# PROGRESS OF THE LAW.

## As Marked by Decisions Selected from the Advance Reports.

### ARBITRATION.

In *Munson* v. *Straits of Dover S. S. Co.* 99 Fed. 789, a suit in admiralty, the question arose under a charter which provided generally for submission to arbitration. One of the parties, disregarding this provision, brought a libel against the other, which the court dismissed without costs. The defendant then filed this libel against the plaintiff for breach of the agreement to arbitrate, averring as his basis for damages the fact that his expenses for counsel, etc., in the former suit were greater than those he would have incurred had the matter been submitted to arbitration. Judge Brown of the District Court (S. D. N. Y.) dismissed the libel, holding that no adequate damages had been proven, and it was clear that a libel in admiralty would not lie for the recovery of nominal damages. The opinion covers all the authorities on the subject, after an examination of which Judge Brown remarks that there is no reported case where a recovery has been allowed for breach of a merely executory agreement to arbitrate.

Damages for Refusal to Arbitrate

### BANKRUPTCY.

"A court of bankruptcy ought to be as honest as other people." This expression, taken from the opinion in *Ex Parte James*, 9 Ch. App. 609, was made by Judge Baker of the District Court (D. Md.) the basis of his decision that a trustee in bankruptcy may not take advantage of the well-known rule of law that a voluntary payment, made in ignorance of law, cannot be recovered back. In *In Re Myers*, 99 Fed. 691, the bankrupt had a deposit of $777 in a bank, which transferred the same to the credit of the trustee in bankruptcy and proved its claim against the estate on a $5,000 note of the bankrupt, held by it. Subsequently the bank found out that it would have had the right to retain the deposit as a set-off against the note; it therefore presented a petition praying for leave to withhold the $777 for its own benefit, and to file a new proof of claim for $4,223.

Payment to Trustee in Ignorance of Law, Recovery

BANKRUPTCY (Continued).

*Held*, that the petition should be granted, since the case should be governed by equity and not by the above-mentioned rule of law.

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BILLS AND NOTES.

*Morrison* v. *Bank*, 60 Pac. (Okla.) 273, affirms the rule, prevailing in some jurisdictions, that the mere receipt of a note by a bank, which thereupon credits the depositor with the amount of the note, does not *ipso facto* render the bank a holder for value. To become so, the bank must actually part with something in return for the note, *i. e.*, the depositor must either draw or check out the amount.

**Bank as Holder for Value**

Courts now give a reasonable interpretation to the rule that the amount of a promissory note must be certain and capable of being ascertained at any time. Formerly the addition of the words, "payable with exchange," was held to destroy the negotiability of a note, but nowadays the great weight of authority is to the contrary: *Clark* v. *Skeen*, 60 Pac. 325.

**Negotiability, Exchange**

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CHAMPERTY.

In Utah, as in most other states, an agreement with an attorney for a contingent fee is valid and binding upon both parties, but the courts have drawn the line where such agreements contemplate an undertaking on the party of the attorney to supply the costs of the suit. In *Nelson* v. *Evans*, 60 Pac. 557, the attorney agreed to pay all costs, taxable or otherwise, including the cost of procuring witnesses. The client paid the costs of suit and sued the attorney for their recovery. The Supreme Court of Utah decided that this provision in the agreement was champertous and unenforceable.

**Attorney's Agreement to Bear Expenses**

A statute of Colorado (Gen. Stat. § 815) prohibits any person from "officiously intermeddling" with a suit of another. In *Casserleigh* v. *Wood*, 59 Pac. 1024, the validity of a contract was in question whereby one party agreed to procure and supply evidence for an action which the other was about to bring, the consideration being a contingent fee based upon the recovery. The Court of Appeals of Colorado, in an exhaustive opinion by Wilson, J., decided that the strict English rules against champerty and maintenance do not prevail generally in this country, and that the above agreement was not contrary to public policy.

**Supplying Evidence for Another**

CONFLICT OF LAWS.

