PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

Judge Brown, sitting in the District Court of Massachusetts, was recently called upon to decide a question upon which, as he observed, no case had been cited as a precedent and, within the experience of the expert witnesses called, no such claim had been known in the shipping business. The steamship Barnstaple had, by the terms of a charter-party, been given into the entire control of the charter. It ran down and injured a vessel, the owners of which libelled the Barnstaple. Then the owners of the latter, as claimants, filed a petition against the charterers to have a decree entered for the libellants in the collision case against the Barnstaple and the charterers; providing that the damages awarded should be collected in the first instance from the charterers, and only the balance be paid by the vessel; providing further for a decree over against the charterers in favor of the petitioners. In support of their petition the owners contended that as the charterers of a hired ship must pay for its total loss or partial injury, so also if it should injure another vessel and thus become subject to a lien in favor of the owners of that vessel, the charterers ought to be bound to discharge the lien.

Charter Parties, Liens for Collision

Judge Brown decided the case upon a clause in the charter-party which provided that "the owner shall pay for the insurance on the vessel." This provision, the court held, could and did apply to the risk of all kinds of loss to the vessel. The learned judge said: "If the owner has observed the terms of his agreement he has obtained by the consideration that the charterer has paid him his indemnity against loss." The petition was accordingly dismissed: *The Barnstaple*, 84 Fed. 895.

The duty of a person doing any service for a vessel, to inquire as to her nationality and the residence of her owners, is illustrated by the recent case of *The Burton*, 84 Fed. 998 (D. C. Mass.), in which Brown, J., dismissed the libel of a wharfinger who received and unloaded a vessel upon the request of a ship broker, when reasonable inquiry would have informed him

Maritime Liens, Service in Discharging

ADMIRALTY (Continued).

that, under the terms of a charter-party, the charterer, a New York company, was bound to pay these charges.

In *The Lydia A. Harvey*, 84 Fed. 1000 (D. C. Mass.), Brown, J., had an opportunity to apply a familiar principle. The vessel had stranded off Plymouth Beach, and her owner not being able to afford the expense of getting her off, the insurer procured and paid for the services of a submarine diver and raiser of sunken vessels, taking an assignment of his claim and lien. This lien the insurer attempted to enforce against the proceeds of the vessel in the registry. It was held that he had not acted as a voluntary adventurer, but in his own interest, and consequently had no lien for salvage.

Salvage, Lien, Interested Party

AGENCY.

Central Trust Co. v. *Folsom*, 49 N. Y. Suppl. 670, presents a question of special interest to lawyers. B, as trustee, held a mortgage on A's property; at the time when the interest became due, A drew a check to the order of C, attorney for B. C returned a receipt for interest by D, and A thereby learned for the first time that B had assigned to D. Shortly after, the principal being overdue, and A desiring to pay it off, called on C and finding the bond and mortgage in his possession drew a check to his order for the principal. As a matter of fact C had no authority to collect the principal and nobody knew how he obtained possession of the papers. It was held, reversing the judgment of the lower court, that the "scrivener rule," though adopted in this country, only extended to the case where the attorney had had charge of the investment from the beginning —the rule in such case being that the mortgagor may rely upon his continued possession of the papers; *contra*, here, where C admittedly had not negotiated the original loan.

Implied Authority of Attorney

In *Soule* v. *Palmer*, 49 N. Y. Suppl. (Sup. Ct.) 475, plaintiff leased a room to a company of which defendant, Palmer, was president, the instrument reciting that it was "between Jeanne E. Soule, as landlord, party of the first part, and the National Wrought Steel Manufacturing Company and William W. Palmer, president, as tenant, parties of the second part, ... and the said parties of the second part covenant to pay the rent, etc." The lease was signed and sealed by "William W. Palmer, president."

Lease to Company, President's Signature, Personal Liability

AGENCY (Continued).

In an action for the rent against Palmer, the latter contended that the Manufacturing Company was the only party bound; that the word "president" after his signature showed that he was merely signing as agent of the company. The court, however, held that the addition of the word, "president," was merely one of description, and that Palmer was bound equally with the company for the rent.

