PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

Partnership, Fraudulent Keeping of Books

The fraud of a partner in so keeping the firm books, of which he had sole charge, as to conceal withdrawals of money by himself from his partner as well as creditors, cannot be imputed to the innocent partner to defeat his right to a discharge in bankruptcy under the Bankrupt Act of 1898: U. S. District Court *In re Schultz,* 109 Fed. 264. If in any case, says the court, fraud can be imputed to an innocent partner on account of the fraud of his co-partner or other agent, as respects the false or improper keeping of books, it can only be in such cases where the fraudulent entries or omissions have reference to partnership transactions, so as to fall within the general scope of the partner's or agent's authority.

BILLS AND NOTES.

Release, Consideration

The New York Supreme Court (Appellate Division, Second Department) holds in *Far Rockaway Bank* v. *Smith,* 7 N. Y. Supp. 518. that an agreement not to hold an indorser liable, to induce him to indorse a note given in renewal of another note, which he had previously indorsed, is without consideration, as the performance of an act which is a party is already obligated to perform cannot constitute a consideration for a new contract.

Waiver of Protest

Evidence that a month after a note became due an indorser paid the husband of the plaintiff, the holder, the interest on the note for one year, saying that it was money he owed the plaintiff, is insufficient to show a waiver of protest, and a continuance of his liability thereon, without proof of knowledge of the failure to protest: N. Y. Supreme Court (Appellate Division, Fourth Department) in *Werr* v. *Kohles,* 71 N. Y. Supp. 713. Two judges dissent.

CHARITIES.

The U. S. Circuit Court of Appeals (First Circuit) holds in *Powers* v. *Massachusetts Homeopathic Hospital,* 109, Fed. 294, that the fact that a public hospital, chartered as a charitable corporation, exacts or receives a pecuniary consideration from a patient does not affect its character as a charitable institution nor its rights or liabilities as such in relation to such patient; and hence that where such patient is negligently treated he cannot recover from the hospital, there being an implied contract, the court says, that the corporation's shall not be liable for the negligence of its servants in administering the charity. The theory which denies recovery on the ground that the charitable trust fund has not been set aside for this use seems more satisfactory than the theory of an implied contract to release from liability for negligence.

Liability for Negligence

CONSTITUTIONAL LAW.

By a resolution of the trustees of the University of Arkansas, the office of vice-director and pomologist of the agricultural experiment station was created and A was elected thereto for a fixed term at a specified salary. Before the term expired the legislature passed an act which after detailing appropriations to the university, abolished this office, and prohibited the allowance of any pay therefor. This act is upheld in *Vicenheller* v. *Reagan,* 64 S. W. 278, by the Supreme Court of Arkansas, on the ground that it did not impair the obligation of a contract, since, in the view of the court, the rights, duties and obligations of the officer grew out of the law and not out of the contract, and the legislature, unless prohibited by the constitution, might amend or repeal the law. The Chief Justice dissents.

Obligation of Contract

In *People ex rel. Fleishmann* v. *Caldwell,* 71 N. Y. Supp. 654, the New York Supreme Court (Appellate Division, Fourth Department) holds unconstitutional a law providing that no person shall sell a passage ticket giving any right to a passage or any railway train unless he is an authorized agent of the company running such train, and has received a certificate of authority therefor in writing from such company. Such act, the

Ticket Brokerage

CONSTITUTIONAL LAW (Continued).

court holds, conflicts with the "due process of law" clause of the Constitution, since it deprives citizens of the liberty of engaging in the legitimate business of ticket brokerage. Nor is such act valid as a police regulation of the ticket brokerage business, since in the view of the court, it does not tend to promote the health, comfort or welfare of society, these being set as the boundaries of this rather indefinite power. The fact that certain frauds have resulted from ticket brokerage does not, it is said, justify so rigorous an act.

CONTRACTS.

Mutuality, Enforcement

A contract whereby a water company is to furnish from its canal any surplus water not required for other purposes, without being required to keep its canal in repair, or to perform any labor, or to incur any expense to carry out the contract, and the consumer, if the water is furnished, is to pay for it at a stipulated rate, is wanting in mutuality, and will not support an action to recover of the consumer on his failure to take water: Appellate Court of Indiana in *Jordan* v. *Indianapolis Water Co.*, 61 N. E. 12. The court refers to numerous authorities which it summarizes by saying: "From the authorities to which we have referred, the general rule may be deduced that, in the absence of mutuality in a contract—*i. e.*, where the covenant is lacking in mutual binding covenants,—the contract cannot be enforced.

