

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### BANKS AND BANKING.

Following the rule enunciated in *Bank v. Legrand*, 103 Pa. 309, the Court of Appeals of Kansas has decided that where a bank holds a note signed by a principal and a surety, and the principal has a deposit to his credit at the bank subsequent to the maturity of the note, the bank, while it has the right, is under no duty to retain the deposit for the payment of the note, therefore its failure to do so does not discharge the surety: *Citizens' Bank v. Elliott*, 59 Pac. 1102.

#### CONSTITUTIONAL LAW.

Judge Lochren of the District Court (D. Minn.) has generally been regarded as a careful and clear-headed judge, and the stump speech which he delivered in *Ex Parte Ortiz*, 100 Fed. 955, on "The Constitution Follows the Flag," came as a shock and a surprise to the profession. The case arose upon an application for a writ of *habeas corpus* brought by an inhabitant of Porto Rico, who had been convicted of murder by a military tribunal of the United States on that island. Judge Lochren wrote a lengthy and, it must be admitted, logical and forcible opinion, to the effect that immediately upon the acquisition of Porto Rico by the United States the federal constitution came into effect there, wherefore conviction could be had only by indictment, grand and petit juries, etc.

Having thus demonstrated to his satisfaction that the constitution followed the flag, the judge turned around and announced that all that he had said before was mere dictum, since in the case at bar the constitution did not apply at all, for the reason the crime and prosecution thereunder had taken place previous to April 11, 1898, upon which date Porto Rico became a part of the United States, by virtue of the ratification of the treaty between Spain and the United States. The proceedings of the military tribunal were there-

CONSTITUTIONAL LAW (Continued).

fore held to be within its jurisdiction, and the petition for the writ was dismissed.

The excuse given by the judge for his constitutional discussion causes a lawyer to smile. He says: "In view of this conclusion, it might seem unnecessary to examine, even as briefly as I have, the claim that the constitution does not apply to newly-acquired domain of the United States, had that claim not been urged with such confidence and amplitude of argument, as the basis on which the decision of the case must rest, that acquiescence might be inferred from silence." Why could he not have said, in a dozen words, that the question, although presented and argued, was not necessary to the decision of the case and would therefore be passed by without comment? The answer might possibly be, in the words of the judge, that the constitutional question has hitherto been discussed only in "an elaborate argument of a law officer of the war department, as well as arguments of several distinguished senators."

In 1899 the Legislature of New York passed a law providing for the imposition of taxes by counties for the purpose of reimbursing all county officers for expenses incurred in criminal prosecutions, previous to the passage of the law, in which they had been acquitted. In *In Re Jensen*, 60 N. Y. Suppl. 933, the law was attacked on the ground that it violated the constitution of New York in imposing taxation for a non-public purpose. The Supreme Court of New York, while admitting that a law might be regarded as public which provided for reimbursement for future prosecutions, held that the alleged moral obligation of the counties to defray the expenses of past prosecutions did not give a public character to the law in question.

The Supreme Court of the United States has dismissed for want of jurisdiction, the bill in equity filed in that court by the State of Louisiana against the State of Texas, its governor and its health officer. The bill sought to obtain relief against the action of the governor and the health officer of Texas in instituting a practical embargo against all goods coming into Texas from New Orleans on the alleged ground of a yellow fever epidemic: *Louisiana v. Texas et al.*, 20 Sup. Ct. 251. The court were of the unanimous opinion that the bill should be dismissed, but the members adopted different grounds of opinion. Fuller, C. J., thought that the embargo by order of the governor of Texas

Taxation for  
Public  
Purpose, Costs  
of Criminal  
Prosecutions

Jurisdiction in  
Suits Between  
States

## CONSTITUTIONAL LAW (Continued).

was not such state action as would present a controversy between the two states; Harlan, J., was of the opinion that no harm had been done to the State of Louisiana, but merely to some of the citizens thereof; and Brown, J., while intimating that, if the matter had affected all the citizens of Louisiana, a "controversy" between the states would have arisen, based his concurrence on the ground that the State of Louisiana could not act on behalf of the inhabitants of New Orleans alone.

