NOTES AND COMMENTS ON RECENT DECISIONS.

INJUNCTIONS TO RESTRAIN STRIKES AGAIN.

In the January number, page 81, we took occasion to criticise the action of the Circuit Court for the Eastern District of Wisconsin, Judge Jenkins, for issuing an order which prohibited the employés of a road in the hands of a receiver from going on a strike. Not having an exact copy of the injunction before us, we were obliged to rely on other information as to the nature of the injunction. As part of this information necessarily came through the newspapers, we designated the source of information, generally, as newspaper reports. Some of our subscribers, who evidently do not agree with us in our strictures on the injunction, have criticised us for relying on such meagre authority. We beg to state, however, that we took every means in our power to verify the correctness of our statement as to the nature of the injunction. We said that its practical effect was to order men to continue to work. To show that this was no exaggeration, and also on account of the great importance of the injunction, we here print one of them in full:

"Whereas, it has been represented to the United States Circuit Court for the Eastern District of Wisconsin, on the part of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, as by their certain verified petition filed in said cause on December 18, 1893, and by their supplemental petition filed in said cause on December 22, 1893, and that said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, ought to be relieved touching the matters in said petitions more particularly described;

"And whereas, the United States Circuit Court for the Eastern District of Wisconsin, in a certain cause there pending, in which the Farmers' Loan & Trust Company is

the complainant, and the Northern Pacific Railroad Company, Philip B. Winston, William C. Sheldon, George R. Sheldon, William S. P. Prentice and William C. Sheldon and Thomas F. Oakes and Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, are defendants, did make orders directing that the writ of injunction issue as prayed for in said petition and supplemental petition of said receivers;

"Now, therefore, in consideration thereof, and of the matters in said petition set forth, you, the above named and the officers, agents and employés of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employés of said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations and combinations, voluntary or otherwise, whether employés of said receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby strictly charged and commanded that you, and each and every of you, do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use any engines, cars or other property of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars or property of the said receivers or in their custody, and from interfering in any manner, by force, threats or otherwise, with men who desire to continue in the service of the said receivers, and from interfering in any manner, by force, threats or otherwise, with men employed by the said receivers to take the place of those who quit the service of said receivers, or from interfering with or obstructing in any wise the operation of the railroad or any portion thereof, or the running of engines and trains thereon and thereover, as usual, and from any interference with the telegraph lines of said receivers or along the lines of railways

operated by said receivers, or the operation thereof, *and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quiting the service of the said receivers, with or without notice, as to cripple the property or to prevent or hinder the operation of said railroad,* and generally from interfering with the officers and agents of said receivers or their employés, in any manner, by actual violence or by intimidation, threats or otherwise, in the full and complete possession and management of the said railroad, and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said receivers, whether belonging to the receivers or shippers, or other owners, and from interfering, intimidating, or otherwise injuring or inconveniencing or delaying, the passengers being transported, or about to be transported, over the railway of said receivers, or any portion thereof by said receivers, or by interfering in any manner, by actual violence or threats, or otherwise preventing or attempting to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by said receivers, *and from combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time, and from ordering, recommending advising or approving, by communication, or instruction, or otherwise, the employés of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending or advising any committee or committees, or class or classes of employés of said receivers, to strike or join in a strike, on January 1, 1894, or at any other time until the further order of this Court.*"

(Signed) EDWARD KURTZ, *Clerk.*

If the words printed in italics in the above injunction do not prevent the employés from leaving the employ of the receiver, and practically, in effect, to keep them at work under the present wages and conditions, we are unable to read the English language.

We have said all that we care to say on this subject from a legal point of view in the January number above referred to. We hope, however, to be able, in the March number of the Magazine, to print a defence of the action of the Court by an eminent lawyer, whose belief that the injunction is sound is as strong as ours is that it is not. W. D. L.

EXECUTOR'S POWERS TO TRANSFER SHARES.

The decision in Livezey *v.* The Northern Pacific Railroad, 33 W.N.C. 126 (Pa.), deserves notice. It opens a running sore that we all thought had been healed.