Misrepresentation, Materiality

A, doing business under the name of Committee on Distribution, through his agent obtained B's order for certain books. The agent falsely represented and induced the defendant to believe that he was purchasing the books from a committee of the United States Congress, that the books could be obtained only on the recommendation of a Congressman and that he had been recommended by the Congressman of his district. The N. Y. Supreme Court (Appellate Division, Fourth Department) with one judge dissenting, holds in *Barcus* v. *Dorries*, 71 N. Y. Supp. 695, that B was under no obligation to take the books from A, even though they were in every respect as good as represented.

COVENANTS.

Implied

In *Bridgewater* v. *Ocean City R. Co.*, 49 Atl. 801, the Court of Chancery of New Jersey holds that where a general scheme of land improvement is announced to invited purchasers of lots, and part of the promulgated scheme is the declaration that a named portion of the lands shall be devoted to special purposes which are held out to be advantageous to all the lots to be sold, an implied covenant is thereby entered into by the owner with lot purchasers that the named portion shall be devoted to the announced uses, though there is no written covenant in their deeds. This implied covenant may be enforced by the purchaser of his grantees against the vendor or such of his grantees as purchased with notice of such covenant; so, too, against a donee of the grantor.

DAMAGES.

Death by Wrongful Act

In *Wiest* v. *City of Philadelphia*, 49 Atl. 891, the Supreme Court of Pennsylvania holds that an expectation of inheritance cannot be considered as an element of damages to adult children from their father's death and should not be submitted to the jury. The case further decides a point entirely different, but worthy of note, that where the plaintiff in trespass to recover damages for negligence declares for a joint tort, and the evidence shows no joint action by the defendants, a judgment against one defendant for a separate tort cannot be permitted.

Repairing Injury

In an action for injuries caused by the diversion of a stream, evidence that the plaintiff, by a small expense in "riprapping" the bank of the new channel, could have avoided or diminished the damages to his property, was admissible, it being his duty to use reasonable care to save it from injury; Supreme Court of Montana in *Sweeney* v. *Montana Cent. Ry. Co.*, 65 Pac. 912. The court discusses the authorities in regard to the active steps which must be taken by a man to protect himself from the consequences of the wrongful acts of others. "It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary effort and care and at moderate expense," says the court, and whether he could have done so in this case, it is said, should have been left to the jury.

DEATH BY WRONGFUL ACT.

Enforcement in Another State

A cause of action founded on a statute of one state, conferring a right of action to recover damages for wrongful death, may be enforced in a court of the United States sitting in another, when it is not inconsistent with the statutes or public policy of the state in which the action is brought: U. S. Circuit Court of Appeals (Fifth Circuit) in *Burrell* v. *Fleming,* 109 Fed. 489.

DECEDENT'S ESTATES.

Admission of Execution

The Pennsylvania rule that in actions founded on a note, a copy of which shall have been filed at the time of filing the statement, the execution of the same shall be taken as admitted, unless the defendant shall deny its execution on oath, does not apply to suits against an executor on a note given by the decedent: so held by the State Supreme Court in *Perkins* v. *Humes,* 49 Atl. 934.

DEPOSIT BY PUBLIC OFFICER.

Recovery by Municipality

The Supreme Court of Nebraska, overruling a former decision made in *State* v. *Keim,* 8 Neb. 63, holds in *Farmers etc. Co.* v. *Red Cloud,* 87 N. W. 175, that when an officer charged with the collection and custody of public money unlawfully deposits the same in a bank for safe-keeping, and the same is subject to check or demand of such officer, the state, county or other municipal body for whom such officer acted may maintain an action in its own name to recover such deposit.

DIVORCE.

Sufficiency of Evidence

The well-known hesitation of the courts is granting divorces where there is a suspicion of collusion appears again in *Kloman* v. *Kloman,* 49 Atl. 810, where the Court of Chancery of New Jersey holds that a divorce will not be granted on the uncorroborated confessions of adultery by the defendant, through such confessions are non-collusive.

EQUITY.

The Supreme Court of Pennsylvania holds in *Keystone etc.* v. *People's etc. Co.,* 49 Atl. 951, that a bill for the recovery of possession of personal property will not lie though there is alleged interference with the exercise of corporate rights, this being merely incident to and the result of the retention of the property by the defendant, and though such property is, as a rule, necessary to the exercise of the franchises of a company like the plaintiff, it not being alleged that without the specific property in dispute, it cannot exercise the powers and privileges conferred on it.

Jurisdiction

FEDERAL COURTS.

An orderly administration of the law requires that the U. S. Circuit Courts should follow a decision of a Circuit Court of Appeals of another circuit in the absence of conflicting authority and when the question is presented on precisely the same state of facts: U. S. Circuit Court (N. D. New York) in *Hale v. Hilliker,* 109 Fed. 273.

Stare Decisis

FRAUDULENT CONVEYANCE.