Parol evidence of what Palmer thought when he was executing the leave was, of course, inadmissable to vary the strict terms of the lease.

ASSIGNMENTS.

Omission from Schedules, Frauds

In an action to set aside a general assignment on the grounds of fraud, it was contended that a large claim held by the assignor against a third party was withheld from the schedules, and that the execution of a mortgage by the assignor and others to a third party, prior to the assignment, was fraudulent. Held, that if these were frauds, they were frauds upon the assignment, and did not constitute a fraud in the assignment, and could not, therefore, be made the basis for setting it aside: *Sweetser et al.* v. *Davis et al.* (Supreme Court, App. Div., N. Y.), 49 N. Y. Suppl. 874.

CARRIERS.

Delivery to Connecting Carrier, Liability as Warehouseman

A railroad company received certain cotton for shipment over its road and a connecting steamship line. It owned a wharf at the point of connection on which it deposited goods to be transferred to the steamship line, and according to the usage between the two companies, the steamship company on being notified that goods had been received for transfer to its line was allowed to load direct from the wharf on giving a receipt for the goods loaded, but further than this the steamship company had no control over either the wharf or the goods deposited thereon.

The cotton in question was deposited on the wharf, and the steamship company notified of its arrival and requested to remove it as soon as practicable, but before removal the cotton was burned without fault or negligence on the part of the railroad company. Held, (1) that there had been no delivery from the railroad to the steamship company; (2) that the railroad company could not be considered to have ceased to hold the cotton as a carrier, and to have become a ware-

CARRIERS (Continued).

houseman, it having done nothing evidencing such intention: *Texas & Pacific Ry. Co.* v. *Clayton et al.* (Circuit Court of Appeals, Second Circuit), 84 Fed. 305.

Issue of Mileage-books, Conditions

The Supreme Court, Appellate Division, of New York, has decided that a statute requiring railroad companies to issue 1000 mile mileage-books, at two cents a mile, and declaring a forfeiture of $50 to any person to whom such company shall refuse to issue a mileage-book as provided by the act, or, in violation thereof to accept the mileage-book for transportation, does not authorize the company, as a condition of its transportation upon its lines and the issuing of a mileage-book, to require the execution of a contract by the purchaser that it shall be good for passage only when presented with a passage ticket received in exchange for coupons detached from the book: *Corcoran* v. *N. Y. Cent. & H. R. R. Co.*, 49 N. Y. Suppl. 701.

CONSTITUTIONAL LAW.

Courts, Jurisdiction, Federal Question

A bill to restrain the enforcement of a city ordinance fixing the rates of charge at which a water company shall supply water, the averment in the bill being that such rates are so low as to amount to the taking of the property of the company without due process of law, presents a federal question: *Consolidated Water Co.* v. *City of San Diego et al.*, 84 Fed. 369 (Circuit Court, S. D. California).

Interstate Commerce Law, Discrimination, "Circumstances and Conditions"

The charging of a greater rate for a shorter than a longer haul is not a violation of the fourth section of the interstate commerce law when the rate charged for the shorter distance is not in itself unreasonable, and the more distant point is a commercial centre and large distributing point, when there exists strong competition both by land and water, none of which conditions are present at the other point; such difference creating a dissimilarity of "circumstances and conditions" within the meaning of the act, and that such greater charge is not unlawful, though forbidden by the interstate commerce commission in the particular case: *Brewer et al.* v. *Central of Georgia Ry. Co.*, 84 Fed. 258.

CONTRACTS.

The Circuit Court, Eastern District of Pennsylvania, in the recent case of *Horst* v. *Roehm*, 84 Fed. 565, has followed the

CONTRACTS (Continued).

Anticipatory Breach, When Action may be Brought, Damages

doctrine laid down in *Dingley* v. *Oler*, 117 U. S. 502, and denied in *Daniels* v. *Newton*, 114 Mass. 530, that where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract and sue for damages without waiting for the time mentioned for the completion and fulfilment of the contract by its terms. In such action the measure of damages is the difference between the price named in the contract and the price at which it is shown the plaintiffs could have made sub-contracts for the delivery of the goods, according to their agreement with the defendant.

