PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ASSOCIATIONS.

In *State* (*DeHart*) v. *Good Will Hook and Ladder Co.*, 40 Atl. 570 (Supreme Court of New Jersey), it appeared that the prosecutor had been expelled from the defendant company, under a by-law which provided that "any member of the company who shall be guilty of an act whereby the reputation of the company may be injured, witnessed by any member, may be punished by expulsion." DeHart had been chairman of a building committee which was discharged, and a new one appointed, as he alleged, illegally. He therefore refused to turn over to the new committee funds which he held as chairman. For this he was expelled. It was held that his expulsion was not authorized by the by-law, as it could only be taken to apply to acts of moral turpitude.

By-Laws, Expulsion of Member

BANKRUPTCY.

In *Tompkins* v. *Hazen* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 1003, the question was as to the sufficiency of a promise to revive a debt barred by a discharge in bankruptcy. The promise was in the following words: "If you will only wait—hold on a little longer—until the New York folks pay me, then I will pay you." It was admitted that this promise, by reason of the condition attached, was not sufficient unless it could be shown that the condition was performed or waived. In order to prove a waiver, a subsequent series of small payments was shown, some accompanied by letters which made no reference to the condition, but which, on the other hand, did not absolutely promise to pay more, merely expressing a hope of ability to continue payments. The majority held that these payments, together with the letters which made no reference to the condition of the original promise, were "inconsistent with an intention upon his part to insist upon the condition which he had previously imposed," and that "upon the evidence, the jury were authorized to find that the defendant waived any condition which he had imposed, and intended in any event to pay the debt."

Discharge, Revival of Debt, Sufficiency of Promise

BILLS AND NOTES.

Simmons v. *Thompson* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 1018. A trust company had made large loans to an improvement company to build a railroad. Further loans being necessary and the trust company refusing to make them unless it could be secured from the criticism which previous loans had excited, the defendant, secretary of the railroad, was induced to give the promissory note in question upon the vice-president of the trust company, promising that the maker would not be called upon to pay, it merely being held as "apparent security."

Corporations, Agreement Against Liability

"Upon that state of facts, the defendant insisted that his case was controlled by the rule of law that it is a defence to the enforcement of a promissory note against the maker, in the hands of an original party to it, that the note was without consideration, and was delivered upon condition that the maker should not be liable thereon," and the majority thought the case was "clearly within the rule."

Ingraham, J., dissented on the ground that to admit evidence of the oral agreement of the vice-president was contrary to the parol evidence rule.

A case peculiar in its facts and a decision which seems questionable under the previous New York decisions are found in *Oneida County Bank* v. *Lewis* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 826. A and B were joint makers of a note, and B's name also appeared as an irregular indorser. The note came into the hands of the plaintiff bank, and being unpaid was taken up by C, an indorser whose name appears prior to the indorsement of B, and judgment obtained in the name of the bank against A. The judgment against A being a bar to a judgment against B as maker, it was sought to charge the latter on his liability as indorser; but B defended on the ground that C, being the real plaintiff, and being a prior indorser, would, as between themselves, be ultimately liable. The court, after noting that the order of the indorser's names on the paper is not necessarily the order of their liability where one of them is irregular, continued as follows: "In the case at bar B was one of the makers of the note, and ultimately liable for it; and it would seem to me a legal inference that, in indorsing the note, he became liable as the indorser before C . . . although, as a matter of fact, Crossman's name may have been placed upon the note before that

Irregular Indorsement, Circuity of Action

BILLS AND NOTES (Continued).

of Lewis; otherwise, independent of any discharge of Lewis as maker, there would be a succession of rights leading to circuitous and unnecessary actions." Judgment for plaintiff.

Negotiable Instruments, Restrictive Indorsement, Parol Evidence

In *United States Bank of Omaha* v. *Geer*, 75 N. W. 1088, the Supreme Court of Nebraska reversed its former ruling (73 N. W. 266; 53 Neb. 67) and held that a certificate of deposit indorsed by the payee "Pay to the order of R. C. O. cash, for account" of the indorser, is a restrictive indorsement, vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collecting; and parol evidence is not admissible to establish that the transfer of title was absolute. The reversal seems to be in accordance with the authorities and correct in principle. See *First Nat'l Bank* v. *Reno Bank*, 3 Fed. 257 (1880), *Sweeny* v. *Easter*, 1 Wall. 166 (1863); *Hoffman* v. *Bank*, 46 N. J. Law, 605 (1884); *White* v. *Bank*, 102 U. S. 658 (1880); *Freeman's Nat'l Bank* v. *National Tube Works*, 151 Mass. 413 (1890). Three judges dissented.