Where a conveyance of a husband's land by a husband and wife was set aside as in fraud of creditors, the wife's right to dower therein was subject to a ratable contribution towards the payment of a mortgage on the premises executed by the grantee: N. Y. Supreme Court (Appelate Division, Fourth Department) in *McMahon* v. *Specht,* 71 N. Y. Supp. 806. It was immaterial, says the court, as affecting such right of the mortgagee that the wife was not a party to set aside the conveyance.

Mortgage, Dower

GIFT CAUSA MORTIS.

In a very able opinion in *Sinnott* v. *Hibernia National Bank,* 30 Southern, 233, Chief Justice Nicholls, of the Supreme Court of Louisiana, reviews and compares the common law and civil law rules as to gifts *causa mortis.* It appears, he says, that the donation causa mortis of the common law is but the donation *inter inos* es-

Civil Law

GIFT CAUSA MORTIS (Continued).

tablished by our Code with the exception that the first was not complete until the death of the donor, while the second becomes effective at once. Without doubt the tendency of the common law is in the same direction to require the same formalities in the two kinds of gifts, retaining the difference as to the time of taking effect. Of course certain distinctions outside of this still remain in some jurisdictions.

INSURANCE.

Agreements, Warranty

The application for insurance on a mill contained an agreement by the insured "to keep a watchman on the premises at all times when not in operation," but the policy contained no express provision that failure to keep a watchman should make the policy void. Under these circumstances the Supreme Court of Michigan holds in *McGannon* v. *Michigan Millers' Mut. Fire Ins. Co.*, 87 N. W. 61, that where the insured employed a reliable watchman, and charged him with the duty of watching the premises, the company was liable on the policy, though the watchman may have been absent at the time of the fire, since such agreement, in the opinion of the court, is not a warranty requiring a literal observance to keep the policy in force. One judge dissents; Judge Grant dissents on the ground that the application is a part of the contract and that by it the statements were declared to be warranties.

JUDGMENT.

Equitable Assignment, Set-off

B recovered a judgment of $463.13 against A, and a few days later A recovered a judgment of $200 against B. A was insolvent, and had agreed to give his attorneys forty per cent of the judgment recovered in his favor. B sued to set off A's entire judgment of $200 against a like sum of B's judgment. Upon these facts the Supreme Court of Mississippi holds in *Harris* v. *Hazelhurst Oil-Mill and Mfg. Co.*, 30 Southern, 273, that there was an equitable assignment in *praesenti* of forty per cent of the judgment to A's attorneys, and it was an error to grant the set-off for the full amount.

LANDLORD AND TENANT.

Rent Reserved in Kind

The Suprme Court of Oregon, in *Messinger* v. *Union Warehouse Co.*, 65 Pac. 808, holds that where the owner of land makes an agreement whereby another is to cultivate the same on shares, in the absence of any express words indicating a contrary intention, the owner impliedly reserves an interest in the crop, which he may take without the occupier's consent. This practically amounts to holding that an agreement to cultivate land on the shares does not constitute a lease in which the parties sustain the relation of landlord and tenant, but that the occupier receives his share of the crop as wages. By itself under this decision the occupier is not a tenant, but, as he is called in Pennsylvania, a cropper. Something more is necessary to establish the relation of landlord and tenant and to cause the landlord's share to be properly designated rent.

Injunction

A landlord will be enjoined from cutting off power which he was to furnish under a lease to a tenant in lawful possession, notwithstanding, differences have arisen between the parties as to the payment of rent: N. Y. Supreme Court (Special term, New York County) in *Traitel Marble Co.* v. *Chase*, 71 N. Y. Supp. 628.

MANDAMUS.

Telephone Companies, Discrimination

Where a telephone company refuses to supply all in similar circumstances with similar facilities, without discrimination, it may be compelled to do so by mandamus: Supreme Court of South Carolina in *State ex rel. Gwynn* v. *Citizen's Telephone Co.*, 39 S. E. 257, and this remedy the court holds available and the company will be compelled to furnish the facilities to the petitioner though the petitioner has not complied with a previous contract with the respondent whereby he agreed to use the respondent's telephone exclusively, the remedy of the respondent being in an action for breach of the contract and not in a refusal to furnish further facilities. But it is a sufficient return to such writ of mandamus that the respondent has not the means to comply at once with the demand.

MASTER AND SERVANT.

