PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

Judgment for Alimony

A judgment for the payment of alimony, obtained by a bankrupt's wife against him, is a "debt" under § 17 a of the Bankrupt Act, which is provable against the bankrupt; therefore the wife will be enjoined from prosecuting her judgment to satisfaction in a state court: *In re* Van Arden, 96 Fed. 86.

Bankrupt's Unrecorded Mortgage

In Georgia an unrecorded mortgage is good as against the mortgagor and all persons except subsequent purchasers and incumbrancers. The present bankrupt, residing in Georgia, executed a mortgage on September 15, 1898. The mortgage was entered for record on January 19, 1899, at 4 P. M., and on the same day, at 5.45 P. M., a petition for voluntary bankruptcy was filed. Held, that the mortgaged property passed to the mortgagee on September 15, 1898, and the transfer was therefore more than four months previous to the filing of the petition: *In re* Wright, 96 Fed. 187.

"Workmen," General Manager

The general manager of a corporation, who has charge of the whole business of the corporation at a salary of $100 per month, is not one of the "workmen, clerks or servants" who are entitled to priority of payment under § 64 b of the Bankrupt Act: *In re* Grubb-Wiley Co., 96 Fed. 183.

BILLS AND NOTES.

Indorsement on Separate Instrument

The Supreme Court of California has announced its adherence to the now well-settled rule of the law merchant which requires an indorsement of a negotiable instrument to be upon the instrument itself. Whether a valid indorsement may be made upon the face of the instrument is perhaps an open question and was not decided by the court. In the present case a note and mortgage had been assigned to the plaintiff by separate instruments in writing. Held, that while the assignor's title passed, yet

BILLS AND NOTES (Continued).

the assignee did not become a holder of the note under the commercial law, and was liable to be met by the defence of want of consideration on the part of the maker: *Hays* v. *Plummer*, 58 Pac. 447.

Presumption of Payment

In an action against an executor on a promissory note made by his testator, the defence was payment. It was shown that the testator was indebted to the plaintiff in other ways besides being liable on the note, and that he had given to the plaintiff his note and mortgage for a sum which would just about cancel his liabilities to the plaintiff, including his liability on the note now the subject of the action. However, the executor was unable to show that the testator had given the mortgage for the purpose of paying off the note held by plaintiff. The Supreme Court of California very properly held that the executor had failed to sustain the burden of proving that the payment by the testator was intended for, and accepted as, a payment of the note in suit: *Griffiths* v. *Lewin*, 58 Pac. 205.

CONSTITUTIONAL LAW.

Act Depriving Corporation Creditor of Remedy Against Stockholder

The Circuit Court (D. New Jersey) has declared void, as regards certain cases, the New Jersey Act of March 30, 1897 (Laws 1897, p. 124), which provides that no action may be brought in any New Jersey court by a creditor of a corporation to enforce a stockholder's liability arising in a foreign jurisdiction, save an equitable proceeding, allowed by the statute, for the benefit of all the creditors. In *Western Nat. Bank* v. *Reckless*, 96 Fed. 70, the plaintiff became, in 1892, a creditor of a Kansas corporation, organized under a law of Kansas which provided, *inter alia*, that after the creditor had obtained a fruitless judgment against the corporation, he might sue any stockholder for an amount equal to the value of his stock. Plaintiff brought this action against the defendant, a stockholder of the corporation residing in New Jersey, in the Circuit Court of the United States for the district of New Jersey, and was met, of course, by a plea setting up the above act of 1897.

The opinion of Judge Gray, ordering judgment for the plaintiff, establishes the following propositions: (1) That the obligation of the defendant, created under the Kansas statute, was

CONSTITUTIONAL LAW (Continued).

transitory and could be enforced in any jurisdiction by any competent court; (2) That the act of 1897 was binding upon the Federal courts of New Jersey, as well as the state courts; (3) That the relation between the plaintiff and defendant was a contract relation, after plaintiff had recovered judgment against the Kansas corporation; (4) That the act of 1897 deprived the plaintiff of an integral portion of the remedy, whereby he could enforce his contract, and the deprivation of his direct right of action was not compensated for by the equitable proceedings allowed under the statute; (5) That therefore the act of 1897 was unconstitutional as impairing the obligation of plaintiff's contract.

