PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

AGENCY.

It is a well established principle of the law of agency that a principal is bound, so far as the outside world is concerned, not by the real, but by the apparent, authority of the agent. This is conceded in *Spooner* v. *Browning* [1898], 1 Q. B. 528, in which the court, by a vote of two to one, held that the fact that a firm of stockbrokers had on three occasions filled orders brought them from the plaintiff by a clerk of their own, was not evidence for the jury of a holding out by them of the clerk as authorized to enter into contracts on their behalf.

Apparent Authority

An agent to buy real estate may, legally speaking, buy it himself and resell it to his principal at a higher price; but the burden is heavy on him to show that his principal was familiar with the transaction in all its details: *Jackson* v. *Pleasonton*, 23 S. E. (Va.) 680.

Fraud, Presumption

CARRIERS.

The Supreme Court of New York, Appellate Division, has recently decided in *Snelling* v. *Yetter*, 49 N. Y. Suppl. 917, that where a person who had goods in defendant's warehouse terminated the storage agreement, paid all defendant's charges, surrendered the contract and thereupon directed defendant, who was also a common carrier, to deliver the goods at her residence the same day, and paid the transportation charges, and where defendant accepted and entered the order; that from the time of such acceptance, the defendant assumed the relation of a common carrier.

Warehouseman, Assumption of Character of Common Carrier

CONSTITUTIONAL LAW.

The Supreme Court of New York, in *In re Kenny*, 49 N. Y. Suppl. 1037, has recently decided that a statute making the term of imprisonment of a person committed to the workhouse for public intoxication to depend upon the determination of the workhouse superintendent and commissioner of correction whether such person has previously been convicted of a like offence, without giving him an opportunity to be heard thereon, de-

"Due Process of Law," Term of Imprisonment

CONSTITUTIONAL LAW (Continued).

prives him of liberty without due process of law, within the Fourteenth Amendment of the Federal Constitution.

The charter of a turnpike road company exempting the citizens of a certain town from paying toll, gives them a vested right of which they cannot be deprived by a subsequent act of the legislature, unless a proper exercise of the police power of the state requires the change, or the interest of the general public demands it: *Louisville & T. Turnpike Road Co.* v. *Boss et al.* (Court of Appeals of Kentucky), 44 S. W. 981.

Vested Rights, Police Power

CONTRACTS.

The fact that a government contractor was not a manufacturer of, or a regular dealer in, the articles he had contracted to supply, as required by Rev. St. U. S. § 3722, is unavailing as a defence in an action by the contractor for failure to perform a contract made by him with defendant to do certain work on the articles embraced in the government contract: *White* v. *McNulty* (Supreme Court, App. Div. of N. Y.), 49 N. Y. Suppl. 903.

Action for Breach, Defence

A contract entered into by a government contractor with another to do certain work on articles which he had agreed to furnish the government, does not constitute an assignment of the contract, within the purview of the Rev. St. U. S. § 3737, prohibiting the transfer to another of any contract or interest therein by the party to whom the contract is given: *White* v. *McNulty* (Supreme Court, App. Div. of N. Y.), 49 N. Y. Suppl. 903.

Assignment

A contracted to sell B 850 shares of capital stock, the contract stipulating that if B failed to make the payments thereon as agreed he should forfeit said stock, which should revert to A, and all claims against B should thereupon cease. Held, that the forfeiture and reverter of the stock provided for in the contract was not a penalty, but constituted an option in B. to either pay the price and take the stock, or refuse to pay and forfeit the stock, and a refusal to pay was not a breach of the contract: *Gallup* v. *Sterling et al.* (Supreme Court of N. Y.), 49 N. Y. Suppl. 942.

Breach, Penalty, Option

A company agreed to pay to defendants, who were patentees of a button holder, a certain royalty on each button sold within one year, and to sell not less than 250,000 buttons within that period. Defendants gave the company an option, on the expiration of the con-

Sales, Royalty, Amount

CONTRACTS (Continued).

tract, either to renew the same or to buy the patent outright. It was further agreed between the parties that if the company should not sell 250,000 buttons, said company should lose their option. Held, that defendants were entitled to a royalty on 250,000 buttons, though the company sold a less number: *Meyer* v. *Brenzinger* (Supreme Court, App. Term, N. Y.), 49 N. Y. Suppl. 1091.