CARRIERS.

Arrival of Goods at Destination, Carrier's Subsequent Liability

Perhaps the courts of the various states of this country are nearly equally divided as to the question: What is the nature of the liability of a carrier when the goods have arrived at their place of destination and have been deposited in a warehouse? One line of cases, including Pennsylvania and Massachusetts, hold that the common carriers' special liability ceases *eo instanti*, while in New Hampshire, New York and other states the opposite view prevails and the special liability is declared to continue for a reasonable time after arrival.

The question has arisen for the first time in West Virginia, in *Berry et al.* v. *W. V. & P. R. R.*, 30 S. E. 143, where the latter rule was followed and the railroad was held to its common carrier's liability for a reasonable time after the goods had been stored. The vexed question as to whether notice of arrival of the goods must be given by the railroad to the consignee was answered in the negative by the West Virginia Court.

When goods are delivered to a common carrier a strong presumption arises that they are for immediate shipment, and

CARRIERS (Continued).

Goods, Delivery to Carrier, Carrier's Liability, Presumption

the burden is on the carrier to prove that he did not receive the goods in his capacity as common carrier, but merely as a warehouseman to await further instructions from the shipper before sending them. The Supreme Court of North Carolina held that it was error to decide, as a matter of law, that the following letter, sent with the goods to a railroad station, was not sufficient to shift the burden of proof: "Freight Agent— Dear Sir. . . . will you mark them [the goods] prepaid? I will be at the depot to-morrow, and get the bill of lading and pay the freight. B." The question as to the capacity in which the railroad received the goods should have been submitted to the jury: *Berry* v. *Southern Rwy. Co.*, 30 S. E. 14. Faircloth, C. J., dissented.

Interstate Commerce Law, Violation

The Circuit Court of Appeals of the Fifth Circuit has recently decided that where the agent of a connecting carrier has, by mistake, offered a shipper an unusually low rate on a shipment of an unusual character, and the initial carrier, in ignorance of the rate, breaks its contract of carriage by sending the goods over a different road from that inserted in the bills of lading, thus subjecting the shipper to the payment of a much higher rate of freight than that contracted for, the initial carrier cannot escape liability to the shipper for damages, on the ground that the rate given was in violation of the interstate commerce law: *Pond-Decker Lumber Co.* v. *Spencer*, 86 Fed. 846.

Passenger, Failure to Put Off, Pullman Co., Railroad, Liability

A decision of general interest has lately been handed down by the Supreme Court of Louisiana, determining the relation existing between a sleeping car company and the railroad over whose lines its cars are run. Plaintiff took a berth in a Pullman car on the T. & P. R. R., the conductor promising to let her off at Cypress Station. Before Cypress was reached the conductors and Pullman porters on the train were changed, and the new T. & P. conductor asked the Pullman car porter who had been on duty whether there were any passengers to get off at Cypress, to which the porter replied "No," forgetting about plaintiff. It was impossible for the conductor to find out in any other manner, since he could not arouse the sleeping passengers to ask them their destinations. Plaintiff was therefore carried beyond Cypress Station and was put to

CARRIERS (Continued).

expense and inconvenience in returning, to recover which this action was brought against the Pullman Company and the T. & P. R. R.

It was held that the T. & P. R. R. was liable for the negligent acts of the Pullman Company's servants, seemingly on the theory of agency. "The negligence of the porter or conductor of the palace car was the negligence of the railroad company. We are constrained to hold that the failure in duty of the Pullman porter was chargeable to defendant:" *Airey* v. *Pullman Palace Car Co. et al.*, 23 So. 512.

CONSPIRACY.

In *Sherman* v. *Doran et al.* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 731, the complaint charged that plaintiff had obtained a patent in United States on a suspender clasp and intended to patent it in Canada, but that defendants learning of the details of the device applied for a Canadian patent; that when plaintiff made a similar application, an arbitration board was appointed; that through false swearing of defendants and their witnesses a decision adverse to plaintiff was given and a patent issued accordingly; that plaintiff through the issue of the Canadian patent to defendants had lost large sums. The court decided that as the gist of the action was the damage sustained, it devolved on the plaintiff to show that he would have secured the patent but for the defendants' perjury, and that as this would involve a review of the points passed on by the arbitrators, the proper mode was by an appeal from their decision, and not by a collateral attack on an award which was entitled to the solemnity of a judicial decision. It was further said: "There is no difference in principle between this case as thus presented and an action for a conspiracy against persons who have recovered a judgment against a plaintiff on false and perjured testimony. Upon principle and considerations of public policy it is manifest that such an action ought not to lie while the judgment stands."

