PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BILLS AND NOTES.

Following the rule suggested by the United States bankruptcy cases in preference to the English rule on the subject, the Supreme Court of Massachusetts, in *Beals* v. *Mayher*, 54 N. E. 857, has decided, (1) that where the maker of a note has made an assignment for the benefit of creditors, and the indorser has made a partial payment to the holder, the latter is entitled to prove the full amount of the note before the assignee of the maker, without deducting the amount received by him from the indorser; from which it follows (2) that the indorser cannot compete with the holder before the assignee for the amount paid by him, since to allow him to do so would be to allow a double proof of the same debt.

Assignment by Maker, Partial Payment by Indorser

There is a presumption that the common law of the forum is the law of a sister common law state, but there is no presumption that it prevails all over the world. By analogy the Supreme Court of Massachusetts reasons that while the law merchant may be presumed to be effective throughout Europe, there is no presumption that it is effective in Asia. A charge of court was therefore held proper, to the effect that there was no presumption that the law of protest of negotiable paper was recognized in Harpoot, Turkey, but that the burden was on the party alleging the existence of any certain law there, to prove it: *Aslanian* v. *Dostumian*, 54 N. E. 845.

Law Merchant, Presumption in Other Countries

CARRIERS.

The defendant railroad company, operating in Iowa, leased a portion of its right of way to an elevator company, the lease stipulating that the defendant should not be liable for fire caused by locomotive sparks, even though the fire was occasioned by the negligence of defendant's servants. The elevator being burned down, the Supreme Court of the United States, on an appeal from the Circuit Court of Appeals, Eighth Circuit, was called upon to decide whether the defendant could law-

Contract Exempting Railroad from Liability for Negligence

CARRIERS (Continued).

fully exempt itself from liability for the negligence of its servants: *Ins. Co.* v. *Chicago, etc., Rwy. Co.*, 20 Sup. Ct. 33.

The opinion of the court, by Justice Gray, clearly shows that if this had been a case where the general commercial law governed, *i. e.*, a case where the railroad had attempted to limit its liability for a duty which it owed the public, such as the carriage of passengers and freight, the Supreme Court would have declared the stipulation void, irrespective of the decisions of the courts of Iowa. But the case did not involve a question of this sort. The railroad was under no duty to make the lease and there were no principles of public policy which forbade the insertion of such a provision in a private agreement between the railroad and the elevator company. Such being the case, the court was bound to follow the Iowa decisions, as on a mere matter of private property, and, it being clearly shown that such an agreement was lawful in Iowa, the decision of the Circuit Court of Appeals in favor of the railroad was affirmed.

CONFLICT OF LAWS.

Foreign Decree of Divorce, Impeachment for Irregularity in Service of Process

The English Court of Appeal has decided an important case in regard to the extent to which an irregularly obtained foreign divorce will be recognized in England: *Pemberton* v. *Hughes*, [1899] 1 Ch. 781. This was an action by a wife to enforce her marriage right against her alleged husband, to whom she had been married in England. It appeared that she had been married previously in the United States and that her husband was living, but she set up a decree of divorce obtained in Florida, the validity of which was the question in the case. It appeared that, by a rule of the Florida court, ten clear days must elapse between the issue of the subpœna and the return day, and the record of the divorce proceeding showed that only nine days had elapsed. It was alleged that this defect in the service of process prevented the jurisdiction of the Florida court from attaching to the parties, and that there was no objection to the collateral impeachment of the decree in the English court, and this view was adopted by Kekewich, J., in the divisional court.

His decision was reversed by the Court of Appeal (Lindley, M. R., and Vaughan Williams and Rigby, JJ.) and the principle laid down that for international purposes the test of the jurisdiction of a court is not the regularity with which the parties have been summoned before it, but the power which it possesses to summon the parties and to decide the question pre-

CONFLICT OF LAWS (Continued).

sented; that in this case the Florida court possessed undoubted jurisdiction under the latter test; and that the fact that a rule of procedure had been violated was not fatal to the jurisdiction, but was a matter which should have been called to the attention of the Florida court.

