PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BALLOTS.

Against the dissent of three judges, the Supreme Court of Kansas lays down in *Parker* v. *Hughes*, 67 Pac. 637, a very important rule in regard to the marking of ballots. It is there held that when one's name appears upon a ballot more than once as a candidate for the same office, upon two or more tickets on the same ballot, and such name is marked with a cross-mark in the squares opposite the same two or more times, such double-marked ballot is not thereby made void, but must be counted, the excess of marks being mere surplusage.

Double Marking

BOUNDARIES.

The Supreme Court of Louisiana holds in *State* v. *Burton*, 31 Southern, 293, that the description of a boundary may be a matter of construction for the court, and therefore a question of law, but the ascertainment of it with a view to its location is a question of fact. So, too, what is "the middle" of a river is a question of law; but once defining that "the middle" of a river is the half-way point between its banks, or that the thread of the stream is its middle, it is a question of fact to determine whether an object in the river is on the one side or the other of the middle as thus defined. "The thread" of a stream, it is held, is the line midway between the banks at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream. See *State* v. *McAdams*, 31 Southern, 187.

Thread of River

BUSINESS COMPETITION.

In *West Virginia Transp. Co.* v. *Standard Oil Co.*, 40 S. E. 591, the Supreme Court of Appeals of West Virginia holds that one may, without liability, in furtherance of his own interest in the competition of business, establish any works competing with another, and may induce customers of that other to with-

Interfering with Business of Others

BUSINESS COMPETITION (Continued).

draw their patronage from him, in order to obtain business for himself, though it injure, and is intended to injure, that other person's business, if there is no contract between such person and his customers. The motive of the person so doing, though malicious, is not material, his acts being lawful. But if he induce such withdrawal of custom not in *bona fide* neighborly advice, nor in free right of competition to benefit his own business, but wantonly only to injure that other person, he is liable. And it is further held that what one may do thus, several, with the same justification, may combine to do.

CARRIERS.

Actual discrimination in rates charged is necessary to constitute a violation of the interstate commerce act; and the mere making or offering of a discriminating rate, under which it is not shown that any shipment was ever made, constitutes no legal injury to a shipper who is charged a higher rate: United States Circuit Court (E. D. Pennsylvania) in *Lehigh Valley R. Co.* v. *Rainey,* 112 Fed. 487.

Interstate Commerce Law

In *Scofield* v. *Pennsylvania Co.,* 112 Fed. 855, the U S. Circuit Court of Appeals (Sixth Circuit), holds that where a railroad company agrees to transport a passenger between specified points, with a right to stop off at an intermediate point, and the ticket coupon covering the distance between such points is taken up by the company's conductor before reaching the intermediate point, over the passenger's objection, the fact that the passenger was thus left without written evidence of his right to resume his journey from the place of stop-over gives the conductor of a later train no authority to eject the passenger. The policy of this ruling may well be questioned since it gives the conductor of the second train no evidence of the passenger's right thereon except the word of such passenger. A safer rule would seem to require the passenger to pay his fare when demanded by the second conductor, and then allow him to recover against the road for breach of contact: See *Frederick* v. *M. H. & O. R. Co.,* 37 Mich. 342.

Taking up Ticket

One phase of the interesting question of relation between common carriers and a terminal company appears in *Frazier* v. *New York, N. H. & H. R. Co.*, 62 N. E. 731. The Massachusetts law, Acts 1896, c. 516, § 1, declares that the Boston Terminal Company is created to maintain a station and to provide and operate adequate terminal facilities for several railroad companies, and for the accommodation of the public in connection therewith. Section 2 authorizes each of five railroads to subscribe to one-fifth of the terminal company's stock. Section 3 places the immediate government and direction of the affairs of the company in five trustees, one of whom may be appointed by each of the five railroads. Section 9 provides that on completion of the station all said railroads shall use the same, and that the company may contract with either of the railroads for the use of such separate portion as may be necessary for their respective use. Under these provisions the question arose when the relation of carrier and passenger ceased, and the Supreme Judicial Court of Massachusetts holds in the case above referred to that a railroad which uses the station only as required by the statute, and has not contracted for the use of any separate portion thereof, discharges its duty to a passenger, whom it has contracted to carry to Boston, when the passenger alights in safety on the platform of the station, and is not liable for injury received by him while going through the station.

