PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACCUMULATIONS.

In *Codman* v. *Brigham*, 72 N. E. 1008, the Supreme Judicial Court of Massachusetts holds that where a will directed that a fund should be held and accumulated for twenty-five years before it should be actually used for the relief of suffering, such provision was valid even though the accumulations might extend beyond the times prescribed in the rule against perpetuities, the accumulation being directed in favor of a charity. Compare *St. Paul's Church* v. *Attorney-General*, 164 Mass. 188.

Charities

ADJOINING LANDOWNERS.

In *Cotton* v. *Huston*, 84 S. W. 97, the cattle of one of two adjoining landowners broke through the fence between them and did damage to the corn of the other. He thereupon detained the cattle in order to secure reparation for the injury inflicted, and the owner of the cattle brought an action for such detention. It is held that although the duty was imposed on him to keep the fence in repair, so that the cattle should not break through, nevertheless his neighbor had no right to retain such cattle until he compensated him for the damages. The old rule about distraining cattle damage feasant seems to be disappearing. Compare *O'Rieley* v. *Diss*, 41 Mo. Ap. 484.

Fences: Cattle Breach

The Supreme Court of Missouri, Division No. 1, holds in *Gerst* v. *City of St. Louis et al.*, 84 S. W. 34, that where one of two adjoining landowners intends to make an excavation on his property it is his duty to inform his neighbor of such fact and of the extent to which he proposes to excavate and to give him time to protect himself against such excavation, and failure to do

Lateral Support

ADJOINING LANDOWNERS (Continued).

this will subject him to liability for excavation on his own property, resulting in damage to his neighbor, unless such neighbor had knowledge of his intention and an actual opportunity to protect himself.

ALTERATIONS.

In *Messi et al.* v. *Frechede,* 37 S. 600, the Supreme Court of Louisiana decides that the burden of proof rests upon a party relying upon a written instrument to account satisfactorily for any interlineation which operates a substantial change in the effect of such instrument. It will be remembered that the rules in England and in some of the states in this country have taken a different view. See Stephen on Evidence, Article 89.

Burden of Proof

ASSAULT.

In *McNeil* v. *Mullin,* 79 Pac. 168, the Supreme Court of Kansas decides that if the conduct of the parties to a mutual combat constitutes a breach of the criminal law, the consent of either one to participate in the mêlée does not deprive him of his civil remedy against the other, and each contestant may recover from the other all damages resulting from the injuries he received in the fight. Compare *Willey* v. *Carpenter,* 23 Atl. 630.

Consent to Fight

BAILEES.

The interesting question arises as to whether a storage company which, in carrying on its business, transports the goods for storage to and from its warehouse and also engages in moving such goods for its patrons from one part of a city to another is a common carrier. This question is involved in the case of *Jaminet* v. *American Storage and Moving Co.,* 84 S. W. 128, where the St. Louis Court of Appeals, Missouri, holds that under the facts of the case such company was not a common carrier but assumed only the liability of a bailee for hire. The case is decided on another ground, but this apparently being as yet still an unsettled question, the decision will no doubt be of significance in the future.

Storage and Moving Company

BANKRUPTCY.

Breach of Marriage Promise

In *Biela* v. *Urbanczyk*, 85 S. W. 451, the Court of Civil Appeals of Texas decides that a demand for damages for breach of marriage promise and seduction is a demand provable in bankruptcy proceedings, though the damages are unliquidated. Compare *Baily* v. *Gleason*, 56 Atl. 537.

BREACH OF MARRIAGE PROMISE.

Contract with a Married Woman

The Code of Tennessee provides that a second marriage cannot be contracted before the dissolution of the first, but that the first shall be regarded as dissolved for such purpose if either party has been absent five years and is not known to the other to be living. In *Johnson* v. *Iss*, 85 S. W. 79, it appeared that a man had made a contract to marry a married woman whose husband had disappeared less than five years after his disappearance. It is held by the Supreme Court of the state that such promise was immoral and afforded no predicate for damages for a breach, though it was understood that the marriage should not take place until the five years elapsed or a divorce should be obtained by the woman.

CARRIERS.

Passengers' Effects

The questions which arise as to the liability of a carrier to a passenger for goods of the passenger of which he retains partial or exclusive possession are involved in much difficulty and the cases can by no means be regarded as establishing a satisfactory and well-settled rule. A new decision upon this point occurs in *Hart* v. *North German Lloyd S. S. Co.*, 92 N. Y. Supp. 338, where the property in question was taken from the cabin of a passenger. The property consisted of shirt studs, and they had been left in the shirt, which had been hung in his cabin. The New York Supreme Court, Appellate Term, decides that the carrier's liability was that of an insurer in the absence of negligence on the part of the passenger. One judge, however, dissents. See also *Adams* v. *N. J. Steamboat Co.*, 151 N. Y. 163, 34 L. R. A. 682.

