PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

APPEAL.

In *Kentucky Heating Co.* v. *Louisville Gas Co.*, 59 S. W. 1090, the appellant had been previously adjudged by the appellate court to be in contempt for disobedience of an injunction. This case was the appeal from the original injunction. It appeared that the appellant after having been adjudged in contempt continued to disobey the injunction. Under these facts the Court of Appeals of Kentucky holds that the company so disobeying will be punished by a dismissal of its appeal on a day named unless on or before that day it should be made to appear that it has faithfully and fairly obeyed the order to obey the injunction. One judge dissents without assigning any reason.

Injunction, Disobedience

BANKRUPTCY.

A corporation incorporated for the purpose of giving theatrical performances and engaged solely in such business is not one "engaged principally in trading or mercantile pursuits," and cannot be adjudged an involuntary bankrupt under the Bankrupt Act of 1898: *In re Oriental Society*, 104 Fed. 975.

Theatrical Companies

The same court (District Court, E. D., Pennsylvania) similarly holds that a corporation whose sole business is the mining of coal and preparing and shipping the same to market is likewise not included under the above designation *In re Woodside Coal Co.*, 105 Fed. 56.

BILLS AND NOTES.

A note was signed "R. J. Beatty, President," and above the note, on the paper on which the note was written, appeared the name of a corporation. Under these circumstances the Supreme Court of Indiana holds, in *Second Nat. Bank of Akron* v. *Midland Steel Co.*, 58 N. E. 833, that the presumption that the note was the individual obligation of the signer was not conclusive,

Signature, Descriptio Personæ, Parol Proof

BILLS AND NOTES—(Continued).

but it could be shown by parol that it was the contract of the corporation. The authorities appear to be by no means unanimous in favor of this ruling, but the court overrules expressly previous decisions of its own state inconsistent therewith.

Lost Note, Bond of Indemnity

In *Munroe* v. *Weir*, 58 N. E. 1013, the Supreme Judicial Court of Massachusetts, speaking through Chief Justice Holmes, holds that a judge has power in his discretion to enter judgment in a suit on a note declared on, and now alleged to be lost, without requiring plaintiff to file the note and to execute a bond of indemnity; since in the view of the court a bond is not always necessary for the reasonable protection of the defendant in such cases.

CARRIERS.

Negligence, Reduced Valuation

The rule that a common carrier cannot exempt itself from liability for loss due to its own negligence appears in a somewhat modified form in *Gardner* v. *Southern Ry. Co.*, 37 S. E. 328. There it was claimed that the shipper had set the value of goods at a particular figure and was precluded from recovering anything beyond that amount. Under the circumstances of the present case the court holds this merely an indirect attempt of the carrier to limit its liability for its own negligence, and, therefore, refuses to allow the contention. Two things must concur it holds to allow a common carrier to make a valid agreement fixing the value of shipments in case of loss by its negligence, to wit: first, the agreement must be reasonable, and second, it must be based on a valuable consideration. It distinguishes on these grounds various cases in which it appeared that the rate had been lowered in consequence of the reduced valuation, the accompanying stipulation being reasonable.

Termination of Relation of Carrier and Passenger

The ordinary rule that the relation of carrier and passenger between a railroad company and a passenger on one of its trains is not terminated when the passenger alights at a station, until he has had a reasonable time under all the circumstances to leave the station, is not modified by the fact that the passenger does not intend to leave the station, but has planned to stay there all night: *Chicago R. I. & P. Ry. Co.* v. *Wood*, 104 Fed. 663. Just when the relation under such circumstances ceases the court does not decide, except in the general holding that a reasonable time to leave must have elapsed.

CONSTITUTIONAL LAW.

