PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

General Average

That the common danger to which the whole adventure must be exposed and from which, by the sacrifice of a part, the rest must be preserved to constitute a case of general average, need not be an actual but only an apparent danger, has been once more asserted in a recent case: *The Wordsworth*, 88 Fed. 313. The forepeak of the vessel being discovered full of water, her master and officers believed that there was a hole below the water-line, a serious menace to the ship and cargo. The sluices leading to the next compartment were accordingly opened and an examination made. It was found that the leak could easily be repaired. The water damage to the flour in the next compartment was held by Judge Brown to be a proper subject for general average contribution.

Where a vessel's owners do not provide the master with proper charts, and by their directions contribute to the imprudent navigation which leads to a stranding, they cannot recover a general average charge from the cargo owners for their indemnity: *Trinidad Shipping and Trading Co.* v. *Frame, Alston & Co.*, 88 Fed. 528. This case follows the ordinary rule that a man cannot recover for a loss which has been caused by his own fault. It is to be distinguished from the case of *Chrystall* v. *Flint*, 82 Fed. 472, in which the owner, being exempted by the Harter Act (Act Feb. 13, 1893), from liability for the negligent stranding, was permitted to recover a general average contribution from the owners of the cargo. See 37 Am. Law Reg. (N. S.) 23, (Jan. 1898).

Pleading

The freedom of admiralty pleading from narrow technicalities is well illustrated in the recent case of *The Highland Light*, 88 Fed. 296. To a libel *in rem* to recover money earned by libellants as stevedores in loading *The Highland Light* and another vessel, a cross libel was filed to recover damages for breach of a promise to render towage services to the vessels in question, and exceptions to the cross libel were overruled on the ground that the agreements for

ADMIRALTY (Continued).

loading and towage were contained in the same instrument, and each was the consideration for the other.

It seems strange there should have been any doubt in counsel's mind as to whether timber found drifting with the tide on deep water in a harbor, and out of the control of the owners, is the subject of salvage. The short *per curiam* opinion of the court ought, certainly, to have removed that doubt: *Whitmire* v. *Cobb*, 88 Fed. 91.

Salvage, Timber

AGENCY.

Statements made by an agent, after his principal has made an assignment for creditors, as to the fraudulent intent of the principal, are not admissible to prove fraud, the agency being terminated by the assignment: *Wilson* v. *Sax*, 54 Pac. (Mont.) 46.

Admissions

A, the mortgagor, resided in New York, and B, the mortgagee, in California. At the request of A, B sent the mortgage to an express agent in A's town, with instructions to allow A to examine the mortgage, but not to give it to him unless he paid the mortgage debt to the express agent. A went to the office of the express agent, examined the mortgage, which had just arrived, and paid the amount to the express agent. At that moment the sheriff of the county, who had been waiting outside of the express office under instructions from A, entered and attached the money in the express agent's hands, by virtue of an attachment issued by A against B for a debt. Held, that, without inquiring into the justice of A's claim against B, the mortgage had been satisfied by virtue of payment to B's agent: *Ambrose* v. *Barrett et al.*, 53 Pac. (Cal.) 805.

Mortgage, Payment, Title to Money

Sullivan v. *Sailor*, 40 Atl. (Conn.) 1054, decides on familiar principles that an undisclosed principal in any contract not involving personal trust and confidence may claim the benefit of, and sue on, a contract made by his agent, subject, of course, to the right of the third party to use any defence which would have been available against the agent.

Undisclosed Principal, Defence

ASSIGNMENTS FOR CREDITORS.

Dearing v. *M'Kinnon Dash & Hardware Co.*, 53 N. Y. Suppl. 513, is an important case. A Michigan corporation,

ASSIGNMENTS FOR CREDITORS (Continued).

