PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

In re Blair, 102 Fed. 986, decides, (1) that where a creditor collects his debt by judgment and execution within four months prior to the debtor's bankruptcy, such collection does not amount to a preference unless the creditor has reason at the time to believe that the debtor is insolvent, and (2) that the court of bankruptcy has no jurisdiction to entertain an action by the trustee to recover back such money, but the trustee is relegated to his action in the state court. The latter part of the decision is of course in line with *Bardes* v. *Bank*, 20 Sup. Ct. 1,000, although the latter case had not been decided at the time.

Preference, Action by Trustee

Under the Bankruptcy Act of 1898, in order to support a petition for involuntary bankruptcy, it is necessary that the petitioning creditor possess a provable debt at the moment the act of bankruptcy is committed. In *In re Brinckmann*, 103 Fed. 65, the petitioner obtained a verdict in tort against the alleged bankrupt on January 13, 1900, and on January 29 judgment was entered upon the verdict. The alleged act of bankruptcy was committed on January 15. Judge Baker of the District Court (D. Ind.) dismissed the petition, on the ground that the petitioner's claim was not liquidated until the moment of judgment; therefore he did not possess a provable claim at the time the act of bankruptcy was committed.

Provable Debt When Act of Bankruptcy is Committed

BANKS AND BANKING.

In *De Weese* v. *Smith*, 97 Fed. 309, Judge Phillips of the District Court (D. Mo.) decided that when the Comptroller of the Currency has levied an assessment for any amount, no matter how small, against the stockholders of an insolvent national bank, his power is exhausted, and he may not levy a second assessment. The decision was strongly criticised in 39 Am. Law Register (N. S.) 185, and in *Aldrich* v. *Campbell*, 97 Fed. 663, the Circuit Court of Appeals for the Ninth Circuit,

Successive Assessments Against Stockholder of National Bank

BANKS AND BANKING (Continued).

reached the opposite conclusion from that of Judge Phillips. Now that the Circuit Court of Appeals for the Seventh Circuit has adhered to the result reached by the Ninth Circuit—*Studebaker* v. *Perry*, 102 Fed. 947—we may regard the question as practically settled.

Application of Deposit to Payment of Depositor's Note

In *Schuler* v. *Citizens' Bank*, 82 N. W. 389, an attachment execution was levied upon a bank deposit, and on the trial, the bank offered to prove that it held a note of the depositor, due subsequent to the service of the attachment, and that the depositor had authorized it to apply the deposit to the payment of the note. The evidence was objected to on the ground that it tended to add to and vary the terms of the note, but the Supreme Court of South Dakota sustained its admission on the ground that the depositor had constituted the bank his agent to make the application. In Pennsylvania and many states the courts would not be obliged to go so far for an excuse to admit the evidence.

CONFLICT OF LAWS.

Proof of Foreign Law

In *Clardy* v. *Wilson*, 58 S. W. 53, which was an action in a court of Texas, it became necessary to prove the married women's law of Tennessee. A Tennessee lawyer testified that the common law prevailed in that state, except in so far as it had been modified by statute. This was all the evidence upon the subject. The Court of Civil Appeals, of Texas, decided that the evidence was insufficient to overcome the presumption that the law of Texas, and not the common law, upon the subject of married women prevailed in Tennessee. The decision is scarcely satisfactory, for, if the court believed the evidence, it was bound to assume the existence of the common law in Tennessee, in the absence of statutes; and the court certainly could not infer the existence of statutes changing the common law without proof of the same.

Stockholder's Liability, Statute of Limitations

In *Brunswick Co.* v. *Bank*, 99 Fed. 635 (noted in 39 AM. LAW REGISTER, N. S. 487), the Circuit Court of Appeals (Fourth Circuit), decided that where an action was brought in Maryland to enforce the individual liability of a Maryland stockholder in a Georgia corporation under a Georgia statute, the Georgia statute of limitations and not that of Maryland applied. Coxe, J., of the Circuit Court (N. D. N. Y.), adopted the opposite view, hold-

CONFLICT OF LAWS (Continued).

ing that in one of the numerous suits, which have been brought all over the country to enforce the individual liability of stockholders in Kansas corporations, the statute of limitations of the forum controls the liability: *Seattle Nat. Bank* v. *Pratt*, 103 Fed. 63.

