PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACKNOWLEDGMENT.

The Supreme Court of Nebraska holds in *Gilber* v. *Garber*, 95 N. W. 1030, that the fact that an acknowledgment of a mortgage upon a family homestead was taken by an officer and stockholder in a loan company which was agent for the lender does not invalidate the acknowledgment.

Validity

CANCELLATION OF INSTRUMENTS.

On the death of a mortgagor, the complainant, the mortgagee, secured a release of the widow's right of dower in the premises, and also a deed from the mortgagor's father, under the belief that the property descended to the latter and cancelled the mortgage. No consideration was paid for such cancellation. In *Swedesboro Loan & Building Ass'n* v. *Gans*, 55 Atlantic, 82, the Court of Chancery of New Jersey holds that as against the heirs of the mortgagor, complainant was entitled to a decree for the re-establishment and foreclosure of the mortgage.

Mistake of Law

CARRIERS.

The Court of Civil Appeals of Texas holds in *Missouri, K. & T. Ry. Co. of Texas* v. *Meek*, 75 S. W. 317, that a carrier's liability as bailee for the storage of unclaimed baggage extends only to such articles as come within the definition of baggage, and does not include articles improperly checked as baggage. See *Railroad* v. *Morrison*, 34 Kansas, 505.

Liability as Bailee

It is a somewhat difficult question to decide to what extent the fact that a person who enters a train intends to do an illegal act at the end of the journey justifies the employees of the railroad in refusing to carry him. From the decision of the court in *Ford* v. *East Louisiana R. Co.*, 34 Southern, 585, it appears that the fact that one *has done* an illegal act prior to his asking for

Expulsion of Passenger

CARRIERS (Continued).

transportation will not justify his being refused, even though such illegal act has reference to the carrier. Thus the court holds that a person who "scalps" railway tickets otherwise than on the train cannot be denied transportation over the lines of the railroads in whose tickets he traffics. He is a part of the general public, and railway companies, as common carriers, must, ordinarily, permit all who pay the regular fare to travel on their trains. Undoubtedly the court would reach a different conclusion where a person would seek such transportation as a fugitive from justice.

Purchase of Ticket

Against the dissent of three judges, the Court of Appeals of New York holds in *Monnier* v. *New York Cent. & H. R. R. Co.*, 67 N. E. 569, that the refusal of a passenger, who was unable to buy a ticket because of the absence of a ticket agent, to pay the additional fare required of passengers without tickets by a rule of the company does not justify a forcible resistance by the passenger to his ejection for this cause by the conductor, so that neither the company nor the conductor is liable in damages for an assault on the passenger under such circumstances. See *Bradshaw* v. *Railroad*, 135 Mass. 407.

Bill of Lading

The Court of Appeals of New York holds in *Mairs* v. *Baltimore & Ohio R. Co.*, 67 N. E. 901, that where a common carrier delivered goods without requiring surrender of a bill of lading which was not indorsed "non-negotiable," as required by law, it did not authorize a subsequent bona fide transferee of the bill, which had been fraudulently altered so as to make it negotiable, to sue a carrier to recover damages for its neglect, as the forgery was not the proximate result of such neglect.

CIVIL DAMAGE ACT.

Intoxicating Liquors

It is no defence to a suit for damages growing out of the traffic in intoxicating liquors to show that others furnished liquors that contributed to the injury, as any one who sold or furnished liquors at the time of the intoxication is liable for any and all damages sustained. As the court says with regard to the liquor furnished, "it is wholly immaterial whether it be the first or last drink": Supreme Court of Nebraska in *Johnson* v. *Carlson*, 95 N. W. 788. Compare *Kercow* v. *Bauer*, 15 Neb. 150.

CONFLICT OF LAWS.

Wills: Power of Appointment

The Supreme Court of Delaware holds in *Lane* v. *Lane*, 55 Atlantic, 184, that the law of the domicile of the testator governs, as against the law of the domicile of the person to whom he gives by will a power of appointment, in determining whether the donee's will is an execution of the power. Applying this principle, the court holds that a will of a testator domiciled in Pennsylvania, disposing of all his "estate, real and personal, of whatever kind and wheresoever situate," is not an execution of the power contained in a will made by a testator domiciled in Delaware, authorizing the former testator to dispose of by will the principal, the income of which was given to him for life, though under the law of Pennsylvania it would be a valid execution. See *Andrews* v. *Emmot*, 2 Bro. Ch. 297.