What Constitutes an Assignment

doing business in New York, had authorized its officers to execute to a trustee a chattel and a real estate mortgage to secure the payment of certain creditors in a specified order. In the mortgage the trustee was given discretionary power to sell the assets, and it contained the usual provision that, in case of their payment, the instrument should be void; a provision that unpreferred creditors who assented thereto should be paid out of the balance, if any; also a provision that the mortgagor might, in his discretion, continue in business for the purpose of using up material on hand. In this suit, a replevin by the trustee against a judgment creditor who had issued execution, it was held: (1) that the conditional feature of the instrument distinguished it from an assignment for creditors, and that plaintiff, as the trustee under a chattel mortgage, would have been entitled to recover, had it not been (2) that the instrument in the features above mentioned was likely to hinder and delay the company's creditors, and, therefore, whatever its name and form, was in contravention of the Statute of Frauds (*sed quære*, is this a proper description of the familiar Statute of Elizabeth?). The rule of interstate comity, of course, did not compel the court to recognize the validity of an instrument opposed to its policy, even though it might have been sustained in Michigan.

CARRIERS.

"Roadway," What is Included

The Constitution of North Dakota declares that "the franchise, roadway, road bed, ... etc., shall be assessed by the state board of equalization." Held, that the word "roadway" includes not only the strip of ground upon which the main line is located, but, also, all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations necessary to accomplish the object for which the company was incorporated: *Chicago, M. St. P. Ry. Co.* v. *Coss Co. et al.* (Sup. Ct. of N. D.), 76 N. W. 239.

CONFLICT OF LAWS.

Statue of Limitations, Lex fori, Statutory Rights of Action

The United States Circuit Court, Maryland District, has applied the well-settled rule that statutes of limitation affect the remedy, not the substantive right, and are determined by the law of the forum. To a suit brought in Maryland in the Federal court against a stockholder in a Georgia bank to enforce a liability imposed by a Georgia statute the

CONFLICT OF LAWS (Continued).

defendant pleaded the Maryland statute of limitations, and a demurrer to this plea was overruled: *Brunswick Terminal Co.* v. *Nat'l B'k of Baltimore*, 88 Fed. 607.

The court refused to follow *Andrews* v. *Bacon*, 38 Fed. 778 (1889), and qualified and explained *Bank* v. *Franklin*, 120 U. S. 747, 756, 7 Sup. Ct. 757 (1886), cases which appeared to qualify the general rule, in respect of suits against stockholders to enforce a statutory liability to creditors of a corporation. In the principal case it appeared that the right of action conferred by the Georgia statute had been expressly decided by the Georgia courts to be in the nature of a specialty. It was, therefore, contended that the obligation, being a specialty in Georgia, should remain a specialty in Maryland, and that if any Maryland statute of limitations applied, it was that relating to specialties. The court disposed of this contention as follows: "There is nothing peculiar to the Georgia statute which relates to the liability of stockholders which led the Supreme Court of Georgia to rule that the action was in the nature of a specialty; and it was from the principles of the general law, as interpreted by that court, and held by it to be applicable to actions given by statutes, that the court reached its conclusion. . . . . It was not, therefore, the interpretation of a state statute, but the announcement of a general rule of law, ... as to which the decision of a state court is not binding."

Federal Court, State Decisions on "General Law"

CONSTITUTIONAL LAW.

The Act of Congress of March 1, 1893 (27 Stat. 507), entitled "An Act to Create the California Débris Commission and Regulate Hydraulic Mining in the State of California," was designed to prevent the obstruction or injury of the navigable waters of the state. The act contains a provision that the owners of mining ground in the territory drained by the Sacramento and San Joaquin river systems, before engaging in hydraulic mining thereon, shall execute an instrument surrendering to the United States the right to regulate the disposal of the débris. On application by the United States for decree enjoining the mining carried on by respondent, it was contended that this provision of the act is unconstitutional, as requiring the surrender of property rights without compensation. The Circuit Court of the United States for the Northern District of California declared the provision constitutional,

Regulation of Commerce, Navigable Waters, Hydraulic Mining

CONSTITUTIONAL LAW (Continued).

since it adds nothing to the authority already possessed by Congress over all navigable waters within a state, which are accessible to interstate or foreign commerce. This was affirmed by the Circuit Court of Appeals: *North Bloomfield Gravel Min. Co.* v. *United States*, 88 Fed. 664.

