PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

As the trustee in bankruptcy is subject to the orders of the court, it might seem that a person would not be allowed to refuse to serve merely on the ground that there are no assets from which his fees could be paid. However *In re Levy*, 101 Fed. 247, decides that where the bankrupt files the affidavit that he has no means and is unable to pay even the preliminary costs, the court has no power to require a person to serve as trustee unless the creditors furnish his advance fee or otherwise arrange with him.

Fees of Trustee

In *In re Hoadley*, 101 Fed. 233, the bankrupt was a devisee under will of his father, whereby the latter left his property to his wife for life, remainder to the children of testator who should then be living, in equal shares, the issue of a deceased child taking their parent's share. The District Court (S. D. N. Y.) held that under the law of New York the estates of the children of the testator were contingent until the death of the widow, therefore no interest passed to the trustee in bankruptcy of one of them who became bankrupt prior to that time.

Contingent Estate

The District Court (E. D. N. Y.) has decided that an action for breach of promise of marriage, followed by the seduction of the plaintiff, is an action of contract and within the terms of the bankruptcy act, therefore a judgment in such an action is discharged by the discharge of the judgment debtor in bankruptcy: *In re McCauley*, 101 Fed. 223.

Promise of Marriage

CARRIERS.

In *Lewis* v. *Chesapeake Rwy. Co.*, 35 S. E. 908, the defendant railroad received goods for consignment to a steamship company, the bill of lading providing that defendant's liability should cease upon delivery "to the steamship company or on the steamship pier at the port." The goods were delivered upon a pier owned and controlled by the railroad company, but which the steamship company was permitted to use, and were there

Delivery to Wharf of Steamship Company

CARRIERS (Continued).

destroyed by fire. The Court of Appeals of West Virginia held (1) that the bill of lading contemplated a delivery upon a wharf of the steamship company and not upon one of the railroad, and (2) that even if the latter construction were intended, it would be void as an unreasonable attempt of the carrier to escape the duty of delivery.

CONSTITUTIONAL LAW.

Under the fourteenth amendment it is one of the "privileges" of a citizen of the United States to make use of the flag of the United States as an advertisement for selling goods, and a state statute forbidding such an use of the flag deprives him of his property without due process of law. So the Supreme Court of Illinois decides in *Rushstrat* v. *People*, 57 N. E. 41, holding that the police power is not broad enough to cover cases of mere "sentiment." Cartwright, C. J., and Wilkin and Carter, J J., dissented, and, though no dissenting opinions appear, we imagine that a very strong one could be written.

National Flag as Advertising Medium

It was formerly held that although a state could not tax an agency of the federal government, yet the United States could tax at pleasure the agency of a state. However, since the case of *U. S.* v. *B. & O. R. R.*, 17 Wall. 322, the rule has been different, and it is now held that the taxing power of the United States is limited to the same extent as that of the states. But, in *U. S.* v. *Owens*, 100 Fed. 70, Judge Adams, of the Circuit Court (E. D. Mo.), carries the doctrine of state exemption a little too far in holding that the United States has no power to impose a stamp tax on a bond given by a saloon keeper, who has received a license, for the proper conduct of his business. The opinion proceeds upon the ground that the granting of the license, in return for the bond, constitutes a contract between the licensee and the state, which is clearly wrong. The judge says that since the United States could not tax the license, it cannot tax the bond. Granting that no tax could be imposed upon the license, the conclusion arrived at does not follow by any means.

State Agency, Taxation by United States

It is well settled that the constitutional provision in regard to public trials is to be interpreted in a reasonable manner and does not deprive courts of a certain amount of discretion in regard to the conduct of cases. *People* v. *Hall*, 64 N. Y. Suppl. 433, applies this principle to a statute passed to carry out the constitutional

Public Trials, Discretion of Court

CONSTITUTIONAL LAW (Continued).

mandate. The New York Civil Code (§ 5) provides that the sittings of every court shall be public and every citizen may freely attend the same, except that in trials and actions on certain named subjects the trial judge shall have authority to exclude all but interested persons. The Supreme Court of New York held that even where the trial involved a subject not mentioned in the exception of the statute, the court had authority to exclude from the court-room the spectators probably drawn there by desire to hear the loathsome details of the case

Notice of Intention to Bring Suit

While the legislature may require that notice of intention to bring an action against a municipal corporation must be given within a specified time after the accrual of the cause of action, yet such requirement of notice must be reasonable. So where it was provided in a village charter that no action for personal injuries against the village could be brought unless the plaintiff gave notice to the village of his intention to sue, which notice must be received within forty-eight hours after the accident, the Supreme Court of New York held the provision void, as depriving the plaintiff of a property right under the fourteenth amendment to the constitution of the United States: *Green* v. *Village of Port Jarvis*, 64 N. Y. Suppl. 547.