Specific Performance, Evidence

A sought to obtain specific performance of an oral agreement alleged to have been made between him and B, his wife, that B should purchase certain real estate, and whenever she should sell the same she would pay to A one half of all she received after deducting the purchase price. B denied making the agreement. Held, that the alleged contract was too vague and uncertain to entitle A to specific performance: *Gouge* v. *Gouge* (Supreme Court, App. Div.), 49 N. Y. Suppl. 879.

CORPORATIONS.

Purchase by a Corporation of its Own Stock, "Ultra Vires"

In *Burrows* v. *Niblach*, 84 Fed. 111, the Circuit Court of Appeals, Seventh Circuit, has decided that it is "illegal" for a national bank to purchase shares of its own stock otherwise than for the purpose of preventing a loss upon a pre-existing debt. The receiver of such a bank, without tendering back the stock, was permitted to recover from the vendor of the stock the price which had been paid. The court sought to distinguish the case from *Bank* v. *Matthews*, 98 U. S. 621, and *Bank* v. *Whitney*, 103 U. S. 99, and professed to assimilate it to *McCormick* v. *Bank*, 165 U. S. 538, and *Bank* v. *Kennedy*, 167 U. S. 362. In the former case, a national bank, not yet authorized by the Comptroller to transact business, took a lease of a building for use as a banking house. Having held possession of the premises for some time the bank abandoned its organization proceedings without transacting any business or receiving authority so to do. In an action upon the lease a recovery was refused on the ground that the statutory prohibition against transacting business without the Comptroller's permit made the lease absolutely void even between the parties. In the latter case, a national bank, after purchase of stock in another corporation, was sought to be held liable as a stockholder therein. The court refused to enforce the liability, assigning as a reason that the purchase was made void by the prohibition in the Banking Act directed against

CORPORATIONS (Continued).

such purchases. These last two decisions represent the remorseless application of the principles adopted by the court in *Thomas* v. *R. R.*, 101 U. S. 71, *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24, and cases of that class. In the principal case, however, as the contract had been fully performed on both sides it is doubtful whether, on any theory, the decision can be justified. Certainly the rights of the corporation, if any, are equitable rights and no recovery should have been permitted without compelling restitution of the stock. The case, therefore, may be said to represent the *remorseless misapplication* of the principles appealed to by the court.

"Ultra Vires" Contracts, Recovery in Quasi Contract

Just as this number of the AMERICAN LAW REGISTER goes to press, the daily papers announce the reversal by the Supreme Court of the United States of the decision of the Circuit Court of Appeals, Third Circuit, in the last stage of the litigation over the lease by the Central Transportation Co. to the Pullman Palace Car Co. Recovery of rental by the lessor on the covenant in the lease was refused in 139 U. S. 24. The parties then went into equity and the lessor obtained a decree for the payment of a large sum of money found to be due upon the basis of an accounting for benefits conferred. The amount of the recovery has now been cut down to a figure which, as reported in the papers, seems to indicate that nothing but the actual value of the corpus of the leased property can be recovered by the lessor. The profession will await the opinion with great interest. The palpable injustice of the decision and the manifest difficulty in the way of permitting any recovery at all upon the court's theory of corporate power will probably hasten the inevitable reaction against the artificial doctrine of *ultra vires* contracts which Mr. Justice Gray has done so much to fasten upon the court. It is satisfactory to note the beginning of the reaction in the reported dissent of two of the justices.

Reorganization, Rights of Minority, Laches

The Circuit Court of Appeals, First Circuit, while recognizing that majority stockholders cannot compel the minority to elect between a sale of their holdings and an exchange for stock in a new concern, has nevertheless emphasized the principle that the aggrieved minority may, by acquiescence in the reorganization, estop themselves from asserting their rights in equity: *Post* v. *Beacon Vacum Pump & Electrical Co.*, 84

CORPORATIONS (Continued).

Fed. 371. In this case it appeared that the reorganization plan involved the creation of a new corporation and the transfer to it of the business and property of the old. The stockholders of the old concern were to receive proportionate holdings of stock in the new, with a privilege of subscribing for the balance at a stated figure. The minority opposed the transfer but subscribed for their *pro rata* "under protest and to save their rights." Having done this and having allowed the new concern to carry on the business for a year and a half, the court thought it too late for them to invoke equitable relief.