The opinion of Lindley, M. R., well repays a reading, but the question arises,—how far does the "power to summon the parties and decide the subject-matter" confer jurisdiction? Suppose in the above case the defendant had never been served. Would the undoubted power of the Florida court to summon her confer jurisdiction? It is to be feared that a general rule deducible from the above opinion might carry the court a little further than it would wish to go.

CONSTITUTIONAL LAW.

Whether the Supreme Court of the United States possesses the power to issue a *mandamus* to a state court to compel obedience to a mandate of the Supreme Court, is an interesting question, and is touched upon, but not decided, in *Ex. Parte Blake*, 20 Sup. Ct. 42. It will be remembered that in the celebrated case of *Blake* v. *McClung*, 172 U. S. 239, the Supreme Court of the United States declared unconstitutional a Tennessee statute which gave priority to Tennessee creditors of insolvent corporations, and decreed, "that as to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered." One of the aforesaid citizens of Ohio, not being satisfied with the final disposition of the case by the Supreme Court of Tennessee, applied to the Supreme Court of the United States for a writ of *mandamus* to compel obedience to the above mandate. The Supreme Court of the United States, in an opinion by Fuller, C. J., denied the writ, on the ground that a writ of error was an adequate remedy, but declined to pass upon the abstract question of the power of the court to grant the *mandamus*.

Supreme Court, Mandamus to State Courts

Where counsel intend to appeal from the highest court of a state to the Supreme Court of the United States, it is essential that the constitutional question be presented before the state court. Thus in *Scudder* v. *Coler*, 20 Sup. Ct. 26, an appeal was taken from the Court of Appeals of New York to the Supreme Court of the United States on the ground that a New York tax was attempted to be levied upon property in New Jersey. In the proceedings before the Court of Appeals

How Soon the Constitutional Question Must be Raised

CONSTITUTIONAL LAW (Continued).

no mention was made of any constitutional objection to the validity of the tax as affected by the Constitution of the United States, except one objection, which might either have referred to the constitution of New York or that of the United States. The Supreme Court dismissed the writ of error, on the ground that the record did not clearly show that the provision of the Constitution of the United States had been called to the attention of the Court of Appeals.

Twice in Jeopardy, Sentenced Under Constitutional Act

In *Comm.* v. *Murphy*, 54 N. E. 860, the appellant had been convicted, sentenced to imprisonment and had served a portion of his sentence in prison, when the law under which he had been sentenced was declared unconstitutional and his case was remanded for sentence in accordance with a former law. The appellant contended that, since his new sentence, together with the time which he had served, would amount to a greater term than his previous sentence, such sentence placed him twice in jeopardy and punished him twice for the same offence, but the Supreme Court of Massachusetts dismissed his appeal.

CONTRACTS.

Partial Restraint of Trade

Ever since the leading case of *Mitchell* v. *Reynolds*, 1 P. Wms. 181 (1711), the English courts have never opposed technical or unreasonable objections to contracts in restraint of trade, when such contracts are partial either as to time or place, reasonable in their nature, and founded upon a good consideration. The latest case in which such a contract was upheld is *Haynes* v. *Dornan*, [1899] 2 Ch. 13. Defendant, on entering plaintiff's service, covenanted not to enter the service of any other person or firm within twenty-five miles from the plaintiff's works without plaintiff's consent. The Court of Appeal considered that the contract, while unlimited as to time, was limited as to space, and was, upon the whole, reasonably necessary for the protection of the trade secrets of the employer. An injunction was therefore granted to prevent its violation.

Illegality as Defence to a Written Lease

In a late case it was held that in an action for rent on a written lease, the defendant may prove that at the time the lease was executed, it was the intention of defendant, and known to the plaintiff, that the premises were to be used for the illegal sale of liquors, and that such sales took place with the knowledge of plaintiff; which defence defeats recovery on the lease: *Mound* v. *Barker*, 44 Atl. 346

COPYRIGHT.

"Sheet Music," Perforated Roll for Mechanical Organ

A rather interesting case, involving the latest mechanical invention in music, has lately been decided by the Court of Appeal of England: *Boosey* v. *Whight*, [1899] 1 Ch. 836. Plaintiff possessed the copyright on several popular songs, including "the sole and exclusive liberty of printing or otherwise multiplying copies" thereof. Defendant was a manufacturer of one of the various well known instruments by which a so-called "musical" effect is produced by the machine itself, without any execution on the part of the performer beyond that of regulating the time and tone of the instrument. The question in the case was this: Was the sale of the perforated roll of paper employed in the instrument, with holes corresponding to the various notes, and also containing marks of expression, such as *andante*, *moderato*, etc., to guide the performer, a violation of plaintiff's patent?