It rules that an executor cannot transfer personal property of the testator after six years from the death without a decree. It evidently assumes that if the will creates a trust the executor is not only converted into a trustee, not merely as between himself and the *cestui que trust*, which is true after administration is completed, though not till then (6 Madd. 13), or when he assents to the legacy (42 Ch. Div. 302), but also that a trust arises without any act to ascertain that the duties of administration are completed, and the title to the property as trustee is ascertained, which it is submitted, is a very serious mistake. Evidently, no distinction between these very different things is noticed in the case.

The point deserving of notice *on this point of law* is the tendency to ignore well settled rules and avoid decisions without even a remark so that the profession is left in doubt whether the rules and decisions were unknown or are intentionally overruled.

In 1796, the very case, *identical* in every material fact, was before Lord Eldon, in Hartga *v.* The Bank of England,

3 Ves. 33, the material fact being far stronger, however, in favor of the present contention.

In the judgment under consideration, it is said after six years there could be no occasion for a transfer by the executor. In that case the testatrix died in 1778, and the question was whether the bank could, in 1793, fifteen years afterwards, demand evidence of the right of an executor to transfer, or be called to account for having allowed a transfer, the stock being specifically devised in trust and there being in fact no dispute about the trust.

All the arguments presented in Livezey *v.* The Railroad were there presented and a good many more. The decision was that the bank had no business to inquire why an executor transferred stock. That the fact that it was given in trust had nothing whatever to do with the question. The judgment well deserves reading. It has never been questioned by any one, who was aware of its existence, and it never could be questioned by any one who understands what an executor is, as to the outside world. The reasons are unanswerable and the rule has remained to this day.

But it may be said, all this amounts to nothing, for there is no reason why we should not have the right to make new law for ourselves. But (1) it is not pretended and it could not be that there has been any legislation. (2) It is not pretended that there has been any judicial recognition of any change in the law or any divergence between the system of our ancestors and ours. On the contrary, in the very judgment from which there is a long quotation, the purpose of which it is difficult, if not impossible, to see there is a most emphatic endorsement of the law as laid down in Hartga *v.* The Bank, and a flat contradiction of the law as now stated. Whether the case was unknown or unread may be debated. But one would think that such a passage as this would induce inquiry in one citing an authority for the point, that a transfer clerk is liable for permitting a transfer of shares by an executor, on reading, that it is *undoubted law that he is not.* The material passage which is *not* quoted is this:

"The law casts the legal ownership of personal property of

"a deceased intestate upon his administrators. They are "sometimes said to be trustees, but they are such for adminis- "tration. Their primary duty always is to dispose of the "personal property, and therewith pay the debts of the intestate "and make distribution amongst his text of kin. A sale and "transfer of stocks by them is therefore in the line of their "duty. Their is no *cestui que trust* having a right to interfere "and prevent such a transfer. Hence, letters of administra- "tion are always sufficient evidence of authority . . . and so, "generally does an executor. His primary duty is adminis- "tration. He is to pay debts and legacies out of the personal "estate, and use even specific legacies to pay debts if "necessary. His letters testamentary, therefore, show an "apparent right to dispose of the stocks of the testator; even "if the stock has been bequeathed specifically, a transfer agent "has no means of ascertaining whether it is needed to pay "debts. He can inquire only of the executor, the very person "who proposes to make the transfer. If he inquire of the "specific legatee he can learn nothing, for the legatee may be "ignorant, and to require evidence of authority beyond the "letters testamentary might greatly delay and embarass the "executor in the discharge of his duties. It has, therefore, "generally been held that transfer agents may safely permit a "transfer of stock by an executor without looking for his "authority beyond his letters. Such was the ruling in Hartga "*v.* The Bank of England, 3 Ves. 55; Bank of England "*v.* Parsons, 5 id. 665; Same *v.* Same, 15 id. 569; Franklin *v.* "The Bank, 9 B. & C. 156; Fowler *v.* Churchill, and "Churchill *v.* The Bank, 11 M. & W. 323; and Bank *v.* "Franklin, 1 Russell Ch. 575." Similar decisions have been made in this country, *and so far the law is undoubted.*

The apparent forgetfulness of the Act of 1874, intended to protect transfer agents, induced an examination of the paper book. And who would suspect from the judgment that the Court was not dealing with a case with which the law of Pennsylvania had nothing to do. And this explains the palpable contradiction between this case and that of Fezmeyer *v.* Shannon.