Foreclosure Proceedings, Rights of Unsecured Creditors, "Trust Fund"

Foreclosure proceedings are instituted upon a mortgage securing bonds of a consolidated corporation of two different states. From the time of consolidation the company has exercised the franchises of a consolidated corporation without objection from the state or the stockholders. An unsecured creditor, having obtained leave to intervene, now petitions (after a decree of foreclosure) that the decree be vacated, the mortgages be adjudged invalid and the assets of the corporation declared a trust fund to be distributed among unsecured creditors. This relief the Circuit Court of Appeals, Seventh Circuit, very properly refuses in *Louisville Trust Co.* v. *Louisville N. A. & C. Ry. Co.*, 84 Fed. 539. The court expresses surprise that such relief should be sought. But the judges have only their own loose reasoning to blame. Here, as in *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, the petitioning creditor was merely following out to a logical conclusion the untenable theory that the creditor of an insolvent corporation has all the rights of a *cestui que trust.* One hopes that the theory will not survive the blow which it received in the Hollins Case. One also could wish that the courts would cease to torture the doctrine of estoppel by invoking it, as in the principal case, to support an obviously sound decision upon a state of facts from which the elements of an estoppel are wholly absent. Why not admit that the validity of a consolidation can be questioned only by the state or by stockholders? This is all that can be meant by the sonorous announcement that general creditors are "estopped."

Purchase of its Own Stock, "Trust Fund"

Another illustration of a resort to the fiction of a "trust fund" to justify a decision which in no sense involves trust principles is to be found in *Hamor* v. *Taylor-Rice Engineering Co.*, 84 Fed. 392 (Circuit Court, D. Delaware). A corporation bought shares of its own stock from a director and gave him a promissory

CORPORATIONS (Continued).

note for the price. The director sought to prove on this note under an order made after the corporation had gone into the hands of receivers. The court was of opinion that *prima facie* such a transaction involved an impairment of capital and that the burden rested upon the claimant to show the existence at the date of the note of a surplus adequate to meet it. In any view the decision seems sound. The note having been given on the verge of insolvency and without the passage of value to the corporation, the director was bound to establish that the promissor was in a condition which justified the giving away of its property. On the other hand (assuming that the question of insolvency was out of the case) it was proper enough to place upon the claimant the burden of establishing that no impairment of capital was involved. The court, however, preferred to resort to the theory that the capital stock of a corporation is a trust fund for creditors and seems to have been of opinion that the assertion of this proposition was a satisfactory solution of all the problems involved.

CRIMINAL LAW.

Homicide, Appeal, Supersedeas, Mandate of Governor

The Supreme Court of Pennsylvania, in *Com.* v. *Hill*, 39 Atl. 1055, decided that the date of execution being no part of the sentence, the mandate of the Governor, requiring the sheriff to cause the sentence to be executed on a day named, is in full force, and should be executed without undue delay, though the day named for the hanging has passed without execution; there having been no actual escape, but the sheriff having delayed action, under advice, on doubt as to the effect to be given to an appeal under a new act and its effect as a supersedeas.

HUSBAND AND WIFE.

Common Law Marriages

Possibly it would be well if common law marriages were once for all abolished by statute; as long as they are permitted, however, they should, of course, be protected by the courts, and we cannot but agree with the majority of the court in *Comly's Estate*, 39 Atl. (Pa.) 890, that evidence that the alleged common law wife had, prior to the date of the alleged marriage, lived in meretricious relations with others was not relevant to the question of marriage itself.

Under the community theory in vogue in Louisiana the creditor of a spouse, when the community is dissolved by the

HUSBAND AND WIFE (Continued).

Community System

death of the other spouse, may not proceed directly against the undivided interest of his debtor spouse on the community property, but should first force a final settlement of the survivor's interest in that property: *Pior* v. *Giddens*, 23 So. (La.) 337.

Divorce, Desertion

A wife left her husband's house on account of his unkind treatment. Several months later she returned without his request, but was put out of his house and sent to a farm-house belonging to him. Held, that this act was notice to her of his intention to exclude her from his home and that he did not want her society. Hence, her act in then leaving him was not such wilful desertion as would entitle him to a divorce: *Musgrave* v. *Musgrave*, 39 Atl. (Pa.) 960.