**Statute of Limitations, Stockholder's Liability.**

While it is generally true that the application of the statute of limitations is governed by the law of the forum, to the exclusion of the law of the place where the action arises, yet a well-recognized exception exists where the cause of action is based entirely upon a foreign statute. Thus in *Brunswick Co.* v. *Bank*, 99 Fed. 635, an action was brought in Maryland to enforce the individual liability of a stockholder in a Georgia corporation under a Georgia statute. The Circuit Court of Appeals (4th Circ.) decided that the Georgia statute of limitations relating to stockholders' liability, and not the Maryland statute of limitations, applied. Brawley, J., dissented.

CONSTITUTIONAL LAW.

**Statute Requiring Issue of 1000-Mile Ticket Books**

Following the leading case of *Rwy. Co.* v. *Smith*, 173 U. S. 684, the Court of Appeals in *Beardsley* v. *N. Y., etc., Rwy. Co.*, 56 N. E. 488, decided that the New York act of 1895 (C. 1027), requiring all railroads in New York to issue 1000-mile ticket books for $20, was, as applied to railroads incorporated previous to 1895, void as depriving them of property without due process of law. But the act is valid as to railroads subsequently incorporated, since they receive their charters on the express condition that they will obey its provisions: *Purdy* v. *Erie Rwy. Co.*, 56 N. E. 509.

**Issue of Drovers' Passes**

The Supreme Court of Kansas, in *Atchison, etc., Rwy. Co.* v. *Campbell*, 59 Pac. 1051, has declared unconstitutional, as being in conflict with the fourteenth amendment to the Constitution of the United States, a statute of Kansas (1895, C. 195) requiring railroad companies within that state to allow every shipper of cattle, or one of his employes, to travel free of charge with each shipment of cattle. The statute was held to be without the police power, since it did not sufficiently appear to the court that the mere fact that the shipper traveled with the cattle, which were completely under the control of the railroad company, would contribute at all to the safety of the cattle or to the general public welfare. In his opinion, Doster, C. J., says that he does not believe that the word "person" in the fourteenth amendment was intended to refer to corporations, but he yields gracefully to the authority of the Supreme Court of the United States.

CONTRACTS.

In *Brewer* v. *Horst-Lachmund Co.*, 60 Pac. 418, the Supreme Court of California held that an offer and acceptance by telegram were memoranda sufficient to take the transaction out of the statute of frauds.

Telegrams

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CORPORATIONS.

The rule which protects members of an association which has been irregularly incorporated requires that the person seeking to hold them as partners shall have dealt with them as a corporation; in other words, the basis of the rule is the implied agreement between the parties that the contract shall be made with the corporation alone and that recourse shall be had only against the treasury of the corporation. This view is supported by *Slocum* v. *Head et al.*, 81 N. W. 673, where the Supreme Court of Wisconsin decided that evidence was admissible on behalf of the plaintiff, to show that at the time he dealt with the irregularly incorporated association he was informed that he was dealing with a partnership and that he intended to treat the defendants as partners.

Irregular Incorporation, Liability

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CRIMINAL LAW.

An indictment for bigamy averred that the defendant, A. P. Niece, while his wife, Anna L. Niece, was living and undivorced, married one N. J. Overman. *Held*, that the indictment was insufficient, since it did not contain an allegation that N. J. Overman was not the wife of the defendant at the time of his second marriage; and the mere fact that the name N. J. Overman was different from that of A. P. Niece and Anna L. Niece was insufficient, in strict criminal law, to enable the court to infer that N. J. Overman and Anna L. Niece were different persons: *Niece* v. *Territory*, 60 Pac. (Okla.) 300.

Bigamy, Indictment

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EVIDENCE.

In *Archer* v. *United States*, 60 Pac. 268, a case involving a question of disputed handwriting, the plaintiff endeavored to prove that a certain document was written by the defendant. The plaintiff produced an affidavit, the signature to which was declared by experts, basing their opinion upon comparisons with the defendant's handwriting, to have been the defendant's. The plaintiff was then allowed to submit the signature to the affidavit as a test paper to experts, who compared it with the

Disputed Handwriting, Test Paper, Identification

EVIDENCE (Continued).

document in question and declared the handwriting to be the same. Upon appeal, the action of the trial court was held in error by the Supreme Court of Oklahoma, upon the ground, intimated, though not decided, in *Travis* v. *Brown*, 43 Pa. 9, that the identification of a document as a test paper must be established by evidence other than mere comparison. "To say that the standard writing may be established by comparison with some other standard is to base a probability upon a probability, and if this may be done in the first instance it may be followed by proving successive standards by comparison with other standards resting solely on opinion evidence, until the real question to be established is lost in confusion." Per Burford, C. J.