It was first contended that a person could become acquainted with the method of the perforation of the rolls and could become so expert that he would be enabled to read the music from the rolls, just as from an ordinary sheet of music. The unlikelihood of any person going to this trouble prevented the point from being seriously considered by the court.

It was then urged that the rolls were copies of a substantial part of what was found in the sheet music, although expressed in a different form of notation, being similar to the relation which a piece of shorthand would bear to the ordinary letterpress. The court, however, decided that the intention of the act was to prohibit only such copies as would appeal to the mind through the eye, and that the rolls were simply parts of the machines and not "copies" any more than the cylinders of music boxes would be. But while refusing to enjoin the sale of the rolls, the court forbade the use of the expression marks to guide the performer, as coming within the copyright.

CORPORATIONS.

Power to Purchase and Hold Stock of a Rival Corporation

The Supreme Court of the United States has again affirmed the general rule that a corporation cannot purchase and hold the stock of a rival corporation, except that it may hold it by way of pledge for the security of an antecedent debt: *De La Vergne, etc., Co.* v. *Savings Inst.*, 20 Sup. Ct. 20. Nor does the New York Act of June 7, 1853 (C. 333) authorizing such corporations to "purchase mines, manufactories and other property necessary for their business" confer any such power. It is needless to say that the Supreme Court, after

CORPORATIONS (Continued).

holding the purchase of the stock *ultra vires*, decided that the mere fact that the contract was executed interposed no objection to the right of the defendant corporation to set up the illegality of its own act as a defence to an action on the contract;—citing a long list of decisions beginning with *Pearce* v. *R. R.*, 21 How. 441. Brewer and McKenna, JJ., dissented, but the grounds of their dissent are not stated.

DEEDS.

Misdescription, Common Mistake

Rooms on the second floor of a house, Nos. 13 and 14 Bond street, were rented to plaintiff, together with the free right of ingress and egress "through the staircase and passage of No. 13." It appeared that there was no staircase or passage to the demised premises in No. 13, but there was one in No. 14. The Court of Appeal of England, affirming the decision of Romer, J., [1898] 2 Ch. 551, held that, as there was evidently a common mistake, the doctrine of *falsa demonstratio non nocet* applied, and the lease was rectified by allowing plaintiff a right of way through No. 14: *Cowen* v. *Truefitt*, [1899] 2 Ch. 309.

EVIDENCE.

Receipt of Letter, Presumption

The Supreme Court of Pennsylvania has affirmed the now familiar rule that proof that a letter was mailed, properly addressed and stamped, raises a presumption that it was duly received, but that this presumption is rebutted as a matter of law, and should be so declared by the court, when the addressee, whose testimony is uncontradicted, swears that he never received the letter. This rule was applied to the case of the mailing of a notice of reinsurance to an insurance company, where it was held that the rule of notice of dishonor of commercial paper did not apply, but that the burden was on the insured to prove, or to raise a presumption not rebutted by the insurance company, that the notice was actually received: *Packing Co.* v. *Southern Mut. Ins. Co.*, 44 Atl. 317.

Witness, Correction of Other Testimony

A witness, who testified to a certain fact in direct examination, was asked on cross-examination whether he was not present at a former trial where another witness testified to precisely the opposite, and he (the witness) did not attempt to correct him. The question was excluded. *Held*, no error: *Turner's Appeal*, 44 Atl. (Conn.) 310.

EVIDENCE (Continued).

U. S. Revenue Stamps

On the trial of an indictment for selling beer on Sunday, the defence was that the article sold was a non-alcoholic liquor. A witness was permitted to testify that he saw United States revenue stamps on the kegs from which the alleged innocent liquor was drawn. *Held*, no error, as tending to show that the kegs contained malt liquor: *State* v. *Wright*, 44 Atl. (N. H.), 519.