Married Woman's Residence, Conflict of Law

In re De Nicols [1898], 1 Ch. 403, presents, apparently for the first time in England, an interesting question, to wit: Are the rights of a married woman in the property of her deceased husband to be determined by the law of the place of the marriage, or the law of the domicile of the family at the time of his death? Kekewich, J., held to the former view, and thus decided that the property earned while decedent was a naturalized citizen of Great Britain was subject to the community doctrine of the French law, because of the marriage having taken place years before. It is to be hoped that the question will be passed upon by a court of appeal, as the decision is contrary to the American rule as stated in Story on Conflict of Laws, and also apparently to a decision in Ireland and, possibly, a dictum of Lord Eldon.

Suits for Alienating Husband's Affections

In a number of states, including New York, suits for alienation of a husband's affections are recognized at the present day. It has recently been held that it is incumbent on the plaintiff in such suit to prove a wrongful intent on the part of the defendant, proof of her own attractiveness and of her pleasure at the husband's attentions not being sufficient: *Vitman* v. *Egbert*, 49 N. Y. Suppl. 3.

INSURANCE.

"Personal Effects," Interpretation

The case of *Woodside* v. *Canton Ins. Office*, 84 Fed. 283, is an illustration of the rules that a policy of insurance is to be given a reasonable interpretation, and that an ambiguity in such a policy is to be resolved in favor of the insured. The policy was for $2000

INSURANCE (Continued).

upon property consisting of various articles of clothing, an organ, silverware, nautical instruments, charts, etc., which were described generally as "personal effects" and were valued at the sum insured. On the margin of the policy was the memorandum clause, "Warranted free from all average." A sextant, a few charts and some articles of clothing, most of them damaged and in all worth about $78, were saved from the wreck of the ship.

The court held that the policy should be construed distributively, making each item of the "personal effects" retain its separate and distinct character, rather than that the "personal effects" as a whole should be treated as an integral subject of insurance. The decision is sustained by reference to cases involving policies on goods of different and distinct natures, where a general description was used for convenience; a number of other cases are distinguished in which the insurance was upon the whole cargo as an integral subject.

We observe that the decree was for $2000 and interest, without allowance for the goods saved. The average-clause, moreover, was certainly applicable for these, as there was not a total loss.

MORTGAGES.

Prior Judgment

In Georgia, as in the majority of the states, it is settled that a sale under a mortgage discharges the lien of a prior judgment creditor, who must look to the fund realized for his satisfaction: *Brunswick Co.* v. *Bank of Brunswick*, 23 S. E. (Ga.) 688.

Rights of Purchasers of Mortgaged Property

A mortgaged to B, and subsequently sold to C; he then made a payment to B on account of the mortgage debt, which payment was subsequently rescinded by agreement between A and B. It was held that A and B could not by agreement adversely affect the rights of C, and that while A and B might have agreed that subsequent payments by A to B should take the place of this payment (which was now unsecured), yet there was no evidence to show that the subsequent payments by A to B were not, as they purported to be, payments on account of the mortgage debt: *McCown* v. *Westbury*, 29 S. E. (S. C.) 663.

MUNICIPAL CORPORATIONS.

The Supreme Court of Virginia, in *City of Lynchburg* v. *Wallace*, 29 S. E. 675, affirmed the following instruction "that

MUNICIPAL CORPORATIONS (Continued).

Obstruction on Sidewalk, What Constitutes

it was the duty of the city to keep its sidewalk in a reasonably safe condition, and free from obstructions dangerous to persons using ordinary care, but that it was not liable for an accumulation of ice or snow which produced mere slipperiness, but had not become uneven or rounded, so as to form an obstruction." The plaintiff had slipped on the sidewalk and sustained injuries, as a consequence of which she was now suing the city for damages.

NEGLIGENCE.