CONTRACTS.

Reward for Information, Purpose of Information

Ever since the case of *Williams* v. *Carwardine*, 4 B. & Ad. 621, it has been a mooted question whether or not, when a reward is offered for certain information, the information must be given with the express purpose of obtaining the reward, in order to constitute a binding contract. *Vitty* v. *Eley*, 64 N. Y. Suppl. 397, holds that, under the New York rule, (1) the information must be given with the knowledge of the reward, and (2) it must be given for the express purpose of obtaining the reward, so that (3) the reward is not earned by the informer if the information is extorted from him by threats of arrest.

Breach of Contract to Make Will, Limitations

Henry v. *Rowell*, 64 N. Y. Suppl. 488, is a questionable decision of the Supreme Court of New York, which should be appealed. In 1872 A. and B. entered into a contract whereby A. promised to board and lodge B. for the rest of her life, in consideration for which B. promised to leave all her property by will to A. B. boarded with A. until 1884, when she left A. without cause

CONTRACTS (Continued).

and did not return to the end of her life, in 1898, when it appeared that she had not left A. all her property. In an action by A. against the estate, it was held that the only breach of contract occurred in 1884, when B. repudiated it, and not in 1898, therefore A.'s cause of action was barred by the statute of limitations.

CORPORATIONS.

In *Johnson Co.* v. *Chamber of Commerce*, 82 N. W. 795, the Supreme Court of Michigan discusses the nature of the power given by the charter of a corporation to the directors to assess annual dues against the stockholders. It was held (1) that such a power authorizes assessments only for the incidental expenses of the corporation and not for the purpose of paying its general indebtedness, and (2) where the directors have assessed and collected the dues for a certain year, a corporate creditor cannot maintain a creditor's bill to compel the directors to levy an extra assessment.

[Assessments for Annual Dues, Debts

Where an electric corporation receives permission from a city to erect poles and wires, which it maintains for a number of years, the city is estopped from alleging that the act under which the corporation was incorporated gave it no power to conduct such a business and that the franchise conferred upon it by the city was void: *Electric Co.* v. *Wyandotte*, 82 N. W. (Mich.), 821.

Attack upon Franchise

The Illinois courts follow consistently the doctrine of the Supreme Court of the United States that an *ultra vires* contract is absolutely void, and no amount of acceptance of benefits by the corporation will render it liable on such a contract. The latest Illinois case on the subject is *Best Brewing Company* v. *Klassen*, 57 N. E. 20, where a brewing company became surety upon an appeal bond of a liquor dealer, a clearly *ultra vires* act. The Supreme Court of Illinois decided that the fact that the effect of the bond, in enabling the dealer to continue his business and thus purchase the brewing company's beer,—even if such facts would constitute a benefit in the eye of the law,—did not estop the company from pleading the invalidity of the contract. Of course this rule does not apply where the contract is *intra vires*, but merely irregular: *Brewing Co.* v. *Flannery*, 137 Ill. 309.

Ultra Vires Contract, Estoppel

CRIMINAL LAW.

Burglary, Indictment, Variance

In *State* v. *Hill*, 35 S. E. 831, the Court of Appeals of West Virginia reversed a conviction for burglary upon a seemingly immaterial point. The indictment alleged that the goods were stolen from a car of the "Pittsburg, Cincinnati, Chicago and St. Louis Railroad Company, in the custody of the Baltimore and Ohio Railroad Company." On trial it appeared that the car belonged to the "Pittsburg, *Cleveland*, Chicago and St. Louis Railroad Company," which was in the custody of the Baltimore and Ohio Railroad Company. It was held that the variance was fatal, even though the court admitted that it was unnecessary to specify the actual owner of the car in the indictment, since the car was both alleged and proved to have been in the custody of the Baltimore and Ohio Railroad Company, which special ownership would have been sufficient to support conviction under the indictment. The decision seems to violate the general modern rule that variance in an immaterial point is not fatal.

Illegal Sale, Knowledge

Under the Indiana decisions it would seem that where a bartender illegally sells liquor on Sunday in violation of the express orders of the proprietor of the saloon, and without the knowledge of the latter, the proprietor is not guilty of a criminal offence: *Rosenbaum* v. *State*, 57 N. E. 156.

COURTS.