Patent, Decision of Arbitrators

CONSTITUTIONAL LAW.

A woman cannot act as notary public in Ohio: *State* v. *Adams* (S. C. Ohio), 51 N. E. 135. The court founds its decision on sec. 4, art. 15, and sec. 1, art. 5 of the Ohio Constitution, which provide that every officer must be an elector and every elector a male. The

Notary Public, Eligibility of Women

CONSTITUTIONAL LAW (Continued).

Act April 26, 1898, to amend sec. 110 Rev. Stat. (93 Laws, 405) is thus rendered ineffectual of its purpose. The old act had provided "the governor may appoint . . . as notaries public as many persons *having the qualifications of electors*," etc. The italicized phrase was omitted in the amended section.

Police Power, Plumbers, Public Health

The Supreme Court of Ohio decides that the business of plumbing is so nearly related to the public health as to be constitutionally regulated by law: *State* v. *Gardner*, 51 N. E. 136. The court says, "We are aware that an opinion prevails in some quarters, and has found expression in judicial utterances, that the pursuit of plumbing is a mere trade, which may be easily mastered by any one possessed of ordinary intelligence; that the plumber is not, nor is he expected to be, an expert in the science of sanitation; and hence his work cannot have such relation to the public health as to justify its regulation." In rejecting such aspersions upon the plumber, the court follows the authorities: *Peo.* v. *Warden*, 144 N. Y. 529 (1895); *Singer* v. *State*, 72 Md. 464 (1890). The Act of April 26, 1896, "to promote the public health and regulate the sanitary construction of house-drainage and plumbing," requiring plumbers, masters or journeymen to take out licenses, but allowing all members of firms to engage in the business where only one member has a license, and all members of corporations, though only the manager is licensed, is unconstitutional for lack of uniformity.

Uniformity

Street Railways, Regulation of Fares

The Supreme Court of Indiana, after the cases of *Central Trust Co.* v. *Citizens' St. Ry. Co.*, 80 Fed. 218 (1897); *Indianapolis Street Railway Cases*, 82 Fed. 1 (1897), and *City of Indianapolis* v. *Central Trust Co.*, 27 C. C. A. 58; 83 Fed. 529 (1897), deciding unconstitutional the act regulating the street railway fares of Indianapolis, has, nevertheless, reaffirmed its original opinion that the act is constitutional: *City of Indianapolis* v. *Nevin*, 51 N. E. 80.

Telegraph Company, Message for Gambling Purposes, Interstate Commerce

In *State* v. *Harbourne*, 40 Atl. 179, defendant, the local manager of the Western Union Telegraph Company, was indicted for receiving a message in Waterbury, Connecticut, and transmitting it to Jersey City, New Jersey, the message authorizing a company in New Jersey to place a bet on a horse race for the sender, and being contrary to a Connecticut statute, Publ. Acts, 1893, p. 240. The only de-

CONSTITUTIONAL LAW (Continued).

fence was that the statute was unconstitutional, as amounting to an attempt to regulate interstate commerce.

The Supreme Court of Connecticut, in an able opinion by Hall, J., showed clearly that the statute was a mere exercise of the police power and was valid. "It simply prohibits in this state the business of aiding crime; and, if such commerce is thereby affected at all, it is the incidental effect of depriving those here engaged in telegraphing of the profits they might make through the business of promoting gambling in this state."

CONTRACTS.

Restraint of Trade, Reasonableness

The owner of a line of vessels running between New York and the West Indies sold the good-will thereof and covenanted "to do no business with such port in or from any place in the United States east of the Mississippi." In a suit growing out of this contract, it was insisted that the covenant was an unreasonable restraint of trade but the court took the opposite view: *Brett* v. *Ebel* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 573.

Stipulation Not to Engage in Business, Enforcement, Injunction

Defendant became a salesman of plaintiff in the wine business under a contract which, *inter alia*, provided, that for ten years the defendant "shall not in any manner, directly or indirectly, engage or employ himself in any other business with, or for any person or persons other than the firm [plaintiff] during the continuance of this agreement."