CORPORATIONS.

The Supreme Court of Illinois has placed itself squarely in line with the position taken by the Supreme Court of the United States in regard to the liability of a corporation, when it sets up the invalidity of one of its own acts on the ground that it is *ultra vires* of itself, to be met by the answer that it has taken the benefit of the act and is estopped from setting up its own lack of power. Thus in *Nat'l Bldg. & Loan Ass'n* v. *Home Savings Bank*, 54 N. E. 619, it was held that a building and loan association, which had made a contract beyond the scope of its charter, was not estopped from setting up its invalidity by the fact that it had reaped the benefits of the transaction. The distinction was emphasized between acts *ultra vires* of the corporation itself and acts of the corporation officers which were irregular, but which could be ratified by the stockholders. In the one case the invalidity could be pleaded, in the other case it could not. In order to make its opinion on the subject clear, the court quoted several pages from *Cent. Transp. Co.* v. *Pull. Pal. Car Co.*, 139 U. S. 24, and *Thomas* v. *R. R. Co.*, 101 U. S. 71, and definitely announced the doctrines therein expressed to be the law of Illinois. Carter, J., dissenting, announced his adherence to the Pennsylvania doctrine; that the corporation is estopped from pleading *ultra vires* whether the act is beyond the power of the corporation itself, or merely irregular in that an agent of the corporation has exceeded his authority, and that, after the corporation has received the benefit of the act, the state is the only party competent to raise the question of its validity.

Acts Ultra Vires, Estoppel

Perhaps no question presents greater difficulty than that of the status of a stockholder in an insolvent corporation, when

CORPORATIONS (Continued).

Right of Stockholder to Rescind his Contract of Subscription after Insolvency

his subscription has been obtained by the fraud of the officers of the corporation. Has he a defence to an action by the receiver for unpaid subscriptions, and if so, on what grounds? The question generally arises in the suit by the receiver against the stockholder, but in *Tierney* v. *Parker*, 44 Atl. 151, it was substantially presented in an action by the stockholder against the receiver to rescind his contract of subscription. It appeared that the stockholder had been induced to subscribe in 1889 through the fraudulent representations of the president of the corporation; that he had received notice of the fraud in 1890; that the receiver had been appointed in 1893; and that not till then had the stockholder made any effort to rescind, when he brought this bill. Upon these facts the Court of Chancery of New Jersey held that the stockholder had possessed the right of rescission when he first discovered the true facts, but that he had lost his right through his delay of three years in asserting it. Although the decision of the court expresses the rule adopted in several jurisdictions, yet there is a growing feeling of approbation for the English rule that the liability of the stockholder becomes absolute upon the insolvency of the corporation. Whether this liability results from an estoppel created by the stockholder by the mere fact of his name appearing on the books, or whether it arises from the doctrine that the principles of partnership law apply to a case like this is a question yet to be decided by the courts.

CRIMINAL LAW.

In *In re Breton*, 44 Atl. 125, the petitioner was convicted upon two complaints for illegally keeping intoxicating liquors,

Simultaneous Sentences, Presumption of Time of Taking Effect

and received a sentence of sixty days imprisonment in each case. It was not stated which imprisonment should be suffered first, nor that sentence in either case should begin at the expiration of the sentence of the other. After serving sixty days the petitioner applied for his release.

The Supreme Court of Maine ordered his discharge, holding that, in the absence of statutes, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time will run concurrently, and the two punishments will be executed simultaneously. Citing 1 Bish. Crim. Proc. 1310.

CRIMINAL LAW (Continued).