CONNECTING CARRIERS.

Sealed Cars

In *Beede* v. *Wisconsin Cent. Ry. Co.*, 95 N. W. 454, the Supreme Court of Minnesota holds that where goods have been transported by several connecting carriers, and they are shown to have been in good condition when delivered to the first carrier, but damaged when delivered to the last carrier, the burden is on it to show that the loss did not result from any cause for which it was responsible, even though the goods were transported in through sealed cars. Compare *Schriver* v. *Railway Co.*, 24 Minn. 506.

CONSTITUTIONAL LAW.

Interstate Commerce

In re Pringle, 72 Pac. 864, the Supreme Court of Kansas holds that a person who takes orders from samples for goods which he engages to deliver, and which are to be shipped into the state from another state, is not engaged in interstate commerce, when such orders are not transmitted to such other state, or filled there, but are filled from goods, not in the original package of importation, sent to him in bulk, C. O. D., from such other state; and therefore a license tax may be imposed upon a man so engaged. Compare with this case *Emert* v. *Missouri*, 156 U. S. 296.

CONSTITUTIONAL LAW (Continued).

A recent law of North Dakota substituted the penitentiary for the county jail as the place of confinement pend-
Ex Post Facto Law
ing execution, and directed that executions should thereafter take place within the penitentiary walls. The Supreme Court of that state holds in *State* v. *Rooney*, 95 N. W. 513, that this does not operate to increase the punishment of one convicted of murder in the first degree, with the death penalty affixed; nor is it a change of the punishment to the disadvantage of the prisoner, and therefore it is not an ex post facto law.

CORPORATIONS.

With two judges dissenting, the Court of Appeals of Kentucky holds in *Dietrich* v. *Rothenberger*, 75 S. W. 271,
Liability of Directors
that if the directors of a corporation engage in a business not within its corporate powers, and, in so doing, waste or lose the corporate assets, they are personally liable.

COURTS.

In *Ex parte Conley*, 75 S. W. 301, the Court of Criminal Appeals of Texas holds that the force of a decision of an
Decision as Authority
intermediate appellate court as an authority is destroyed by a holding of the Supreme Court that the questions passed upon were not involved in the case. One judge dissents, relying on the case of *Norman* v. *Thompson*, 72 S. W. (Texas), 64.

DEEDS.

The Supreme Court of Indiana deals in *St. Clair* v. *Marquell*, 67 N. E. 693, with the perplexed question of what
Delivery
is sufficient to constitute a delivery of a deed and holds that where the owner of land executed a deed thereof, and placed it in an envelope and gave it to a third person, telling him to deliver it after the grantor's death to grantee, though the one to whom the deed was delivered was not told its nature, the delivery was binding and a return of the envelope and contents subsequently to the grantor did not affect the title conveyed.

DIVORCE.

The question of what constitutes cruelty sufficient to entitle one to a divorce seems to recur continually. In *Ring* v. *Ring*, 44 S. E. 861, the Supreme Court of Georgia holds that it is the willful infliction of pain bodily or mental such as reasonably justifies apprehension of danger to life, limb or health. It is therefore held in the particular case that the habitual and intemperate use of morphine, unaccompanied by any conduct coming within the above definition, is not such cruel treatment as the law recognizes as ground for a divorce. The intention to wound, it is stated, is a necessary element of the cruel treatment for which a divorce is allowed.

Cruelty

The Supreme Court of Nebraska holds in *Dakin* v. *Dakin*, 95 N. W. 781, that a husband who requires his wife to live with him in the home of his mother, who treats the wife with extreme cruelty, cannot defend an action for divorce brought by the wife on the ground that he himself was not guilty of the acts of cruelty complained of. By allowing third parties to abuse and mistreat his wife, and refusing to provide her with another home, he becomes legally answerable for the cruel treatment. See *Day* v. *Day*, 50 N. W. 979.

Cruelty

FRAUDULENT CONVEYANCES.