Bicycles, Right of Way

That there is some difference between a wagon and a bicycle as respects the law of the road was manifested in *Taylor* v. *The Union Traction Co.*, 184 Pa. 465, where it was held, that notwithstanding the Act of April 23, 1889, P. L. 44, which gives to riders of bicycles the same rights as persons using carriages drawn by horses, and a city ordinance which gives vehicles on passenger railways, going in the direction that the cars travel, the right to the track when they meet vehicles going in the opposite direction, if a bicycler, while riding between the tracks of a street railway in the direction that the cars run, meets a wagon approaching him on the tracks from the opposite direction, it is his duty to leave the track, and if he fails to do so and is run down by the wagon, he is guilty of contributory negligence.

Excavation, Knowledge of Injured Person

City of Hillsboro v. *Jackson*, 44 S. W. (Tex.) 981. In an action against a city for personal injuries caused by an excavation in a street, previous knowledge of the existence of the dangerous place does not necessarily show contributory negligence. The plaintiff had crossed the ditch on a visit to an acquaintance, and on her way back, not knowing exactly where it was, it being a dark night, and there being no light to apprise her, she fell into it. Held, the court could not charge her with contributory negligence.

Landlord, Failure to Repair, Injury to Tenant

The Supreme Court of New York, in *Schick* v. *Fleischhauer*, 49 N. Y. Suppl. 962, decided that a mere contract by a landlord to repair does not subject him to liability for negligence for personal injuries resulting to the tenant from the landlord's failure to perform the contract, because the tenant has no right to stay in the premises when they are in an unsafe condition by reason of the landlord's neglect to perform the contract.

NEGLIGENCE (Continued).

but he may move out and defend in an action for the rent as upon an eviction.

"Stop, look and listen," Street Railways

That the rule of "stop, look and listen," as applied to street railways, is not an absolute and unbending rule, see *Callahan* v. *Phila. Traction Co.*, 184 Pa. 425, where it was held that a person about to cross a street at a regular crossing is not bound to wait because a car is in sight. If a car is at such distance from him that he has ample time to cross, if it is run at the usual speed, it cannot be said, as a matter of law, that he is negligent in going on. The rule to stop, look and listen, applicable to the crossing of steam roads applies only in part to the crossing of street railways. There is always a duty to look for an approaching car, and, if the street is obstructed, to listen, and in some situations to stop; but to cross the tracks of a steam road in front of an approaching train will generally prevent a recovery.

Street Railroads, Defective Tracks, Injury to Pedestrian

The Supreme Court of New York, in *Wiley* v. *Smith*, 49 N. Y. Suppl. 934, decided that a pedestrian has a right to assume that street car tracks are in a reasonably safe condition at a particular point, although there is no defined crossing, and the railroad company might not have anticipated that he would be liable to cross there, and that if he uses due care, the company is liable for injuries he sustains.

PARTNERSHIP.

Joint Estate, Debtor's Exemption

Until *Porch* v. *Arkansas Milling Co.*, 45 S. W. 51, came on for decision, the question of debtor's exemption in partnership property had not arisen in the Supreme Court of Arkansas. A separate creditor obtained judgment and proceeded under the local statute to levy upon the debtor's interest in a partnership. The debtor's statutory answer set forth that he was the head of a family, etc., and that his entire estate, including his interest in the property of the partnership, did not exceed the exemption limit. A majority of the court, following the general rule as approved in other jurisdictions, thought that as the partnership was a "going concern" the title to firm property was not in the individual partners and that neither partner could call such property his own within the meaning of the statute. A minority, while agreeing with decisions to this effect where exemption is claimed in specific chattels, thought that a dif-

PARTNERSHIP (Continued).

ferent result should have been reached in this case because the debtor claimed his exemption in respect of the balance due him on final settlement. The majority seem to have been right. Whether upon the entity theory (which the court tacitly adopts) or upon the common law theory of a joinl estate; it is impossible to regard the partner as having a severat title before liquidation. Without such a title there can be no exemption. The opinion of the dissenting judge does not meet the difficulty.

PRACTICE.

Judicial Acts, Collateral Attack

The Supreme Court of New York has decided that where an attorney has been regularly appointed to appear on behalf of the city in proceedings to condemn land for educational purposes, and the bills for such services have been duly presented to the judge for taxation, the act of the judge in passing upon their amount is a judicial act which cannot afterwards be questioned by the board of education. *People ex rel. Allison* v. *Board of Education of City of New York* (Supreme Court, App. Div. of N. Y.), 49 N. Y. Suppl. 915.