In *State* v. *Nordstrom*, 58 Pac. 246, the appellant had been convicted of murder in the first degree. After his case had been taken twice to the Supreme Court of the United States, together with sundry appeals to the various courts of Washington and the Circuit Court of the United States, he was finally sentenced to be hanged. After his sentence, his counsel suggested to the court of conviction that he had become insane, and the court, of its own motion, appointed a committee of physicians to examine the appellant, which committee reported that he was sane. His counsel then moved to have the question of his sanity submitted before a tribunal where he could be represented by counsel. This motion was dismissed, whereupon an appeal was taken to the Supreme Court of Washington. The latter court, following *Laros* v. *Comm.*, 84 Pa. 200, and *Webber*, v. *Comm.*, 119 Pa. 223, dismissed the appeal on the ground that it was not a matter of right, but vested wholly in the discretion of the trial court. Whether the prisoner has taken any further appeals does not appear from the report.

Insanity of Convicted Prisoner, Discretion of Court

DAMAGES.

In *McBride* v. *Sunset Telephone Co.*, 96 Fed. 81, the plaintiff brought an action against the telephone company for failure to deliver a message to him, alleging, as his basis for damages, that by reason of the non-delivery of the message, he was not informed of the death of his child, and that his apparent outrageous conduct, in remaining away from his family at the time, had caused them to become estranged from him and to refuse to associate with him, and also that he had suffered great mental anguish. Held, dismissing plaintiff's complaint, (1) that mental suffering, by itself, does not furnish the basis for the recovery of damages, and (2) that in this case the estrangement of plaintiff's family was not the natural and probable consequence of the failure to deliver the message, and therefore could not support the action.

Breach of Contract, Remote Damages

DEEDS.

In a proceeding for a partition of a decedent's estate, the defendant claimed the land by virtue of a deed from the decedent to him. It was shown that the deed had been kept by the decedent in his private box at the bank and had never been delivered to the defendant.

Symbolical Delivery, Evidence

DEEDS (Continued).

The latter relied upon declarations of the decedent that he had intended the land for defendant, also upon the fact that the decedent had given defendant his key to the strong box, thus making a symbolical delivery to him of the deed contained within. However, the defendant was unable to clearly prove that the key had been given to him for the express purpose of transferring to him the possession of the deed, and that it was not done with the intention of giving him access to certain other papers. Held, that the defendant had, on the above facts, failed to sustain the burden of proving a delivery of the deed: *Walls* v. *Ritter*, 54 N. E (Ill.) 565.

EQUITY.

In *Fahy* v. *Cavanagh*, 44 Atl. 154, the Court of Chancery of New Jersey dismissed a bill to compel the performance of a written contract to purchase real estate under the following rather peculiar circumstances:—The title of the vendor depended upon a will, drawn evidently by an illiterate man, which, after the devises and bequests, contained the following: "Excetoras of the will, Valentine Burke, Cornelius McCue." Underneath these names the signature of the testator appeared. At the probate of the will the testimony of Burke and McCue, who had written their names in the will, as above, clearly showed that the testator intended their signatures to be that of witnesses to his will, and that he did not intend to designate them as executors.

Contract to Purchase Land, Title Depending on Testimony of Two Witnesses

In the bill for specific performance, the Court of Chancery decided that the will was properly admitted to probate and that it passed the land under the New Jersey statute requiring subscribing witnesses, but the court refused to decree specific performance on the ground that the will, standing alone, was unwitnessed; therefore the vendor's title to the land depended upon his ability to call upon the witnesses at any time, since the probate of the will would not become conclusive against the heirs for a number of years. For these reasons the court concluded that the continued existence of the two witnesses was too frail a foundation upon which to build a decree of specific performance.

ESTOPPEL.

A. and others, partners, trading under the firm name of A. & Co., owned stock in the B. corporation. In order to qualify

ESTOPPEL (Continued).