CONTRACTS.

In *Malcomson* v. *Wappoo Mills et al.* (Circuit Court, D. South Carolina, 88 Fed. 680), Simonton, C. J., following *People* v. *Globe Mut. Life Ins. Co.*, 91 N. Y. 174, has decided that damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all other persons from interfering with its business or property. See, *coutra*, *Spader* v. *Manufacturing Co.*, 20 Atl. 378 (47 N. J. Eq. 18).

Damages, Performance Prevented by Law

A, having entered into a contract with B, assigned his interest to C, and B was succeeded by D. Held, that C could not maintain an action on the contract against D, there being no privity between them: *Hand* v. *Evans Marble Co.* (Court of Appeals of Maryland), 40 Atl. 899.

Parties, Privity

The Supreme Court of Georgia, in *Rakestraw* v. *Lanier*, 30 S. E. 735, has decided that a contract binding one to desist from the practice of a learned profession within a certain area, without limit as to time, differs from a contract binding one who has sold out a mercantile or other kind of business, and the good will therewith connected, not to again engage in that business; and that the former is void as in restraint of trade.

Restraint of Trade, Practice of Profession

A rule by which it may be determined whether, in a given case where a builder has failed to comply in all respects with his contract, he shall be allowed to recover on the contract with a deduction to cover the defects in performance, or whether suit on the contract shall be barred, was laid down in *Spence* v. *Harr*, 50 N. Y. Suppl. 960. Some of the defects went "to the strength

Substantial Performance, Building Contract

CONTRACTS (Continued).

and stability of the structure; others to inferior materials used in the work; and others to matters of style and finish." In deciding that these omissions barred any recovery on the contract the court said that, while strict performance was no longer a prerequisite to action on the contract, there still had to be substantial performance, which was referred to as follows: "Substantial performance permits only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may, without injustice, be compensated for by deductions from the contract price."

CORPORATIONS.

Reorganization Committee, Voting Trust

That question which has arisen so often and received varied treatment of late years, namely, the powers and duties of the members of a voting trust, arose in the case of *Haines* v. *K. & H. Ry. Co.*, 52 N. Y. Suppl. 1061. By the terms of the reorganization of the road a committee of nine was named, who were to constitute the first board of directors, and to hold and vote sixty per cent. of the new stock until such time, not exceeding five years, when in their judgment the condition of the road should warrant the distribution of the stock. Plaintiff, a party to the agreement, later asked for an injunction to restrain the members of the committee from longer acting as such and voting on the stock held in trust, averring that five of the defendants had disposed of their individual holdings of stock, thereby disqualifying themselves from longer acting as directors. A minority of the committee, having retained their shares, claimed the sole right to vote the trust stock. The court took the view that, while those who had sold out might no longer be qualified to act as directors, yet they were still members of the organization committee, since they were "originally trusted as individuals, irrespective of their financial interest in the old or new company." It was further held that, if necessary, an injunction would issue to prevent the minority of the committee exercising the exclusive right to vote. All the members of the committee should exercise the power vested in them as long as permitted by the agreement, free from any interference tending to defeat the object for which it was formed.

CRIMINAL LAW.

Compounding Crimes, Defence

The Supreme Court of Oregon, in *State* v. *Ash*, 54 Pac. 184, decided that, where a police officer compounds a crime, it is no defence to an indictment for it, that he subsequently procured the conviction of the offender.

Oath, Sufficiency

Under the rule that an oath to be sufficient, must be in such a form as to furnish a foundation for an indictment for perjury if it is false, the test is whether it would authorize an indictment, not whether it would warrant a conviction: *Ward* v. *City of Brooklyn et al.* (Sup. Court, App. Div. N. Y.), 53 N. Y. Suppl. 41.