The Supreme Court of New Hampshire holds in *Bartlett* v. *Gilcreast*, 55 Atlantic, 189, that the owner of an undivided half interest in realty, who receives a conveyance of the other half, which is fraudulent toward creditors, and who then mortgages the premises, cannot complain of a ruling holding the mortgage a lien only on her original interest.

Mortgage by Grantee

GUARDIAN AND WARD.

In *Dudley* v. *Rice*, 95 N. W. 936, the Supreme Court of Wisconsin holds that where the bond of the guardian of a lunatic was conditioned to pay over the amount found due on the settlement either with the county court or with the lunatic, if of sound mind, it was enforceable as a voluntary obligation, though

Guardian's Bond

GUARDIAN AND WARD (Continued).

the court had no jurisdiction of the guardianship proceedings, so that it was invalid as a statutory bond. Compare with this case, which presents a good discussion of the point involved, *Conant* v. *Newton*, 126 Mass. 110.

Religious Education of Ward

Where a father and mother were Roman Catholics, their child, when committed to the care of a guardian, must be brought up as a Roman Catholic: *In re Jacquet*, 82 New York Supplement, 986.

HOMICIDE.

Justification

A husband has the legal right to the company and custody of his wife and child, and the wife's father has no authority to keep her from him; and if it is necessary for the husband to kill the wife's father to prevent the latter's killing him or taking his wife and child away from him, and thus endangering him in life or serious injury, he would be justified: Court of Criminal Appeals of Texas in *Cole* v. *State*, 75 S. W. 527.

HUSBAND AND WIFE.

Witnesses

In a prosecution for homicide, the Court of Criminal Appeals of Texas holds in *Moore* v. *State*, 75 S. W. 497, that it was competent for the state to ask defendant as a witness whether he had married the prosecuting witness on the day before the trial, for the purpose of showing that the defendant married her for the purpose of suppressing her testimony.

Mortgages

With two judges dissenting, the Appellate Court of Indiana holds in *Field* v. *Campbell*, 67 N. E. 1040, that where a husband and wife execute a mortgage including her separate estate to indemnify his sureties, and she subsequently obtains a loan on other separate property to relieve her land from the mortgage, which, by her election not to defend against it, has become a valid lien, she cannot defeat the subsequent mortgage on the ground that it was executed to secure her husband's debts, as the consideration of the mortgage was the release of a subsisting lien, which was a valid consideration. Compare with this case *Field* v. *Noblett*, 154 Ind. 360.

HUSBAND AND WIFE (Continued).

Witnesses: Competency

The Supreme Court of Wisconsin holds in *State* v. *West*, 95 N. W. 521, that the rule that neither husband nor wife can testify for or against the other (the common law rule being still in force on this point in Wisconsin) is confined to cases where the testimony, if given, would be by one directly for or against the other in a suit to which such other is a party, and hence does not render a husband incompetent to testify as to the fact of marriage and incriminating circumstances in a criminal prosecution of another.

Alienation of Husband's Affections

In two recent cases it is held that at the common law the wife had no property right in the performance of the marital duties on the part of her husband, and therefore no right to sue for the alienation of his affections. The first of these is *Lonstorf* v. *Lonstorf*, 95 N. W. (Wis.) 961, where it is held that this has not been changed by any of the married women's statutes. From this decision two judges dissent. The second case is *Hodge* v. *Wetzler*, 55 Atlantic (N. J.), 49, where the same result is reached by the Supreme Court of New Jersey in a unanimous decision.

INJUNCTION.

Prize-fighting

In Kentucky the law makes it the duty of all judges of courts on being informed that a prize-fight is about to take place to suppress and prevent the same, and in doing so, to exercise all the powers vested in them for the prevention of crimes. Construing this statute the Court of Appeals of Kentucky holds in *Commonwealth* v. *McGovern*, 75 S. W. 261, that this act authorizes a Court of Equity in a suit by the commonwealth to enjoin one from permitting the holding of a prize-fight on his premises, on the ground that such a use of his property will constitute a public nuisance, though it cannot grant an injunction against the principals in the contemplated prize-fight, nor those connected with them as managers, trainers, etc., since the process of the criminal courts is regarded as adequate to prevent the fight by the arrest and prosecution of the parties concerned. The case is interesting on account of the broad principle underlying it. Three judges dissent.

INJUNCTION (Continued).