Barnes Cycle Co. v. *Reed*, 84 Fed. 603, illustrates the familiar rule that where a guarantor signs a guaranty for future advances to be made to his principal, and the creditor has not at the time any binding agreement with the principal, the so-called guaranty is but a mere offer, and cannot be enforced as a contract by the creditor, unless the guarantor is notified of its acceptance.

Guarantee, Notice of Acceptance

CRIMINAL LAW.

The Court of General Sessions of Delaware, in *State* v. *Lockwood*, 39 Atl. 589, decided that the husband had, as head of the family, the right to use the necessary force to dismiss a guest who had no right to stay, but who persisted in staying after being told to go, without being guilty of an assault; and the fact that the wife owned the property did not affect the husband's right as the head of the family.

Assault, Expulsion of Guest, Head of Family

The District Court for South Dakota in *In re Kirby*, 84 Fed. 606, decided that a court will disbar an attorney convicted of an offence involving moral turpitude, and to which Congress has attached an infamous punishment, though it is not a felony, and the suing out of a writ of error and the granting of a supersedeas thereon, do not vacate the judgment, so as to prevent its being ground for the defendant's disbarment.

Conviction, Disbarment, Effect of Supersedeas

The District Court of Delaware, in *United States* v. *Murphy*, 84 Fed. 609, decided that, knowingly providing the means of transportation for a military enterprise to be carried on from the United States against Spanish rule in Cuba is within the meaning of section 5286. A military enterprise under this section is

Neutrality Laws, Military Enterprise

CRIMINAL LAW (Continued).

the combination of men, few or many, who organize into a body within the limits of the United States with the intent at the time to proceed in a body to a foreign territory to engage in armed hostilities against a foreign power with which the United States is at peace, and with such intent proceed from the limits of the United States with arms or prepared to secure them before reaching the scene of hostilities. The defendant was the master of the Laurada and was indicted under the above section for transporting a military enterprise from Delaware.

EVIDENCE.

Declarations in the Regular Course of Business

In *Bently* v. *Falker*, 49 N. Y. Suppl. 691, the question was whether certain moneys had been paid by defendant to plaintiff's son and whether the latter had paid plaintiff's debt with a portion of them. The books of a deceased banker were offered to show: (1) son's balance in bank; (2) receipt by the banker of a draft to the son's order, and (3) a check drawn against the fund so created by the son in favor of the plaintiff's creditor and paid by the banker. These were rejected by the trial judge and upon appeal his decision was reversed under the rule "That all entries or memoranda made by deceased persons in their course of business or duty by any one who would at the time have been a competent witness of the fact which he registers are competent."

Expert Testimony

In *Kirkman* v. *Kirkman*, 49 N. Y. Suppl. 683, the question in dispute was, the value of the "good will" of a firm of soap manufacturers. It was held that the opinion of a grocer who sold the product was not admissible, since it was not a proper subject for expert testimony.

Similar but Unconnected Facts

In *Dunning* v. *Maine Central R. Co.*, 39 Atl. 352, the Supreme Court of Maine discuss the rule of evidence applied to fires kindled by sparks from passing locomotives. The defendant contended that when the plaintiff had shown that it was the Dover & Dexter train which had passed immediately before the fire was discovered, he had "identified" the locomotive, and hence could not prove other fires kindled by defendant company's locomotive at or about the time. At the time the objection was made, defendant's counsel also stated that it was "No. 95." The court held that this was not a sufficient identification to bring

EVIDENCE (Continued).

plaintiff within the rule and admitted the evidence. The defendant, by proving or offering to prove the identity of the engine, could not limit the plaintiff's rights. This case seems to be in accord with Mr. Justice Clark's full discussion of the rule in the Pennsylvania Supreme Court: *Henderson* v. *Railroad*, 144 Pa. 461 (1892).

INSURANCE.

