PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

Bottomry, Construction of Contract

The Supreme Court of the United States has recently (Nov. 29, 1897) handed down a decision (not yet reported) in a very interesting admiralty case: *O'Brien* v. *Miller et al.* The first question considered by the court was whether a bottomry and respondentia bond, executed by the master of the "Andrew Johnson," covering that vessel and its cargo, and, also, that portion of the cargo which had been trans-shipped on the "Mary J. Leslie," was avoided by the loss of the "Andrew Johnson" in a collision with the ship "Thirlmere," because the defeasance clause of the bond provided that it should become void upon the loss of "said vessel." This question was answered in the negative, the Supreme Court, in a very able opinion by Mr. Justice White, holding that the words "said vessel," when read with the contract as a whole, could not be construed so as to indicate solely the "Andrew Johnson." The Circuit Court of Appeals had considered them free from ambiguity and as leaving no room for construction, but Mr. Justice White said this was a confusion of thought "in failing to distinguish between the contract as a whole and some of the words found therein." His arguments in favor of the construction he put upon the contract are unanswerable.

Limitation of Liability of Ship-owners

The second question with which he had to deal was whether owners of the "Andrew Johnson" could escape a personal liability for their due proportion of the amount of the bond, on the ground of the loss of that vessel, while retaining the damages they had recovered in their suit against the "Thirlmere," which caused the loss. This question also was answered in the negative. It was asserted that Congress intended, when passing the Act of March 3, 1851 (Chap. 43, 9 Stat. 638; Rev. Stat. §§ 4282 *et seq.*), to compel the ship-owner, in order to be able to claim the benefit of the limited liability, to surrender to the creditors of the ship all rights of action which are directly representative of the ship and freight.

A further question which the court felt it was not compelled to deal with, though raised by counsel *arguendo*, because not averred in the pleadings, was as to the necessity of communication between the master and owner before the former can hypothecate the vessel or cargo. The court intimated, however, that the more modern English rule, which only requires communication where it is reasonable to expect an answer within a convenient time, would be followed, and said: "We think the duty was upon the party who questioned the power of the master to have executed the instrument of hypothecation to plead it as a matter of defence."

Necessity of Communication before Hypothecating Ship or Cargo

Judge Brown, of the Southern District of New York, has recently decided that, although the stranding of a vessel may be due to poor navigation on the part of its master, its owner may recover from the cargo a general average contribution on account of the injury the vessel has suffered in saving the cargo. While he admits the general rule that one whose fault has caused the injury cannot recover for what he has suffered, the learned judge assigns as the sole reason for it, that the ship-owner would have to restore to the cargo's owner as damages whatever he might collect as general average. As, by the Harter Act of 1893 (2 Supp. Rev. Stat. p. 81), the ship-owner is relieved from all responsibility to the cargo for the navigation of the ship, his right to a general average contribution "arises necessarily by the same principles of equitable right that apply in ordinary cases of general average."

General Average

As the whole object of the Act is to modify the relation previously existing between the vessel and her cargo, and to establish one of non-responsibility for damages or loss arising out of bad navigation, (*The Delaware*, 161 U. S. 459, 1895,) granting Judge Brown's premises, his conclusion seems inevitable but unjust.

It was further held, that the allowance of gross freight on the cargo jettisoned was proper; the cargo-owners having unsuccessfully contended that it should be net freight, after deducting the cost of handling at a port of delivery: *Chrystal* v. *Flint*, 82 Fed. 472.

Gross Freight Allowed

AGENCY.

One who deals with an agent of another and who, upon receiving the agent's individual notes, gives an absolute receipt, cannot afterwards hold the principal who has settled with the agent on the faith of the

Recourse to Principal

receipt: *English* v. *Ranchfuss*, (Supreme Court,) 47 N. Y. Suppl. 639.

Nitting v. *Kings County El. R. Co.*, 47 N. Y. Suppl. 327, affirms a familiar principle of agency. Defendant having obtained from plaintiff the right to construct its road in front of his property, and having so constructed the road, could not afterwards refuse to recognize its agent's authority to promise plaintiff the sum he agreed to pay. A principal cannot retain the fruit of his agent's acts and yet disclaim his authority in order to escape the corresponding obligation.

Liability of Principal

Agency cannot be proved by the uncorroborated testimony of the agent, nor can any implication of consent to the work done arise, in the absence of proof of knowledge that it was being done: *Roberge* v. *Menheimer*, 47 N. Y. Suppl. 655.

Proof, Evidence

ASSIGNMENTS FOR CREDITORS.

A general assignment of a corporation for the benefit of creditors does not constitute a breach of its outstanding contracts when the corporation continues to exist, has the capacity to sue and be sued, and the assignee is not prohibited by anything contained in the assignment, or in the said contracts, from carrying on the business and completing the contracts of the corporation: *In re Carter* (Supreme Court), 47 N. Y. Suppl. 383.

Effect

A general assignment for creditors does not, *per se*, constitute a breach of a contract of the assignor to do work or perform services for a third party. *In re Carter*, 27 N. Y. Suppl. 383, a shipbuilding company, at the time of its assignment, had on hand a contract with another company to build a ship for $50,000, had almost completed the ship, and received $42,500 on account of the price. Some time after the assignment the other company forcibly seized the unfinished ship, and yet presented against the assigned estate a claim for $42,500 and also judgment of $29,000, obtained on the bond given by the assigning company, conditioned for the completion of its contract. These claims were both disallowed. From the opinion it seems clear (1) that the title to the ship remained in the assigning company after the assignment, and (2) that the other company's only claim against the assigned estate was for the unliquidated damages occasioned by the breach of contract by the assigning company. From (1) it may fairly be concluded that the other company was guilty of a tort in seizing the unfinished ship.

Unfinished Contract, Effect on Assignor

ATTORNEY AND CLIENT.

Right to Recover from Assignor

An attorney employed to bring suit on a claim in the name of the assignee may recover for his services from the assignor if the assignment is merely nominal, and the assignee was the assignor's agent in employing him: *Simon* v. *Sheridan & Shea Co.* (Supreme Court), 47 N. Y. Suppl. 647.

BANKS AND BANKING.

Assignment of Deposit

Money on deposit in a bank may be assigned by parol, and without the consent of the depositary: *Oppenheimer* v. *First National Bank of Butte* (Supreme Court of Montana), 50 Pac. 419.

CARRIERS.

Contract of Carriage, Damages for Breach

The Supreme Court of New York has added another to the long list of decisions defining the rights, duties and liabilities of common carriers of passengers. In this case a passenger boarded a train upon the assurance of the station agent that it would stop at a certain place, when, as a matter of fact, it was not scheduled to do so; and, as a result, the passenger was obliged to get off at an intermediate station and walk to his destination, a distance of three miles. The court held that the passenger might recover substantial damages for breach of the contract of carriage: *Miller* v. *King et al.*, 47 N. Y. Suppl. 534.

Separate Cars for White and Colored Persons, Damages

The Kentucky Court of Appeals has decided in *Wood* v. *L. & N. R. Co.*, 42 S. W. 349, that where white persons enter a car set apart under the law and the company's regulation for colored people, and abuse or annoy them, the company is responsible—although the employes, while knowing that the white persons were there, were ignorant of the abuse.

CONSTITUTIONAL LAW.