The citation of Chew *v.* The Bank, is an odd one and induces the suspicion it was at second hand. No point was there raised as to the power of an executor to transfer, and it is for this it is cited. It was, did the consent of one known to be an idiot, and so found, warrant a transfer of his (the idiot's property) by an executor to himself?

But the purpose of this paper is simply to show that a considerable decision has been so cited as to make it appear to be the exact reverse of what it was, and that this has opened the flood gates of litigation about a question so simple as the right of executors and administrators to transfer stock, and of the duty of transfer clerks to sit as Chancellors, but always *ex parte*, and at the risk of their employers on that question.

R. C. McM.

SOME EQUITY CASES.

There have been some recent decisions in the department of equity which possess more than a passing interest, though it would be entirely too much to say that they are in any way remarkable. The peculiar characteristic of equity jurisprudence, it must be remembered, is its creative faculty and, as has been well said by an eminent jurist, "if we want to know what the rules of equity are we must look, of course, rather to the more modern than to the more ancient cases." And the equity lawyer must, therefore, not only read the current decisions in his branch of jurisprudence, but should also examine them closely, for its progressiveness is generally written in minute characters which are undecipherable, if once the sequence is broken.

It is proposed, therefore, to illustrate the different principles of equity by the citation of selected cases with a short discussion whenever a particular case seems to require more than ordinary attention.

Resulting Trusts.

Where one agrees to buy and hold certain real estate for the joint benefit of himself and another, and does in fact purchase it, a resulting trust arises which is not within the

statute of frauds; and which may be established by the evidence of the *cestui que trust* and by the admission of the trustee that he originally intended to buy for their joint benefit. And, in this case, the effect of this admission was not affected by the fact that it included a statement by the purchaser that he changed his mind before he bought the property, inasmuch as it appeared that he did not notify the *cestui que trust* of his changed intention: Towle *v.* Wadsworth (Ill. Sup. Ct.), 35 N. E. Rep. 73.

This decision was on a rehearing of the case and overrules the decision of MAGRUDER, C. J., reported in 30 N. E. Rep. 602. The latter decision was based upon the Court's view that the evidence to establish the alleged loan was not full and satisfactory enough, a view which BAILEY, C. J., on the rehearing considered erroneous. The principle, however, is a familiar one: See Kimmel *v.* Smith, 117 Pa. 192 (1887), and Hackney *v.* Butt, 41 Ark. 393.

Trustees.

The obligation of each co-trustee to see that the duty of their office is properly discharged is well shown in the case of Purdy *v.* Lynch, 25 N. Y. Sup. 585. Certain land was conveyed in trust to three trustees to sell for the payment of debts and to reconvey the surplus to the grantor. Two of the trustees practically turned over the proceeds of the sale to their associate to pay off the debts, and he misapplied the funds. The Court held that the others were liable for a breach of duty for failing to attend to it, that he applied the money as provided for in the trust agreement.

Jurisdiction.

The case of Enslin et al. *v.* Wheeler (Sup. Ct., Ala.), 13 So. Rep. 473, illustrates the scope of the general jurisdiction of equity jurisprudence. From the facts it appeared that a judgment had been rendered against a decedent in his lifetime, which, by the provisions of the code, became a lien upon his estate for a certain period after his death. But, through delay in issuing execution, the creditor found himself without any

statutory remedy for the enforcement of his lien. Upon application to a court of equity, however, the required relief was granted. After stating that there was no original jurisdiction in courts of law to enforce liens, the Court proceeded, "in the absence of statutory provisions conferring the remedy upon a court of law to enforce a lien created by the statute—and no other mode is provided by statute—a court of equity by virtue of its general jurisdiction over liens and trusts will take jurisdiction and enforce the lien."

Injunctions.