Romer, J., in the Divisional Court, held that there was nothing by which the court could be forced to construe this stipulation with reference merely to the wine business, and that it was unreasonable to prohibit defendant from engaging in *any* other business for ten years. Therefore an injunction would not issue to restrain defendant from serving another wine merchant, for which position he had left plaintiff: *Ehrman* v. *Bartholomew* [1898], 1 Ch. 676.

Wagering Contract, Sale of Futures

Defendant, in Savannah, employed plaintiff to make contracts for the sale of cotton in New York, delivery to be made in the future. It was shown that defendant had no intention of fulfilling the contracts, relying on plaintiff to avoid this contingency, but that it was simply a scheme to profit by the difference in values arising under the contracts in the New York market before the time for delivery arrived.

CONTRACTS (Continued).

Held, that the contract between plaintiff and defendant was a "gaming" contract under the Georgia Code, § 3671, and that it was, moreover, void as a wagering contract, according to the decisions of the Supreme Court of the United States: *Waldron et al.* v. *Johnston* (Circ. Ct. S. D. Ga.), 86 Fed. 757.

CORPORATIONS.

Essential Attributes, Ultra Vires

The *Status* of Limited Partnership Associations, organized under the Pennsylvania Statute of June 2, 1874, formed the basis of a lengthy opinion in the case of *Andrews Bros. Co.* v. *Youngstown Coke Co., Ltd.*, 86 Fed. (Ohio) 585, April 11, 1898. The court, Lurton, Circuit Judge, after a comprehensive review of all the authorities in point, reached the conclusion that the only essential attributes of a corporation is the capacity to exist and act with the powers granted, as a legal entity, apart from the individual or individuals who constitute its members. Suit was brought by the coke company, a citizen of Pennsylvania, against the defendant, a citizen of Ohio, in the Circuit Court, for a large amount of coke sold by an unauthorized agent of the plaintiff to the defendant. The court refused to admit the defence of *ultra vires*, although the contract was not made in accordance with the terms of the plaintiff's charter, on the ground that this suit being for a conversion, the action was in disaffirmance of a contract that bound neither party. "The contract," said Mr. Justice Lurton, "not having been immoral or contrary to public policy, may be disaffirmed and suit brought for the value of benefits which the other has received and retained thereunder."

DAMAGES.

Damages, Compensatory, Remittitur

Where punitive and compensatory damages, in an action of slander, have been awarded in a lump sum, and it is apparent that the verdict is excessive, the court cannot, on the filing of a remittitur of the punitive damages, apportion them, but must send the whole case back for a new trial: *Reid* v. *Keith* (Supreme Court of Wisconsin), 75 N. W. 392.

ELECTIONS.

Ballot, Pasters

The paster has been held again to invalidate the ballot, for otherwise "the official ballot might become but little more than a convenient card upon which to

ELECTIONS (Continued).

paste private tickets, printed and circulated in secret:" *Roberts* v. *Quest* (S. C. Ill.), 50 N. E. 1073.

EQUITY.

Demurrer, Admission

While the questions, what is a fact? and what is a conclusion of law? have been frequently answered, and while exact rules have been laid down to distinguish a fact from a conclusion of law, yet it has been recently contended in the Supreme Court of New York that the allegation in a complaint in equity, that the complainant has no remedy at law is a fact within the rule that a demurrer admits facts but not conclusions of law. The court took the opposite view, however: *Starbuck* v. *Farmers' Loan and Trust Co.* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 8.

Demurrer, Effect of

A demurrer having occured in the course of the pleadings in *Henriques* v. *Yale University* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 284, a question arose as to its effect under the Code. It was contended that, under the common law judgment, one demurrer went against the party in whose pleadings the first mistake occurred, but it was also shown that no such rule obtained in equity. It was held that the common law rule prevailed under the Code.

Equitable Assignment, What Constitutes

A client placed certain notes in his attorney's hands for safe-keeping and, at his death, his sole heir wrote the attorney to take entire charge of her interests and pay himself out of the money he had in his hand. The Supreme Court of Iowa, *Foss* v. *Cobbler*, 75 N. W. 516, held, in accordance with principle, that this did not amount to an equitable assignment of the fund because it did not create an absolute personal indebtedness, payable at all events. See *Christmas* v. *Gaines*, 14 Wall. 69; *Frist* v. *Child*, 21 Wall. 441.