Moulton et al. v. *Ætna Fire Insurance Co.*, 49 N. Y. Suppl. 570, was as follows: The policy was on goods owned by a partnership and contained a clause avoiding it "if the subject of the insurance be personal property and be or become incumbered by a chattel mortgage." One partner gave the other such a mortgage to secure advances to the firm. The court held that this did not avoid the policy, for both partners were presumably acceptable to the insurer and the transaction did not bring a third party into contractual relations with the original parties. The transaction is assimilated to a sale by one partner to another of an interest in the firm. This does not constitute a change or assignment of interest with the meaning of a policy in New York (*Germania Fire Ins. Co.* v. *Home Fire Ins. Co.*, 144 N. Y. 199 (1894)); this point is much disputed and the contrary is the rule in several states (1 Biddle on Ins. § 224.) The question of a mortgage as distinguished from a sale appears to be a novel one in New York.

Chattel Mortgage on Partnership Assets

The case of *Backus* v. *Exchange Fire Ins. Co.*, 49 N. Y. Suppl. 677, discusses the effect of a notice of cancellation containing a distinct offer to return the unearned premiums. It had been held that a notice which did not contain such an offer was by itself insufficient; here the policy was cancelled without formal tender or payment of the premiums. The court suggests that a subsequent refusal to pay on the part of the company might revive the policy. We might add that if the holding were not thus, the door would be open to possible fraud.

Notice of Cancellation

MASTER AND SERVANT.

The so-called fellow-servant rule, of course, does not exempt from liability a master who has furnished his servant with defective appliances. If he has provided proper ones, however, it is not fault if a fellow-servant uses improper ones which happen to be upon the premises: *Campbell* v. *New Jersey Dry Dock & Transportation Co.*, 39 Atl. 658.

Liability for Accident to Servant

MUNICIPAL CORPORATIONS.

In the Circuit Court for the Eastern District of Wisconsin, in the case of *Webster* v. *City of Beaver Dam*, 84 Fed. 280, the court held that charter provisions imposing upon abutting property owners the duty of keeping the sidewalk in repair, and making such owners primarily responsible for any negligence therein, are for the protection of the city, not the traveler, and do not relieve the municipality of its duty to provide safe thoroughfares, nor release it from liability for damage for failure to perform the same.

Duty of Property Owners, Effect on City's Liability

NEGLIGENCE.

Hobson v. *N. Y. Condensed Milk Co.*, 49 N. Y. Suppl. 209. The Supreme Court of New York decided in this case that in an action brought by a conductor of a horse car against the owner of a truck, to recover damages for injuries caused by a collision, the concurring negligence of the driver of the car, who alone had charge of stopping and starting the horses to avoid collisions, is not imputable to the conductor.

Action by Conductor, Negligence of Driver

The United States Circuit Court of Appeals, in *Chesapeake & O. Ry. Co.* v. *Steele*, 84 Fed. 93, decided that, as far as the United States courts were concerned, contributory negligence was a matter of defence to be established by the defendant, and in the entire absence of proof it will be presumed that the decedent stopped, looked and listened before going upon the track.

Presumption of Due Care

NEGOTIABLE INSTRUMENTS.

In *Citizens' Bank* v. *Millet*, 44 S. W. 366, the defendant, an agent of the drawee, in his individual name, drew a sight bill on his principal for an indebtedness due the plaintiff (the payee) by the drawee. Upon the bill's dishonor for non-payment, an action was brought against the defendant. The Court of Appeals of Kentucky held that parol evidence was inadmissible to show an agreement between the plaintiff and the defendant, that the defendant was not to be liable upon the bill, the agency of the defendant being disclosed at the time the bill was drawn.

Bill Drawn by Agent on Principal

The authorities upon this question are in hopeless conflict, though, perhaps, the trend of authority is in favor of the admissibility of such evidence. See *Pike* v. *Street*, Moody & Malkin, 226; *McCulloch* v. *Hoffman*, 10 Hun. 133; Ames' Cases on Bills and Notes, Vol. 2, p. 135, note 2.

NEGOTIABLE INSTRUMENTS (Continued).

