was too heavy for him to lift and that he had been accustomed to lifting heavier weights. It was held that he was entitled to recover, as his right to indemnity was not lost because the injury resulted from over-exertion, unless the over-exertion was conscious and intentional. This ruling is in accordance with the authorities: *Indemnity Co.* v *Dorgan*, 7 C. C. A. 581; *Johnson* v. *Accident Co.* (Mich.), 72 N. W. 1115.

LIBEL.

What Constitutes, Commercial Agency Reports

On reargument, the Supreme Court of Minnesota has reversed its decision in *McDermott* v. *Union Credit Co.*, reported 78 N. W. 967. See 79 N. W. 673. The court held in its former opinion that the designation of a merchant by the word "slow" in a commercial agency catalogue to indicate to its patrons that the person in question did not liquidate his debts with promptitude, amounted to a libel.

The court says in its opinion on the reargument: "Thus considered, it by clear implication asserts that the plaintiff does pay all his bills and that he does this without being pushed,

LIBEL (Continued).

and without the necessity of leaving the claim in the hands of some one for collection or taking judgment against him, and that he does not refuse payment of his bills or break his promises to pay; neither does he let his note, when he gives one, go to protest, nor is his credit not recommended; but, on the other hand, he does not pay promptly weekly or monthly, or always on demand. Our final conclusion is that, thus considered, there is nothing in the word 'slow' that does *per se* injure a man's credit or his reputation for integrity and honesty or affect his standing in the community in the esteem and respect of his neighbors." It would seem that this is rather an ingenious explanation of a rather obvious terminology. The decision was dissented from by two judges. What, perhaps, influenced the decision as much as anything was the fact mentioned by the court that an opposite conclusion would open the door to a mass of profitless litigation.

MORTGAGES.

A mortgage was executed under agreement that it should be subject to a prior mortgage executed to a third person. The prior mortgage was subsequently released and a new one substituted for the same indebtedness. The subsequent mortgagee thereupon claimed that his mortgage was thereby given priority. It appeared that the junior mortgagee was not misled or deceived, and parted with nothing on the faith of the release of the mortgage, and the senior mortgagee agreed to a change in this security only on condition that his priority should not be affected. Held, that the junior mortgagee did not gain a priority by the transaction: *Roberts* v. *Doan*, 54 N. E. 207 (Illinois).

Priority, Release of First Mortgage

PLEADING.

The Supreme Court of Nebraska, in *Chicago, R. I. & P. Ry. Co.* v. *Young*, 79 N. W. 557, has followed the rule laid down by it in *Railroad Co.* v. *VanBuskirk*, 78 N. W. 514, and *Railroad Co.* v. *Bond*, 78 N. W. 710, to the effect that in a suit by an administrator in behalf of the widow and children of one killed by the wrongful act of another, it is a sufficient averment of damage for the declaration to set out the relationship of the parties, as a presumption of damage arises therefrom. This rule is contrary to the general trend of authority in this country: *Regan* v. *Ry. Co.*, 51 Wis. 599. In *Hurst* v. *Ry. Co.*,

Death by Wrongful Act, Averment of Damage

PLEADING (Continued).

84 Mich. 539, it was held that an averment merely of the relationship of the parties did not even make out a case for nominal damages. The same rule is followed in England in construing Lord Campbell's act. See English cases cited in *Orgall* v. *Ry.*, 64 N. W. 450.

These late decisions of the Nebraska court seem to be a complete reversal of the former rule of that court which was in harmony with the authorities. See *Electric Co.* v. *Laughlin*, 45 Neb. 390; *Orgall* v. *Ry. Co.*, 46 Neb. 4. But see *City of Friend* v. *Burleigh*, 53 Neb. 674, and *Ry. Co.* v. *Crow*, 54 Neb. 747. The court recognized the departure from the old rule and justified it on the ground that the later ruling works more substantial justice.

PROPERTY.

Party Wall, Covenants Running with the Land

The Supreme Court of Michigan gives its adherence to the line of cases which hold that an agreement that one owner is to build a wall, which shall become a party wall, and one-half of the cost of which is to be paid by the adjoining owner, when the latter uses it, runs with the land and passes to the purchaser or assignee when the contract evinces such intention: *Noble* v. *Kendall*, 79 N. W. 810. See to the same effect, *King* v. *Wight*, 155 Mass. 444; *Mott* v. *Oppenheimer*, 135 N. Y. 312; *Roch* v. *Ullman*, 104 Ill. 11; *Ins. Co.* v. *Lee* (Minn.), 77 N. W. 794.

It is held that, where the provision of the agreement is that payment shall be made to the party building the wall, and there are no words indicating that the right to receive payment shall pass to his assigns, the contract is personal: *Sebald* v. *Mulholland*, 155 N. Y. 455; *Voight* v. *Wallace*, 179 Pa. 520; *Joy* v. *Bank*, 115 Mass. 60.

WILLS.

Provision for After-born Children

The Supreme Court of Wisconsin in *Re Donges' Estate*, 79 N. W. 787, has handed down a very elaborate opinion on the subject of a presumed intestacy by reason of the non-provision in a will for after-born children. In that case it appeared that the testator devised his estate to his wife, directing that she should hold it until the youngest of his children, if any are born, should attain twenty-one years of age, without directing that it should then go to such children or making any disposition of it. The court found no difficulty in holding that in accordance with the general rule

WILLS (Continued).

that the court will do its utmost to ascertain the testator's intention and will presume against an intestacy that this operated as a devise to the children on the majority of the youngest child. The question then presented itself, whether this was a "provision" for such after-born children within the Revised Statutes, Section 2286, which confer upon an after-born child the share which he would have had in the event of intestacy when the parent, by his will, makes no provision for such child. The court held that this amounted to such a provision as would satisfy the statutes and the children should take their shares under the will and not as if the testator had died intestate.

The cases on the subject of non-provision for after-born children are very numerous and are usually of small value out of the jurisdiction in which they are decided on account of the difference in the object sought to be attained by the statutes of the various states. The decision in this case is sustained by the authorities in all jurisdictions where the statute has for its object the protection of such children from an apparent oversight or mistake on the part of the testator: See *Mann* v. *Hyde*, 171 Mich. 278; *Given* v. *Hilton*, 95 U. S. 591, 594.

In such states, however, as Maine and Pennsylvania, where the statute is intended absolutely to restrict a testator from disinheriting his after-born children, such a decision as that in the case cited would probably not be reached. In such states the court is required to go a step further than the court went in the principal case, and to determine whether the provision made by the will is a reasonable provision. In *Hollingsworth's Appeal*, 51 Pa. 521, it was held that a gift of all the testator's property to his wife absolutely and the appointment of her as guardian for all his children, they being committed to her affection, judgment and discretion for their maintenance, education and future provision, was not a sufficient provision for the said children, although the testator distinctly declared in his will that he so regarded it. It has also been held that such a provision must not be postponed or reversionary: *Bowen* v. *Hoxie*, 137 Mass. 527; *Rhodes* v. *Weldy*, 46 Ohio St. 234; *Waterman* v. *Hawkins*, 63 Me. 156; *Potter* v. *Brown*, 11 R. I. 232; *Willard's Est.*, 68 Pa. 327.