Trade Name, New Company, Injunction

The English Court of Appeal has decided that the name, "The North Cheshire and Manchester Brewing Company" resembles "The Manchester Brewing Company" too closely for the company to be allowed to trade under that name. In this case the Manchester Brewing Company obtained an injunction to prevent the North Cheshire and Manchester Brewing Company, which had just been started, from using the name adopted,

EQUITY (Continued).

even though there was no intention to deceive the public or to injure the plaintiff's trade: *Manchester Brewing Co., Ltd.* v. *North Cheshire and Manchester Brewing Co., Ltd.*, [1898], 1 Ch. 539.

EVIDENCE.

The subject of judicial notice is necessarily indefinite in its limits, and in consequence it is not surprising to occasionally find those limits very expansive. In a recent case arising out of the question whether specifications for street paving calling for "best quality Lake asphaltum" had been complied with, the court said it would take notice that such language referred to asphaltum Lake in Trininad, and that "there is an overflow from that lake which spreads asphalt over the adjacent land: *Conde* v. *Schnectady* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 854.

Judicial Notice, Trinidad Asphalt

HUSBAND AND WIFE.

In *Flynn* v. *Flynn*, 50 N. E. 650, the Supreme Court of Massachusetts held, in accordance with principle, that a wife's dower is divested by a seizure of her husband's land during her coverture by virtue of the right of eminent domain. The court say, "There can be no doubt that the inchoate right of the wife is always subject to any incumbrance or infirmity in the husband's title existing at the time he became seized, and we are also of opinion that it is subject to any incident attached to it by law." *Moore* v. *New York*, 8 N. Y. 110, was followed, and *Wheeler* v. *Kirtland*, 27 N. J. Eq. 534, which holds the converse of the principal case, was disapproved by the court.

Dower a Right Not an Estate

Dower is not an estate, but a mere inchoate right: *Windham* v. *Partland*, 4 Mass. 384; *Bullard* v. *Briggs*, 7 Pick. 533; *People* v. *Palmer*, 10 App. Div. (N. Y.) 395. A wife may not assign her dower, *Mason* v. *Mason*, 140 Mass. 63; *Reiff* v. *Horst*, 55 Md. 42; a deed purporting to convey it is void.

In *Naumer* v. *Gray* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 222, a married woman employed an attorney to secure her a separation from her husband. The attempt was unsuccessful and this action was brought by the attorney to charge the husband with the fee. In England it would seem such action is main-

Separation, Attorney's Fees

HUSBAND AND WIFE (Continued).

tainable whether the action be for divorce or merely for separation. The court decided, after a review of authorities, that in this country the attorney may collect from the husband when the action was for separation, but must in addition "show affirmatively that the suit was for the protection and support of the wife, and the conduct of the husband was such as to render its institution and prosecution reasonable and proper."

INNKEEPERS.

Liability for Clothing, When Relation Exists

An officer in the German army came to New York, intending to remain some time, but not permanently. He got a room in defendant's house, an acknowledged hotel, and engaged a room at the rate of $1.25 per week, though he did not agree to remain a definite time. His clothing having disappeared from the room, he seeks to enforce against defendant an innkeeper's liability. It was contended that the nature of the agreement destroyed the relation of innkeeper and guest, the plaintiff becoming a boarder or lodger. It has been said that a guest is one who "comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives." But it appears by recent decisions, at least in New York, "that a special agreement fixing in advance the price to be paid, or the length of the stay, does not absolutely disturb the relation of innkeeper and guest, and constitute the person so acting a boarder or lodger." The court was of opinion that considering together all the circumstances, the plaintiff's connection abroad, the nature of the house, and the agreement itself, the relation was that of innkeeper and guest: *Metzger* v. *Schnabel* (Supreme Court, Appellate Division), 52 N. Y. Suppl. 105.

LIBEL.

Witnesses, Cross-Examination

Palmer v. *Matthews* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 839. The defendant, publisher of a daily paper, having published an article in relation to plaintiff, the same article being published at the same time by other papers, the plaintiff wrote a letter to defendant demanding a retraction and compensation, and also the statement that "I do not expect any one paper to bear it all, but only its due proportion." During plaintiff's cross-examination in the suit subsequently brought by him, this letter

LIBEL (Continued).