In order to render its fish and game laws effective, the Legislature of New York seems to have gone a little too far. In 1892 an act was passed (C. 488, § 110) rendering it a misdemeanor for a person to "have in his possession" certain varieties of fish during the closed season. In *People v. Buffalo Fish Co.*, 62 N. Y. Suppl. 543, the defendant, indicted under this law, defended on the ground that the fish in question were imported from Canada, where they had been caught. The Supreme Court of New York held that, as to fish imported from another state or a foreign country, the law was void, as an attempted regulation of commerce on a subject requiring a uniform system of regulation, and therefore exclusively within the control of Congress.

## CORPORATIONS.

The laws of Kansas, in regard to the rights of creditors in insolvent corporations, have become famous as sources of litigation throughout the whole United States. The latest instance where they have been called into question occurred in *Woodworth v. Bowles*, 60 Pac. 329, decided by the Supreme Court of Kansas itself. Under the state insolvent corporation law, each creditor of an insolvent corporation was given a direct right of action against the stockholders. In 1897 the Legislature of Kansas passed an act (C. 47, § 55) providing that assignees of insolvent banks should have power to suspend the bringing of such actions by the banks' creditors for the period of one year, during which period the assignees were required to bring suit for the benefit of all creditors. Following *Mech. Bank v. Fidelity Ins. Co.*, 87 Fed. 114, the court held that the separate right of action given to the creditor was a contractual one, therefore, as to creditors whose rights had accrued previous to 1897, the law was void as an impairment of the obligation of contracts.

The late case of the Associated Press has been discussed so widely that it is but necessary to give its citation in the

CORPORATIONS (Continued).

**Associated Press, Public Interest** advance reports: *Inter-Ocean Pub. Co. v. Associated Press*, 56 N. E. 822. It will be remembered that in this case the Supreme Court of Illinois decided that the Associated Press is a quasi-public corporation; therefore it cannot make and enforce a by-law that its subscribers may not receive news from other sources, under penalty of expulsion.

**Suit by Creditor Against Stockholder** In *Walter v. Merced Acad. Asso. et al*, 59 Pac. 136, the defendants, who had been stockholders in a corporation for six years, were sued by a creditor of the corporation for unpaid balances on their stock. The defence set up was that there was a material variance between their agreements of subscription to the stock and the articles as to the purposes of the corporation. The Supreme Court of California properly held that this defence was unavailing as against corporation creditors, but it does not clearly appear whether the court based its decision on the broad ground that the defendants were stockholders, or upon the fact that by their laches in asserting their rights, the defendants were estopped.

CRIMINAL LAW.

Rev. Stat. (U. S.) § 5418, makes it a crime to counterfeit any "bid, proposal, guaranty, official bond, public record, affidavit or other writing." In *United States v. Ah Won*, 97 Counterfeiting Bank Certificate Fed. 494, the defendant was indicted for counterfeiting a blank form of certificate of residence, issued by the government to Chinese persons entitled to remain in the country. Judge Bellinger, of the Circuit Court (D. Or.), decided that as the form was of no value or meaning in its blank condition, the act of the defendant did not come within the purview of the statute.

**Corroborative Evidence in Case of Rape** In New York there is the generally prevailing statutory rule that no conviction in rape may be had upon the testimony of the prosecutrix "unsupported by other evidence." In *People v. Page*, 56 N. E. 750, the Court of Appeals of New York was called upon to consider what evidence amounted to corroboration under the statute. *Held*, that neither (1) the fact that the prosecutrix made a subsequent complaint of the offence, nor (2) that the defendant remained silent when told that this complaint against him had been made, amounted to such corroboration as would support a conviction.

## DAMAGES.

The articles of separation between a husband and wife included a bond given by the husband in the sum of \$2,000, to secure the payment by him to his wife of \$25 per month. It was also provided in the bond that if, at any time, the obligor defaulted in the payment of any of the monthly instalments for more than fifteen days, the principal sum and interest should become due and payable. After the obligor had defaulted for more than six months, an action was brought on the bond for the \$2,000. The obligor tendered the unpaid instalments and claimed that this would relieve him from liability for the \$2,000, but the Supreme Court of Pennsylvania decided that his contention was without merit: *Biery v. Steckel*, 45 Atl. 376.