In 21 Supreme Court Reporter, 132, is reported the case of *Austin* v. *Tennessee*, to which some notoriety has already been given by the daily papers. A law of Tennessee forbade the sale of cigarettes in the state. The court has no difficulty in holding that such cigarettes are well recognized as articles of commerce, but the principal question arises upon the determination of whether the sale was in the original package. The cigarettes were shipped in the usual size box containing ten each, such boxes lying loosely in baskets belonging to the carrier, and not tied together. The defendant sold one of these boxes containing ten cigarettes and for this was indicted and found guilty. The United States Supreme Court, by a majority of five to four, affirms this decision, holding the sale not to have been made in the original package. The court says that "the real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealers residing in different states. We hold to the latter view." The court then goes on to point out that in its opinion the method of shipment is with the "express intention of evading the laws of another state," and refuses to such transaction the protection of the original package rule. The opinion of the court is by Mr. Justice Brown.

Original Package

The dissenting judges, agreeing with Mr. Justice Brewer, who writes the dissenting opinion, regard the rule laid down by the majority as tending to uncertainty and making each case turn too much on the "shifting opinions of individual judges."

An act of the Legislature of Indiana made it unlawful to pipe or conduct natural gas from any point within the state to any point without it. The Supreme Court of the state, in *Manufacturers' Gas and Oil Co.* v. *Indiana Natural Gas and Oil Co.*, 58 N. E. 706, holds this act unconstitutional as an interference with interstate commerce not justified under the exercise of the state police power. *Geer* v. *Connecticut*, 161 U. S. 519, in which it will be remembered the Supreme Court of the United States upheld such a state statute which prohibited the shipping of game out of the state, is distinguished on the ground that the ownership of wild animals, before reduction to possession, is in the public, which has a right to refuse to allow the individual to acquire title except burdened with such conditions as it may see fit to annex, while in this case the ownership is primarily in the man who owns the "superincumbent lands."

Interstate Commerce, Natural Gas

CONSTITUTIONAL LAW (Continued).

Impairment of Contracts, Evidence

In New York a law provided that copies of the records, books and papers constituting part of the archives of the Board of Health should be presumptive evidence of the facts recited. In *Davis* v. *Supreme Lodge Knights of Honor*, 58 N. E. 891, an insurance case, these records were sought to be used as facts bearing upon the cause of death of certain persons. The Court of Appeals inclines to the view that such a change in the rules of evidence is so material as to amount to an impairment of the obligation of the contract, but avoids a decision on this point by placing its disposition of the case upon another ground.

CONTRACTS.

Alternative Obligation, Election

In *Phillips* v. *Cornelius*, 28 Southern, 871, it appeared that the respondents had accepted the plaintiff's money, and had agreed to convey certain property to him *or* repay the money, but they refused to do either upon being requested by the plaintiff, who then brought a bill for specific performance of the contract to convey. A demurrer to this was overruled by the lower court and this decision affirmed on appeal to the Supreme Court of Mississippi, the court holding that on the failure of the person who had the right to make his election in proper time the right of election passes to the opposite party.

Assuming Debts of Firm, Suit by Firm Debtor

In Connecticut the general rule obtains that a third person cannot sue on a contract made for his benefit to which he is not a party. Of course certain exceptions are recognized. In *Morgan* v. *Randolph-Clowes Co.*, 47 Atl. 658, the following case is held to fall under the general rule and not within the exceptions: A member of a firm died and a corporation was organized to continue its business. This corporation made a contract with the surviving partner and the administrator of the deceased partner, by which it took the firm property and agreed to pay the firm debts: Held that a creditor of the firm could not maintain an action at law for its refusal to pay his debt.

Affecting Interstate Commerce

In *U. S.* v. *Chesapeake & Ohio Fuel Co.*, 105 Fed. 93, the United States Circuit Court (S. D. Ohio) holds that a contract by which a corporation agrees to take the entire product of a number of persons, firms and corporations engaged in mining coal and making coke in a certain district, which is intended for "western shipment," to sell the same at not less than a minimum price, to be fixed by

CONTRACTS—(Continued).

an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum to be retained as "compensation"—the stated purpose being "to enlarge the western market"—and under which shipments are made into other states, is one affecting interstate commerce and is illegal under the anti-trust law of 1890.