was brought to his attention and, over his objection, he was asked how many papers he had sued for the publication. This was assigned as error and the ruling affirmed in spite of the dissent of two judges who, in a very able opinion, contended that the fact of a contemporary publication is irrelevant, as is also the fact of suits for such publications. There was, apparently, much weight in the appellant's contention that the jury had been influenced by this testimony in assessing damages as they allowed but six cents, though on the other evidence the plaintiff would seem to be entitled to substantial damages. Odgers says in this connection: "Nor should the fact, that other actions have been brought for other publications of the same libel, be taken into consideration by the jury in assessing damages arising from the publication by the present defendant," and further, "so is evidence (inadmissible) that other actions are pending against other persons for other publications of the same libel:" Law of Slander and Libel, pp. 298, 316. In *Witches* v. *Jones*, 17 N. Y. Suppl. 491, it is said: "But evidence of contemporary publications by others does not tend to disprove malice and is inadmissible." See *Folewell* v. *Journal Co.*, 37 Atl. 16; *Smith* v. *Assoc.*, 5 C. C. A. 91.

Mandamus to Governor

It has been decided by the Court of Appeals of New York, *People* v. *Morton*, 50 N. E. 791, that the courts have not power to issue a mandamus to the governor, either alone or as one of a board of officers of which he is a member by virtue of his office, requiring him to perform any act, either purely ministerial or otherwise. Vaun, J., thought the exemption should apply to the lieutenant-governor also. O'Brien, J., dissented from the court's conclusion, holding that without the mandamus, statutes might be abrogated at will by executive officers.

LIBEL AND SLANDER.

Defences, Lunacy, Actual Malice

The Supreme Court of New York, at trial term, has lately considered a point which seems to have been unsettled in that jurisdiction, namely, that a lunatic is liable for slander or libel. Of course, this decision is limited to cases where actual malice need not be proved, excluding cases of privileged communications and those where "smart money" is sought: *Ullrich* v. *N. Y. Press Co.*, 50 N. Suppl. 788.

MASTER AND SERVANT.

Defective Appliances

An employe was injured because of a defective stirrup strap furnished him for use in the course of his employment. This strap had been tested by the foreman in the employe's presence, and the latter had professed himself satisfied that the strap was strong enough. Held, by the Supreme Court of Massachusetts, that the employe assumed the risk, and judgment for defendant affirmed: *Davis* v. *Forbes*, 51 N. E. 20. Knowlton, J., delivered an exhaustive dissenting opinion, holding that the employe, by the weight of evidence, did not fully understand and appreciate the risk. "He was undoubtedly influenced by the statements and representations of Abbott" (the foreman who had tested the strap). "He saw Abbott pull upon it, but he did not know how much force was applied in the pulling." Judge Knowlton considers that the majority have invaded the province of the jury. He cites, among others, *Ferren* v. *R.*, 143 Mass. 197 (1887); *Fitzgerald* v. *Paper Co.*, 155 Mass. 155 (1891); *Mahoney* v. *Dore*, 155 Mass. 513 (1892); *Tenanty* v. *Mfg. Co.*, 49 N. E. 654 (1898); *Smith* v. *Baker* (1891), A. C. 325; *Thoussell* v. *Handyside*, 20 Q. B. D. 359 (1888); *Yarmouth* v. *France*, 19 Q. B. D. 647 (1887).

Liability to Provide Safe Place to Work

The Supreme Court of Connecticut has recently held (*Channon* v. *Sandford Co.*, 40 Atl. 462), that where a servant is sent to a place, some distance away, by his master to work on a building, the master having no control over the said building, but assuring the servant that it was a safe place, and that the contractor in charge would see to it, the master was not liable for failure on the part of the contractor in charge to provide the servant with a safe staging on which to work, the duty of providing a safe place being neither specially assumed nor imposed by law in such a case. The court, while admitting the rule in case the premises on which the servant works are in the control of the master, held that the very reasons of the rule fails where the premises are not under his control. Andrews, C. J., dissented. It is held, on the same principle that where the work upon which the servant is engaged is of a nature to make the place where it is done temporarily insecure, the servant assumes the increased hazard: *Gulf, C. S. & F. Ry. Co.* v. *Jackson*, 65 Fed. 48; and that where the servant does work at the direction of one who is without authority, the master is under no duty to provide a safe place: *Goff* v. *Chippewa River Co.*, 86 Wis. 237.

NEGLIGENCE.

The law of negligence seems to have been applied to a novel state of facts in *Selover* v. *Sheardown*, 76 N. W. 50 (Supreme Court of Minnesota), where it was held that a court clerk who negligently gave misinformation to a suitor relative to his cause, was liable to the suitor for loss sustained as the result of the clerk's negligence.