Receipted Sight Draft Equivalent to Payment

The plaintiff, a depositor with the defendant bank, deposited with it a draft upon a bank in another city, which draft was entered in the plaintiff's pass book as for "collection." The defendant forwarded the draft to an agent, at the place where the drawee was located, for the purpose of collection. The drawee gave to the agent a sight draft upon its correspondent in another city, and the defendant, upon receipt of this information, credited the plaintiff with the proceeds of the draft and notified him to that effect. Upon presentation of the sight draft for payment it was dishonored, and a month thereafter the defendant notified plaintiff that the credit allowed him was cancelled. Held, that the receipt of the sight draft by the defendant's agent constituted, in the absence of any evidence showing a contrary agreement, payment of the draft, and as, therefore, the defendant had been paid the amount of the draft deposited with it by the plaintiff, the defendant was liable in that amount to the plaintiff: *Kirkham* v. *Bank of America*, 49 N. Y. Suppl. 267.

Waiver of Notice of Dishonor, Accommodation Partnership Paper

In *Bank* v. *Weston*, 49 N. Y. Suppl. 542, it was held that an indorsement of a renewal of a note prior to its maturity by the indorser of the original note constitutes a waiver of notice of dishonor. The court also held that an indorsement of a note by one partner in the name of the partnership for the accommodation of third parties and not within the scope of the partnership business, is a fraud on the non-consenting partners and creates no liability on their part, as the fact that the payee requested the plaintiff to discount the note is notice of the accommodation character of the partnership indorsement. It is well settled that an indorser or drawer may waive presentment and notice by words or act. See *Phipson* v. *Kuellor*, 1 Starkie, 116.

PARTNERSHIP.

Action for Work and Labor, Pleading

Where, in an action against A and B to recover for work, labor and services, the complaint sets up a contract made with A, and avers that the work thereunder proceeded with the knowledge and consent of B, who had in the meantime become a partner of A, and with the knowledge and consent of their firm, no cause of action is shown against B: *Hodges* v. *Friedheim* (Supreme Court, App. Div. N. Y.), 49 N. Y. Suppl. 529.

PRACTICE.

Circuit Courts, Jurisdiction, Removal from State Courts, Judgment, Effect

Hanford, D. J., in the Circuit of the United States, Washington, N. D., deduced the following rules from the decisions of the Supreme Court, upon the questions of jurisdiction and effect of judgments covered by them. The circuit courts of the United States have jurisdiction to decide questions as to their own jurisdiction in cases removed from state courts, and the decision of such questions by a court which has jurisdiction of the parties, if erroneous, is nevertheless binding upon the parties until set aside or reversed by an appellate court, or by an order in a proper proceeding in the same court. The judgment of a circuit court of the United States in a case removed from a state court is binding upon the parties to the same extent as it would be if the case had been commenced therein by original process, and after a circuit court in such a case has entertained jurisdiction, and proceeded to a final judgment, and the case has been carried to an appellate court, and a decision rendered therein upon the merits of the controversy, and after a mandate has been issued, directing the manner of further proceedings in the circuit court, the decision of the appellate court is binding and conclusive upon the parties and upon the circuit court. While it is true that a court may not, by its own judgment, create jurisdiction in its favor which the law has not conferred, and while the parties cannot, by their consent, confer jurisdiction upon a court, it is nevertheless true that, after parties have voluntarily submitted a cause for determination upon its merits, to a court of superior, although limited, jurisdiction, the submission of the cause, and the final judgment of the court, together, do estop the parties from denying in a collateral proceeding that it had jurisdiction, except in cases where it is impossible to give effect to the judgment without violating the constitution: *Dexter, Horton & Co.* v. *Sayward*, 84 Fed. 296.

Ground for New Trial, Abusive Words of Counsel

In an issue whether D was a member of the defendant firm the verdict was for the plaintiff. The opinion of the Supreme Court of Rhode Island being that a preponderance of the evidence was against the finding, gave a new trial because of an attack by plaintiff's counsel on the defendant, which was groundless. The statement by counsel was: "I expect at some stage of the game to show by the testimony of witnesses who are perfectly disinterested and know about these transactions, that it is an old trick of D to do such work—to get up a company,

PRACTICE (Continued).

get goods for twenty per cent. of what they are worth and then swipe the whole business and steal the books, etc." In the opinion of the court, this was calculated to prejudice the minds of the jury and to prevent them from weighing the evidence with that discrimination and impartiality to which the defendant was entitled: *Parker* v. *Carriage Co.*, 39 Atl. 242.