Allowing Stock to Stand in Name of Another

A. to act as one of the directors of the corporation, the stock was allowed to stand as in A.'s name. One of A.'s creditors endeavered to attach the stock as the property of A., and claimed that A. & Co. were estopped from setting up their ownership. Held, (1) that in absence of proof that the creditor knew that the stock was in A.'s name and acted upon such information, he could not set up the estoppel; (2) that a representation by A. to the creditor that he was the owner of the stock was insufficient to raise an estopped against A. & Co., although it might as against A.: *N. Y. Comm. Co.* v. *Francis*, 96 Fed. 267 (Circ. Ct., N. D. Conn.).

EVIDENCE.

Proof of Incompetence by Evidence of Single Acts

The Supreme Court of Indiana has decided that where the question at issue is the competency of a person for a certain duty, evidence of specific acts of negligence on his part is admissible to show that he is incompetent. Thus in action against a railroad company to recover for injuries alleged to have been received by the plaintiff from a doctor in the defendant's hospital, where plaintiff was being treated, the fact that, about that time, the doctor had performed an operation upon another person in a negligent and unskillful manner, was held to be relevant upon the question of the doctor's competency to act in his position: *Wabash R. R. Co.* v. *Kelley*, 54 N. E. 752.

Self Incrimination, Testimony as to Separate Transactions

It is well settled that where a witness has testified to certain facts which lead to an inquiry as to other facts, the witness may be cross-examined as to these latter facts, even though their effect is to incriminate him, and he cannot set up his constitutional privilege as a bar. But where the issue consists of a number of separate transactions, the mere fact that he testifies as to one does not lay him open to incriminating cross-examination upon the others, even though the transactions are all of the same character. This distinction is well illustrated by *Evans* v. *O'Connor*, 54 N. E. 557, an action for the seduction of plaintiff's wife. The plaintiff proved acts of adultery committed by his wife by the defendant in 1893, 1894 and 1895. The wife was called by the defendant and desired to testify as to her relations with the defendant in 1893, but not as to those in 1894 and 1895. She was instructed by the trial judge that if she testified as to matters in 1893, she could be cross-exam-

EVIDENCE (Continued).

ined fully as to 1894 and 1895, and her constitutional privilege would be considered as waived; whereupon she refused to testify. The ruling of the trial judge was held, error, by the Supreme Court of Massachusetts on the grounds above stated, namely, that the acts of adultery in 1894 and 1895 were wholly unconnected with those of 1893, even though they were material to the issue. The language of Justice Shepley in *Low* v. *Mitchell*, 18 Me. 372, was quoted with approval.

INSURANCE.

In *Kettenring* v. *N. W. Masonic Aid Ass'n*, 96 Fed. 177, an action was brought upon a policy which provided that "no suit at law or in equity shall be maintainable . . . . unless the same shall be commenced within twelve months after the death of said insured." The suit was not brought until twelve months and fifteen days after the death of the insured, but the plaintiff sought to excuse his delay on the ground that there was another clause in the policy providing that the money should be paid within ninety days after the proof of death had been received; that the true intention was that the twelve months should run from the expiration of the ninety-day period, so as to give the beneficiary twelve full months in which to sue. Following the weight of authority, Judge Kohlsaat held that the limitation clause was plain and unambiguous, and he dismissed the plaintiff's complaint.

Limitation of Time for Bringing Suit on Policy

The question of construction of the so-called "American clause" in marine policies has recently come before the Supreme Court of Massachusetts. The clause in question, contained in a policy issued by the defendant company, read as follows: "Other insurance upon the premises aforesaid, of date the same day as this instrument, shall be deemed simultaneous herewith, and the said company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured, to the aggregate of such simultaneous insurance."

Construction of the "American Clause"

The above policy was issued on August 2, 1895, and another policy was taken out on the same cargo, dated and issued August 14, 1895. However, by their terms, both policies went into effect on August 21, 1895, at noon. Were these policies of "even date?" The court decided that they were not; that the above clause referred solely to the date of the execution of the policies; and the mere fact that they went into effect simulta-

INSURANCE (Continued).

neously was immaterial: *Carleton* v. *China Mut. Ins. Co.*, 54 N. E. 559.