Consuls, State Courts, Jurisdiction

The Supreme Court of California has decided that, in the absence of statutory provision, exclusive jurisdiction of an action against a consul of a foreign government is not vested in the federal courts by art. iii. sec. 2 of the Constitution of the United States, declaring that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers and consuls; but that such consul may be sued in a state court, and may, by suffering judgment to go against him by default, waive his right under the Constitution to have the matter determined

or the judgment reviewed by the courts of the United States: *Wilcox* v. *Luco*, 50 Pac. 758.

Habeas Corpus, Federal and State Courts

The Circuit Court for Montana has reiterated the rule that a federal court should not grant a writ of habeas corpus when it appears that the petitioner is held under the judgment of a state court of competent jurisdiction, unless the pivotal point has been finally decided by the Supreme Court of the United States, and the illegality of his detention is beyond question: *In re May*, 82 Fed. 422.

Impairment Obligation of Contracts, Fixing Railroad Rates

The State of Indiana provided by the Act of 1896 for the incorporation of street railways. Section 11 of the Act provides: "This Act may be amended at the discretion of the legislature." The railway companies organized under this Act were expressly given the right to fix rates of fare. Last year, the legislature passed an Act reducing the fare of street railway companies in cities of the first class, (which included only Indianapolis,) to three cents. The railway company secured a preliminary injunction in the United States Court against the enforcement of this last Act: 80 Fed. 218 (1897).

In order to test the question in the state courts, the city of Indianapolis brought a suit to recover a penalty under an ordinance of the city for the alleged misconduct of one Navin in boarding a street car and refusing to pay the fare demanded, viz.: five cents. The Supreme Court of Indiana, in 47 N. E. 525 (1897), dismissed the suit on the ground that the Act of 1897 was valid. The United States Court now makes permanent the injunction against the enforcement of the Act for the the reason that the statute is invalid as impairing the obligation of a contract.

The Supreme Court of the United States has already decided, see *Regan* v. *Trust Co.*, 154 U. S. 362 (1893), also *Railway Co.* v. *Smith*, 128 U. S. 174 (1888), that when a charter in definite terms grants to the corporation power to collect a definite sum per mile for transportation of persons and property, such express stipulations form a part of the obligation of the state which it cannot repudiate. There is no doubt, on the other hand, that the State of Indiana can fix the rates of fare of street railway companies incorporated under the Act of 1861, provided the reasonableness of the rate fixed by the legislature can be submitted to the court: *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U. S. 339 (1892).

The only new point of law, therefore, which the present case decides, is that when we have a general law of incorporation

with the right of amendment reserved on the part of the state, the amendment must affect all the corporations incorporated under the Act to be a valid exercise of the power on the part of the state. This is a new rule of law, and will unquestionably have to be passed upon by the Supreme Court of the United States before the question can be said to be finally determined: *Central Trust Co. of New York* v. *Citizens Street Railway Company of Indianapolis*, (Circuit Court of the District of Indiana,) 82 Fed. 1.

Municipalities, Police Pension Fund, Power to Loan

The Supreme Court of Pennsylvania has decided that the appropriation of a reasonable sum of money by the councils of a city for the creation and maintenance of a police pension fund is an appropriation to a municipal use, and that the delegation of the distribution of the sum appropriated, to a corporation organized for the purpose of administering such funds, does not violate sec. 7, art. ix, of the State Constitution, which provides that "the General Assembly shall not authorize any . . . city . . . to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to any corporation, association, institution or individual:" *Commonwealth* v. *Walton*, 182 Pa. 373.

Original Packages, Boxes of Cigarettes

The ever-recurring question, "What is an original package?" has been again ruled on, *In re May* (Circuit Court Montana), 82 Fed. 422, Knowles, J., holding that when cigarettes put up in small boxes bearing internal revenue stamps (ten cigarettes being packed in each box, and these boxes placed in a larger box for convenience in shipping), are shipped from one state to another, the small boxes constitute original packages; but when they reach their place of rest for final sale to consumers, they lose this character and become part of the mass of the property of the state and amenable to its laws. See also decision of Simonton, J., U. S. C. C. for South Carolina, in *Buckenheimer* v. *Sellers*, 81 Fed. 997.

Special Act, What Constitutes

The Court of Errors and Appeals of New Jersey has decided that a statute in terms applying only to cities of the first class (cities having a population exceeding 100,000) and combining in such cities the election of municipal officers with elections for state and county officers, which theretofore had been kept separate, is in violation of art. iv, sec. 7, paragraph 11, of the State Constitution prohibiting special laws regulating the internal affairs

of towns and counties (Collins and Dixon, J.J., dissenting): *Wanser* v. *Hoos*, 88 Atl. 449.

CONTEMPT.

A purchaser of real estate at a foreclosure sale was held not punishable as for contempt in refusing to obey an order of court requiring completion of the sale.: *Burton* v. *Linn*, 47 N. Y. Suppl. 693. This decision was reversed by the Appellate Division of the Supreme Court (Ingraham, J., dissenting), 47 N. Y. Suppl. 835.

Foreclosure, Refusal to Complete Purchase

In 1808 Lord Eldon, after some hesitation, in a similar case, gave the order for judgment against a recalcitrant purchaser: *Lansdown* v. *Elderton*, 14 Ves. 512. At that time, however, imprisonment for debt was permissible, and the order of the High Court of Chancery was "punishable in any case for disobedience as for contempt." Refusal to pay money into court after the court's decree is contempt: *Wartman* v. *Wartman*, Taney C. C. 362 (1852); *People* v. *Compton*, 1 Duer (N. Y.), 512 (1853); *Mead* v. *Norris*, 21 Wis. 310 (1867); *contra*, *Myers* v. *Becker*, 95 N. Y. 486 (1884); but inability to pay is sufficient to avoid commitment: *Smith* v. *Smith*, 92 N. Car. 304 (1885). In *Burton* v. *Linn* (*supra*), Russell, J., in the lower court, said . "Inability to pay is not a crime. . . . Where performance is in execution of a contract simply, the non-payment of money should not be punished as a crime." The Appellate Division, however, per Rumsey, J., said the purchaser would not be relieved from contempt by inability to pay, and directed that a warrant issue *to commit her to prison* until the completion of the sale. This seems a little remarkable.

CONTRACTS.

A contract whereby a person agrees to pay a sum of money in consideration of the performance of certain work is assignable in the usual way: *Hand* v. *Brooks* (Supreme Court), 47 N. Y. Suppl. 583.

Assignability

As a general rule there can be no recovery of damages for a breach of contract to loan money when, according to the terms of the contract, the loan is payable on demand; but the reason of the rule and the rule itself ceases when substantial injuries result from a failure to make the loan: *Doushkees* v. *Burger Brewing Co., Limited*, (Supreme Court,) 47 N. Y. Suppl. 312.

Breach, Damages, Loan Payable on Demand

Where, upon breach of a contract, it appears from the

nature of the contract that damage may have been sustained which would be difficult to establish, and a sum, not unreasonable, was stipulated for as liquidated damages for the breach, such stipulation will not be treated as a penalty, but will be given effect to in accordance with its terms: *Peekskill, S. C. & M. R. Co.* v. *Village of Peekskill* (Supreme Court of N. Y.), 47 N. Y. Suppl. 305.