CARRIERS (Continued).

The recent decision of the Pennsylvania Supreme Court in *Hughes* v. *Pennsylvania R. R. Co.*, 202 Pa. 222, in which the court held that, though the Pennsylvania rule is well settled that a carrier may not limit his liability for negligence, this rule will not be applied where the contract of carriage is made and the negligent act occurs in some jurisdiction whose laws permit such limitation, is already bearing fruit. Thus in *Cappel* v. *Weir*, 92 N. Y. Supp. 365, it appeared that an express company made a contract in Pennsylvania to carry a certain package to New York, but failed after its arrival in New York to deliver it to the consignee. The New York Supreme Court, Appellate Term, decides that, in view of the decision in Pennsylvania referred to, a clause in the contract limiting the liability to fifty dollars, being valid in New York, would be there enforced where the breach of the contract occurred in a jurisdiction permitting the limitation.

Limitation of Liability

It is decided by the Court of Appeals of Kentucky in *Hancock* v. *Louisville and N. R. Co.*, 85 S. W. 210, that a passenger purchasing a ticket for transportation to a station on the carrier's line contracts to take his passage on a train scheduled to stop at that point, and he cannot, on boarding a train not scheduled to stop there, compel the conductor to accept the ticket, or recover damages for being ejected from the train. Compare *Flood* v. *C. and O. Ry. Co.*, 80 S. W. 184.

Stopping Through Trains

CONFLICT OF LAWS.

In *Howard* v. *Western Union Tel. Co.*, 84 S. W. 764, it is decided by the Court of Appeals of Kentucky that where a contract for the transmission and delivery of a telegram was made in West Virginia, but was to be consummated by delivery in Kentucky, and the negligence complained of consisted of delay in delivery occurring mainly in Kentucky, the contract was governed by the laws of that state. One judge dissents.

Delivery of Telegrams

CONSTITUTIONAL LAW.

In *Ames* v. *Kirby*, 59 Atl. 558, the Supreme Court of New Jersey decides that a statute prohibiting the keeping of a place within the state to which persons might resort for pool-selling or book-making or for betting upon the event of any horse-race, either within or without the state, or for gambling in any form, or aiding, abetting, or assisting therein, is violated by the keeping of a resort for gamblers whose wagers are made by means of telegraphic communication with persons outside of the state, and though this is so, the statute is not in conflict with the interstate commerce clause of the Federal Constitution, though the section incidentally operates to prevent interstate wagers by telegraph. Compare *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347.

Interstate Commerce

In *Bazemore* v. *State*, 49 S. E. 699, the Supreme Court of Georgia decides that under the police power laws may be passed for regulating common occupations which, from their nature, afford peculiar opportunity for imposition and fraud. Applying this principle, it is decided that because of its value, the ease with which it is taken from the field, and the difficulty of detecting the thief, the state may regulate the sale of seed cotton, and fix a punishment upon the person who buys in violation of the terms of the statute. Compare *Turner* v. *Maryland*, 107 U. S. 41.

Police Power

In *United States Exp. Co.* v. *State*, 73 N. E. 101, the Supreme Court of Indiana decides that a statute of the state requiring express companies to deliver parcels to the consignee in cities having a specified population is not a deprivation of liberty or property without due process of law within the inhibition of the Fourteenth Amendment to the Constitution.

Due Process of Law

CORPORATIONS.

The Court of Errors and Appeals of New Jersey discusses with great thoroughness and in a very satisfactory manner the questions connected with voting trusts in the case of *Warren* v. *Pim*, 59 Atl. 773. It is there held that an irrevocable "voting trust," or any other irrevocable grant, uncoupled with an interest in

Voting Trusts

CORPORATIONS (Continued).

the stock to be voted upon, assuming to confer upon the donee the power to vote at stockholders' meetings for the choice of directors, is contrary to the letter and also to the spirit and policy of the general corporation act of New Jersey (P. L. 1896, page 277). One of the judges in rendering his opinion declares that in New Jersey the validity of a voting trust depends upon two considerations, first, that the holders of all the shares of the corporation shall have an equal privilege (after fair information) of availing themselves of the trust agreement; and, second, that the object and aim of the trust shall be the equal benefit of all the shares. There is a dissenting opinion and the whole case is well worthy of study. On the question of whether the voting trust litigated was contrary to public policy the court divides almost evenly, seven judges against six holding it contrary to public policy.