The power of a court of equity to enjoin the breach of negative covenants where *expressed* in a contract has been unquestioned since the decision in Lumley *v.* Wagner. But cases are continually arising where the contracts call for personal services and there is no covenant *not* to perform them for others, and the courts have enforced such contracts by injunction, on the ground that the services are special and unique. It is probable that the current of decision in this country will ultimately set that way. In a recent case in Georgia it appeared that an insurance agent had assigned to a firm his interest in a contract of agency, and had covenanted to remain with the firm as special agent, in a named State, for one year, and to give his entire time and attention to soliciting business for that company. He began soliciting business for a rival company and his covenantee endeavored to enjoin him from so doing. The Court was of opinion, however, that it could not grant the relief prayed for, since there was no express negative covenant in the assignment, and it did not appear that the defendant was an *especially skillful, successful or expert agent,* whose place could not be readily and adequately supplied by another: Burney *v.* Ryle, 17 S. E. Rep. 986.

See, on this point, Metropolitan Exhibition Co. *v.* Ward, 24 Abb. N. C. 393.

R. P. BRADFORD.

SOME CASES ON TORTS.

Two cases recently decided in the Supreme Court of

Pennsylvania will serve to show the limits there set to the master's duty to instruct his servants in the management of novel machinery and implements, and to inform them of a danger necessarily connected therewith, which is unknown to such servants.

In Lebbening *v.* Struthers, Wills & Co., 157 Pa. 312: The company was held responsible for an injury to one servant, resulting from the unskilfulness and neglect of a fellow servant, who was engaged with him in the management of a piece of machinery, whose nature and character had not been sufficiently pointed out to them by the foreman in control of their work. Both workmen were unacquainted with the manner of working the machine. It was there stated to be the positive duty of the master, before putting an inexperienced employé in charge of dangerous machinery, with the use of which he is unacquainted, to properly instruct and qualify him for such new service. If he does not do so himself he must remain responsible for the manner in which the person, to whom he has delegated the work of instruction, performs it. The master can not clear himself by showing that he selected for the performance of his duty a person, to the best of his knowledge, competent and trustworthy. To this extent the subordinate is the "vice-principal." In this case it will be noted that the person injured was not injured solely by the danger inherent in the nature of the machine of which he was unwarned, but by that combined with the unskillfulness of a fellow workman, produced by the lack of that instruction, which it was the master's duty to give him, not only for his own safety but for that of all those who might be harmed by his lack of skill.

This duty to warn workmen of danger and instruct them in the management of their machines only extend to those who obviously lack experience. Thus, in Burrows *v.* Pa. & N. Y. Canal and R. R. Co., 157 Pa. 51, decided just before the above case, it was held that, where the railroad allowed the engines of another road to run upon their line, they were not bound to warn such of their own engineers as might be put in charge of those engines of the somewhat greater width, which,

taken in connection with the width of the bridges, etc., on the line, might be a source of danger, inasmuch as he was an experienced engineer and more likely to know of the dangerous nature of the route than any other employé of the company. The former case shows the true meaning of the term vice-principle, when used in the Pennsylvania cases. It means one to whom the master has delegated the performance of some positive duty laid by the law upon him, and for the proper performance of which he is answerable just as much when he so delegates it as when he undertakes its performance himself. In sharp contrast to this meaning of vice-principal is that adopted by the Supreme Court of Washington, which is applied in the recent case of Morgan *v.* Carbon Hill Coal Co., 34 Pac. Rep. 152, in which following the federal decisions (R. R. *v.* Ross, 112 U. S. 377, etc.), it was said, that test as to whether one employé was a fellow servant of another or a vice-principal for whose conduct the master was responsible, depended upon whether or not the one servant had the power of control over the other. There, it was held that a fire boss, who had only the power to order the miners from one place to another, was not vice-principal but a fellow servant with a miner who was injured by the fire boss' negligence in lighting his pipe where there was fire damp, and so causing an explosion. He had no control over their work or their manner of conducting it. Had, however, the injury resulted from the act of the fire boss in ordering the miners into a place of danger the company would be liable. Where a limited power of control is given the company is only liable for a misuse of that power. Where authority over workmen is conferred by the master he must be liable for the mode in which it is exercised. Such is the definition of vice-principal in that case. The distinction between the two meanings is clear, the one describes a subordinate in what so ever grade of service to whom is delegated the performance of some positive duty which the master, at his hazzard, is bound to see performed, the other one to whom the master has given authority to control the movement and actions and work of other employés.