Pleading under New York Code, Action on Contract of Hiring

It was said by Vann, J., in *Linton* v. *U. F. Co.*, 124 N. Y. 533, "Moreover, the main object of a pleading is to notify the adverse party of the facts relied upon by the pleader to constitute a cause of action or a defence. The improvement sought to be effected by the system of pleading provided by the Code was to enable each party to know precisely what he would be required to prove upon the trial." A recent ruling of the New York Supreme Court, Special Term, Kings County, is in accord with this expression of purpose. In an action by an employe for damages, for breach of a contract of service by discharge, it was held that it was no defence to plead that the defendant discharged the plaintiff for good and sufficient cause, and particularly for disloyalty to its interests, and for conduct and actions harmful and injurious to its interests. Under the Code Civ. Proc. S. 500, a defence is a statement of new matter, viz: facts constituting a defence: *Hicks* v. *Car Spring Co.*, 49 N. Y. Suppl. 401.

One who has been used to common law pleading, seldom reads a case under code practice without wondering whether the very effort to simplify does not tend to complexity and to delay, but that is "another question," and now an old and unprofitable one.

Res Judicata

An action was commenced on the first of a series of notes, all of which were given for work done and materials furnished in fitting up a drug store for the defendants. An answer was interposed, amongst other things, setting up a counter-claim that the defendants had sustained damage by reason of the negligent and improper performance of the work by the plaintiff. Judgment was obtained against defendants in that action by default. The same plaintiff sued upon the three of the notes next maturing, and the same defence and the same counter-claim were again made. On the trial the notes and the judgment roll were received in evidence with the concession that the parties in the two actions were the same and all the notes arose out of the same transaction. The question was as to the effect of the preceding judgment. Was it

PRACTICE (Continued).

res judicata? The Supreme Court, Special Term, New York County, decided that the former judgment was a bar and that plaintiff was entitled to judgment: *Graham* v. *Van Horn*, 49 N. Y. Suppl. 401.

QUASI-CONTRACTS.

Money Paid under Compulsion

In *Wood* v. *Mayar*, 49 N. Y. Suppl. 622, the Supreme Court of New York refused to permit a recovery of money paid to the city authorities for a permit to construct vaults under a side-walk, even though at the time of payment the plaintiff protested upon the ground of his previous payment for a permit applying to a portion of the space in question. The court held the payment a voluntary one, as the testimony of the plaintiff that the payment was made to avoid litigation fearing a delay in the erection of the buildings upon which he was to procure a building loan, is not evidence of such compulsion as will prevent the payment being a voluntary one. See *Trixler* v. *City of New York*, 125 N. Y. 617; *Swift Co.* v. *U. S.*, 111 U. S. 22; *Robertson* v. *Frank Bros.*, 132 U. S. 17; *Oceanic Steam Navigation Co.* v. *Tappan*, 16 Blatch. 296. The test as to whether the payment be voluntary, laid down by Judge Van Brunt, in *Wood* v. *Mayar*, *Supra*, and by Mr. Justice Bradley, may be well compared.

REAL PROPERTY.

Contract to Purchase Land, Outstanding Title, Specific Performance

Plaintiff, executor with power of sale, made a written contract with defendant whereby the latter agreed to purchase a piece of land belonging to the estate. In an action for specific performance defendant excused himself on the ground that the land had been, and was at the time of the suit, in the possession of a third person whose title was derived adversely to that of the testator and his devisees, and the defence was held sufficient. Although Sec. 225 of the Real Property Law of New York (1896, c. 547), which provides that a grant of real property shall be void, "if at the time of delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor," does not apply when the sale is by an executor, yet it is a well-recognized principle of equity that a court will not decree specific performance when the vendee would be obliged to bring ejectment for the property. The court will never compel a purchaser to take a title, where the purchase would

REAL PROPERTY (Continued).

expose him to the hazard of litigation: *Bullard* v. *Bicknell*, 49 N. Y. Suppl. (Sup. Ct.) 666.