CRIMINAL LAW.

Seduction: Minority

The constitutional law of Missouri provides that if any person shall, under or by promise of marriage, seduce an unmarried female of good repute, under twenty-one years of age, he shall be deemed guilty of a felony. In applying this statute the Supreme Court of the State holds in *State* v. *Brock,* 85 S. W. 595, that, in a prosecution under such section, it was no defence that defendant at the time he made the promise to marry was under twenty-one years of age, and therefore could not have made a promise of marriage enforceable against him.

DEAD BODIES.

Mutilation: Who May Sue

In *Koerber* v. *Patek,* 102 N. W. 40, the Supreme Court of Wisconsin decides that where there is no surviving spouse a son is the lawful custodian of the body of a deceased parent for preservation and burial and is entitled to an action for an unlawful mutilation of the body. In such action damages are allowed for the sense of outraged and mental suffering resulting directly from the wilful mutilation of the body of plaintiff's deceased mother.

DEEDS.

Cancellation: Fraud

In *Sanford* v. *Reed,* 85 S. W. 213, it appeared that a woman conveyed land in order to get it out of her hands in case recovery should be had on a bond on which she was surety. It is held by the Court of Appeals of Kentucky that notwithstanding this fact she is entitled to have the deed cancelled where the grantees' attorney took advantage of her weakness to induce her to make the conveyance without consideration by frightening her as to her liability on the bond, and promising to reconvey when the matter of the bond was out of the road. Compare *Anderson's Adm'r* v. *Merideth,* 82 Ky. 571.

Validity: Duress

The Court of Civil Appeals of Texas decides in *Medearis* v. *Granberry,* 84 S. W. 1070, that where parents executed a deed in consequence of threats of the grantee to prosecute their son, a criminal, such deed may be avoided on the ground of duress. See 10 Am. and Eng. Ency. Law (2d ed.), 330, and cases there cited.

EVIDENCE.

Statements as to Physical Condition

The Court of Appeals of Kentucky in *Louisville and N. R. Co.* v. *Smith,* 84 S. W. 755, lays down the general rule that where the physical or mental suffering of a person resulting from an injury is the proper subject of inquiry the usual expression of such suffering manifested or made at the time may be admitted as original evidence. Compare *Bacon* v. *Charlton,* 7 Cush. 586.

There is also an interesting decision as to elements of damage, the court deciding that it is inadmissible to prove a dream which is alleged to have caused the injured person pain and suffering even though the dream seems without question to have been the result of the injury and to have caused the injured person distress naturally resulting from a disagreeable dream. This decision no doubt will commend itself, but it is interesting as dealing with a matter seldom appearing in legal decisions.

HIGHWAYS.

In *Cumberland Telephone and Telegraph Co.* v. *Avritt*, 85 S. W. 204, the Court of Appeals of Kentucky decides that the building of a telephone line on a public highway imposes no additional servitude. This is an extension of the Kentucky doctrine that a steam railroad or an electric railway built on a highway does not constitute additional servitude.

Servitude

INTERSTATE COMMERCE.

In *Southern Ry. Co.* v. *Greenboro Ice and Coal Co.*, 134 Fed. 82, the United States Circuit Court (E. D. North Carolina) decides that an order of a state corporation commission directing a railroad company to place cars on a certain track for unloading, as requested by the consignee, is without jurisdiction and void when it affects cars loaded with coal shipped from one state into another. These it is held remain subjects of interstate commerce for the purposes of the case until delivered to the consignee, and consequently cannot be brought within an order such as was promulgated here.

State Commission

It is also held in the same case that a suit against such state corporation commission to enjoin the enforcement of such order is not a suit against the state, and is within the jurisdiction of a Federal court. On this point see note to *Tindall* v. *Wesley*, 13 C. C. A. 165.

LARCENY.

The Supreme Court of Nebraska decides in *Junod* v. *State*, 102 N. W. 462, that wire fastened to posts for the purpose of fencing a part of the public domain, for temporary use as a summer pasture for live stock, is personal property; and one who cuts or tears it from the posts and carries it away with larcenous intent, without the consent of the owner, may be convicted of larceny. Compare *Jackson* v. *State*, 11 Ohio State, 104.

What Constitutes

LIFE INSURANCE.