Convict Labor

A manufacturer contracted with prison directors for a certain building and the labor of convicts, who were to remain in the custody of the guards while engaged in the work. The plaintiff, a convict, was assigned to operate an elevator, and while engaged at his duty was injured. The Court of Appeals of Maryland holds that the relation of master and servant so far existed between such manufacturer and the plaintiff that the former was liable for any injury resulting from failure to exercise reasonable care in providing safe machinery: *Baltimore Boot and Shoe Mfg. Co., of Baltimore City,* v. *Jamer,* 49 Atl. 847. Referring to some cases holding that between an employer of convict labor and the convicts the relation of master and servant does not exist, the court says: The legal principles applicable to such cases require that the contractor should be held to a master's liability to the convict whose labor he uses, in respect to those incidents of employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control.

NEGLIGENCE.

Contributory Negligence

In *Western and A. R. Co.* v. *Ferguson,* 39 S. E. 306, it is held by the Supreme Court of Georgia that failure to exercise ordinary care on the part of a person injured before the negligence complained of is apparent or should have been reasonably apprehended will not preclude a recovery, but will authorize the jury to diminish the damages in proportion to the fault attributable to the person injured.

NEW TRIAL.

Retraction by Prosecuting Witness

It is apparently well settled that courts, as a rule, do not grant new trials on newly-discovered evidence that is merely cumulative, or that simply tends to discredit or impeach one or more of the witnesses of the adverse party. But in *Bussey* v. *State,* 64 S. W. 268, the Supreme Court of Arkansas holds that where the defendant's conviction for rape rested almost

NEW TRIAL (Continued).

entirely on the testimony of the prosecuting witness, who afterwards made a retraction under oath, it was error to refuse a new trial on the ground of newly-discovered evidence.

PARTITION.

A will provided that the testator's estate should be divided among her seven children equally with the exception of one, whose share should be reduced to a certain amount, and the amount of the reduction divided equally among the other children. It was provided the children could agree on a division of the property, but if they were unable to agree thereto voluntary, the executor's should sell the realty in one year from the testator's death and divide the proceeds and the personalty as directed. The Court of Chancery of New Jersey holds that two of the testator's children cannot compel a partition of the realty prior to the time when the power to sell would become operative. The court says that if the children should be unable to agree in the time designated the power to sell given to the executors becomes imperative, and in that case the doctrine of conversion operates and partition is no longer possible.

Power of Sale

PLEDGES.

In *Meyer Bros. Drug Co.* v. *Matthews*, 64 S. W. 264, it appeared that a note indorsed to the plaintiff by the payee was pledged by the plaintiff's husband, as her agent to the co-defendant, as collateral to a note given by him to the latter on an express agreement that such co-defendant would not allow it to go out of his possession. Thereafter, the husband having made what seemed to be a satisfactory arrangement with this co-defendant, as to his note, the defendant bought a claim against the plaintiff from the co-defendant the purchase carrying the pledged note with it, and such sale and delivery of the note being without notice to the plaintiff. On these facts the Supreme Court of Arkansas, with one judge dissenting, holds that the co-defendant having placed it beyond its power to restore the note, was liable for a conversion thereof, without a payment or tender of the debt.

Assignment, Conversion

RAILROADS.

In *New York, N. H. and H. R. Co.* v. *Book,* 49 Atl. 965, the railroad company brought trespass against a hackman for remaining on the company's premises to solicit traffic. The defendant sought to defend by showing that under an agreement the company attempted to give the exclusive privilege of soliciting passengers on the premises to another party, that this exclusive privilege was invalid, and that defendant had as much right on the premises as such third party. But the Supreme Court of Rhode Island holds such testimony irrelevant, that the validity of such an agreement, purporting to give exclusive privileges to a stranger cannot be put in issue by a defendant in a suit of this nature.

Hack Drivers

TROVER.

Where a watch is stolen from one in possession thereof as a conditional purchaser, a subsequent demand by the seller for the return of the property on the falling due of an instalment of the purchase price, and the purchaser's failure to deliver, do not show a conversion: N. Y. Supreme Court (Appellate Division, Second Department) in *Sternberg* v. *Schein,* 71 N. Y. Supp. 511.

Demand and Refusal

VERDICT.

A finding by a jury expressed in the words, "We, the jury, find for the plaintiff nominal damages, without naming any amount," is held by the Supreme Court of Georgia not to be a lawful verdict. Such finding, says the court, is purely relative and carries with it no suggestion of certainty as to amount, and "a substantial requisite of a verdict is the element of certainty": *Sellers* v. *Mason,* 39 S. E. 11.

"Nominal Damages"

WILLS.

Where, after the execution of a will devising realty, the testator subjects it to a mortgage, such mortgage must be paid from the personalty, leaving the devisee the land free from the lien: Supreme Court of Errors of Connecticut in *Jackson* v. *Bevins,* 49 Atl. 899. Of course, the testator may devise the land subject to the mortgage, in which case the devisee, accepting it, takes it subject to the mortgage and must discharge the debt.

Devise, Mortgage