The deed of warranty of a parent prevents his after-born children from ejecting a *bona fide* purchaser of the realty. Thus, a testator having been declared *non compos mentis* at the time of making a given will and for two years previously, a deed of warranty of three of his sons will estop the children of one of them, born after the execution of the deed, from recovering in an action of ejectment against a *bona fide purchaser*. And the judgment declaring the testator insane is a bar to a recovery attempted to be founded upon an after-discovered will, executed within the two years: *Fee* v. *Fee*, 49 N. Y. Suppl. 292.

Deed of Warranty, Estoppel, Will, Insanity, of Maker.

The modern tendency of the courts to decide questions concerning fixtures upon real property according to the intention of the person who erects them, rather than to the mere part of their physical annexation, is illustrated by the case, *Markle* v. *Stackhouse, et al.*, 44 S. W. (Ark.) 808. There the court decided whether a mill erected by a vendee on the purchased property fell within the vendor's lien for the purchase money, simply by inquiring as to the intention of the vendee whether he intended it to be a permanent portion of the property or not. Adaptation of the plant to the use or purpose to which that portion of the realty, with which it is connected, is appropriated, furnishes the best evidence on the subject.

Fixtures, Mill, Intention of Builder

A trust deed was executed of land to permit M to receive the rents during her life, subject to the "limitation hereinafter mentioned;" to sell, lease, or mortgage as M, by writing, might direct; to invest the proceeds of any sale, and pay M the interest, or to re-invest in other realty, as M might direct, to be held according to the trusts; and on the death of M to convey the land, or such part as might remain, or the proceeds thereof, to such persons as M, by will, may have appointed, and, in default of such appointment, unto her "heirs at law or next of kin." The Court of Errors and Appeals of New Jersey held that, since the ultimate destination of the trust estate is in M's heirs at law or next of kin, the trust was a continuing one, and could not be terminated during M's life-time. The words "heirs at law" and the words "next of kin"

Trust, Determination, Rule in Shelley's Case

REAL PROPERTY (Continued).

in such deed are synonymous, and the rule in Shelley's Case does not apply: *Martling* v. *Martling*, 39 Atl. 203.

RECEIVERS.

The difficult problems relative to receiverships are gradually being solved: *Veatch* v. *American Loan & Trust Co.*, 84 Fed. 274 throws valuable light upon one of the more important. A receiver had here been appointed at the instance of a stockholder. The court admitting that, if he had been appointed upon the petition of a mortgagee or judgment creditor, the income would have been impounded for the benefit of the petitioner, held that the receiver, thus appointed, practically represented the company, and might, therefore, like the company, pay claims accruing prior to receiverships, or for betterments, or for interest on mortgage. In this proceeding the court was not advised as to what had been done with the surplus, and not undertaking to decide in advance whether it had been properly employed, simply decided that at least the petitioner (holding judgment for tort committed prior to receivership) was not prevented from inquiring further on any ground that the income belonged to the mortgagee.

Mortgage of Railroads, Receiver's Duties

SALES.

The Circuit Court, Eastern District of Wisconsin, in *Farwell* v. *Hilton*, 84 Fed. 293, has decided that where a person has become a purchaser of goods through fraudulent representations, and has made a partial payment thereon, but has sold a part of the goods exceeding in value the payment made, thus rendering it impossible for the seller to rescind the sale *in toto*, such seller is not bound to tender the purchaser the payment received as a condition precedent to maintaining replevin for the goods remaining unsold.

Rescission, Tender of Partial Payments Received

SURETYSHIP.

National Bank of Redemption v. *Rutlege*, 84 Fed. 400, contains a careful discussion of a familiar problem. It was a suit against a county auditor and his sureties on a bond conditioned for the "faithful discharge of the duties of his said office." The complaint set forth his signature and issue of $10,000 of false and duplicate bonds. Demurrer on the ground that the act was done not *virtute officii*, but only *colore officii*, now overruled. Hammond, J.,

Acts Done Virtute Officii

SURETYSHIP (Continued).

points out that the Ohio State and United States courts, following the leading case of *People* v. *Schuyler*, 4 N. Y. 173, have taken a liberal view of such transactions and hold those acts to be within his office which are done "in the discharge of the very duties which the statute in express words requires of him." The further statutory provision making this act a penal offence is rightly regarded as controlling evidence of the legislative interpretation of the scope of his duties.