Actual delivery of a policy of insurance to the insured is not necessary in all cases to complete the contract. Thus in *Crawford* v. *Trans-Atlantic Ins. Co.*, 58 Pac. 177, the policy was prepared on April 30, 1897, as a result of the negotiations between the insured and the agent of the company. By its terms the policy was to go into effect on May 2d, at noon. On May 1st the agent sought the insured for the purpose of making the delivery, but was unable to find him, and retained possession of it on May 2d, which was Sunday, on which night the property was burned. The policy was deposited at a bank, and a few days later the insured tendered the premium and demanded delivery, which was refused. The Supreme Court of California held that the question of the completion of the contract was properly left to the jury, and that declarations of the agent, to the effect that the deal had been completed, were admissible to fasten the liability upon the company.

Delivery of Policy, Evidence

JUDGMENTS.

The Court of Chancery of New Jersey has affirmed the familiar doctrine that a judgment *in personam* against a non-resident of a state without personal service is void under the fourteenth amendment to the Constitution of the United States. In the present case, a decree of divorce and alimony had been obtained in New Jersey against the defendant, who was then a resident of Missouri, without personal service. In an application for a *ne exeat* to prevent the defendant from leaving New Jersey without securing the payment of the alimony, it was held that the invalidity of the former decree, being based upon the want of jurisdiction of the court, could be successfully attacked in this collateral proceeding: *Elmendorf* v. *Elmendorf*, 44 Atl. 164.

Judgment without Personal Service, Collateral Attack

LIBEL AND SLANDER.

In *Sherwood* v. *Kyle*, 58 Pac. 270, it appeared that while the plaintiff, a schoolmistress, was sitting in the schoolroom with her pupils, the defendant entered the room and said to her, "You have no business to be in charge of young children. You are no more fit to teach school than hell is for a powder house." In an action for slander

Damages, Discretion of Trial Court

LIBEL AND SLANDER (Continued).

the plaintiff recovered a verdict of $1000. The trial court made an order granting a new trial unless the plaintiff would remit $760, which plaintiff refused to do, and a new trial was ordered. From this order an appeal was taken. The Supreme Court of California held that the above facts would not justify them in interfering with the discretion of the trial court in the matter of damages, and the decision was probably correct, although one whose acquaintance with the case is limited to a reading of the report would be inclined to agree with the jury, rather than with the judge.

MASTER AND SERVANT.

The Court of Chancery of New Jersey has properly decided that where a servant has been engaged by a firm to work in their manufactory, and the servant examines the books of the firm without the consent of his employers, such action on his part, not being connected with the work for which he is engaged, constitutes a breach of faith, and furnishes his master with a sufficient excuse for discharging him: *Allen* v. *Aylesworth*, 44 Atl. 178.

Discharge, Excuse

A mate of a ship is not a fellow servant with one of the seamen, so as to cause the latter to assume the risks of the mate's negligence. Also, the obedience by the seaman on board the ship at sea to the orders of the mate is not negligence, even though the seaman knows the danger. His is a duty of imperative obligation: *Keating* v. *Pacific Steam Whaling Co.*, 58 Pac. (Wash.) 224.

Mate of Ship, Relation to Seaman

NEGLIGENCE.

The Supreme Court of Kansas refuses to lay down a rule of law that a traveller upon a highway must stop before crossing a railroad, but it decides whether this duty is present upon the facts of each case. Thus where a traveller was approaching a track through a grove of trees bordered by a high hedge, and it was shown that he could not hear the train on account of the rustling of the trees, and that there was an opening in the hedge twenty-eight feet from the track, through which he could have had a clear view of the track if he had stopped, it was held that his failure to stop charged him, as a matter of law, with contributory negligence: *Atchison, Etc., R. R. Co.* v. *Willey*, 58 Pac. 472.