DAMAGES.

Personal Property, Conversion, Measure of Recovery

A very difficult question arises when one person has through a mistake taken possession of the property of another and, by labor, changed its form and enormously increased its value. Should the original owner be allowed to bring replevin for the article in its altered form, or, if he sues for the conversion, should the measure of damages be the original value of the article or its increased value through the work of the trespasser? The Supreme Court of Arkansas, following the leading cases of *Wetherbee* v. *Green*, 22 Mich. 318 (1871), and *Mining Co.* v. *Hertin*, 37 Mich. 332 (1877), has decided that where defendant had innocently cut down plaintiff's trees and converted them into cross-ties, replevin would lie, and if delivery could not be had, damages could be recovered for the value of the ties, less the labor expended on the timber: *Eaton* v. *Langley*, 47 S. W. 123.

DEEDS.

Deed, Delivery

A, having decided to convey his property to his brother's wife as a provision for his brother's children, executed a deed to said property one month before his death, which he believed to be impending, and handed it to his sister-in-law, at the same time telling her that he deeded her the land and wanted it to go to the children at his death. She then returned the deed to A, who placed it under his pillow, and later gave it to his brother with directions to have it recorded after A's death. Held, a valid delivery: *Payne et al.* v. *Hallgarth et al.* (Sup. Ct. of Oregon), 54 Pac. 162.

DEEDS (Continued).

It is a familiar rule that an instrument will be given such a construction, if possible, that it may stand rather than fall. The main question which arises is, how far the court will go in remedying defects.

Defective Deed, Remedy by Court, Assignment for Creditors

It is provided by statute in New York, (c. 503, § 30, Laws 1887), that preferences for creditors shall be limited to one-third of the assigned estate. A deed of assignment, by one clause, expressly subjected the preferences to the operation of this statute, but, by a subsequent clause, provided that the residue should be applied to the "payment of liabilities mentioned in the preference." It being clear that the intention was to make a valid assignment and that that intention would be effectuated by inserting "not" between the words "liabilities" and "mentioned," the word was read in, the court saying: "We think the intention to insert "not" is clear, that its insertion is necessary to prevent the defeat of the instrument, and that we should read it in, or construe the instrument as if it were in it:" *Eliassof* v. *Eckler*, 51 N. Y. Suppl. 892.

EVIDENCE.

On the trial of an issue to determine the validity of a will two experts were called for the purpose of proving the testator's mental incapacity. Hypothetical questions were framed embracing "every angry expression and every controversy with his employes and those with whom he dealt; every instance of sleeplessness, nervousness, and forgetfulness, during the last few years of his life, when his strength was failing," was included, and acts and expressions separated by years were so united in the question as to appear part of a continuing state of mind. The experts answered that such facts would show insanity, but the court decided that the experts' testimony did not constitute sufficient facts to take the case to the jury, saying: "The experience of the courts has demonstrated that the answers of experts, though honestly given, to hypothetical questions embracing pages of assumed and isolated facts covering a long lifetime, about which facts the experts have no personal knowledge, are the weakest and most unreliable kind of evidence in respect to the sanity or insanity of the person inquired about:" *Dobie* v. *Armstrong*, 50 N. Y. Suppl. 801 (Supreme Court).

Expert Testimony, Insanity, Hypothetical Questions

EVIDENCE (Continued).

Partnership, Evidence, Newspaper Item, Admission by Silence

In an action to charge the defendant, Grier, with partnership liability, evidence was offered in the Superior Court of Delaware to the following effect: That the following notice was inserted in a newspaper, "A change has been announced in the canning firm of J. Alexander Harris & Co. Mr. George S. Grier will be an active partner in the business this coming season. So Mr. Harris informs us;" that on the day after the publication Grier called at the newspaper office and inquired as to the nature of the notice; that the publisher of the paper read the notice to Grier, who neither affirmed nor denied it. Held, that the evidence was admissible: *Deputy* v. *Harris et al.*, 40 Atl. 714. Cullen, J., dissented on the ground that no charge had been made against Grier, which it was necessary for him to admit or deny, but that it was a mere rumor.