"It is," says the court, "the policy of Congress to encourage and promote individual effort. It looks to individual competition rather than to combinations for the benefits which are to follow and flow from commerce between the states, and, in the exercise of its constitutional power, has prohibited all combinations which restrain trade." No doubt the policy of the common law has always been against restraint of trade, but it seems too great an assumption that a restraint of competition is *per se* and of necessity a restraint of trade.

CRIMINAL LAW.

Burglary, Breaking and Entering

The Penal Code of Texas declares the crime of burglary to be committed, the other elements being present, when the entry is by "force, threats or fraud." In *St. Louis* v. *State*, 59 S. W. 889, it appears that the defendant had entered a store during the daytime and had been shut in when the store was closed at the end of business hours. The trial court instructed the jury in such a way as to indicate that if he entered with intent to commit larceny, his taking advantage of the common privilege to enter amounted to the fraud contemplated by the statute, but the Court of Criminal Appeals holds that the entry must be *gained* by some force, threats or fraud—some device or stratagem must be used. Of course the indictment in this case being statutory, considerations as to whether the entering occurred in the day or night did not arise, the code allowing prosecution for both species of offences.

Grand Jury, Presence of Third Party

The Code of Iowa provides that the presence of any person other than the grand jurors during the investigation of a charge, except such persons as are required or permitted by law to be present, shall constitute a ground for setting aside the indictment—a provision similar to the general rule. In *State* v. *Wood*, 84 N. W. 503, the Supreme Court of that State holds that where a father and daughter were both witnesses before the grand jury on the investigation of a charge against defendant, the fact that the daughter, who was very nervous, was accompanied during her

CRIMINAL LAW—(Continued.)

examination by her father, constituted no ground for setting aside the indictment.

DEAD BODIES.

In *Enos* v. *Snyder*, 63 Pac. 170, it appeared that a man had provided by his will that the manner, time and place of his burial should be "according to the wishes and directions of A." Upon his death the next of kin claimed the right to the body as against A. The Supreme Court of California holds that the general current of authority denies to a man the right to dispose of his own body; that this extends to appointing the right to bury his body to a particular person, and that the provision in this case is therefore void. The next of kin, it is held, have the right to bury the body, though, it is said, in England the right to the custody and possession of the body of decedent is in the executor or administrator until it is properly buried.

Right to Bury, Wills

DEATH BY WRONGFUL ACT.

In *Foot* v. *Great Northern Ry. Co.*, 84 N. W. 342, the Supreme Court of Minnesota holds that where the personal representative of the deceased person is the proper person to sue for death, he may compromise and settle the claim arising under the statute with the party liable, without the consent of the next of kin, or of the probate court, where it does not appear that the settlement was procured through fraud or misrepresentation.

Right to Compromise

ELECTRIC RAILWAYS.

That an electric railway in a city street does not impose an additional burden upon the street, so as to make necessary the obtaining of the consent of the abutting property owner who owns the fee to the middle of the street, or so as to entitle him to damages, appears well settled. More doubt arises when such railway seeks to locate upon a country highway. This question is presented to the Court of Chancery of New Jersey in *Ehret* v. *Camden & T. R. Co.*, 47 Atl. 562, and it is decided that the same rule should be applied as applies to city streets. *Pennsylvania R. Co.* v. *Montgomery Co. Pass. Ry. Co.*, 167 Pa. 62, is apparently contrary to this view, though the court in this case seeks to draw distinctions, mainly, however, on the facts.

Country Roads, Additional Burden

EVIDENCE.