Terminal Company

CORPORATIONS.

In *Reagan* v. *First National Bank of Chicago*, 62 N. E. 701, it is held by the Supreme Court of Indiana that where an insolvent corporation, which cannot mortgage its property without the consent of a majority of the holders of the preferred stock, in order to obtain such consent prefers such stockholders to unsecured creditors, the preference renders the mortgage not only invalid as to such stockholders, but invalid as a whole. In answer to the arguments of counsel seeking to uphold the mortgage, even though the preference should fall, the court says: "Counsel seemingly overlook the fact that the very thing which made it possible for the corporation to execute the mortgage at all was the illegal agreement between it, Gates and Harrison [two preferred stockholders] to the effect that their stock claims should be secured by the mortgage as a reward for

Preference Invalidity

CORPORATIONS (Continued)

their consent to its execution. That was the consideration of their consent, and the evil thereof under the stipulations and terms of the mortgage permeated the instrument as an entirety."

HOTEL KEEPER.

In *Carhart* v. *Wainman*, 40 S. E. 781, the petition alleged that the plaintiff was a guest at a hotel, and delivered a baggage check given him by a railway company, to the porter of the hotel, whose business it was to receive baggage and deliver it to the guests, and that thereafter the plaintiff made demand upon the proprietor for the baggage or the check, and the proprietor refused to deliver either. The defendant demurred. But the Supreme Court of Georgia holds that the petition set forth a cause of action against the proprietor of the hotel, and should not have been dismissed upon demurrer. The delivery of the check, it is said, was *prima facie* evidence of a delivery of the baggage: 4 Elliott, R. R. § 16,557.

Baggage of Guest

HUSBAND AND WIFE.

Where, in order to secure a loan and the acceptance of a mortgage on the joint property of a husband and wife as security therefor, they both state that the money is for their joint use and improvement of such property, the wife is estopped from claiming that the loan was for her husband, and she only a surety: *Lavene* v. *Jamecke*, 62 N. E. 510. The case is of peculiar interest to practitioners in those States where a wife is not allowed to become an accommodation endorser for her husband.

Wife as Surety

JURISDICTION.

The U. S. Circuit Court (E. D. Missouri) holds in *Greene County Bank* v. *Teasdale Commission Co.*, 112 Fed. 801, that in an action for the recovery of money only, the amount of damages claimed determinus the jurisdiction, unless the declaration on its face shows that such amount is claimed in bad faith, and merely to give a colorable jurisdiction. As to the jurisdiction of Circuit Courts with reference to the amount in controversy, see notes to *Aner* v. *Lombard*, 19 C. C. A. 75; *Shoe Co.* v. *Roper*, 36 C. C. A. 459.

Amount in Controversy

JURY TRIAL.

The Declaration of Rights of the Massachusetts Constitution provides that in all controversies concerning property, except in cases where the previous practice has been otherwise, the parties have a right to trial by jury. Construing this provision, the Supreme Judicial Court of that State holds in *Parker* v. *Simpson,* 62 N. E. 401, that it does not give the respondent in a bill in equity a jury trial as to issues of fact as a matter of right, but the granting thereof is within the discretion of the court. The court makes a most thorough discussion of the subject and gives an interesting review of the judicial history of the colonial and provincial periods. The court in concluding its opinion says: "The article as it now stands is a declaration of the common-law right to a trial by jury, and in no way is inconsistent with the establishment of a court of chancery having general jurisdiction, as it was at the time of the adoption of the constitution, and proceeding in accordance with its fundamental rules of practice as then existing. One of these rules was that trial by jury should be at the discretion of the court." The case finds its general interest in consequence of the presence of substantially similar constitutional provisions in the other States.

Discretion

LEASE.