On appeal to the Court of Errors and Appeals of Delaware the ruling was affirmed: *Grier et al.* v. *Deputy*, 40 Atl. 716.

HUSBAND AND WIFE.

Pregnancy at Time of Marriage, Concealment

The Court of Chancery of New Jersey has rendered a decision upon the vexed question as to whether the fact that a woman, upon her marriage, conceals from her husband her pregnancy by another man is a sufficient cause for annulment. The court decided that since the husband had no sexual relations with the wife previous to the marriage, and since he filed a bill to have the marriage declared a nullity as soon as he learned the true state of affairs, a decree would be made that the marriage was void *ab initio: Sinclair* v. *Sinclair*, 40 Atl. 679. See 36 AM. LAW REG. 779, 37 *Id.*, 59.

Unlawful Marriage, Innocent Performance

In *Whippon* v. *Whippon*, 51 N. E. (Mass.) 175, the court had to consider the meaning of a statute that where persons who cannot legally marry go to another state to avoid the law, the marriage shall be void in Massachusetts. Admitting the power of the legislature to pass such an act the court, nevertheless, held that, as an infringement of the common law rule, the statute should be strictly construed, and therefore did not apply to a case where one of the two persons was not intending to evade the statute. The libel to have the marriage declared null was therefore dismissed.

INSURANCE.

Fernald v. *Providence-Washington Ins. Co.*, 50 N. Y. Suppl. 838. This case involved a question of importance to vessel owners. The plaintiff, the owner of a tug, had obtained from the defendant a policy covering any liability the tug should incur through collisions, etc., the policy containing a provision that the insurance company should not be liable unless the liability of the tug should be determined by a suit at law or otherwise. A collision occurred, the tug was libeled, and the plaintiff, at the request of the insurance company, defended the action. The tug was sold under the decree of court and the plaintiff, in suing on the policy, claimed the counsel fees and costs in defending the previous suit, but it was held that, under the above clause requiring the tug's liability to be determined by a suit at law, the cost of defending that suit fell on the plaintiff, and not on the insurance company.

Policy, Construction, "Suit at Law," Costs

LIBEL AND SLANDER.

The Supreme Court of Rhode Island in *Metcalf* v. *Times Pub. Co.*, 40 Atl. 864, decided that a publication of judicial proceedings, or of papers used therein, is privileged only if it is a fair and complete publication thereof, and therefore a plea, which states that only part of a bill for an injunction was published, and that that part contained the allegations of fraud in the bill, will not bring the publication within the privileged class.

Privileged Publications, Fairness

MASTER AND SERVANT.

The Supreme Court of Maryland, in *Smith* v. *Benick*, 41 Atl. 56, decided that, where a proprietor of a public place of amusement employed another to make a balloon ascension, who was to exercise his own judgment in the premises, and who used implements not contemplated, and without the proprietor's knowledge, whereby a spectator was injured, the proprietor was not liable, on the ground that the person employed was an independent contractor.

Independent Contractor, Balloon Ascension

MORTGAGES.

A mortgagee who takes possession of personal property of a perishable or fluctuating value must sell within a reasonable time, or he becomes responsible for a depreciation in the value: *Lomax* v. *Walk*, 54 Pac. (Ore.) 199.

Duty of Mortgagee in Possession

MORTGAGES (Continued).

The ordinary rule is that where A sells to B and C parts of a lot which is subject to a blanket mortgage, the part remaining to A shall, in the event of foreclosure, be sold first, and B and C relieved from the obligation which properly belonged to A and his land. *Thompson* v. *Bird*, 40 Atl. (N. J.) 857, shows, however, that where B and C have in their deeds expressly assumed the mortgage debt, the equities are reversed, and A has now the right to require that B's and C's portion shall be sold first to the relief of his part.