## EVIDENCE.

In New York a strict construction is given to the rule which forbids parol evidence to add to, alter or vary a written instrument. In *Stephens v. Ely*, 56 N. E. 499, the parties entered into a lease under which the lessee was given the right to remove fixtures erected by him, at the expiration of the term. When the lease had expired, a new lease was made containing the usual covenants, but without mention of any right on the part of the lessee to remove the fixtures. The Court of Appeals of New York held that parol evidence was inadmissible to show that it was the intention of the parties to continue the agreement in regard to the fixtures throughout the term of the second lease.

## HUSBAND AND WIFE.

The doctrine that the husband and wife constitute one person has been recently asserted by the Supreme Court of Florida. A statute of that state (Rev. Stat., § 967) provides that a judge shall be disqualified from trying a case "by reason of interest, consanguinity or affinity to either of the parties." In *State v. Wall*, 26 So. 1020, the wife of the judge was the aunt of the wife of one of the parties. It was held (1) that the judge was an "affinis" of his wife's niece, and (2) therefore was connected by affinity with the niece's husband, since the husband and wife were but one person in the eye of the law.

Whether or not a wife may successfully bring an action for the alienation of her husband's affections is a question upon

HUSBAND AND WIFE (Continued).

Alienation of Husband's Affections which the courts have disagreed. In *Crocker v. Crocker*, 98 Fed. 702, the Circuit Court (D. Mass.) was called upon to decide it under the law of Massachusetts. Putnam, Jr., held that under the English common law, which existed in Massachusetts unaffected by statute, the mere alienation of the husband's affections did not give a right of action to the wife, but that the loss of the husband's *consortium* would be an element of damage if it was the probable consequence of any tort for which the wife could bring suit.

The Supreme Court of Pennsylvania declared to be a necessity a course of practice which Pennsylvania lawyers have hitherto adopted from abundance of caution. Separate Acknowledgment by Wife In *Bingler v. Bowman*, 45 Atl. 80, the question was presented whether or not the Married Women's Acts of 1848, 1887 and 1893 had relieved a married woman from the necessity of acknowledging a deed of her real estate separate and apart from her husband, according to the act of 1770. It was held that the Married Women's Acts affected merely the power of married women, and not the formality necessary for its exercise; therefore the act of 1770 was still in force.

The conservative position retained by some states to the present day on the subject of the power of married women is remarkable. At the present time in Virginia a Married Women's Contracts married woman is not liable on her contracts, unless the same are made in respect to her separate estate: *Hirth v. Hirth*, 34 S. E. (Va.) 964.

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INSURANCE.

In *Johnson v. Ins. Co.*, 56 N. E. 569, the insurance policy provided that it should become void "if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days." There being evidence to show that the vacancy was merely temporary in character, the Supreme Court of Massachusetts decided that the jury were properly instructed that provision in the policy would not apply unless they should find that the vacancy was intended to be permanent.

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NEGLIGENCE.

One of the first fruits of *R. R. v. Conroy*, 20 Sup. Ct. 85, in which, it will be remembered, the Supreme Court of the

## NEGLIGENCE (Continued).

**Fellow Servants** United States overruled the leading case of *Ross v. R. R.*, 112 U. S. 377, is *Briegal v. South. Pac. Rwy.*, 98 Fed. 959, where the Circuit Court of Appeals (Ninth Circuit) held that an engineer and his fireman were fellow servants, so as to preclude a recovery by the fireman for the negligence of the engineer.

*Schafer v. Central Rwy. Co.*, 61 N. Y. Suppl. (Sup. Ct.) 806, is authority for the propositions (1) that it is not necessary for a passenger on a street car to give notice to the conductor of his intention to alight, if he arises to alight at the same time another passenger does, who has given notice, and (2) that it is not negligence *per se* for the passenger to fail to take hold of the railings, when alighting, to guard against a sudden starting of the car.