The summary remedies to enable a landlord to obtain possession of leased property under certain conditions are so general as to make the decision of the Court of Appeals of New York in *Michaels* v. *Fishel,* 62 N. E. 425, of more than local interest. In that case the lease reserved to the lessors the right upon default "into and upon said premises to re-enter," and the same to have again as in their first and former estate, and the lessee covenanted to pay any deficiency arising on the reletting of the premises after such re-entry by the lessors as his agents. The court holds this language to cover only a re-entry in the technical sense as known to the common law by ejectment, and not to include a removal of the lessee by statutory summary proceedings. Two judges dissent on the ground that under this provision any legal remedy could be invoked by the landlord to "repossess and enjoy" their former estate. The majority proceed on the ground that the term was a purely technical one found in the midst of the quaint language of ancient leases, and that the presumption arises that the parties used it in its strict common-law meaning.

Construction, Re-entry

LIMITATIONS.

Actions for Fraud

The question of when the Statute of Limitations begins to run in actions which have originated in consequence of some fraud practiced by the defendant is constantly presenting itself in some new form. The Supreme Court of Nebraska, dealing with this point in *Forsyth* v. *Easterday,* 89 N. W. 407, holds that the recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which if pursued would lead to a discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise: Compare *Wright* v. *Davis,* 28 Nebr. 479.

MARRIAGE.

Validity of Marriage Promise

In *Davis* v. *Pryor,* 112 Fed. 274, the facts showed that the defendant was living with a certain woman under circumstances which, the court decided, constituted a common-law marriage. The defendant assured that he was not married to this woman and promised plaintiff to marry her. Upon this promise the action was subsequently brought, and the U. S. Circuit Court of Appeals (Eighth Circuit) holds "that where a woman has knowledge that the man has for many years lived and cohabited with another woman in the relation of husband and wife, she is chargeable with notice that he is married, and cannot maintain an action for breach of the contract on the ground that he represented himself to be unmarried.

NEGLIGENCE.

Walls of a Burned Building

The Supreme Judicial Court of Massachusetts holds in *Ainsworth* v. *Lakin,* 62 N. E. 746, that where walls of a building remain standing after its destruction by fire, but cannot be utilized in rebuilding, the owner is not liable for an injury caused by the fall thereof until he has had a reasonable time in which to make investigation and take precautions to prevent the wall from falling; but after the expiration of such time he is liable, if he allows the walls to remain standing, for the failure to use care sufficient to prevent absolutely injury from the wall, except such as may result from *vis major,* acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably foresee.

PARTNERSHIP.

Dissolution Assumption of Debts

In *Norman* v. *Jackson Fertilizer Co.*, 31 Southern, 419, it appeared that two of four members of a partnership sold out to the other two, who assumed all the debts of the firm. The holder of a note of the first firm, who knew of the sale and dissolution of that firm, but did not know or assent to the terms agreed with the new firm to extend the note for another season on condition of their buying the kind of goods he furnished exclusively of him. The Supreme Court of Mississippi holds that this did not release the selling partners, nor were they released by the failure of the holder of the note to sue until the new firm became bankrupt: See *Rawson* v. *Taylor*, 30 Ohio St. 389.

RAILROADS.

Effect of Sale under Foreclosure

In *Central Trust Co. of New York* v. *Western North Carolina R. Co.*, 112 Fed. 475, the U. S. Circuit Court (W. D. North Carolina) holds that on a sale under a decree of foreclosure of all the property and franchises of a railroad company, mortgaged by it as permitted by its charter, and the conveyance of such property and franchises to the purchaser, as directed by the court, the company is devested of all its right, title and interest therein, and has only remaining its franchise to exist, as a corporation; and it cannot, by any act or negligence of its own, thereafter subject the property so sold or the franchise of the corporation to exercise the rights, powers and privileges of a railroad company in connection therewith, to liability: Compare *Railroad Co.* v. *Delamore*, 114 U. S. 501.

REPLEVIN.

Affidavit of Defence in Pennsylvania

The practice in Pennsylvania under the Laws of Pennsylvania, 1901, page 88, requires an affidavit of defence from the defendant in the action of replevin. In *Uncapher* v. *B. & O. R. Co.*, 112 Fed. 899, the affidavit filed in compliance with the act stated that the defendant had no knowledge as to who was the owner of the goods, and that it was in actual possession as a carrier for hire, and received such possession not from the plaintiff, but from another. The U. S. Circuit Court (E. D. Pennsylvania) holds that such affidavit is sufficient to put the plaintiff to proof of his title.