Clerk of Court

Prior to the Act of 1869 (Rev. St. 1874, p. 814) it had been held in Illinois that a duty devolved on the owner of land adjacent to a railway track to keep his premises free from combustible matter to avoid the spread of fire set by locomotives. The act referred to provides that "it shall not in any case be considered as negligence on the part of the owner or occupant of the property injured that he has used the same in the manner, or permitted the same to be used, or remain in the condition, it would have been used or remained, had no railroad passed through or near the property so injured." Under this statute *held* not contributory negligence to leave combustible matter near the right of way: *Cleveland C. C. & St. L. R.* v. *Stephens* (S. C. Ill.), 51 N. E. 69.

Fires Set by Locomotive, Contributory Negligence

A platform of the B. Ry. connected with a freight house used mostly for storing oil, was saturated with oil leaking from barrels which had been left there longer than the 48 hours allowed by law (Pub. St. of Mass., c. 102, § 74). A teamster not connected with B brought goods for shipping, and in lighting his pipe threw a match on the ground underneath the platform, which immediately caught fire. As a result the buildings of plaintiff were destroyed. This probably would not have occured if the oil had not been on the platform. *Held*, that B could not have apprehended the result, which was only remotely an effect of the negligence and judgment for B affirmed. Knowlton, J., dissented on the ground that violation of the statute was negligence *per se*, since the very *raison dêtre* of the act was to reduce the liability to such accidents. The learned judge cannot "see what negligence on the part of defendant could have been found except its failure to anticipate and guard against such a danger." The majority say "illegality on the part of a defendant does not of itself create a liability for remote consequences:" *Stone* v. *Boston & A. R.* (S. C. Mass.), 51 N. E. 1.

Fire, Storage of Oil, Remote Cause

The view taken by the dissenting justice is supported by

NEGLIGENCE (Continued).

Pollock, who holds that "the commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. When the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment. . . . Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequences of disobedience, there is some default in the mere fact that the law is disobeyed; at any rate a court of law cannot admit discussion on that point; and the defaulter must take the consequences." See Webbs' Pollock on Torts, p. 24, and cases there cited.

Passenger's Contributory Negligence

What amounts to contributory negligence in a passenger of a vehicle threatened by a sudden danger is a question to which it is difficult to apply the test of the "prudent man" and the courts, recognizing its difficulty, have been loath to deal with it strictly. In *Poulsen* v. *Nassau Electric R. Co.* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 933, it appeared that plaintiff was a passenger on a car of defendant line; that, suddenly, a flame from two to six feet high shot out of the motor-box and continued while the car ran a distance of one hundred feet. Frightened by the flame, the plaintiff jumped from the car while it was moving and was hurt. The defendant insisted that the fact that other passengers remained seated, conclusively established contributory negligence on the plaintiff's part, but the court took the opposite view, for which it was affirmed on appeal.

Telephone Wire, Repair, Borough, Liability

A borough or municipality is liable for any injury resulting from neglect in supervising the adjustment and regulation of the electric wires suspended over its streets, and the fact that the company owning the wire may be liable also, does not have any effect on the liability of the municipality: *Mooney* v. *Borough of Luzerne*, 40 Atl. (Pa.) 311. The court refers to the *dictum* in *West Chester* v. *Apple*, 35 Pa. 284 (1860), which seems to imply a contrary view, and remarks upon the fact that it was disapproved in *Philadelphia* v. *Smith*, 16 Atl. (Pa.) 493 (1889).

Therefore, when a telephone wire which had been used for fifteen years in safety, was abandoned and cut by the borough, so that one end sagged within reach of a pedestrian, who was

NEGLIGENCE (Continued).

injured by an electric shock resulting from the crossing of the telephone wire with an electric wire, the question of the borough's negligence was for the jury.

PARTIES.

That the laws of a primitive people would not fit the needs of a highly civilized people is perfectly patent. The converse of that proposition might be supported with some degree of success by the case of *Montauk Tribe of Indians* v. *Long Island R. Co.* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 142. The railroad company having occupied tribal lands, an action was brought for their recovery in the name of the "Montauk Tribe of Indians, by Wyandank Pharoah, their chief and king." The right to sue in such a form was, of course, denied. The court suggested, though in a manner implying doubt, that possibly an action might be maintained by one of the tribe on behalf of the rest.