Breach, Liquidated Damages

The rule that parties are presumed to contract in reference to custom applies only when the terms of the contract are such as to permit its application, without conflicting with them: *Gould's Manufacturing Co.* v. *Munckenbeck et al.* (Supreme Court), 47 N. Y. Suppl. 325.

Custom, Presumption of Following

A party to a contract that is illegal as against public policy, in that it seeks to control the price and production of an article of general use, is not estopped to question the validity of the contract in an action against him for specific performance: *National Harrow Co.* v. *E. Bement & Sons* (Supreme Court), 47 N. Y. Suppl. 462.

Estoppel, Illegal Contract, Defence

An interesting case, involving the interpretation of a coal lease, has recently been before the Supreme Court of Pennsylvania. A coal lease executed in 1864 provided for a royalty of a certain amount per ton upon "prepared coal," and a royalty of one half the amount upon chestnut coal, which was the smallest size marketable at that time. At the date of the lease there were seven kinds of coal recognized in the market, which, according to size, were as follows: lump, steamboat, broken, egg, stove No. 3, stove No. 4 and chestnut. Lump and steamboat coal were the large pieces separated by the blasts. The other kinds were obtained by screening the larger pieces through parallel iron bars, or by small pieces which came from the mines with the lump coal. At the date of the lease the production of the chestnut coal was about fifteen per cent. of the output of the mines. After the date of the lease there ceased to be a market for lump and steamboat coal, and lessee was compelled to break these in smaller sizes. Two new kinds of coal, known as pea and buckwheat, came to have a market value, although at the date of the lease such small sizes had been thrown on the culm bank as worthless. The lessees, by breaking, largely increased the production of chestnut coal, and sold large quantities of pea and buckwheat on which they refused to pay royalties.

Lease, Coal Land, Interpretation of Written Instrument

The Supreme Court held, that the plaintiffs were entitled to

recover royalties at the higher rate fixed for grades of coal above chestnut, for all chestnut and pea coal in excess of fifteen per cent. of the product of the mines. The ground of the decision seems to rest upon the assumption that the parties must be presumed to contract upon the conditions as they existed at the time of the lease, when only fifteen per cent. of chestnut coal was produced. The lease did not contemplate the breaking of the mine product to a greater extent than was common at that time, and, therefore, any coal broken to a smaller size than chestnut should be paid for at the rate of larger coal which it would have been under existing conditions at date of lease.

Mr. Justice Mitchell dissented on the ground that there was nothing in the lease which contemplated "the breaking of the whole mine product into the different sizes of what was prepared coal in 1864, with their proportionate percentages to one another by means of the methods and appliances in general use at the time," as found by the master. That on the contrary, the lease gave the lessee the clear right to produce the various sizes of prepared coal without restriction as to the proportion of each to the whole. The contract only contemplates the production of chestnut as an incident to the production of the prepared sizes. The increase in chestnut is consequence of increased demand for prepared coals, and is only a necessary consequent of the production of a greater amount of such prepared coals. There was no intentional reduction to chestnut to avoid the payment of royalties. This, the master finds as a fact. The effect of the decision of the majority of the court is to make a new contract for the parties: *Wright* v. *Warrior Run Coal Co.*, 38 Atl. 491.

CORPORATIONS.

Combination in Restraint of Trade, When Illegal, Patented Articles

The Supreme Court of New York has decided that under sec. 7, ch. 384, of the laws of 1897, which prohibits any corporation doing business in the state to combine with any other corporation or person for the creation of a monopoly, or the unlawful restraint of trade or for the prevention of competition in any necessary of life, a combination to control the price and production of a certain article may be illegal, though its manufacture is protected by patents: *National Harrow Co.* v. *E. Bement & Sons*, 47 N. Y. Suppl. 462.

The Court of Chancery Appeals of Tennessee in *Mills Co.* v.

McElwee, 42 S.W. 465, has made a decision which will probably meet with no criticism on the part of those who bear in mind that a corporation is the absolute owner of the corporate property. In this case the secretary and treasurer gave the check of the corporation in payment of a private debt due by the secretary and treasurer as an individual. It was held that the taker of the check with knowledge that the debt was not a liability of the corporation was answerable to the corporation for the amount of it.

Corporation Check, Officers' Private Debt, Knowledge of Taker

The decision of the Supreme Court of the United States in *Briggs* v. *Spaulding*, 141 U. S. 132 (1891), is bearing fruit of a somewhat unpalatable kind. It will be remembered that in that case the court refused to impose personal liability upon the directors of a bank, three of whom (in the judgment of the four justices who dissented) had been guilty of such neglect of duty as had made it possible for the president to loot the bank. In *Warner* v. *Penoyer*, 82 Fed. 181, the Circuit Court for the Northern District of New York has recognized the binding authority of *Briggs* v. *Spaulding*, and has held that the directors of a national bank are not guilty of negligence, although they have failed to examine the discount register and the general ledger of the bank when such an examination would have enabled them to ascertain that a trusted and respected cashier was engaged in defrauding the bank on a large scale. The court appears to have reached this conclusion with regret. In speaking of the conclusiveness of the decision in *Briggs* v. *Spaulding* the following significant language is used: "This is true even though the court may be convinced that the rule contended for by the dissenting justices is conducive to greater stability, conservatism and honesty in all branches of commerce and finance. A somewhat extended experience in the trial of indictments under section 5209 of the Revised Statutes has led to the conclusion that in fully half these cases an examination of the books of the bank by the directors, or an examiner, would prevent failure or at least would save large sums for the creditors." The court distinguished *Gibbons* v. *Anderson*, 80 Fed. 345 (1897), and *Robinson* v. *Hall*, 25 U. S. App. 48; 12 C. C. A. 674 (1894), on the ground that in those cases there were circumstances which tended to put the directors upon inquiry. Commenting upon the conduct of the president of the institution, the affairs of which it was investigating, the court remarked (with perhaps a touch of irony): "It will hardly be controverted that,

Embezzlement by Cashier, Negligence of Directors

when compared with Spaulding's directorship in the Buffalo bank, it is a record of activity and prudence."

Foreign Corporations, Service of Process

The Supreme Court of Tennessee has emphasized the right of a state to impose stringent conditions upon foreign corporations as a prerequisite to the right to do business within its borders. By a statute passed in 1875 the State of Tennessee required foreign corporations to file an irrevocable power of attorney authorizing the Secretary of State to accept services of process in actions instituted against the corporation. The Connecticut Mutual Life Insurance Company complied with this requirement. In 1887 the legislature passed another Act providing for service on any agent of a foreign corporation "found within the county where the suit is brought who represented the corporation at the time of the transaction out of which the suit arose." Service having been had under this latter statute (although the power of attorney required by the earlier Act remained in force), the corporation contended that the second Act impaired the obligation of a contract, and that, in any event, the judgment rendered against it deprived it of its property without due process of law. The court dismissed the contention in regard to the contract without hesitation. Upon the other point it was compelled to consider *St. Clair* v. *Cox*, 106 U. S. 350 (1882), where service upon a foreign corporation was held invalid when effected upon the agent of a corporation who was not, at the time, representing it in an official capacity. The Tennessee court, however, disposed of the point on the ground that, in the case before it, the agent was actually employed on the business of the company at the date of the service, and refused to declare the statute invalid merely for the sake of the possible injustice which it might cause under a different state of facts: *Insurance Co.* v. *Spratley*. 42 S. W. 145.