In *Supreme Lodge K. P.* v. *Bradley*, 83 S. W. 1055, the Supreme Court of Arkansas deals with the provision found in most life insurance policies excepting the death in consequence of the violation of any criminal law, and it is held with two judges dissenting that a death received while retreating from a personal difficulty, not for the purpose of gaining vantage ground to renew the strife, even though the encounter

Death in Violation of Criminal Law

LIFE INSURANCE (Continued).

is begun by an assault by the deceased on his slayer with a weapon capable of inflicting great bodily harm or death according to its use, but for the purpose of protecting himself, is not a death within the meaning of such clause exempting the company from liability for a death in the way aforesaid. Compare *Bloom* v. *Franklin Life Ins. Co.*, 97 Ind. 478.

LOTTERY.

The Supreme Court of Georgia decides in *De Florin* v. *State*, 49 S. E. 699, that a "suit club," whose members pay to a tailor one dollar per week, and which holds weekly drawings, as a result of which the member holding the lucky number receives from the tailor a suit of clothes, and then ceases to be a member of the club, is a scheme in the nature of a lottery. This is so although an unlucky member who continues to pay his one dollar weekly for thirty weeks is entitled to a thirty-dollar suit of clothes regardless of the result of the drawings. Compare *Meyer* v. *State*, 112 Ga. 20.

What Constitutes

MARRIAGE.

In *Boehs* v. *Hanger*, 59 Atl. 904, the Court of Chancery of New Jersey decides that the jurisdiction of the Court of Chancery to decree the annulment of a marriage on the ground of fraud is confined to cases of fraud which affect the essentials of marriage, and will not be exercised if a decree of annulment will violate public policy. Applying this principle, it is held that where a man induced a woman to believe that he was not a divorced person, though in fact he was, the misrepresentation did not affect the essentials of marriage and did not constitute ground for its annulment, although the woman was a member of a church, one of the tenets of which is that marriage cannot be dissolved except by the death of one of the contracting parties, and that a marriage with a divorced person, the other party to the divorce being still living, is invalid, and cohabitation therein is sin. Such marriage is not, however, in violation of the law of the land and will be upheld.

Annulment

MORTGAGES.

Priorities

In *Gibson* v. *Thomas*, 73 N. E. 484, it appeared that an owner of a farm subject to a mortgage conveyed a right of way through the farm to a railroad company, which entered under the deed and operated a railroad thereon. The owner of the mortgage, holding by assignment from the mortgagee, which had been recorded, executed a release to the mortgagor of the land conveyed to the railroad, which release was given to the railroad company, but was not recorded. Under these facts the Court of Appeals of New York decides that a subsequent purchaser of the mortgage, with no knowledge of the existence of the release, and not knowing that the railroad ran through the farm, was protected under the recording act in his lien on the entire premises. Three judges, however, dissent.

PARENT AND CHILD.

Civil Liability of Parent to Child

In *Roller* v. *Roller*, 79 Pac. 788, the Supreme Court of Washington holds that a child cannot in a civil action recover against a parent for a tort done by the parent to the child, though the offence is rape and the offending parent has been criminally convicted therefor. In answer to the argument that under the circumstances the reason of the rule fails in view of the fact that the harmony of the domestic relations has already been so seriously broken as not to be much further impaired by such suit, the court replies that there could then be no practical line of demarcation drawn and the interests of other minor children might suffer. See also *Hewlett* v. *George*, 68 Miss. 703, 13 L. R. A. 682.

Custody

The question as to the effect of a contract entered into by a parent with regard to the custody of his child upon his legal right to such custody is one upon which there seems to be some uncertainty. This question is presented to the Supreme Court of Washington in *Carey* v. *Hertel*, 79 Pac. 482, where it is held that though a father, upon the death of his wife, placed his infant daughter in the care of the parents of the child's mother, under an agreement to pay them for their services, agreeing to allow her to live with them until she was six years of age, he may nevertheless recover the care and custody of his daughter

PARENT AND CHILD (Continued).

(before the child has arrived at the age of six years) where he is a proper person to be intrusted with such custody. In this case she was but three years of age when she was awarded to the custody of her father. Compare *Lovell* v. *House of the Good Shepherd,* 9 Wash. 419.

PLEADING.