TRUSTS.

A grantor, who is also a debtor, does not entirely deprive his creditor of remedy by creating a trust estate. This decision was reached by the Supreme Court of New York, in the case of *Schenck* v. *Barnes et al.*, 49 N. Y. Suppl. 222, where the debtor had conveyed real property to a trustee, to apply the profit thereof for the benefit of the grantor for life, remainder over, with a power of sale in the trustee. A judgment-creditor of the grantor whose execution had been returned unsatisfied was allowed to attack his debtor's interest.

Grantor a Beneficiary, Creditors' Rights

The Statutes of the District of Columbia require that all declarations or creations of trust shall be manifested and proved by writing. There is no statute in force in the District putting an end to implied and resulting trusts. In *Smithsonian Institute* v. *Meech*, 18 Sup. Ct. 396, a man purchased land in Washington with his own money, taking title in the name of his wife. The wife died, then the husband, the latter bequeathing his property to the Smithsonian Institute. The wife had died intestate. Her heirs claimed the property. A bill was filed by the Institute to establish their right under the will of the husband and evidence was introduced of a parol agreement on the part of the wife that the property should at their death pass to the Institute. The trial court found in favor of the Institute. This was reversed by the Court of Appeals of the District of Columbia. The Supreme Court, in a decision by Judge Brewer, now reverses the decision of the Court of Appeals on the ground that, though a purchase in the name of a wife or child is presumed, in the first instance, to be a settlement on the wife or child, this is a mere presumption, and may be rebutted. The case contains a summary of a number of cases dealing with the general question.

Creation, Parol Evidence

TRUSTS (Continued).

Brown v. *McGill*, 39 Atl. 613, brings out several interesting questions which are, however, rapidly becoming settled along the lines indicated in the opinion. A woman in contemplation of marriage conveyed her legal separate property to a trustee, the deed containing the usual clauses for a sole and separate use without anticipation. After marriage she contracted a debt with express reference to this separate estate, and intent to charge the same. It was held (1) that spendthrift trusts are possible under the laws of Maryland; (2) that a person cannot ordinarily create a spendthrift trust for his own use, thus enjoying the income and exempting the principal from liability for his debts; and (3) that modern policy of the law does not require that a married woman should be an exception to the second proposition.

Married Women, Spendthrift Trust

It has recently been held in New York that where, by will, a trust of personalty was created for the use of a beneficiary for life, but no indication of the testator's intent as to the ultimate disposition of the fund itself was given, it devolved by statute on the next of kin, and that, although the next of kin was the life beneficiary, the fact did not prevent her from taking the reversion after her own life estate: *Brown* v. *Richter*, 49 N. Y. Suppl. 368.

Personalty, Devolution

It was held in *Spencer* v. *Weber*, 49 N. Y. Suppl. 687, that where a trustee has power to vary the investments of the trust estate, a mortgagor who pays the principal when due to the trustee or his assignee is not bound to ascertain whether the trustee is acting honestly, or what he does with the proceeds.

Power of Trustee

WILLS.

A testator gave (1) to the child of J $1000; (2) to the children of P $1000; (3) to the child of S $1000; and declared that, "in case of the death of any of the above legatees before me, the legacy shall not lapse, but shall go to their lawful issue, if they leave such issue." J left several children, P had twelve children, seven of whom were living at the date of the will; only three of the five who had before died left issue. S had one child who died before the will was made, leaving issue. Held, by the Court of Chancery of New Jersey, that the gift to J's child, should be construed J's children, that the children of P's children, whose parents died before the will was made,

Construction, Designation of Legatees

WILLS (Continued).
should not share with the children of those who were then living; and that the gift to S's child, means to S's grandchildren: *Dunn* v. *Cory*, 39 Atl. 368.

Devise, After-Acquired Property

The Supreme Court of New York, in *Miller* v. *Miller*, 49 N. Y. Suppl. 407, decided that where a husband devises to his wife his right and interest in property which is held in her name, but which was purchased with money earned by both, and after making this will the husband buys in an outstanding mortgage in his own name, such devise does not include the interest secured by the mortgage.