Quasi-Public Corporations, Discrimination

In *Gas Light Co.* v. *Hildebrand*, 42 S. W. 351, it appears that a gas and electric light company undertook to compel one of its customers to give, in advance, security to cover the probable amount of consumption. The customer brought suit to compel the company to supply him, without a compliance on his part with the condition upon which the defendant insisted. The court had no difficulty in reaching the conclusion that the plaintiff was entitled to the relief prayed for, inasmuch as the condition was not applicable to all the public alike, and was imposed by the corporation in violation of the duty which

rests upon all quasi-public corporations to serve the public without discrimination.

Sale of Stock on Default of Stockholder

Clise Investment Co. v. *Washington Savings Bank*, 50 Pac. (Washington) 575, represents an interesting application by the Supreme Court of Washington of the undoubted principle, that at common law a corporation has no lien upon the stock of one of its members for an indebtedness due to it by him. It appears that the Washington statute, differing from the enactments in force in many states, provides that in case of default on the part of a stockholder his stock may be sold by the corporation in accordance with the provisions of its by-laws. The plaintiff corporation had omitted to make provision in its by-laws for this contingency. The court was, therefore, of opinion that no right to sell existed, while, of course, recognizing that the corporation was in no way deprived of its right to sue the stockholder and to sell his stock on execution, subject to the rights of the defendant corporation, with which the debtor had pledged it.

State Decisions Followed as to Power of State Corporations

In the following case the rule is again stated, that when the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations, created under its laws, that decision is conclusive in the national courts in all cases in which no question of general or commercial law, and no question of right under the Constitution of the United States is involved. The court further ruled, that a mortgage given by a corporation to secure a debt in excess of the amount of indebtedness, which it had power to incur by the statute under which it was organized, is binding on the corporation and its subsequent creditors, where the corporation has received the full consideration for the debt secured, and the transactions were free from fraud. "The statute whose provisions the bonds and mortgage violate, prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation if fixed, should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it, and the debtor cannot usurp its functions:" *Sioux City Terminal R. Co.* v. *Trust Co.*, 82 Fed. 124.

Ultra Vires Contract, Indebtedness in Excess of Statutory Limit

CRIMINAL LAW.

The English Divisional Court, in *Hatton* v. *Treeby* [1897], 2 Q. B., 452, decided that a policeman who sees a person riding a bicycle at night without a light, contrary to the provisions of a statute, has no power to stop him, even for the purpose of ascertaining his name and address. An officer, at common law, cannot interfere with a person without a warrant, except in cases of felony, or suspected felony, or breaches of the peace. Therefore, he had to rely upon statutory authority, but the difficulty in this was, that while the statute prohibited such riding, it made no provision for the apprehension of the offenders. Hence the above result.

Municipal Ordinance, Bicycles, Lights at Night, Constable, Power to Arrest

The Supreme Court of Washington, in *State* v. *Williams*, 50 Fed. 580, decided, that where a prisoner was brought in for trial and kept manacled for a time, without any impelling necessity, he was deprived of his constitutional privilege of "the right to appear and defend in person in criminal cases," as that right means without his mental or physical faculties fettered unless his conduct renders it necessary.

Prisoner Fettered at Trial, Right to Appear in Person

EQUITY.

The following points were recently decided in the United States Circuit Court of Appeals, Eighth Circuit: In a suit in equity by a trustee for bondholders to foreclose a mortgage, by which the bonds were secured, certain banks, which were corporations of the same state as the complainant, were joined as defendants. These banks had liens upon the mortgaged property subsequent to the mortgage. After demurrer to such defendants, the suit was, by leave of court, dismissed as to them by the complainant. The court, Sanborn, Circuit Judge, held that the complainant in an equity suit is not required to join any but indispensable parties to the suit when their joinder will oust the jurisdiction of the court, and, if he does join them, the court may permit their dismissal, and thereupon it has the same jurisdiction and power to proceed to a decree in the case that it would have had if they had never been made parties to it. Nor could the subsequent introduction of these banks and other parties into the suit, or their own petition to protect their own interests, affect the jurisdiction of the court: *Sioux City Term. R. R. Co.* v. *Trust Co.*, 82 Fed. 124.

Practice, Joinder of Defendants, Indispensable Parties

FRAUDULENT CONVEYANCES.

Layman v. *Denton*, 42 S. W. (Tenn.) 153, is a good illustration of the rule that a creditor cannot complain of his debtor's disposition of any property which is not subject to the payment of the creditor's claim. By the Tennessee statute growing crops cannot be levied upon until after November 15th of each year; consequently it was held that the creditor could not interfere with a transfer of the crops before November 15th to another creditor, though the transfer, had it been of ordinary property, might have been attacked on the ground of its being intended to delay and hinder creditors.

Growing Crop, Execution, Exemption by Statute, Alienation

A conveyance from husband to wife in Tennessee will be set aside as against the husband's creditors where the only evidence of the indebtedness of the husband to the wife is the unsupported evidence of the spouses: *Sanford* v. *Allen*, 42 S. W. (Tenn.) 183.

Husband and Wife, Evidence

HUSBAND AND WIFE.

That antenuptial agreements are not affected by recent married women's acts is amply demonstrated in *White* v. *White*, 47 N. Y. Suppl. 273. A husband having there covenanted in such agreement that he would claim no interest in his wife's estate, it was held that the guardian of the only child of the marriage could recover real estate from the father by a quasi-ejectment proceeding: To the argument that the child was not a party to the agreement, it was replied that the rule of priority through legal obligation does not apply to antenuptial contracts.

Antenuptial Agreement, Married Women's Acts, Effect

Under the community of property system imported from France, and prevailing in some of the Southern States, the husband may, upon the dissolution of the firm, as it were, by the death of his wife, pay the firm debts out of any firm property which he chooses: So held in *Burkett* v. *Key*, 42 S. W. (Tex.) 231, that a daughter could not take exception if the father sold the homestead for this purpose.

Community Property, Death of Wife, Power of Husband

Train v. *Davidson*, 47 N. Y. Suppl. 289, is an interesting suit by a wife (now married again) against her former husband from whom she had obtained a divorce, to recover sums due under a written agreement. The defence set up was that this agreement was part of a larger agreement between the parties who desired a divorce; that the husband would furnish the wife with evi-

Divorce, Agreement to Procure, Validity

dence of his adultery and would fail to defend a suit for divorce, provided she would not ask for alimony or counsel fee. The court was clear that such an agreement was invalid, and against public policy as a contract "for the purpose of procuring a divorce," and was fortified in its conclusion by the additional averment in the affidavit that the purpose of the entire arrangement was to enable the wife to marry another man.

Russell v. *Russell* [1897], A. C. 395, is a landmark in the history of the law as to what constitutes legal cruelty, such as will justify the injured spouse in asking for a divorce. The evidence was that the wife had for years publicly accused her husband of an unnatural crime, with the hope of being able to obtain better terms for a private separation. Yet the House of Lords, after much conflict in the lower court, decided, by a vote of 5 to 4, that the husband was not entitled to a divorce, being unable to find any other test of legal cruelty other than the old one of physical danger. The hardship of the rule is apparent when we recollect that, by a writ of restitution of conjugal rights, the wife would, after such conduct, apparently be able to demand again the society of her husband.