## PARTNERSHIP.

*Johnson v. Haws*, 62 N. Y. Suppl. 641, raises the question whether or not notice to a partnership creditor that one of the partners is not to be bound relieves such partner from liability. In that case the two partners entered upon a building operation with a provision in the agreement that one of them was not to be liable for the debts. The plaintiff, having notice of this provision, supplied material for the operation and sued the partner who was not to be held liable. The Supreme Court of New York decided that the plaintiff was bound by his knowledge of the agreement, but Ingraham, J., dissented, on the ground that it was against public policy to allow a partner to stipulate for the profits of an undertaking without liability to the creditors, and that the agreement for non-liability was binding only between the partners.

## PRINCIPAL AND AGENT.

In *Janes v. Citizens' Bank*, 60 Pac. 290, an action was brought against Fred. R. Janes on a promissory note which was in the usual form: "We promise to pay, etc." The note was signed: "Jacob Guthrie, president of Enid Town Co.; Fred. R. Janes, secretary the Enid Town Co." The Supreme Court of Oklahoma, (overruling the former case of *Keokuk Co. v. Kingsland Co.*, 5 Okl. 32.) decided that the note disclosed a latent ambiguity as to whether or not the defendant signed merely in his official capacity; therefore parol evidence was admissible on the part of Janes, to show that he signed as

PRINCIPAL AND AGENT (Continued).

agent and that he was not to be held liable on the note. The opinion of Hainer, J., contains a detailed review of all the authorities on the subject.

QUASI-CONTRACTS.

The Supreme Court of Pennsylvania, while holding that tolls which have been illegally exacted by navigation companies may be recovered back, requires as a prerequisite to the action that they shall have been paid under protest. Therefore in *Mon. Nav. Co. v. Wood*, 45 Atl. 73, it was held that in the absence of a protest at the time of payment, or notice of an intention to demand back the tolls, they could not be recovered.

Recovery  
of Illegal  
Tolls,  
Protest

REAL PROPERTY.

The strong tendency of courts to construe all conveyances to husband and wife as conveyances in entirety is illustrated in *Simons v. Bollinger*, 56 N. E. 23. In that case the conveyance was to "A., and B., his wife, and Wife jointly." The Supreme Court of Indiana decided that since all conveyances to husband and wife raise a strong presumption of an estate in entirety, nothing less than the express words, "in joint tenancy," is sufficient to create a joint estate. The word "jointly" was therefore treated as surplusage.

There is some question whether or not a covenant in a deed requiring the erection of dwelling houses is broken by the erection of an apartment house for dwelling purposes only. It was not necessary to pass directly upon this question in *Hurley v. Brown*, 60 N. Y. Suppl. 846; the Supreme Court of New York deciding that a covenant, "to build a substantial dwelling house to cost not less than \$2,500," was not exclusive, so that it would prevent the erection of buildings other than dwelling houses, therefore the erection of an apartment house was no breach.

Restrictive  
Covenants,  
Apartment  
House

The question whether or not an easement exists in favor of land for the flow of its surface water over a lower adjoining property has been variously decided. There are many authorities both ways, and some courts hold that the easement exists in the country, but that in cities every owner of property has the right to improve

Easement for  
Flow of  
Surface Water

## REAL PROPERTY (Continued).

it without regard to the flow of surface waters from other properties. In *Carland v. Aurin*, 53 S. W. 940, the question first arose before the Supreme Court of Tennessee in regard to city lots. It was held, in opposition to the weight of authority, that no distinction was to be made between city and country properties, but that the easement in favor of the upper property existed in both cases. The law on this subject has been collected in 38 AMERICAN LAW REGISTER (N. S.) 707.

## SHERIFFS.

Contrary to the rule in some states, it is held in West Virginia that as between the parties to a suit and their privies  
**Return,** the return of the sheriff is conclusive and the party  
**Impeachment** injured by a false return has recourse against the sheriff only. Therefore the defendant to an action cannot deny the service of process upon him, when a return to that effect is made, nor can he maintain a bill in equity to enjoin the prosecution of the action under these circumstances: *McClung v. McWhorter*, 34 S. E. 740.