N. Y. Code Civil Procedure, Pleading, Separate Defences

The aim of the common law was to produce singleness of issue, but the rule against duplicity in pleading has long been relaxed. The busy practitioner escapes mental strain. The novice has relief from confusing and subtle distinctions, and the defendant has the chance to set up his various defences, if he be fortunate enough to have several, instead of being cut down to the inflexible election of the old régime. The exigencies of actual and active life and the demands of justice worked a need for a change which showed strongly and definitely in the enactment of the Statute 4 Ann. c. 16, § 4. The provisions of this was that "it may be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters as he shall think necessary for his defence . . ." The course, as stated in Stephen on Pleading (Tyler's Ed.), 263, has been for the defendant, if he wished to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so, but (see note n.) the court has a discretion either to permit or refuse according to the nature of the matters proposed to be pleaded. It seems that in practice the leave of court was not applied for, but the defendant might be

PRACTICE (Continued).
compelled, if his pleas were inconsistent, and such as ought not to be joined, to be compelled to chose between them: *LeConte* v. *Pendleton*, I. Johns. Cas. 104. Well-known separate defences may now be made in the same action which would have offended against the original rule. In these instances a defendant is permitted to state more than one matter as an answer to the complaint of the plaintiff, *e. g.*, with non-assumpsit may be pleaded the statute of limitations, or a discharge in bankruptcy or infancy. Double pleas have long been used in Pennsylvania in the familiar short forms which are universally accepted in this State and which are sometimes readily "helped out" by separate notices of special matter, under the rules of the respective Common Pleas Courts. In the State of New York the Code of Civil Procedure, § 507, provides as follows: "A defendant may set forth in his answer as many defences or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counter-claim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer." It seems that the first sentence of this section, being 150 Co. Proc., as originally enacted, ended with the words, "but they must not be inconsistent with each other," but these were struck out by the amendment of 1879: Bliss' N. Y. Ann. Code. 379.

A recent case, *Kelly* v. *Theiss*, 49 N. Y. Suppl. 1108, and in line with prior decisions, is an example of the freedom granted to the pleader by this provision of the Code. To a complaint which alleged that the defendant and another were co-partners and as such executed a promissory note, therein set forth, an answer was filed denying the allegations. The respondent also alleged a separate and distinct defence. It was held that the allegations in the affirmative defence, which described a note made by the respondent, with a special agreement affecting the time of its payment, did not admit the allegations of the complaint. The court said: "Under the system of pleading provided by the Code of Civil Procedure, a defendant is at liberty to set forth in his answer such defences as he may have, whether inconsistent or not." Another illustration of this section of the Code is found in *Bruce* v. *Burr*, 67 N. Y. 237, in which a defendant was allowed to plead a rescission of the contract, for the breach of which suit was brought on the ground of fraud or mistake and also, as a separate defence, a breach of warranty on the part of the plaintiff.

PRACTICE (Continued).

There would seem to be no hardship from the opening of this wide door, for there remains the requirement to separately state each ground of defence. Where there is adequate notice, so that the plaintiff may be prepared to meet each averment that is set up by the defendant, the multiplication of issues has apparently worked no injury in the trial of cases. No actual injustice has been done because of the absence of the ingenuity and learning of old-time special pleading.

REAL PROPERTY.

A stipulation in a deed that the property "shall be used for residence purposes only" is broad enough to allow the erection thereon of an apartment house, even though the latter was built with a common dining-room where those occupants could take their meals who were unwilling to keep up a private kitchen. The mere mention of "residence purposes" does not demand the erection of segregated private residences unless there is something more in the deed to enforce this construction: *McMurtry* v. *Phillips Investment Co.*, 45 S. W. (Ky.) 96.

Deed, "Residence Purposes," Apartment House

In *Airey* v. *Kunkle*, 7 Pa. Super Ct. 112, the Superior Court of Pennsylvania has applied the rule of law that where, in a conveyance, there is a conflict between the adjoiners and the courses and distances, the former shall control. The plaintiff's grantor had been the original owner of the property in dispute, and, in a conveyance to begin so many feet from Street X, stated that the property should extend between parallel lines at right angles to Street Y. Street U formed an angle, slightly less than a right angle, with Street X so that the conveyance attempted to include a triangular piece of ground belonging to the adjoining owner.