Divorce, Cause, Charge of Unnatural Crime

Van Vleck v. *Van Vleck* (Supreme Court), 47 N. Y. Suppl. 470, decides that while it is proper in a suit by wife for separation to allow counsel fees, they should be limited to the amount necessary to enable her to prosecute the action; the allowance made by the trial judge was reversed, because it was determined in amount by a contract (void as against public policy) by the wife to pay her attorney a proportion of the alimony.

Divorce, Alimony, Counsel Fees, Void Agreement

Walker v. *Walker* (Supreme Court), 47 N. Y. Suppl. 513, presents an extremely doubtful problem, viz: Is alimony an admeasurement by the court of the still-existing duty of the husband after divorce to support his wife, or is it a substitution for that duty? The majority of the court took the former view, and logically held, therefore, that the amount thereof could subsequently be altered as circumstances required. Cullen, J., dissented. It is to be hoped that the case will go to the Court of Appeals as the point depends solely upon the principles upon which divorce laws exist.

Divorce, Alimony, Duty of Husband

Heffing v. *Pfaff*, 82 Fed. 403, is a neat illustration of the

kind of complication that justifies the argument of those who favor an amendment to the Federal Constitution, authorizing the passage by Congress of uniform marriage and divorce laws. A wife, who had lived in Massachusetts, moved to South Dakota, where she obtained a divorce against her husband, who still remained in Massachusetts, the court having no jurisdiction over him. Some time afterwards he married again. Subsequently she applied to the same court for an order of alimony, which was granted without notice to him. Held that his marriage was not such an affirmance or ratification of the decree of divorce as gave the court jurisdiction over him, or prevented him from setting up the lack of jurisdiction in a suit to enforce the payment of the alimony.

Divorce, Conflict of Laws

The domicile of the husband is that of the wife, despite her actual residence: So in *McClellan* v. *Carroll*, 42 S. W. (Tenn.) 185, the law of Tennessee not permitting non-residents to claim homestead, it was held that defendant lost her right to homestead by the act of her husband in leaving Tennessee for good.

Domicile, Homestead

Marriage settlements are good, and payments made in pursuance thereof cannot be set aside by other creditors, because marriage is in law a valuable consideration. So, in *Tweed* v. *Russell*, 42 S. W. (Tenn.) 213, it was decided that where a man agreed, before marriage, to pay his wife's daughter $300 upon her marriage or coming of age, and died before she married or came of age, his executors properly conveyed to his widow property worth about $300 in payment of said claim, and his heirs should not complain of said conveyance.

Marriage Settlement, Validity

In *Wilson's Assignee* v. *Wilson*, 42 S. W. (Ky.) 404, it was held (1) that the assignees cannot complain if the assignor excepts from the deed of assignment certain property, even though the assignor's creditors might object to the exceptions as a fraud on them, and (2) that a married woman who, on account of the insolvency of her husband, supports her family, is a "person with a family," within Ky. Stat. § 1697, providing for exemptions upon execution against such persons. On the second point—which would be an important one were such language more frequent in statutes—three judges dissent on the ground that the husband certainly remained a "person with a family," and, consequently, creditors might find, under the majority decision, exemptions claimed by both husband and wife.

Married Women, Assignment, Exemption

Equitable Securities Co. v. *Talbert*, 22 So. (La.) 762, is the most recent illustration of the old maxim that married women are favorites of the law. A married woman was permitted to contradict her own acknowledgment that the money due on her prior mortgage had been paid, and thus to obtain priority over a subsequent mortgagee, who had apparently loaned money on the faith of the acknowledgment.

Married Woman, Mortgage, Acknowledgment, Effect

INFANCY.

The Supreme Court of Georgia has decided that the deed of an infant is binding unless disaffirmed within a reasonable time after majority; that it is not necessary in order to impute notice to him of the existence of the deed that there was adverse possession thereunder, if at the time of its execution he has arrived at such years of discretion that in the ordinary course of events he can reasonably be supposed to take account of his action and of incidents occurring in his career: *Bentley et al.* v. *Greer*, 27 S. E. 974.

Infants, Ratification of Voidable Deed

INSURANCE.

The Supreme Court of Massachusetts, in the case of *Westfield Cigar Co.* v. *Cheshire County Co.*, 47 N. E. 1026, applies the rule that a denial of liability is a waiver of the arbitration clause of the policy. The clause apparently applies only in cases of dispute as to the extent of liability and the like. (See Biddle on Ins., § 1175.)

Arbitration Clause in Policy

In *People* v. *Commercial Alliance Life Insurance Co.*, 47 N. E. 965, the Court of Appeals of New York considered at length the question whether a claim against the receiver of an insolvent life insurance company was affected by the death of the insured after judgment of dissolution, but before the filing of proofs of claim. It was held that the judgment related back to the commencement of the action, for the judgment established the charge of the company's insolvency at that time. The court had then taken possession of the company's assets, through the medium of a receiver, for the purpose of distribution among the creditors, and the amount of the creditors' claims, was fixed and determined as of that day.

Insured's Death After Company's Dissolution

This ruling involves a departure from the earlier cases of *People* v. *Security L. I. & A. Co.*, 78 N. Y. 114 (1879); *Attorney-General* v. *Guardian Mutual L. I. Co.*, 82 N. Y. 336 (1880), and *Attorney-General* v. *Continental L. I. Co.*,

88 N. Y. 77 (1882). In the opinion in the Security L. I. & A. Company case is an elaborate discussion of the nature of a policy-holder's claim and the difficulty in valuing it strictly is shown. In the Guardian-Mutual L. I. Company case, it was held that a claim is not made technically a "death-claim" by the insured's death after the appointment of a receiver. All that can be claimed in such a case "is the value of the policy estimated as of the date when the receiver was appointed; but in consequence of the death of the insured the actual value of the policy can be accountably determined;" *A. G.* v. *Continental L. I. Co., supra.*

The rule now followed is that applied in cases of mutual benefit associations in *In re Equitable Reserve Fund Life Ass'n*, 131 N. Y. 354 (1892), and *People* v. *Life & Reserve Ass'n of Buffalo*, 150 N. Y. 94 (1896). It is well supported, also, by precedents in the Federal and State courts.

The question is an interesting one, involving, as it does, the rules of computation stated in *Bell's Case*, 9 Eq. Cas. 706 (1870); *Lancaster's Case*, Reilly, Alb. Arb. 76, and *Holdich's Case*, 14 Eq. Cas. 72 (1872). (See also Biddle on Ins., § 1369.)

Insured's Title to Premises.

A pledgee for collateral security of a contract for the sale of land has not the "unconditional and sole ownership" of the premises insured, nor does he own the ground in fee simple within the meaning of a policy containing such stipulations; furthermore, the pledgor's interest in the premises falsified the proofs of loss, and the policy was thereby avoided under its terms: *Getteman* v. *Commerciat Union Ass'n Co.*, 72 N. W. 627.