In an action for damages against a railway company by reason of the ejection from one of its trains of a person claiming the rights of a passenger, the petition appeared to be framed on the theory that a right of recovery rested in tort for the wrongful act of the conductor in expelling plaintiff from the train. The petition, however, contained allegations of fact sufficient to show that the railway company violated its contract of carriage entered into with the plaintiff, which averments the evidence tended to sustain. The railway company did not demur to the petition for misjoinder of causes of action, nor move to strike from it irrelevant and redundant matter, but answered. Under these facts the Supreme Court of Kansas decides in *Chase* v. *Atchison, T. and S. F. Ry. Co.,* 79 Pac. 153, that it was error to sustain a demurrer to plaintiff's evidence. This interesting decision is particularly worthy of study in connection with the carefully considered cases of *Supervisors of Kewaunee Co.* v. *Decker,* 30 Wis. 624, 34 Wis. 378.

Different Causes of Action

PRACTICE.

In *Plattner Implement Co.* v. *International Harvester Co. of America,* 133 Fed. 376, the United States Circuit Court of Appeals, Eighth Circuit, decides that the various judges who sit in the same court should not attempt to overrule the decisions of one another, especially upon questions involving rules of property and practice, except for the most cogent reasons.

Decisions of Federal Judges

RAILROADS.

Compliance with Terms of Ticket

Difficult questions arise in connection with the right of a conductor to insist on compliance by a passenger with the terms of his ticket, where such compliance has been rendered impossible or represented as immaterial by some other employee of the carrier. New decisions are always occurring. Two recent ones appear, one in *Ft. Worth and R. G. Ry. Co.* v. *Jones,* 85 S. W. 37, and the other in *Texas and P. Ry. Co.* v. *Smith,* 84 S. W. 852, both by the Court of Civil Appeals of Texas. In the former of these cases it is decided that where a round trip ticket required that it should be stamped at the point of destination in order to entitle the passenger to his return trip, it must nevertheless be accepted by a conductor if the agent of the company at the point of destination refuses to stamp and sign the ticket according to its provisions. One judge dissents. In the latter case the court holds that though a railroad ticket agent assures a passenger who had lost her ticket that the conductor would make it all right and she could travel without it, the conductor was nevertheless justified in ejecting her when she failed to produce either her ticket or her fare for her transportation. These apparently different results are reached, it seems, on the ground that in the former case the act of the ticket agent in refusing to sign and stamp the ticket was within the scope of his authority while the act of the agent in the latter case was not.

RULE IN SHELLEY'S CASE.

Iowa

With two judges dissenting the Supreme Court of Iowa decides in *Doyle* v. *Andis,* 102 N. W. 177, that the rule in Shelley's case is a part of the common law of Iowa. The opinion of the court is a most excellent and elaborate discussion of the rule both from the historical standpoint and from the standpoint of public policy. The criticism made by the dissenting judge of the rule and of the majority opinion is very keen and incisive, and the whole decision is well worthy of study and will undoubtedly prove a leading case upon this branch of the law.

SEDUCTION.

Cases in which some recognition is given to the existence of the hypnotic power are comparatively infrequent, and are of consequent interest and importance. In a recent decision by the Supreme Court of Iowa, *State* v. *Donovan,* 102 N. W. 791, the possible exercise of this power in accomplishing the seduction of a woman is recognized, the court holding that evidence tending to show a continuation of flattery, love-making, and hypnotism in order to gain possession of the person of the prosecutrix was a sufficient predicate for a prosecution for seduction. See note to *People* v. *Ebanks,* 40 L. R. A. 269.

Artifices: Defences

It is further decided that the fact that the defendant in the prosecution was married at the time of the alleged artifices constitutes no defence.

WILLS.

In *Merrill* v. *Webster,* 73 N. E. 672, the contest arose over a will which devised all of the testatrix's property to her husband in fee and then provided in the following clause: "It is my will, in consideration of the fact that I have heirs who are worthy, that my said husband shall leave by his will after my decease . . . the property, of whatever kind, to my heirs." The Supreme Court of Massachusetts, construing this language, holds that it does not create a trust in the husband for the benefit of the testatrix's heirs, but is repugnant to the former grant of the fee to the husband, and his interest cannot, therefore, be cut down to a life estate. Compare *Bassett* v. *Nickerson,* 184 Mass. 169.

Construction: Trust

WITNESSES.

A very interesting decision, and one which may prove an important precedent, appears in *Freasier* v. *State,* 84 S. W. 360. The constitution of Texas provides that all oaths shall be taken subject to the pains and penalties of perjury. A section of the penal code provides that no person shall be convicted of an offence committed before he was nine years old. It is held that under these two provisions a child under the age of nine years cannot be a witness. One judge dissents, and the situation is regarded by the judges who rendered judgment so serious that they suggest to the legislature the need of remedial legislation. Compare *Kenney* v. *State,* 79 S. W. 877, 65 L. R. A. 316.

Competency of Children