Grant, Boundaries, Construction

The grant was construed to mean, parallel to Street X, some weight being given to the fact that a fence, erected by one of the grantees and remaining undisputed for sixteen years, followed a line parallel to Street X. As each grantee received an area of land equal to what the deed purported to convey, neither was damnified. Therefore, as only a party injured can assert an estoppel, the grantees of neither could set up estoppel as a basis of defence. Still less can a party whose error gave rise to the estoppel assert it to establish his title.

In *Leeds, Etc., Theatre* v. *Broadbent* [1898], 1 Ch. 343, a mortgage contained the provision that the principal money

REAL PROPERTY (Continued).

Mortgage, Interest, "Punctual" Payment

should not be required for three years if, in the meantime, every half-yearly payment of interest should be "punctually" made. Half-yearly interest being due on August 15th, a demand was made on the mortgagor and, after some correspondence between mortgagor and mortgagee, a check for the interest was mailed and received on August 24th. An injunction having been sought to restrain the mortgagee from selling the property for default in payment of interest, the court was obliged to construe the meaning of the word "punctually."

Kekewich, J., in the Divisional Court, held that it was not to be taken in its strict and literal sense, but as it was used by business men under such circumstances, and that in this case a delay of nine days was not too unreasonable to be considered without the limits of a "punctual payment." An injunction against foreclosure was therefore granted, but it was dissolved by the Court of Appeal, who, without discussion, said very emphatically that a "punctual payment" means a payment on the day appointed and nothing else, so that the mortgagee had a perfect right to take advantage of the breach of covenant.

SALES.

A shipped goods to B who was to sell them, and remit the proceeds to A, the net profit to be applied on a pre-existing debt owing from B to A. Held, the transaction was not a purchase, B being merely an agent: *Barnes et al.* v. *Darby et al.* (Court of Civil Appeals of Texas), 44 S. W. 1029.

Consignment. Interpretation

SURETYSHIP.

Some familiar propositions are illustrated in *Drescher* v. *Fulham*, 52 Pac. (Colo.) 685: (1) That parol evidence is admissible to show that a joint maker of a note is a surety, provided it be followed by evidence that the creditor knew he was only surety; (2) That an agreement to extend the time of payment will relieve surety where the consideration was an agreement of the principal to pay interest for a definite period after the note was due.

Surety, Discharge

WILLS.

The testator left his estate to his wife, "for her absolute use and benefit, so that during her lifetime she shall have the

WILLS (Continued).

Absolute Interest, Gift Over on Failure to Sell, Validity

fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my estate as she shall not have disposed of, as aforesaid, I give in trust," for the benefit of certain persons. When the wife died the *cestuis que trustent* brought an action against the devisees under the wife's will. Held, that the wife had an absolute interest in her husband's estate which was not cut down by the latter phrases in the will and that the trusts after her death were therefore void: *In re Jones* [1898], 1 Ch. 439.

Descent, Brother of the Half Blood

Although in Pennsylvania brothers and sisters of the half blood, under § 6, Act of 8th April, 1833, P. L. 318, take with those of the full blood, the effect of § 9 of the same Act is to prevent a half brother by another father from taking against a devisee under the will of a granddaughter of the original purchaser: *Henszley* v. *Gross*, 39 Atl. (Pa.) 949. § 6 provides: "In default of issue, and brothers and sisters of the whole blood and their descendants, and also of father and mother, competent by this Act to take an estate of inheritance therein, the real estate of such intestate, subject to the life estates hereinbefore given, if any, shall descend to and be vested in the brothers and sisters of the half blood of the intestate, and their issue, in like manner respectively, as is hereinbefore provided for the case of brothers and sisters of the whole blood and their issue." § 9 imposes the limitation that "no person who is not of the blood of the ancestors or other relations from whom any real estate descended or by whom it was given or devised to the intestate, shall in any of the cases before mentioned, take any estate of inheritance therein, but such real estate subject to such life estates as may be in existence by virtue of this Act, shall pass to and vest in such other persons as would be entitled by this Act, if the persons not of the blood of such ancestor or other relation had never existed or were dead at the decease of such intestate."