Ancient Document, Act of Ownership

In an action to try title to land, plaintiff offered in evidence a piece of paper dated the year 1659, and produced from proper custody, which paper purported to be an admission by a former tenant of one of defendant's predecessors in title, that one of plaintiff's predecessors had been persuaded to stop an action against the writer for bringing his cattle on the land, on the payment of sixteen shillings by the writer. *Held*, that the document was admissible, not as an admission by the tenant as to title, in which case it would be inadmissible against his landlord, but as evidence of an act of ownership by the predecessor of the plaintiff: *Jenkins* v. *Earl of Dunraven*, [1899] 2 Ch. 126.

Confession Induced by Artifice

"Society and the criminal are at war, and capture by surprise, or ambush, or masked battery, is as permissible in one case as in the other." Such is the language used by Justice Mitchell of the Supreme Court of Pennsylvania in holding that a confession was admissible, even though induced by means of a trick, namely a false assurance to the prisoner that a certain knife belonging to him had been found; under the belief of which the prisoner confessed the commission of the crime with which he had been charged: *Comm.* v. *Cressinger*, 44 Atl. 433.

FRAUD UPON CREDITORS.

Gift of Land to Wife

It is now well settled in Pennsylvania that where a man conveys his land to his wife by a recorded deed, such conveyance is valid against a creditor whose debt is contracted long after the conveyance, in the absence of affirmative proof that the conveyance was made with intent to defraud the creditor: *Best* v. *Smith*, 44 Atl. 329. In affirming this familiar rule Dean, J., deemed it important to call attention to certain dicta of Black, C. J., in *Gamber* v. *Gamber*, 18 Pa. 363, which unexplained, would seem to indicate a contrary view.

HUSBAND AND WIFE.

In *Harrington* v. *Harrington*, 44 Atl. 522, a suit for divorce, it appeared that at the time of the libel both parties were residents of New Hampshire, but that when the alleged offence was committed the libellant was absent from the state, although the respondent was domiciled in the state and the offence was committed there. After stating two propositions, (1) that the offence must be committed within the jurisdiction of the court granting the divorce (*Martin* v. *Martin*, 47 N. H., 52), and (2) that the libellant must be domiciled within the jurisdiction at the time, the Supreme Court of New Hampshire goes on to say that if both of these propositions were to be enforced, the present libellant could not obtain a divorce anywhere for that cause; therefore they made an exception to the second proposition and granted the divorce.

Divorce, Offence Committed while Other Party is Absent from the State

Although a husband has the power to dispose of the remains of his wife in any proper manner, yet this is not a property right and will not be permitted to be exercised arbitrarily. Therefore, where the wife was buried in her parents' lot (according to her own previous request) and subsequently the parents bought a lot in another ground, where they, with the knowledge of the husband, prepared a tomb for her at great expense, the husband was enjoined from interfering from the removal of the body to the new ground: *Toppin* v. *Moriarity*, 44 Atl. (N. J.) 469. The opinion of Steven, V. C., contains a discussion of all the authorities on the subject.

Burial of Wife, Discretion of Husband

The Supreme Court of Massachusetts has decided that in an action by a wife against another woman for the alienation of the husband's affections, it is necessary for the plaintiff to allege and prove actual loss of *consortium*, and that alienation of affections alone is not a substantive cause of action, but merely an aggravation of damages for the loss of *consortium*. Even in an action of criminal conversation the loss of *consortium* must be alleged: *Neville* v. *Gile*, 54 N. E. 841.

Alienation of Affections, Consortium

LANDLORD AND TENANT.

It is well settled that in the absence of an express covenant a landlord is under no liability to repair the premises and does not assume the risk of faulty construction. Therefore the fact that the drains of the premises are so unsuitably constructed and maintained that illness

Defective Drains, Liability.

LANDLORD AND TENANT (Continued).

results in the tenant's family, by reason of the foul gas, does not impose any liability upon the landlord: *Towne* v. *Thompson*, 44 Atl. (N. H.) 493.

MORTGAGES.

The loose language of judges in many cases has led to considerable confusion as to what benefits to the mortgagee may be lawfully stipulated for in a mortgage. Thus in *Santley* v. *White*, [1899] 2 Ch. 474, the mortgagee of a leasehold stipulated not only for the repayment of the amount advanced, but also for one-third of the profits of the leasehold throughout the continuance of the mortgage. The English Court of Appeal, reversing the decision of Byrne, J., [1899] 1 Ch. 747, held that the stipulation for the payment of the profits was valid, and that the rather vague rule, that the mortgagor's equity cannot be "clogged" or "fettered," did not apply.