Competency of Testimony

In order tha a witness may testify as to the identity of an object, it is not necessary that he should know at the time he sees it what it is, provided he obtained the requisite knowledge before testifying. This rule is applied in *Cleveland T. & V. R. Co.* v. *Marsh.* 58 N. E. 821 (Ohio), where a witness was allowed to testify that a certain object was a torpedo,though at the time he had seen it he knew nothing at all about it, and only learned later by being told what objects looking like it were. But he must first qualify by showing that he has subsequently obtained the requisite knowledge.

Power to Order Inspection of Party's Person

In *Stack* v. *New York, N. H. & H. R. Co.*, 58 N. E. 686, the Supreme Judicial Court of Massachusetts follows *Railway Co.* v. *Botsford*, 141 U. S. 250, and cases holding with it, and declares that, apart from statute, there is no power in the courts to make an order for the inspection of a party's person. Chief Justice Holmes admits authority may be found in support of the opposite view, but claims that the power does not exist at the common law, and that it would be going too far in the way of judicial legislation for the courts to adopt it of their own accord. He points out that the need of the power is not so great as might appear at first blush, since refusal to submit to such an examination would be a proper fact for admission in evidence to be commented on to the jury.

Unstamped Instruments

The Supreme Court of Georgia, though conceding that Congress has power to require revenue stamps to be placed on certain written instruments, and to provide punishment for failure to comply with the law, and to make such instrument unless stamped inadmissible as evidence in a federal court; holds that it cannot render it inadmissible for such cause in a state court; and therefore construes this section of the Revenue Act of 1898 to apply only to federal courts: *Small* v. *Slocumb*, 37 S. E. 481. Pennsylvania is referred to as sustaining a contrary view: *Turnpike Co.* v. *McNamara*, 72 Pa. 278.

Age of Defendant, Inspection

In *State* v. *Huffman*, 63 Pac. 1, the Supreme Court of Oregon holds that an instruction in a criminal case, where it is necessary that the jury be satisfied that the defendant is over sixteen years old, that the state need produce no evidence as to age, defendant being

EVIDENCE—(Continued).

present, and his appearance being sufficient evidence of his age, of which age the jury are the judges, is not error. There was nothing in the record to show that in this case the appearance of the defendant was not amply sufficient to satisfy the jury that he was more than sixteen years old, and this fact is relied on to some extent, though the court notes the contrary view in Indiana, where this very fact that such "real" evidence of personal appearance cannot be part of the record is a reason for requiring that evidence must be adduced of age.

Exclamations of Person Undergoing a Medical Examination

In *Zingrebe* v. *Union Ry. Co. of New York City*, 67 N. Y. Supp. 554, a husband sues for injuries occasioned to his wife by the negligence of the defendant; and offers evidence of a physician who had examined the wife. It is held that it is competent for such physician to testify as to her flinching and exclamations when he pressed on certain portions of her body, for the purpose of showing the extent of the injury. This seems to allow a party to make evidence for himself, but it is difficult to imagine how satisfactory knowledge of the extent of the injuries could be otherwise obtained and presented to the jury.

HUSBAND AND WIFE.

Contract Between

The married woman's act in Indiana abolishes all disabilities of married women to make contracts, except as otherwise provided. No statute prohibits a contract directly between husband and wife. In *Dailey* v. *Dailey*, 58 N. E. 1065, the Appellate Court of that state holds that a contract so made by a wife to sign a deed of the husband's real estate, thereby releasing her inchoate interest therein, in consideration of his agreement to pay her a certain sum from the proceeds of the sale, is valid. One judge dissents without assigning the grounds of such dissent.

INFANTS.

Contract for the Sale of Real Estate

The Court of Appeals of Kentucky holds, in *Clark* v. *Stanhope*, 59 S. W. 856, that a contract for the sale of land owned jointly by an infant and another, being illegal as to the infant, is void altogether, as the parts cannot be separated, and therefore damages cannot be recovered of either party for a breach of the contract.

JUDGMENT.