Money had and Received, Premium, Policy Cancelled for Fraud

In *McDonald* v. *Insurance Co.*, 38 Atl. 500, a policy of life insurance contained false statements inserted without the assured's knowledge and through the fraud of the assurer's agent. Upon discovery of the falsity of the statements the company cancelled the policy. In an action by the insured to recover the premium, Mr. Justice Blodgett, in delivering the opinion of the Supreme Court of New Hampshire, said that he might recover the premium so paid, less a deduction for the value of the insurance enjoyed by him during the life of the policy, "and this he may recover in an action for money had and received, which is an equitable action, and may in general be maintained whenever the defendant has money belonging to the plaintiff, which, in equity and good conscience, he ought to refund to him"

It is submitted that this decision cannot be sustained. If the plaintiff be allowed to recover at all, it must be upon the

theory that the fraud of the company's agent entitled the plaintiff to rescind the policy. If then he is entitled to rescind, he is entitled to recover the entire premium, because at no time was the policy ever in force as against the insurer, (*Ins. Co.* v. *Fletcher*, 117 U. S. 519) (1885), and the plaintiff therefore never enjoyed any insurance. The case of *Ins. Co.* v. *Stalham*, 93 U. S. 24 (1870), referred to in the opinion of the court, has no application, for then the policy was in force till terminated by the non-payment of premiums. If the plaintiff can recover at all, his measure of recovery is the entire premium, as that is the sum which in equity and good conscience should be refunded to him. See *Martin* v. *Sitwell*, 1 Show. 156 (1691) and *Feise* v. *Parkinson*, 4 Taunt. 640 (1812).

MASTER AND SERVANT.

Wyatt v. *Brown*, 42 S. W. (Tenn.) 478, contains an able exposition of the right of a master to discharge his employe, the employers being the owners of a hotel, of which the employe had been retained as manager, it was held that the employe's frequent absence during the day was not neglect of duty, he testifying that his duties called him out; but that his habit of taking from 8 until 11 every evening for recreation—a time when guests were constantly coming and going—without leaving a competent clerk to provide for their wants, was a just ground for discharge. This decision was supported by the further fact that the manager had allowed and taken part in, gambling in the hotel.

Discharge, Excuse for

The Supreme Court of N. Y., in *Gœrtner* v. *Schmitt*, 47 N. Y. Suppl. 521, decided that where a servant is sent to work at machinery, to which he is unaccustomed, but the danger involved is of an open and obvious character, as working about rip and circular saws, there is no duty on the master to warn the servant, or instruct him how to avoid the danger. Words are not needed to point out what must be obvious.

Duty of Master to Warn Servant of Danger

MORTGAGES.

Oxsheer v. *Watt*, 42 S.W. (Tex.), 121, decides that an action to foreclose a chattel mortgage is properly brought in the county in which the notes are payable, being apparently the county where the maker resided, and where, therefore, the holder could obtain personal service of a writ.

Action to Foreclose, Place of Bringing

Assignment

Although a mortgage be given to secure negotiable notes, yet it is not itself negotiable, and the assignee thereof takes subject to equities: *Equitable Securities Co.* v. *Talbert*, 22 So. (La.) 762.

Equitable Foreclosure, Junior Encumbrances

The disagreeable consequences, in jurisdictions where payment of mortgages is enforced by equitable foreclosure proceedings, of failing to summon all junior encumbrancers as defendants are seen in *Naylor* v. *Colville*, 47 N. Y. Suppl. 267. The holder of the junior recorded mortgage had no difficulty in subjecting the premises to the payment of his mortgage after sale, under a first mortgage, to a third person.

Oral Surrender of Equity of Redemption, Effect

The Supreme Court of North Carolina, in an opinion by Judge Douglass, has held that after default in the performance of the conditions of a registered mortgage the mortgagee could, by means of an oral surrender of the equity of redemption by the mortgagor, become the landlord of the mortgagor, so as to avail himself of the landlord's lien as against the holder of a subsequent lien, who was bound to know of the mortgagee's right of entry. The fact that the mortgagee had, at various times after the creation of the tenancy, agreed that the mortgagor might redeem upon the payment of a fixed sum of money, was held to make no difference. Judges Clark and Montgomery dissented on the ground that it having been established in *Killebrew* v. *Hines*, 104 N. C., 182 (1889), that the lien of a creditor who makes advances to a mortgagor to make a crop is superior to that of the mortgagee, because until entry of the mortgagee the latter is assenting to the mortgagor holding himself out as the owner of the crop, it followed that such right could not be defeated by a parol unregistered agreement between the mortgagor and mortgagee, but that such agreement was good only as between the parties. This certainly seems to be the sounder view, as the construction adopted by the majority of the court opens the door to the possibility of great fraud: *Ford* v. *Green*, 28 S. E., 132.

Purchase at Tax Sale by Mortgagor

Interstate Building & Loan Assoc., 27 S. E. (S. C.) 948, besides a number of points irrelevant to this purpose, decides that a mortgagor cannot, by buying in his property at a tax sale, which was brought about by his neglect to pay taxes, acquire a title as against his mortgagee, though a stranger might, perhaps, do so.

NEGLIGENCE.

Municipality, Liability, Defective Drain

A town is not liable for injury to abutting property caused by the negligence of the town in allowing a drain under the highway, and the highway itself, to remain out of repair in such manner as to turn the surface water into the plaintiff's land: *Murray* v. *Allen* (Supreme Court of Rhode Island), 38 Atl. 497.

Probable and Remote Consequences

The Court of Civil Appeals of Texas, in *Serafina* v. *G. H. & S. A. Ry. Co.*, 42 S. W. 142, has decided that where a railroad company is negligent in allowing sparks to escape from an engine, by reason of which a person's house is set on fire, they are responsible in damages to the inmates for injuries resulting from suffocation and cold in being compelled to leave the burning building at night thinly clad, but not for injuries resulting from their sleeping on a neighbor's floor.

Telegraph Companies, Unrepeated Message, Liability

The Supreme Court of Nevada has decided that a contract stipulating that a telegraph company "shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message which happen by neglect of its servants or otherwise, beyond the amount received for sending the same" does not relieve the company from liability for a delay in the delivery of the message not referable to any mistake in the tenor thereof: *Barnes* v. *Western Union Telegraph Co.*, 50 Pac. 438.

NEGOTIABLE INSTRUMENTS.

Check, Delay in Presenting, Drawer, Liability

A delay in presenting a check only discharges the drawer when he suffers a loss as a consequence of the delay: *Merritt* v. *The Bank*, 27 S. E. (Ga.), 979. See *Scele* v. *Norton*, 2 M. & R. 401 (1829); *Robinson* v. *Hawksford*, 9 A. & E. N. S. 52 (1846), and Ames' Cases on Bills and Notes, vol. 2, p. 729, n. 3.

Check, Indorsement in Blank, Agency, Parol Evidence

In *Aurora Nat. Bank* v. *Dills*, 48 N. E. 19, the Appellate Court of Indiana held in an action by the indorsee of a check against the payee who had indorsed it in blank that the payee could not show by parol evidence that he indorsed merely as an agent of the drawer and notice of this fact to the indorsee. It is impossible to reconcile the authorities upon the question of the admissability of collateral agreements in actions upon commercial paper. For an interesting summary of the law on this point, see Index and Summary (title Col-

lateral Agreement) to Ames' Cases on Bills and Notes, vol. 2, p. 803.

Promissory Note, Form, Essential Ingredients

That the form of a promissory note is unessential, provided it contain the essential ingredients thereof, can be seen from the recent case of *Clarke* v. *Marlow*, 50 Pac. (Mont.) 713, where a note payable by A. to B. was indorsed by B. after maturity to the order of C., who subsequently wrote on the back thereof, "I hereby assume and agree to pay the principal of the within note," signed "C.," and redelivered the same to B. Held, a promissory note payable on demand, the payee of which was B. As to sufficiency of reference to payee, see *Ins. Co.* v. *Whitney*, 1 Metc. 21 (1840); and that the omission of a time of payment is equivalent to a promise to pay on demand. See *Leonard* v. *Mason*, 1 Wend. 522 (1828).