Collateral Advantage to Mortgagee

MUNICIPAL CORPORATIONS.

The city of Chicago passed an ordinance granting to licensed hackmen certain privileges in choosing the positions in front of railroad stations for their hacks. In a bill filed by a railroad company against the city, to enjoin the enforcement of the ordinance, it was *held* (1) that the ordinance was unconstitutional as granting exclusive privileges to certain persons of the use of the city streets, which were held by the municipality in trust for the general public and not for the use of special persons, (2) but that an injunction would not issue, since the railroad company had an adequate remedy at law by which damages could be recovered for the injury to their property: *Penna. R. R. Co.* v. *Chicago*, 54 N. E. (Ill.) 825.

Special Privilege to Licensed Hackmen, Injunction

NEGLIGENCE.

The Supreme Court of Pennsylvania has added another case to the long list of those which explain the meaning of the rule that a railroad is responsible to its employes for injuries resulting from the negligent construction of the road. In *Voorhees* v. *Lake Shore, etc., Rwy.*, 44 Atl. 335, it appeared that there was an ordinary space of some seven feet between the various lines of tracks on defendant's road, but that at one place a switch was

Defective Construction of Railroad Track

NEGLIGENCE (Continued).

only five and one-half feet distant from a track. The plaintiff, a brakeman on a train coming down the latter track, jumped off on the side toward the switch, in order to turn it, and in doing so was struck by a car on the switch. The plaintiff having testified that he had no knowledge of the especial narrowness of the space between the tracks at that point, it was held that the questions of the defendant's negligence in not providing a sufficient space to work, and of the plaintiff's contributory negligence in jumping down without looking at the switch, were properly left to the jury, and judgment for the plaintiff was affirmed.

The other side of the question presented in the preceding case occurs in *Gillin* v. *Patten & S. R. Co.*, 44 Atl. 361, where the Supreme Court of Maine held (1) that there is no common law duty imposed upon a railroad to block its frogs and switches to prevent the feet of the workmen from being caught therein; (2) that a brakeman who jumps down upon a switch, without stopping to see whether or not it is blocked, is guilty of contributory negligence, and (3) that the act of 1889, c. 216, requiring railroads to block their switches after January 1, 1890, must be construed so as to allow a road, constructed after 1890, a reasonable time in which to perform its duty, and the statute does not fasten negligence upon such a road which operates trains before it is fully completed and before the switches are blocked.

Duty to Block Switches

In Indiana the courts do not apply the "stop, look and listen" rule with absolute strictness, but have adopted a more flexible principle in regard to accidents at grade crossings, namely, that "when a person crossing a railroad track is injured by collision with a train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury." Of course the extent to which the plaintiff must prove the absence of contributory negligence is a mixed question of law and fact, and varies with the peculiar circumstances of each case: *B. & O. Rwy. Co.* v. *Young*, 54 N. E. (Ind.) 791.

Railroad Crossing, Contributory Negligence

PLEADING AND PRACTICE.

It was provided by the Pennsylvania act of March 17, 1869,

PLEADING AND PRACTICE (Continued).

that attachments under that act should "be made returnable on the first return of said court next after the time of issuing thereof." By the act of 1878, as amended by the act of 1879 (P. L. 125), it was provided that the attachments might be made returnable, "on the first Monday of the next term, or on the second, third or fourth Mondays of any intermediate month." *Held*, by the Supreme Court of Pennsylvania, that the latter act repealed the above section of the act of 1869; therefore it is not necessary to make the attachment returnable to the next return day: *Slingluff* v. *Sisler*, 44 Atl. 423.

Return Days of Attachments In Pennsylvania

The defendant to a bill in equity may demur on the ground that the cause of action is barred by laches, when said laches is apparent from the face of bill itself, but in an action at law the defendant must plead the statute of limitations specially and may not raise it by demurrer, even though the statement or declaration may show that the cause of action is barred, chiefly on the ground that it is necessary for the plaintiff to have an opportunity to reply that the case is within one of the exceptions to the statute. Such was the rule of the common law, and such is the law of Illinois to-day: *Gunton* v. *Hughes*, 54 N. E. 895.