In *Wells v. Johnston*, 27 So. 184, an action was brought against the sheriff for an illegal arrest. It appeared that the  
**Liability for** plaintiff, who had been arrested, was not the person  
**Arrest of** named in the warrant, but that the sheriff had  
**Wrong Person** reasonable cause to suppose that he was the person and had acted without malice. The Supreme Court of Louisiana at first affirmed a judgment for the defendant, but upon rehearing decided that the liability of the sheriff was absolute for a false arrest, and the absence of malice was to be considered merely in mitigation of damages. Watkins, J., delivered a strong dissenting opinion.

## STATUTE OF FRAUDS.

In Maryland, by virtue of a provision of the state constitution, the English statute of Frauds (29 Car. II.) is in force.  
**Contract of** The question lately arose whether a parol promise  
**Marriage** to marry came within the statute, as being a contract "not to be performed within one year." The Court of Appeals of Maryland, in a learned and exhaustive opinion by McSherry, C. J., after noting the fact that there is no English authority on the subject, gives its approval to those of the American cases which hold that this form of contract is without the purview of the statute and is therefore enforceable: *Lewis v. Tapman*, 45 Atl. 459.

SURETYSHIP.

*Hyde v. Miller*, 60 N. Y. Suppl. 975, raises a very interesting question regarding the duty of a surety, before paying the debt, to ascertain whether or not his principal has been released. In this case A., who had made a mortgage to B., conveyed the property to C., who covenanted to assume payment of the mortgage debt. A. thus became surety for the mortgage debt, with C. as principal. B. brought an action against A. and C. jointly, pending which B. and C. came to an arrangement whereby B. released C., and this release was entered upon the judgment roll of the action. B., however, pursued the action to a judgment against A., who paid it (in ignorance of the fact that he had been discharged from liability by B.'s release of C.), and A. then brought an action against C. for reimbursement. The Supreme Court of New York allowed a recovery, holding (1) that the release of C. without notice to A. was a fraud on A., (2) that the entry on the judgment roll was not notice to A., and (3) that there was no duty cast upon A., before paying B., to ascertain whether or not C. had been released. All these propositions were denied in the dissenting opinion of Spring, J.

Release of  
Debtor, Duty  
of Surety to  
Ascertain  
before  
Payment

TRIAL.

It is generally held that in suits for personal injuries the trial court possesses the discretion to order, or refuse to order, the physical examination of the person injured by one of the defendant's physicians. But if such an order is made, and the subject of the order refuses to submit to the examination, will such refusal be allowed to prejudice any one but the person so refusing? This was the question in *Bagwell v. Atlanta St. Rwy. Co.*, 34 S. E. 1018, where the plaintiff brought an action for personal injuries to his daughter, who was nearly twenty-one years of age. The Supreme Court of Georgia held that the refusal of the daughter to obey an order of court decreeing the examination did not affect the right of the father to recover, since he had not control over his daughter's movements, and could not compel her to undergo the examination.

Physical  
Examination  
of Plaintiff

*Reiss v. Town of Pelham*, 62 N. Y. Suppl. 607, an action for negligence against a town, showed most remarkable conduct on the part of the jury. On a motion for a new trial, after verdict for the defendant, the attorney for the plaintiff produced affidavits, signed by all the jury, that, in their opinion, "both the

Misconduct  
of Jury,  
Affidavits,  
New Trial

TRIAL (Continued).

village and the town should have been sued, and that the entire damage should not be borne by the said town," and "that the said jury believed that under the law the plaintiffs could maintain an action against both municipalities hereafter, or they would not have brought in a verdict for the defendant." Gaynor, J., of the Supreme Court of New York, while severely scoring the action of the jury as "scandalous" and "outrageous," decided that the mere fact that the jury decided the case according to their view of the law, instead of upon the facts of the case, did not afford a ground for setting aside the verdict.