CONSTITUTIONAL LAW.

Extension of Constitution to Porto Rico

It will be remembered that in *Ex Parte Ortiz*, 100 Fed. 955, Judge Lochren, of the District Court of Missouri, wrote a lengthy opinion (all of which was dictum) to the effect that, immediately upon the ratification of the treaty between the United States and Spain, the provisions of the Constitution of the United States extended *ex proprio vigore* to Porto Rico. Now, Judge Townsend, of the Southern District of New York, announces the opposite view, that it requires congressional action to extend the Constitution there: *Goetze* v. *U. S.*, 103 Fed. 73. The question involved was whether or not the inhabitants of Porto Rico were, after the treaty, inhabitants of a "foreign country" within the operation of the Dingley tariff act of 1897. In holding that they were subject to the tariff, Judge Townsend relied especially upon the clause of the treaty providing that the "civil rights and political status" of the inhabitants should be determined by Congress, but he expressed his opinion strongly that, even in the absence of such a provision, it would require the authority of a treaty or act of Congress to invest the inhabitants of Porto Rico with any rights under the Constitution.

COURTS.

Removal to Federal Court, Dismissal, Effect

Within the past month two state courts have decided an important point of Federal practice, which demands a ruling by the Federal courts. When a suit has been removed from a state court into a Federal court, where a voluntary non-suit is suffered, or the case is dismissed otherwise than upon the merits, may another suit be brought in the state court upon the same cause of action? The question was answered in the affirmative by the Court of Appeals of Kansas in *Swift* v. *Hoblawetz*, 61 Pac. 969, and by the Supreme Court of Georgia in *McIver* v. *Florida, etc., Rwy. Co.*, 36 S. E. 775. In the latter case Simmons, C. J., and Little, J., dissented, on the ground that the removal operates to remove not only the suit, but also the cause of action, so as to permanently divest the state court of jurisdiction. *R. R.* v. *Fulton* 53 N. E. [Ohio] 265, supports the dissenting view.

CRIMINAL LAW.

Criminal codes are so extensive nowadays that we rarely hear of a conviction under the common law. But such cases occur. In *Thompson* v. *State*, 58 S. W. 213, an indictment was brought, under the common law, for an attempt to dispose of the dead body of a pauper for gain. The Supreme Court of Tennessee sustained a conviction, on the ground (1) that the sale of a dead body was a misdemeanor at common law, and (2) that, since it was considered to be *malum in se*, and not merely *malum prohibitum*, an attempt to commit the crime was a misdemeanor.

Attempt to Sell Dead Body

Following *Comm.* v. *Waldman*, 140 Pa. 97, the Court of Criminal Appeals of Texas has decided that the business of shaving is not a work of charity or necessity within the generally prevalent exception to the Sunday laws: *Ex parte Kennedy*, 58 S. W. 129. However the court concedes, "that there may be isolated cases which would suggest the necessity for a tonsorial artist," such as "shaving a corpse."

Shaving on Sunday

DAMAGES.

The Code of Alabama (§ 26) provides that when the death of a minor child is caused by the negligence of any person or corporation, the parents or personal representative of the child may recover from the wrongdoer "such damages as the jury may assess." The Circuit Court of Appeals (Fifth Circuit) decided that, under this statute, punitive as well as compensatory damages could be recovered: *McGhee* v. *McCarley*, 103 Fed. 55. Pardee, J., wrote a strong dissenting opinion to the effect that the statute limited the defendant's liability to compensatory damages.

Punitive Damages Under Statute

DEEDS AND MORTGAGES.

The Federal revenue act of June 13, 1898, provides that where a stamp is omitted from a document without fraudulent intent, the document may be rendered valid by a subsequent stamping. Under such circumstances does the validity of the instrument date from the stamping or from the date of its execution? This question was presented in *Wingert* v. *Ziegler*, 46 Atl. 1075, where the question arose as to the validity of a sheriff's sale upon an assigned mortgage, it appearing that the stamp had been originally omitted from the assignment by inadvertence, and that its place had not been supplied until after the sale.