Statute of Limitations, Demurrer

REAL PROPERTY.

In *Bonebrake* v. *Summers*, 44 Atl. 330, the question was presented whether a charge upon land for the maintenance of a person for life was discharged by a sale of the land by an assignee for the benefit of creditors under the Pennsylvania act of February 17, 1876.

Charge on Land, Uncertainty, Discharge by Judicial Sale

The Supreme Court of Pennsylvania decided, (1) that the act of 1876 must receive a construction similar to that of the act of April 6, 1830, in regard to judicial sales, and that those liens, and those only, which would be discharged by a judicial sale, would be discharged by a sale under the act of 1876; (2) that a charge for the maintenance of a person, being of uncertain duration and incapable of being valued exactly, would not be discharged by the judicial sale, therefore the lien in question was not discharged by the assignee's sale.

The latest case where the rule in Shelley's case was rigorously applied by the Supreme Court of Pennsylvania was *Reimer* v. *Reimer*, 44 Atl. 316, where a devise to A. for life with remainder over "if she leaves no

Rule in Shelley's Case

REAL PROPERTY (Continued).

heirs," was held to vest a fee in A. Considering that A. was the daughter of the testator and that the remaindermen included all her brothers and sisters, it seems pretty evident that the word "heirs" was used to designate A.'s children, but the Supreme Court refused to look at it in that light.

SALES.

Perhaps it is difficult in Pennsylvania to formulate any reliable rule which will make a clear distinction between conditional sales and bailments with options to purchase, but there are a few essential elements of a valid bailment which attorneys will do well to remember. In *Morgan Electric Company* v. *Brown*, 44 Atl. 459, the agreement was in the usual form, the so-called "rent" being secured by succession notes and the transaction being carefully designated as a "lease," etc.; but one feature was altogether lacking:—a provision for the return of the article at the termination of the agreement. Chiefly on this ground the transaction was held to constitute a conditional sale—citing *Farquahar* v. *McAlevy*, 142 Pa. 233—and the provision contained in the agreement that, upon the payment of the last of the notes, the bailor should make a bill of sale to the bailee was considered to be a mere euphemism for saying that, upon that contingency, the title of the vendee should become absolute.

Bailment with Option to Purchase, Requirements

SURVIVAL OF ACTIONS.

It seems remarkable that some judges in Pennsylvania have not yet mastered the distinction between the natures of the actions for negligence which survive under the eighteenth and nineteenth sections, respectively, of the act of April 15, 1851. Two long lines of cases have conclusively established (1) that when the administrator of the deceased continues the action under the eighteenth section, the measure of damages is precisely that which would govern the action by the deceased, if alive, viz., damages for pain and suffering, necessary expenses and loss of earning power during his probable period of life, and (2) that where the action is brought under the nineteenth section (by the person designated by the explanatory act of April 26, 1855), the amount recoverable is limited to the pecuniary loss suffered by the plaintiff, (3) and that in no possible instance may both classes of damages be recovered. Yet in *McCafferty* v. *Penna. R. Co.*, 44 Atl. (Pa.) 435, the trial judge

Actions for Negligence Resulting in Death, Damages

SURVIVAL OF ACTIONS (Continued).

instructed the jury that the mother of the deceased (who was continuing, as administrator, an action commenced by the deceased in his lifetime) could recover for her pecuniary loss. As a matter of course, judgment for the plaintiff was reversed.

WILLS.

Testator by his will directed the residuary legatee to pay to each of testator's three daughters $150 in case she married within eight years, or $500 if she remained unmarried at the expiration of that time. Then followed the clause, "It is my will that if either of my daughters should decease, leaving no heirs, that their legacy above named should be divided among such of them as should survive." It having been agreed that the word "heirs" should be construed as "children," the Supreme Court of Vermont held that it was the evident intention of the testator that the conditional limitation to the surviving daughters was to take effect only upon the death of one of them within the eight years, and that there was no foundation for the contention that a life estate was created in the $500 with remainder over upon the holder dying childless: *Andrews* v. *Sargent*, 44 Atl. 341.

Conditional Limitation, Time of Operation