Indians, Tribal Name

If that course should fail, the indians would be driven to the expedient of suing as individuals. But, then, the question would arise, What individuals? Does the land belong to families or to individuals? If it belongs to families, shall only the heads be joined? If, on the other hand, not families, but individuals are to be considered in determining ownership, what individuals are to be made plaintiffs? Are the females of the tribe to be considered? At what age does the individual become an owner? These and similar questions would have to be answered by an investigation of tribal law, the possible difficulties of which may be easily imagined.

PARTNERSHIP.

The Supreme Court of Alabama has again announced its adherence to the so-called English rule, that a retiring partner is not discharged by an extension of time granted by the creditor to the continuing partners: *Brannum* v. *Wertheimer-Schwartz Shoe Co.*, 23 S. E. 639, following *Bank* v. *Cheney*, 114 Ala. 536 (1896). The American courts are divided on the question, many of them following the rule above given. For full citations of cases see Bates on Partnership, §§ 533-534; George on Partnership, p. 271.

Dissolution, Liability of Retiring Partner

REAL PROPERTY.

That a lease may prove a snare for the unwary tenant is not a fact of recent discovery, but its truth has been well proven in a late case. The defendant leased premises of the plaintiff for a year, the rent to be payable monthly in advance. The instalment for September being due on the first day of that month and unpaid, the lessor took summary proceedings to recover possession, and on the eighth of September the tenant moved out. The landlord then sued for rent for the month of September and the defendant pleaded the dispossession before the expiration of the month. The plaintiff was allowed to recover: *Bernstein* v. *Heineman* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 467.

Rent in Advance, Eviction

A divided court lately decided that notice to a landlord of a defect in part of an appliance furnished for the use of tenants puts him on inquiry as to the safety of the rest of the appliance. The appliance was a platform covered with slats, upon which tenants stood when hanging washed clothes. . The defendant had been notified that some of the slats were rotten, but the accident to the plaintiff occurred on another part of the platform. This fact, however, did not relieve the landlord, as the previous notice made it his duty to render the whole platform safe: *Rouillon* v. *Wilson* (Supreme Court, Appellate Division), 51 N. Y. Suppl. 430.

Injury to Tenant, Landlord's Liability

SURVIVAL OF ACTIONS.

The Supreme Court of Michigan, in *Sweetland* v. *Chicago & G. T. Ry. Co.*, 75 N. W. 1066, by a divided court, has adopted the rule followed in most jurisdictions, that where the right of action for personal injuries is made by statute to survive, and there is, also, a statutory remedy given the heirs for the pecuniary loss suffered by them, by reason of the death of the person injured, two actions cannot be brought. It is said that the legislature cannot have meant to give two suits for the same cause of action.

Statutory Right of Action and Statutory Remedy for Loss not Concurrent

This construction has been given to Lord Campbell's act in England, where a mother was refused an action in the nature of a solatium for her son's death, to be tried concurrently with the action which survived by virtue of Lord Campbell's act: *Wood* v. *Gray* (1892), App. Cas. 576. And, in general, it is held that such acts do not create a new cause of action but

SURVIVAL OF ACTIONS (Continued).

that the same cause of action which deceased had, survives: *Read* v. *Railway Co.*, L. R. 3 Q. B. 555; *Hill* v. *Railroad Co.*, 35 Atl. 997 (1896); *McCarthy* v. *Ry. Co.*, 18 Kan. 46 (1877); *Hurlburt* v. *City of Topeka*, 34 Fed. 510 (1888).

But see, *contra*, *Needham* v. *Railway Co.*, 38 Vt. 294 (1865); *Bowes* v. *City of Boston*, 155 Mass. 344 (1892); *Railroad Co.* v. *Phillips*, 64 Miss. 693 (1887); *Heydrick* v. *Navigation Co.*, 30 Pac. 714 (1892).

TAXATION.

Money in Transit, Foreign Corporation

A foreign insurance company did business in the State of New Jersey, it having submitted itself to the laws governing foreign corporations. From time to time its agent in Newark received money for premiums which he deposited in bank, in his name as superintendent, and at the end of each week transmitted the entire amount so collected to the home office. The weekly average was $4500, and no use was made of the money in the State of New Jersey. The assessors of taxes assessed this bank balance as personal property of the corporation, taxable as property of the foreign corporation, and the company appealed. *Held*, that the tax was wrongly imposed as the money was merely in transit, and its deposit in New Jersey was nothing more than an act of convenient transmission: *State* (*Met. Life Ins. Co. of N. Y.*) v. *Mayor, etc., of Newark* (Supreme Court of New Jersey), 40 Atl. 573.