**Testimony by Letter Carrier**

In a divorce suit before the Superior Court of Delaware a United States letter carrier was called to the stand, and asked questions in regard to the action of one of the parties in directing him to deliver letters to another person and at another house, etc. Objection was made that there was a United States postal regulation forbidding letter carriers to disclose information of this character; therefore such information was privileged, as being received by a government officer in his official capacity. *Held*, that the questions should be answered: *Smith* v. *Smith*, 45 Atl. 848.

**Testimony as to Purpose of Act, Conclusiveness**

*Hankinson* v. *Lynn Electric Co.*, 56 N. E. 604, presents a very interesting question. Is the testimony of a person as to his motive upon a particular occasion conclusive, in the absence of evidence to the contrary? This was an action against an electric company for injuries received from a piece of carbon thrown down upon the street by one of the defendants' linemen. The lineman testified positively that he threw down the carbon for a private purpose of his own: "I threw the carbon at the team to attract his [the plaintiff's] attention, so that I might speak to him, and not for any business of the company." Of course there was no other direct evidence on the question of motive, and the defendant insisted that the above evidence was conclusive proof that the lineman was not acting within the scope of his employment. The trial judge, however, left the question to the jury, and a verdict for the plaintiff was approved by the Supreme Court of Massachusetts, chiefly on the ground that the lineman was in the employ of the defendant; therefore, his testimony, although uncontradicted, was open to suspicion.

INFANCY.

Contract Induced by Fraud of Infant

Merchants, enraged at the plea of infancy being set up to preclude recovery for goods sold, where the transactions have appeared regular, have often endeavored to hold the infant in tort for conversion. Thus in *Slayton* v. *Barry*, 56 N. E. 575, the infant had represented himself to be of full age, whereupon the plaintiff sued him in trover, alleging that no title passed, by reason of the fraud in the transaction. Adopting the general rule, in opposition to the one in force in New Hampshire and a few other states, the Supreme Court of Massachusetts decided that since the fraud was inseparably connected with the contract, the plaintiff's claim for recovery would have to be based on the contract, and that he could not evade the law of infancy by sounding his action in tort. Judgment for the defendant was therefore affirmed.

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INSURANCE.

Interest of Insured at Execution of Policy

Some early cases held that no person could take out valid insurance unless he had an interest in the property insured when the policy was taken out. However, in *Sun Insurance Office* v. *Merz*, 45 Atl. 785, the Court of Appeals of New Jersey showed that this rule has been abrogated, and at the present day the only test is whether or not the insured has an insurable interest at the time of the loss.

Waiver Before and After Loss

A stipulation in a policy of fire insurance that no officer or agent of the company shall have power to waive any of the conditions of the policy applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after loss has occurred, in order to enable the insured to sue on his contract, such as giving notice and furnishing preliminary proofs: *Washburn Co.* v. *Merchants' United Fire Insurance Co.*, 81 N. W. (Iowa) 707.

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LIMITATION OF ACTIONS.

In *Wells Co.* v. *Enright*, 60 Pac. 439, it was contended that an agreement not to plead the statute of limitations was void

LIMITATION OF ACTIONS (Continued).

**Agreement not to Plead Statute**

as against public policy. The Supreme Court of California held that as the statute was not based on any peculiar principle of morality or public policy, but was intended merely for the protection of the debtor, the latter had a perfect right to waive the benefit of such protection whenever he should think proper.

**Running of Statute in Favor of Insolvent Corporation**

When a debtor makes an assignment for the benefit of creditors, it is well settled that if a debt is not barred by the statute of limitations at the date of the assignment, the statute will not run as against the assigned estate as long as the property is in the hands of the assignee. Does the same rule apply to the case of a corporation debtor which has become insolvent and has gone into the hands of a receiver? In *McDonald* v. *State of Nebraska*, 101 Fed. 171, Caldwell, J., of the Circuit Court of Appeals (8th Circ.) was strongly of the opinion that the rule applied to claims against the receiver of an insolvent national bank; but the question was not directly before the court, since the action had been brought by the treasurer of the State of Nebraska, in his official capacity, while the debt was yet alive, and it was held that the substitution of the State of Nebraska as plaintiff was not a change of the cause of action that would not relate back to the beginning of the action, as far as the statute of limitation was concerned.