Conclusive Effect Against Employe

A master had been sued for injuries occurring through the negligence of his servant, and judgment had been rendered against him, the servant being a witness at the time and denying negligence, but the jury finding against his testimony. The master then sued the servant for the amount of the judgment. In *Costa* v. *Yoachim*, 28 S. E. 992, the Supreme Court of Louisiana holds that the judgment recovered in the former suit "is binding on the employe, who was notified, who was a witness, and whose negligence was the only cause of damage which was found against his employer, who was made to pay the amount. It devolved upon the employe. The onus was upon him to show wherein the judgment was in any particular erroneous." The court further holds that the measure of damages is the amount of the recovery against the master.

Lien as against Purchaser under a Parol Contract

In *Farmers' Transp. Co.* v. *Swaney*, 37 S. E. 592, the Supreme Court of Appeals of West Virginia holds that a purchaser of land by parol contract, which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract, has an equitable right in said land so purchased, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor.

MARRIAGE.

Validity, Conflict of Laws

The code of Tennessee prohibits a marriage between the guilty husband or wife after a divorce for adultery and his or her paramour during the life of the former wife. Of course it has been held in that state, as in states having similar statutes, that a marriage between such parties will not be recognized where they have gone into another state not forbidding such marriage for the purpose of evading this provision. In *Newman* v. *Kimbrough*, 59 S. W. 1061, the Court of Chancery Appeals goes a step further, and refuses to recognize such marriage, though it does not appear that the parties have been married in another jurisdiction for the purpose of evading the law. Public policy, it is held, is as much violated in the one case as in the other.

MASTER AND SERVANT.

Fellow-Servants

Where the plaintiff, a night watchman in the defendant's mill, caught his foot where carpenters had piled planks insecurely during the day and fell; held that he could not recover, since the negligence, if any, was that

MASTER AND SERVANT—(Continued).

of the plaintiff's fellow-servants: *Bodwell* v. *Nashua Mfg. Co.*, 47 Atl. 613 (New Hampshire).

In *Cleveland, T. & V. R. Co.* v. *Marsh*, 58 N. E. 821 (Ohio), a station agent whose duty it was to attend to switch lanterns employed a boy to do it for him. While so engaged the boy was injured. Whether that injury arose from the negligence of the railroad's servants is a point discussed at length in the case, but as to the contention of the defendant that, admitting negligence, there can be no recovery on the ground that the boy was a fellow-servant of the employe, whose negligence caused the injury, the court holds that he is not so barred, that he is rightfully on the premises, is not a servant of the corporation, since it was not in the station agent's power to make him such, nor is he a mere volunteer assisting such station agent, since he does so with some purpose or benefit to be subserved on his own behalf; that he is therefore entitled while so assisting to protection against the servants of the company.

Person Assisting Servant

MORTGAGES.

In *Fields* v. *Mott*, 84 N. W. 555, a mortgage recited that it was given to secure the prompt payment of rent according to the terms of a certain written lease, and named the amount secured, and this amount corresponded to the amount agreed in the lease to be paid as rent. The tenant held over under this lease, and the question presented was whether the mortgage should be held to cover rent so accruing. The Supreme Court of North Dakota holds that it does not secure such rents.

Rents Secured

In Oregon a statute authorizes a married woman to convey her property to the same extent as her husband can convey property belonging to him. In *Howell* v. *Folsom*, 63 Pac. 116, the Supreme Court of that state holds that where a married woman held with her husband an estate by entirety, and gave a mortgage on such estate, the death of her husband subsequently removed his right of survivorship and the mortgage was a valid lien on the fee.

Estate by Entireties

PRINCIPAL AND SURETY.

In *Smith* v. *Spragins*, 59 S. W. 855, the Court of Appeals of Kentucky holds that when a surety signed a replevin bond, and delivered it to a deputy sheriff, on condition that the deputy sheriff was not to return it to the clerk's office until it had been signed by a certain other person, and the additional signature was

Conditional Signing of Bond by Surety

PRINCIPAL AND SURETY—(Continued).

never obtained, the surety is not bound and is entitled to have the bond canceled unless guilty of laches. The court recognizes the contrary doctrine as applying to the case of a surety who signs a note under similar circumstances: *Smith* v. *Moberly*, 10 B. Mon. 267.