Duty to Stop, Look and Listen

NEGLIGENCE (Continued).

In *Lake Shore Rwy.* v. *Kelsey*, 54 N. E. 608, it appeared that plaintiff boarded one of defendant's trains; that the platform of the car was so crowded that he was unable to get further than the lowest step; that he stood there, clinging to the railings, and that his body projected such a distance out from the line of the train that he was struck by a train on the next track. The company contended, and, it would seem, with some reason, that the position assumed by plaintiff clearly showed contributory negligence on his part, but the Supreme Court of Illinois decided that the question of contributory negligence had been properly left to the jury.

Standing on Crowded Platform

PARDONS.

The Court of Appeals of New York has decided a rather curious case on the effect of a pardon. In *Roberts* v. *State*, 54 N. E. 678, the petitioner, who had been convicted of burglary, was pardoned by the governor. The legislature then passed a special act authorizing the petitioner to present a claim before the Board of Claims for damages sustained by his "improper conviction and punishment." When the case was heard by the board, the evidence showed clearly that the petitioner was guilty and had been justly convicted, and the petitioner's claim was disallowed. On appeal it was urged that the effect of the pardon was to declare that the petitioner was innocent, and the board had no right to hear evidence of his guilt. The Court of Appeals held that the effect of the pardon was, if anything, to declare the petitioner guilty, otherwise there would have been nothing to pardon; that the pardon relieved him from future punishment, but had no retroactive effect; therefore the petitioner had no claim under the statute, since his conviction was not "improper."

What the Pardon Imports

PLEADING AND PRACTICE.

In *Boardman* v. *Creighton*, 44 Atl. 121, an action was brought by a widow for the death of her husband, who had been killed by a fall of rock while working in the defendants' quarry. The declaration alleged that the plaintiff "was then and there employed and was lawfully at work in the said defendants' quarry by the license and permission of said defendants and at their request." The lower court sustained a demurrer to the declaration, which ruling

Declaration for Negligence

PLEADING AND PRACTICE (Continued).

was affirmed by the Supreme Court of Maine on the ground that the declaration did not allege under what circumstances the decedent was in the quarry and what his relation was to the defendants; whether he was the defendants' servant or the servant of an independent contractor, or a mere licencee, since a different degree of care would be demanded of the defendants in each case.

STATUTES.

The Washington Code (1881, § 812) provided that the rape of a child under 12 years of age should be punishable by life imprisonment or less, in the discretion of the court. In 1886 the age of consent was raised from 12 to 16 years. In 1893 the petitioner ravished a child under the age of 16 years, and subsequently the amendment of 1886 was held unconstitutional for the reason that its object was not expressed in the title. The petitioner applied for a writ of *habeas corpus* on the ground that he was sentenced and imprisoned under an invalid law. Held, affirming a judgment denying the writ, that the mere fact that the amendment was void did not render void the act of 1881 defining the crime and fixing the punishment, which had never been ousted by the unconstitutional amendment; therefore the criminal court had jurisdiction, and the regularity of its sentence could not be collaterally attacked on a petition for a writ of *habeas corpus: In re Nolan*, 58 Pac. (Wash.) 222.

Conviction under Amended Statute, Unconstitutional Amendment

WILLS.

The testator bequeathed $500 apiece "to the children of Dr. James B. Strafford." It appeared that the testator left a brother, Joseph B. Strafford, who was a physician, and a nephew, James B. Strafford, who was not. Since the difficulty arose only from the description of the legatee, the court decided that this was a case of a latent ambiguity, and admitted parol evidence to show that James B. Strafford, while not a doctor, had once been a clerk in a drug store, and was commonly known among his associates as "Dr." or "Doc." Upon this evidence the court decided that the intent of the testator was clear, and awarded the legacies to the children of James B. Strafford: *Atterbury* v. *Strafford*, 44 Atl. (N. J.) 160.

Designation of Legatee, Latent Ambiguity