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MASTER AND SERVANT.

**Fellow Servants, Federal Decisions**

Under the decisions of the Supreme Court of Tennessee a telegraph operator on a railroad is not a fellow servant of an engineer, so as to preclude recovery by the latter for the negligence of the former: *R. R.* v. *De Armond*, 86 Tenn. 75. In such a case, even though the cause of action arises in Tennessee, the Federal Courts will disregard the state decisions and apply their own rule that the fellow servant doctrine applies: *Ill. Cent. R. R.* v. *Bentz*, 99 Fed. (Circ. Ct. of App., 6th Circ.), 657.

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MORTGAGES.

**Subrogation by Payment**

Where a person lends money to a mortgagor for the express purpose of paying off the mortgage, and the money is so used and the mortgage satisfied, and the lender takes another mortgage on the property without securing an assignment of the first mortgage, the lender is subrogated to the rights of the former mortgagee as against one who has an interest in the property subsequent to

MORTGAGES (Continued).

the satisfaction of the first mortgage, of which interest the lender has no notice: *Rachal* v. *Smith*, 101 Fed. (Circ. Ct. of App., 5th Circ.), 159.

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PRINCIPAL AND AGENT.

In *Capital Co.* v. *Paper Co.*, 57 Pac., 504, the Supreme Court of Kansas decided that there was no such officer of a corporation as a "business manager" known to the law; therefore in an action on a note of the corporation signed by a person as "business manager" an averment was necessary that the business manager had authority delegated to him to make the note. However, upon a rehearing of the case (59 Pac. 1062), an averment in the complaint that the said corporation "made, executed and delivered" the note was held to sufficiently imply an averment that the business manager possessed the requisite authority.

**Business Manager of Corporation, Authority**

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REAL PROPERTY.

The rule that requires actual possession to render a parol contract for the sale of land enforceable is not absolute, but may be relaxed in some cases. Thus in *Bryson* v. *McShane*, 35 S. E. 848, the decedent, the owner of several pieces of land in different localities, promised the plaintiff that if the latter would nurse and support her for the rest of her life she would deed her [the plaintiff] all her property. The plaintiff lived with the decedent and performed her part of the agreement, but before the deeds were drawn the decedent died. The heirs of the decedent objected to the enforcement of the parol contract in regard to all the land except that on which the decedent actually lived, on the ground that the plaintiff did not take possession. The Court of Appeals of West Virginia decided that the plaintiff had taken the requisite possession under the contract and that an actual entry on all the tracts was not necessary. This relaxation of the general rule is not permitted in some jurisdictions: *Austin* v. *Davis*, 128 Ind. 472.

**Statute of Frauds, Actual Possession**

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STATUTES.

Some difficulty arises where a statute prescribes that a certain result shall follow an acknowledgment in writing. Must the acknowledgment be made for the express purpose of effecting the result or not? The code of Washington (§ 4624) provides that an illegitimate child shall be the heir of its

**Acknowledgment in Writing, Purpose**

STATUTES (Continued).

father, when the latter acknowledges in writing that he is the father. In *Rohrer* v. *Muller*, 60 Pac. 122, the Supreme Court of Washington decided that a writing was sufficient which was not executed for the purpose of complying with the statute, but as an affidavit to a complaint in a suit which the father was bringing for the seduction of the child.

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WAREHOUSEMEN.

Who is a Warehouse man

The Pennsylvania act of September 24, 1866 (P. L. [1867] 1363), which provides in substance that the holder of a warehouse receipt shall be deemed to be the owner of the goods represented thereby, being in derogation of the common law, should receive a strict construction. Thus in *Moors* v. *Jagode*, 45 Atl. 723, the Supreme Court of Pennsylvania decided that where a member of a mercantile firm institutes a so-called "warehouse," which is practically controlled by the firm and used by the latter alone, the firm may not place its own goods in the warehouse and receive a warehouse receipt therefor; and even a *bona-fide* holder of such a receipt will not be protected as against a purchaser of the goods from the firm.