RESULTING TRUST.

Where a husband has purchased land with his wife's money and taken title in his own name, and a resulting trust has thus arisen in favor of the wife, "while the decisions touching the wife's rights are at variance, some jurisdictions holding there must be bad faith on her part to create an estoppel, and others that actual bad faith or fraudulent intent are unnecessary, yet all agree that it must appear that credit was extended to the husband on the faith of his apparent ownership." Otherwise the wife's rights prevail: *Standard Mercantile Co.* v. *Ellis*, 37 S. E. 593.

Estoppel to Assert

SALES.

In *Bishop* v. *Minderhout*, 29 Southern, 11, the plaintiffs had sold a piano to defendants, taking notes therefor, but retaining their title until payment in full. Before payment the piano was destroyed by fire without negligence of the defendant. In a suit on the notes recovery was denied, the Supreme Court of Alabama holding that the loss falls on the plaintiff, since he held the title. "The question presented," says the court, "is one of conflict in the authorities," and apparently the weight of authority is opposed to this decision; v. 6 Am. and Eng. Enc. Law (2d ed.) 455.

Loss by Fire

STATUTE OF LIMITATIONS.

A., being a resident of West Virginia, contracted a liability in favor of B., which B. reduced to judgment, but before the judgment was obtained A. moved out of the state. In *Fisher's Ex'rs* v. *Hartley*, 37 S. E. 578, the Supreme Court of Appeals of West Virginia holds that his absence from the state does not prevent the running of the statute of limitations. The principle on which the court proceeds is that the judgment merges the original cause of action and becomes a new cause of action, which arising while A. is without the state is not within the rule preventing the statute from running where A. removes subsequent to the accrual of the cause of action, though the cause of action upon which that judgment is founded arose prior to his departure.

Absence from State

TAXATION.

Situs of Personal Property

In *Ruckgaber* v. *Moore*, 104 Fed. 947, it is held that the War Revenue Tax of 1898 does not apply to a bequest of certain stocks and bonds of American corporations held by a non-resident alien, and by her bequeathed to a non-resident alien. The court refers to New York authorities, which tax corporation stock irrespective of the domicile of the owner, but bases its decision on the principle that the situs of personal property is that of the owner.

TRADES UNIONS.

Ordinance for Street Improvement

In *Fiske* v. *People*, 58 N. E. 985, the Supreme Court of Illinois holds that an ordinance of Chicago requiring that a bidder for work on a public improvement should agree to hire only members of labor unions in the performance thereof, and that, in all contracts executed by the commissioner of public works on behalf of the city, the contractor should agree to hire only members of labor unions, is unconstitutional and void, as discriminating between different classes of citizens and as restricting competition and increasing the cost of work.

Preventing Employes from Joining

On the other hand, a statute providing that any person who attempted to keep any employe from joining or belonging to any lawful labor organization, by discharge or threats of discharge, should be guilty of a misdemeanor, is held invalid by the same court on the ground that it deprives of property without due process of law, the term property including freedom in entering into and terminating contracts: *Gillespie* v. *People*, 58 N. E. 1007. Apparently, then, it is the unquestioned privilege of the individual to employ union or non-union men, but a municipality may not in its contracts intentionally discriminate between the two.

WILLS.

Execution, Separate Sheets

The Surrogate's Court of Montgomery County (N. Y.) holds in *In re Snell*, 67 N. Y. Supp. 581, that a will written on several sheets of paper, and signed by the testator at the physical end of the writing, is properly executed, though the sheets are not fastened together until after the execution, since the statute does not provide for the fastening together of the sheets composing a will. *Wikoff's Appeal*, 15 Pa. 281, is cited as in accord.