Promissory Note, Holder, Liability for Interest

The holder of an accommodation note made for the benefit of the indorser is liable to a holder for value without notice, even though that holder agree with the indorser to accept a new note from him and hold the old one as collateral: *Nat. Bank* v. *Downing*, 47 N. E. (Mass.) 1016.

Promissory Note, Holder, Presentation

The holder of a note executed by two makers must, if he desires to hold the indorser thereof, be careful to make presentment and demand on both makers, for a failure to do so will discharge the indorser: *Closy* v. *Miracle*, 72 N. W. (Iowa) 502; *Arnold* v. *Dresser*, 8 Allen, 435 (1864); *Willis* v. *Green*, 5 Hill, 232 (1843) accord.

Promissory Note, Purchase, Trustee, Authority of Latter

In *Tradesmen's Nat'l Bank* v. *Looney*, 42 S.W. (No. 3) 149, the Supreme Court of Tennessee reiterated the doctrine that the purchaser from a trustee of a note whose fiduciary character appears upon its face, is bound to inquire only as to the right of the trustee to dispose of it, and not as to the trustee's application of the proceeds. Of course, if the nature of the transaction indicated an abuse of authority, such as the trustee's giving the note in payment of a personal debt, the purchaser would be bound.

If a trustee who indorses as such would escape personal liability, he must do more than merely add the word "trustee" to his indorsement, as in the absence of other words, indicating a clear intention not to assume any personal responsibility, the word "trustee" is merely *descriptio personæ:* (*Tradesmen's Nat'l Bank* v. *Looney*, *supra.*) See *Mfg. Co.* v.

Fairbanks, 98 Mass. 101 (1867), and *Shoe and Leather Bank* v. *Dix*, 123 Mass. 148 (1877).

Purchaser for Value, Collateral Security

Iowa refuses to recognize the correctness of Mr. Justice Story's famous *dictum* in *Swift* v. *Tyson*, 16 Peters, 1—subsequently reaffirmed by the Supreme Court of the United States—that he who takes negotiable paper as collateral security for a pre-existing indebtedness, is a purchaser for value. (Per Given, J., in *Noteboom* v. *Watkins*, 72 N.W. 766, 767).

NUISANCE.

Sewage Accumulating in a Cellar, Who May Sue

The Supreme Court of New York, in *Hughes* v. *City of Auburn*, 47 N. Y. Suppl. 235, decided that a city is liable for wrongfully permitting the accumulation of sewage in a cellar, thereby causing the death of one residing in the house over such cellar; and this, although the decedent had no legal estate or interest in the premises.

PROPERTY.

Execution by Creditors, Right of Presentation to a Scholarship

In consideration of large gifts of moneys to it by M., a chartered college bestowed upon him a perpetual scholarship in the college, giving him the power to place and keep therein one pupil who should receive tuition, board, &c., free of charge. A creditor of M. endeavored by a proceeding in chancery to expose for sale this right or power of appointment, but the Supreme Court of Tennessee held that the right was in no sense an estate which could be taken in execution, but merely a privilege to be exercised by and with the consent of the college: *Cleveland Nat. Bank* v. *Morrow*, 42 S. W. 200.

REAL PROPERTY.

Estoppel

The Supreme Court of Nebraska was called upon recently to pass upon a case where, after a woman had died intestate seized of certain land, and leaving a husband and infant son to survive her, the husband falsely alleged himself to be the guardian of the minor, and by fraud procured a license to sell the land.

In the petition he set forth that the land was his son's. The land was sold under the license, and the deed purported to convey all the interest of him, the party of the first part. He subsequently quit-claimed his interest in the property to his son, who, on attaining majority and while his father was still living, brought ejectment against the purchaser.

It was held (1) that the father was estopped from setting up his estate as tenant by the courtesy; (2) that the estoppel was binding upon a grantee by quit-claim; and (3) that while the son might have a right after his father's death to avoid the sale, ejectment being a possessory action, the son's right to recover must be based upon his present right by the deed from his father, and therefore must fail: *Wells* v. *Steckelberg*, 72 N. W. 865.

Tenants for Life, Fixtures, Museum

A rather extraordinary question recently arose in England between a trustee in bankruptcy of a former tenant for life and the present tenant for life as to the ownership of a museum of stuffed birds. The former tenant for life had made a collection of birds and had built a gallery in the house for them. The birds were fastened by wire and glue, or some similar substance to moveable wooden trays, which were in iron glass-fronted cases. The cases were affixed to the wall of the gallery.

The court held that the cases and the trays, as part of the cases, were fixtures, but that the birds were annexed solely for the purposes of display, and therefore did not pass with the freehold.

This case is an excellent illustration of the absurdity of the former test, which made the fact of physical annexation conclusive of the question whether a particular thing was or was not a fixture: *Gill* v. *Bullock* [1897], 2 Ch. 482.

Title to Land, Breach of Warranty, Cause of Action

A warrantee of a title to land who pays off a judgment, which is an encumbrance on the land, over the warrantor's objection, and after proceedings have been begun by the warrantor to set the judgment aside, does so at his peril, and cannot recover for breach of warranty of title without showing that the proceedings to set aside the judgment were without merit, and must therefore necessarily have failed to accomplish the purpose for which they were instituted: *Tuggle et al.* v. *Hamilton et al.* (Supreme Court of Georgia), 27 S. E. 987.

RECEIVERS.

Receiver, Authority, Mortgaged Property

A practical question, which has arisen in several instances in recent railroad litigation, is the extent of the authority of a receiver, appointed by the court: It seems now well established that such receiver, if appointed at the suit of a mortgage creditor, should not be given authority to take possession of any property not covered by that particular mortgage. *Kreling* v. *Kreling*, 50 Pac. (Col.) 549, applies the same ruling to a small private

mortgage, the ruling being that the receiver should not be authorized to take possession of unmortgaged realty claimed to have been fraudulently conveyed by the mortgagor.

Counsel Fees

The practically important but theoretically uninteresting subject of when a receiver will be permitted to charge the fund with counsel fees is discussed in *Towles* v. *Union Bank*, 82 Fed. 139.

ROAD LAW.

Vacation of Streets, Right of Owners of Abutting Properties

One of the few cases in which the Supreme Court of Pennsylvania has reversed the Superior Court of the same state has recently been reported. The question was upon the right of owners of properties which did not actually abut upon the part of a street which was vacated—but which, it was claimed, were injured by the vacation—to recover compensation. The Act of April 21, 1858, places the owner of land, which has been injured by the vacation of a street, upon the same footing to claim damages as the owner of land which has been injured by the opening or widening of a street. An interesting review of many decisions of the courts of other states is made in the opinion of Rice, P. J., who dissented from the judgment of the Superior Court, and whose conclusion was that it is not decided by the great weight of authority that there cannot be a recovery. He then discussed the question and reasoned in favor of the right of the claimants. The Supreme Court sustained the views of the dissenting opinion. The opinion of Fell, J., contains the following statement: "Where the part of a street in front of a property is vacated, the owner's right to compensation is conceded; but it is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered comparatively worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover at the point where the deprivation of access is total is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of the right would deny him compensation if all of the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right no distinction can be drawn between a partial and a total deprivation of

access; the impairment of the right is a legal injury differing in degree only from its total destruction. If the street is vacated on both sides of his property, so as to cut him off from other streets, his means of access is as effectually destroyed as if the entire street were vacated. If the street is vacated on one side only and his property is left at the end of a cul-de-sac; if the street is decreased in width so as to be impassable to vehicles; or if one means of access is taken away by the closing of a back street or alley, his injury may be less, but the difference is one of degree only. In either case he has sustained a loss by the destruction of an important element in the market value of his property, and he has been injured in a legal sense: *In re Vacation of Melon Street*, 38 Atl. 482. Reversing 1 Pa. Superior Ct. 63.