The Supreme Court of Pennsylvania, in the recent case of In re Coleman's Estate, 28 At. Rep. 137, has consistently carried out the principle of the decision in Miller's Ap., 111 Pa. 321, recognizing the liability of foreign real estate owned by a Pennsylvania testator, to the collateral inheritance tax law, where the owner has, by his will, effected an equitable conversion with respect to such real estate. In Coleman's Estate the converse of this question was presented. A non-resident testator directed his executor to sell certain real estate, situate in Pennsylvania, covert the same into money and pay certain legacies to collaterals. It was held that the assessment of the land, as land, for the payment of the collateral inheritance tax was void, inasmuch as the testator willed only the *proceeds* of a sale of such lands to collaterals.

In former pages we have called attention to some peculiarities of this branch of our collateral inheritance tax law. Thus, in Miller's Appeal, the tax was imposed upon a fund arising from the sale of foreign real estate, owned by a domestic testator, with respect to which he had effected an equitable conversion. "As the order to sell was imperative and absolute," said the court, "and worked a conversion . . . we "have no choice to regard it as other than personalty. As "such it must be regarded as passing by the law of the "domicile."

In commenting upon this decision, it was observed that the notion that real estate and everything pertaining to its devolution, transmission and tenure was governed and controlled by the *lex rei sitæ* had been settled by a long line of authorities: Bigelow's Story's Conf. of Laws (8th Ed.). To charge the succession of foreign real estate with the payment of the collateral inheritance tax is inconsistent with the spirit of such taxation. Land situate abroad and devised by a domestic will, does not devolve by force of the will nor of the domestic law, but by permission of the State where the land is situate; and, not depending upon the domestic law, cannot legally nor in good conscience be asked to pay the price of succession: In re Swift's Estate, 32 N. E. Rep. 1096; 32 Am. L. R. and Rev. 367; Bittinger's Appeal, 129 Pa. 338.

In the opinion of the Orphans' Court in Coleman's Estate we have the following explanation of Small's Appeal, 151 Pa. 1: "The bequest was specifically of testator's (who was domiciled in Maryland) interest, including 'all the property, real and personal, notes, stocks, bonds, and accounts,' in a limited partnership organized under the laws, and having its principal place of business in this State. The value of the property depended largely upon its continuance here. There was no reason for its conversion and transmission to the testator's domicile, and it was given to the surviving partners as such in specie. The facts plainly made an exception to the general rule. The actual situs was here, and liability to the tax followed. It is urged upon behalf of the commonwealth that this case rules the present. But the facts differ in material respects. The gift here was of an interest in a fund whose distribution belonged to the domicile of the donor. It was said in Re Bittinger's Estate, 129 Pa. 338, 18 Atl. 132, that the collateral inheritance tax was not a succession, but a direct tax upon the 'thing' given in the hands of the donees. What was the 'thing' given to these legatees? The answer is in Miller *v.* Com., 111 Pa. 321; 2 Atl. 492, in which it was held that, where a testator, domiciled in this State, orders land, situated without, to be sold to pay pecuniary legacies, these legacies will pass to the legatees as money, subject to the domicillary law, and, consequently, to the collateral inheritance tax. 'Under all the decisions it cannot be questioned,' said the court, 'that the third clause of [sale under the] will operated a conversion of the residuary real estate into personalty, efficacious from the moment of testator's death."

These cases, certainly, appear remarkable from the writer's stand point. A fiction of equity, which, for the purpose of better effecting the intention of a testator, regards land as personalty and personalty as land, seems capable of bringing Pennsylvania real estate into New Jersey, and *vice versa*, for the purpose of taxation.

JOHN A. MCCARTHY.