Unstamped Instrument, Subsequent Stamping

DEEDS AND MORTGAGES (Continued).

The Court of Appeals of Maryland held that the evident intent of Congress was to provide for the validity of the instrument from the date of its execution; therefore the sale was upheld.

EQUITY.

Injunction to Restrain Violation of Charter

Where the legislature has provided a remedy through the attorney-general, by which wrongs to the public through the violation of corporate charters may be redressed, the remedy is exclusive, and a member of the community may not obtain an injunction to prevent such violation of the charter. Thus, in *McNulty* v. *Brooklyn Heights Rwy. Co.*, 66 N. Y. Suppl. 57, the Supreme Court of New York refused to grant the plaintiff, a member of the public using the railway, an injunction to restrain the railway from charging a greater rate of fare than that allowed by its charter, since the plaintiff did not suffer any greater damage than the rest of the public.

INSURANCE.

Subrogation, Prevention by Act of Insured

It is well settled that a fire insurance company, upon paying a loss, becomes subrogated to the rights of the insured as against one who is responsible to the insured for the loss; wherefore it results that if the insured releases the tort-feasor from liability toward himself, he may not recover from the insurance company. In *Packham* v. *German Fire Ins. Co.*, 46 Atl. 1066, the fire which was caused by the negligence of a gas company, destroyed property of the insured, in addition to that portion of his property covered by his policy with the insurance company. The insured brought an action of tort against the gas company, in which it was agreed that the value of the insured property should be deducted from the verdict. In an action by the insured against the insurance company, the Court of Appeals of Maryland decided that, as the insured was barred from bringing further suit against the gas company for the value of the insured property, he could not recover from the insurance company, since he had deprived the insurance company of its right of subrogation against the gas company. Under precisely the same facts, an opposite conclusion was reached in *Ins. Co.* v. *Fidelity Co.*, 123 Pa. 523.

NEGLIGENCE.

In volume 101 of the *Federal Reporter* we have the unusual spectacle of two Circuit Courts of Appeals coming to precisely

NEGLIGENCE (Continued).

Fire from Locomotive Sparks, Presumption

the opposite conclusions upon the same point of law. *McCullen* v. *Chicago, etc., Rwy.*, 101 Fed. 66, decided by the Eighth Circuit, holds that the fact that a fire is caused by locomotive sparks raises a presumption of negligence on the part of the railroad company, while *Garrett* v. *Southern Rwy.*, 101 Fed. 102, supports the opposite view. And this is not a case where the Federal courts apply the law of the locality, but, in defiance of reason and of a proper construction of the Judiciary Act, hold that cases of negligence by railroads present questions of "general commercial law," and that the Federal courts may decide them as they please, irrespective of the state decisions.

RAILROADS.

Construction of Railway Without Authority

Ever since the case of *Penna. R. Co.* v. *Montg. Co. Rwy. Co.*, 167 Pa. 62, it has been well settled in Pennsylvania that where a street passenger railway company, incorporated under the Act of May 14, 1889, attempts to lay its track along a public road without having obtained the consent of the abutting property owners, any such owner may restrain the construction by an injunction. But if the property owner delays action until the railway has been constructed, his right to an injunction is barred, and he is relegated to his action for damages: *Becker* v. *Lebanon, etc., Rwy. Co.*, 188 Pa. 484. In the latter case the plaintiff, having been refused the injunction, attempted to get rid of the railway by an action of ejectment. But the Supreme Court of Pennsylvania decided that the railway, having been constructed, was there to stay, and that the only remedy of the plaintiff was an action of trespass to recover damages for the increased servitude upon his land: *Becker* v. *Lebanon, etc., Rwy. Co.*, 46 Atl. 1096.

WILLS.

Precatory Words to Create Trust

The modern tendency is to limit greatly the rule which allows precatory words in a will to be used as the basis of a trust. Thus in *Marti's Estate*, 61 Pac. 964, the testator gave his property to his wife absolutely. The gift was followed by the clause: "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." The Supreme Court of California decided that, under the circumstances, the word "desire" did not import a command, and therefore no trust was created.