Suit under Copyright Law

The general jurisdiction of the federal courts over actions for penalties and forfeitures is vested in the District Courts. The United States Statute (§ 629, R. S.) gives the Circuit Courts jurisdiction of "all suits at law or equity arising under the patent and copyright laws." It having been decided that a suit to recover the penalty of one dollar for having possession of each copy of an infringed photograph, was a penal one (*Brady* v. *Daly*, 20 Sup. Ct. 64), the question arose whether such suit should be brought in the District or the Circuit Court: *Falk* v. *Curtis Pub. Co.*, 100 Fed. 77. Judge Dallas, of the Circuit Court (E. D. Penna.) while remarking that the point had never been decided directly, held that the Circuit Court could properly hear the case, although the jurisdiction in such cases was probably concurrent.

DAMAGES.

In *Kraemer* v. *Met. Street Rwy. Co.*, 64 N. Y. Suppl. 618, the plaintiff sustained injuries to her knees, whereby she expended

DAMAGES (Continued).

Excessive Damages

$1,600 on physicians and nurses, was unable to walk for eighteen months after the accident and would probably never be able to walk any great distance or up and down stairs without suffering considerable pain. The Supreme Court of New York held that a verdict of $15,000 was excessive and ordered a new trial conditioned upon the plaintiff's refusal of a judgment for $7,000, together with the amount of the actual expenses.

DEEDS AND MORTGAGES.

Incorporation by Reference

The doctrine of incorporation by reference has grown up as a part of the law of wills, but there is no reason why it should not apply equally to the case of other instruments in writing. Thus a Connecticut Statute (§ 3016) provides that certain chattels may be mortgaged by a deed containing "a particular description of such personal property, executed, acknowledged and recorded as mortgages of land." In *Surety Co.* v. *Cycle Co.*, 100 Fed. 40, the mortgage itself did not contain a description of the chattels, but referred to a schedule which was annexed and recorded at the same time. The schedule itself was not subscribed or acknowledged. The Circuit Court (D. Conn.), very properly held that the application of the doctrine of incorporation by reference caused the schedule to become part of the mortgage, so as to render it valid under the statute.

EVIDENCE.

Competency of Witnesses, Province of Court and Jury

In *Comm.* v. *Reagan*, 56 N. E. 577, Hammond, J., of the Supreme Court of Massachusetts gives an interesting discussion of the respective duties of the court and jury in regard to the competency of witnesses. The principal point decided was that when a witness is objected to on the ground of his youth, the question of his competency is for the judge alone. The court then discussed the case of the offer of a confession, which is objected to on the ground that it is involuntary; saying that it is the duty of the court to decide in the first instance, even where the testimony is conflicting. In Pennsylvania it would seem that it is a question wholly for the jury. See *Comm.* v. *Epps*, 193 Pa. 512.

INSURANCE.

In *Cannon* v. *Phœnix Ins. Co.*, 35 S. E. 775, the Supreme Court of Georgia discussed the liability of an insurance com-

INSURANCE (Continued).

"Friendly" and "Hostile" Fires

pany for a "friendly" fire as opposed to its liability for an "hostile" fire. In that case policy insured against "direct loss and damage by fire," and the damage complained of was caused by a stovepipe which refused to work, flooding the rooms with soot, and heating the woodwork so that water had to be used to cool it. *Held*, that since the only fire in question was contained in its proper place, the stove, the damage to the building was not caused by an hostile fire within the meaning of the policy.

The medical examiner of an insurance company has no power to waive non-compliance with the terms of the policy.

Waiver, Authority of Officers

Thus in *Desmond* v. *Benevolent Legion*, 64 N. Y. Suppl. 406, the applicant stated to the medical examiner that he had never applied for insurance in that association before, and his answers were warranted to be true in his application; whereupon the examiner passed him, and the policy was issued. It appeared that several years before the applicant had applied for insurance in the association and had been rejected by the same medical examiner, who had made a note of the rejection in his books. The Supreme Court of New York decided that even if the medical examiner was chargeable with knowledge of the former application, his action could not be construed as a waiver, since it was beyond the scope of his authority.

In contrast to the above case may be cited *Allison* v. *Stevenson*, 64 N. Y. Suppl. 481, decided by the same court at the same term, to the effect that where a by-law of the association provides that the insured may designate the beneficiary by filing with the association a writing duly signed and acknowledged as a will; and a paper, not acknowledged, is filed with the treasurer of the association, by whom it is retained without objection until the death of the insured, the association is deemed to have waived compliance with the by-law.