The Supreme Court of Nebraska holds in *Braasch* v. *Cemetery Ass'n of the Evangelical Lutheran Christ. Soc.*, 95 N. W. 646, that a burial ground near dwellings is not necessarily a nuisance, and the court will only interfere and enjoin its use on clear and convincing proof of probable injury; for instance, that it was so situated that the burial of the dead there will injure life or health either by corrupting the surrounding atmosphere or the water of wells or springs.

Burial Grounds

INSURANCE.

The Supreme Court of Wisconsin holds in *Opitz* v. *Karel*, 95 N. W. 948, that a woman has an insurable interest in the life of the man whom she has contracted to marry. This is on the ground that the one party "has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other or to fear a loss from his death."

Insurable Interest

LANDLORD AND TENANT.

The relation of lessor and lessee arises out of contract, and, where there is neither express warranty nor deceit, the latter cannot maintain an action against the former on account of the condition of the premises hired: Supreme Court of Ohio in *Shinkle, Wilson & Kreis Co.* v. *Birney & Seymour*, 67 N. E. 715. Compare *Gott* v. *Gandy*, 2 E. & B. 845.

Condition of Premises

LIBEL.

The Supreme Court of California holds in *People* v. *Seeley*, 72 Pac. 834, that in a prosecution for libel it was not error to charge that the constitutional provision that the jury have a right to determine the law and fact did not place them above the law, or confer on them the lawful right to decide as they saw fit, regardless of the law; that if they could say on their oaths that they knew the law better than the court, they had the right to do so, but before assuming such responsibility they should be sure they were not acting from caprice or

Function of Jury

LIBEL (Continued).

prejudice, and that they were not controlled by their wills, but from a deep and confident conviction that the court was wrong and they were right.

LICENSES.

In *Dodge* v. *Johnson*, 67 N. E. 560, plaintiff and defendant were adjoining land owners and had entered into and executed an oral agreement whereby the former purchased a six-inch strip of land from the latter, and bore one-half the expense of constructing a party wall and stairway to buildings constructed by each of them, and the latter permitted the stairway to be constructed wholly on his premises, providing an entrance to the upper floors of plaintiff's building; and, in reliance on defendant's agreement, plaintiff provided no other means of ingress or egress. The defendant subsequently blocked up this entrance, against plaintiff's protest, and thus compelled an abandonment of the upper stories of the plaintiff's building. On these facts the Appellate Court of Indiana holds that the plaintiff, having acted on the license to make use of defendant's premises for the purpose of access to his building, it was irrevocable, and defendant was estopped to question its continued use and was liable in damages for the obstruction thereof. Compare with this case *Brauns* v. *Glesige*, 130 Ind. 167.

Executed License: Revocation

MUNICIPAL CORPORATIONS.

The Supreme Court of California holds in *Dobbins* v. *City of Los Angeles*, 72 Pac. 970, that an ordinance making it unlawful to erect or maintain any works for the manufacture of gas, or any tank or other receptacle for the storage of gas, within certain limits, is a legitimate exercise of the police power of the city, and the fact that prior to the adoption of such ordinance A had commenced to erect works under a permit of the Board of Fire Commissioners of the city, did not constitute an express contract by the city to allow him to erect and maintain the works: that in fact the city could not thus estop itself from making and enforcing proper police regulations. Three judges dissent. See and compare *Hyde Park* v. *The Fertilizing Co.*, 97 U. S. 659.

Prohibiting Gasworks

NEGLIGENCE.

The Court of Errors and Appeals of New Jersey holds in *Miller* v. *Central R. Co. of New Jersey*, 55 Atlantic, 245, that a flagman of one train and the engineer of the same company are engaged in a common employment, and are fellow servants within the rule exempting the master from liability. The same court holds in *Campbell* v. *T. A. Gillespie Co.*, 55 Atlantic, 276, that where the negligence of the master concurs with that of the servant in producing injury to a fellow servant, the master is liable; and therefore the burden is on the master, where such negligence is alleged to have arisen from the furnishing of improper tools, to show that he had furnished the proper tools, which the servant might have used. Compare *Paulmier* v. *Railway Co.*, 34 N. J. Law, 151.

Fellow Servants

PARENT AND CHILD.