Total and Part Vacation, Injury, Degree, Legal Damage

SALES.

Where goods are sold to be delivered in lots as required by the purchaser, and the latter thereafter accepts certain lots but later refuses to receive another lot tendered on his order, he does so at his peril, and if the goods in the last lot are up to the contract, his refusal is a breach, and the seller is not required to tender delivery of the rest of the goods: *Lackawanna Mills* v. *Weil et al.* (Supreme Court), 47 N. Y. Suppl. 585.

Non-Acceptance, Tender

The Supreme Court of New York, in *Griggs* v. *Day et al.*, 47 N. Y. Suppl. 609, decided that when a pledgor elected to treat an unauthorized transaction of the pledgee as a substitution of securities, and not as a sale of the collateral to the pledgee, the pledgor could not afterward, as against the pledgee, ratify the transaction as a sale.

Pledge, Conversion, Ratification, Estoppel

When a broker receives deposits from a customer as margins to secure him against loss in buying and selling stocks under the customer's orders, it is a fraud for him to make fictitious purchases and sales, and report them as genuine, and the customer may in such case recover his deposits whether he suffered any loss by the transactions or not: *Prout* v. *Chisolm* (Supreme Court), 47 N. Y. Suppl. 376.

Stock Brokers, Fraud, Recovery of Margins

SURETYSHIP.

The principles to be used in interpreting a contract of surety-

ship are admirably set forth in *Gamble* v. *Ames*, 27 N. Y. Suppl. 48: "It is quite true, that, in one sense, the contract of a surety is *strictissimi juris*, and it is not to be extended beyond the express terms in which it is expressed. The rule, however, is not a rule of construction of a contract, but a rule of application of the contract after the construction of it has been ascertained. Where the question is as to the meaning of the language of the contract, there is no difference between the contract of the surety and that of anybody else." Consequently, it was held that an indemnity "to save him [plaintiff] harmless from any damages which he should suffer by reason of his continuance as one of the sureties upon an appeal," included, under the circumstances, damages to plaintiff arising from his act of becoming surety, and not only such separate damages as might result from his continuing as such.

Contract, Interpretation, Measure of Damages

The surety for the payment of a mortgage debt is not discharged by a receipt given to their owners: "For the ensuing year, interest to be 5 per cent.," instead of 6 per cent. This is not a valid agreement, even though executed, to extend the time for payment of the mortgage, or for the reduction of the rate of interest: *Merritt* v. *Youmans*, 47 N. Y. Suppl. 664.

Discharge of Surety, Receipt, Interest

WATERS AND WATERCOURSES.

The Revised Statutes of Indiana of 1894. sec. 5153, c. 5, authorize a railroad company to construct its road across any stream of water in such manner as to afford security for life and property, but provided that the corporation shall restore the stream so intersected to its former state, or in a sufficient manner not unnecessarily to impair its usefulness or injure its franchises. The Supreme Court held, under this statute, that in intersecting such a stream—where, during the rainy season, waters overflow the ordinary channels and flow in high water channels, having well defined beds and banks, and require a much wider waterway than at other seasons of the year—the company was bound to provide for the stream in such condition; and, therefore, if any embankment built by it threw back water flowing in such high water channels upon the land of another, the company was liable for the damages sustained. Such water is not surface water, as against which the company could build an embankment, even to the detriment of another: *N. Y. C. & St. L. R. R.* v. *Hamlet Hay Company*, 47 N. E. 1060.

Flood Waters, Liability for Diverting

The Court of Appeals in New York, in an interesting case, has recently decided that the grant by Governor Nichols to the inhabitants of the Village of New Harlem, of certain lands, bounded on the east by the Harlem River, did not give the grantees any rights in the tideway along the bank, between high and low water mark, as against the public right to improve it for the benefit of commerce, and that the City of New York, under a grant of the tideway, made by Governor Dongan in 1686, and subsequently confirmed by the Colonial Legislature and the Constitution of 1777, acquired the right to fill in the land between high and low water mark, and build wharves or other works, in the interest of commerce, without compensation to the owners of the upland: *Sage* v. *The Mayor, &c., of the City of New York*, 47 N. E. 1096.

Navigable Stream, Riparian Rights

The Supreme Court of Pennsylvania has decided that where several factories were located for nearly a century along a branch stream separated from the main stream by an island, and where a dam had been built near the uppermost factory for a period considerably over twenty-one years, presumably to secure an even flow of water to all the factories, which dam was operated by the upper owners according to the requirements of their business without any reference to the requirements of the lower owners, but without depriving them of water, that such upper owner had no right, after using the water he wished by day, to turn back the balance into the main stream and so cut off the flow at night from one of the lower owners, although the predecessors in title of such lower owner may not have required the use of such water at night. The right of a riparian owner being a right to use, subject to a right of all others to use, he cannot obstruct the use of another when such obstruction subserved no purpose of use by himself.

Riparian Rights, Statute of Limitations, Right to Obstruct Use

The court further intimated, although the point was not decided, that in its judgment a mere right to do wrong could not be acquired by any lapse of time, no matter how great: *Hughesville Water Co.* v. *Person*, 182 Pa. 450.

WILLS.

The rule in Shelley's case has recently been before the Superior Court of Pennsylvania, who held that a devise "to my four younger sons during their natural lifetime to be equally divided between them . . . , and providing any of them dies without heirs the share of the deceased shall be divided amongst the surviving ones,

Devise, Rule in Shelley's Case

and at their death to be divided amongst their children, and so on from one generation to another," vested a fee simple in each of the four sons, on the ground that the failure of issue contemplated was an indefinite failure which would give the devisees a fee tail which by statute in Pennsylvania is converted into a fee simple: *Seybert* v. *Hibbert*, 5 Pa. Supr. Ct., 537.

Testamentary Charge on Land

A testator in the first item of his will directed that all his debts should be paid as soon as conveniently could be after his decease. After making provision for his wife he gave certain real estate to his son J., and all the rest of his real estate to his son T. After several pecuniary legacies he divided his personalty equally among his children. He further directed that his son T. should pay three-fourths of his debts and his son J. the other one-fourth. T. and J. were made the executors of the will. There was no direction in the will to sell land for the payment of debts or legacies.

Upon a petition by the surviving executor, some eight years after the death of the decedent, for an order to sell lands to pay debts, it was held (1) that there was no express trust to charge the debts as an indefinite lien on the real estate; (2) that even if there was an implied trust it would not continue the lien beyond the statutory period, which, at the time of the testator's death, was five years: *Mitchell's Estate*, 182 Pa. 530.