In *Wisner* v. *Osborne*, 55 Atlantic, 51, it appeared that an insolvent debtor permitted his infant son who lived with him to contract for wages to be paid to the son. These wages were invested in the stock of a corporation and an attempt was made by the creditors of the father to subject this stock to their claims. The Court of Chancery of New Jersey refuses to permit this, holding that whether solvent or insolvent the father may permit his minor child to receive his own earnings for his own use. Compare with this case *Costello* v. *Prospect Brewing Co.*, 52 N. J. Eq. 557.

Creditors of Father

PHYSICIANS.

In *Grattop* v. *Rowheder*, 95 N. W. 679, the Supreme Court of Nebraska holds that one who calls a physician for a member of his family, though not a relative, is liable for the physician's services, rendered without notice that the party who calls him does not intend to make himself liable for such services. As to what constitutes a member of the family, it is held that a woman about seventy years of age, who lives in a family for nine years, performing such services as she is

Liability for Services

PHYSICIANS (Continued).

able, for which she receives the necessaries of life, is a member of the family within the meaning of the foregoing rule.

RES JUDICATA.

Foreign Decree

By divorce granted in New Mexico, the custody of a child was given to the father, with permission for it to visit the mother for a month each year, the visits to be made within New Mexico, and the mother not to remove the child therefrom: the court having jurisdiction of the parties, including the child. The mother took the child to Texas, and plaintiff, the father, brought habeas corpus to obtain its custody. The Court of Civil Appeals of Texas holds in *Wilson* v. *Elliott*, 75 S. W. 368, that the decree determined all facts existing prior to its date in favor of the plaintiff's right to its custody, and only such facts could be considered to disturb that adjudicated right which might have come into existence since that time, such as evidence of changed conditions of the parties bearing on their fitness and the best interests of the child.

STREET RAILROADS.

Additional Servitude

The laws of Massachusetts forbid the granting of any location for the track of any street railway in certain localities, except in ways in which special space shall have been reserved prior to the location of the track, and except within the limits of such reserved space, and authorizing the selectmen of the town to lay out such space. In *Eustis* v. *Milton St. Ry. Co.*, 67 N. E. 663, the Supreme Judicial Court of Massachusetts holds that the act is not unconstitutional on the ground that it authorizes the imposition of an additional servitude without compensation. The court lays down the principle that "in determining whether an additional servitude is imposed by the authorization of a new kind of use, the question is not whether the legislature or the public authorities foresaw and contemplated the particular use in question, but whether it is fairly included in the purposes for which the property was taken by the public." Compare *Attorney-General* v. *Metropolitan Railroad*, 125 Mass. 515.

TAXATION.

United States Bonds

The conflict of state taxation with the operations of the central government presents one of its phases *In re People's Bank of Vermont, Ill.*, 67 N. E. 777, where the Supreme Court of Illinois holds that where the facts tend to show that a purchase of United States bonds by a bank was for the purpose of evading taxation—the bonds being purchased immediately before and sold immediately after the date as of which its property was listed for taxation, and never being taken into its possession, but left on special deposit in a distant bank—the transaction may be regarded as fraudulent, and the bank be assessed with the amount of money invested in such bonds. See *Shotwell* v. *Moore*, 129 U. S. 590.

TESTAMENTARY TRUST.

Carrying on Business

In *Wirth* v. *Wirth*, 67 N. E. 657, the Supreme Judicial Court of Massachusetts holds that legatees of a testator, one of whom is a minor daughter, are not entitled to determine a testamentary trust, whereby the personal representative is authorized to carry on testator's liquor business for their benefit, and to compel a conveyance to them of the property in specie, so that they may carry on the business for themselves, as neither the daughter nor her guardian could engage in such business. Compare with this case *Clark* v. *Garfield*, 8 Allen, 407.

WATER COURSES.

Obstruction

The Supreme Court of Kansas holds in *Singleton* v. *Atchison, T. & S. F. Ry. Co.*, 72 Pac. 786, that a channel or other depression in the ground, forming the bank of a river, through which water escapes and flows from the river only at times of high water in the river, does not constitute a natural water course, and obstructing the flow of water therein from the river, to the injury of another, is damnum absque injuria. Compare with this case *C., K. & N. Ry. Co.* v. *Steck*, 51 Kans. 737.