Foreclosure, Order of Sale

Where a railroad mortgage provides that it may be foreclosed by the trustee upon request of a majority of the bondholders, and such has been made, the bondholders need not be made parties; but where the same trustee represents both the first and second mortgages, and has filed bills to foreclose each, representative bondholders of each class may be admitted as parties, in order to protect their respective interests: *Grand Trunk Ry. Co.* v. *Central Vt. Ry. Co.*, 88 Fed. 622.

Foreclosure, Parties

NEGLIGENCE.

Defendant was the owner of a lot beside the highway and separated from it by a fence which had been allowed to become rotten and unsafe. Plaintiff's son, a young child, who was walking along the highway, was attracted by some children playing on the other side of the fence, so he placed one foot on it and was about to place the other on (not, however, for the purpose of climbing over), when the fence fell and injured him.

Fence, Negligent Repair, Injury to Child

On suit against defendant, the Court of Appeal of England decided that the fence in a dangerous condition was a nuisance, that the act of the child in standing on it was what the defendant might naturally have expected from a child, and that, therefore, on the authority of *Lynch* v. *Nurdin*, 1 Q. B. 29 (1841), and kindred cases, plaintiff could recover: *Harrold* v. *Watney* [1898], 2 Q. B. 328.

The Supreme Court of Pennsylvania, in *Boyle* v. *Borough of Mahanoy City*, 40 Atl. 1093, decided that one who, after seeing a ridge of ice on the sidewalk, attempts to walk along it, instead of stepping into the street, as he could safely have done, is guilty of contributory negligence, and cannot recover.

Ice on Sidewalk

NEGLIGENCE (Continued).

In *Van Orden* v. *Acken*, 50 N. Y. Suppl. 843, it appeared the plaintiff was lawfully in an unfinished building, standing under an opening in the floors above. The brick-work was not completed and a brick, from a cause unexplained at the trial, fell down through the open space and struck the plaintiff. This state of facts bore a close resemblance to that in *Bryne* v. *Boadle*, 2 Ex. 721, although in the latter case the plaintiff was on a public street and the object was a barrel of flour falling from a window. In the principal case the court, after referring to the fact that the accident occurred on private property, said: "It is not shown that the falling of a fragment of a brick or of some other material, during the course of construction of a large building, is so unusual or extraordinary a thing, in itself, that negligence can be inferred from the fact of the fall alone."

Presumption of Negligence, "Res Ipsa Loquitur"

The Supreme Court of Pennsylvania has again ruled that the failure of one to "stop, look and listen," before attempting to cross a railroad at grade, is not merely evidence of negligence, but negligence *per se*: *Ritzman* v. *Philadelphia & Reading R. Co.*, 40 Atl. 975.

"Stop, Look and Listen"

PRACTICE.

A suit was tried in the District Court upon the following written stipulation, without other evidence: "It is hereby stipulated by and between the parties to the above-entitled cause, through their respective counsel, that jury shall be, and is hereby waived, and the said cause submitted to the court for trial upon the foregoing statement of facts. For the purpose of said trial, the said statement shall be considered by the court to be in evidence, and as absolutely true." Judgment was given against the plaintiffs for costs. On writ of error, the Circuit Court reversed the judgment on the ground that the facts stipulated were evidential and not the ultimate facts to be found by the court. On a second trial, the court below refused the request of the plaintiffs (a) for a jury trial; (b) that they be allowed to introduce evidence contradicting the written statements. The case was again taken to the Circuit Court of Appeals, Seventh Circuit, and it was held, again reversing the judgment of the District Court: (b) that other evidence not inconsistent with the stipulated facts might be introduced by either party; (a) the waiver of a jury trial only had relation to the first trial. The conclusion of the

Stipulation to Waive Jury Trial, Agreed Statement of Facts

PRACTICE (Continued).

opinion of Bunn, District Judge, on this point is of interest. He said: "A stipulation to waive, followed by an order of the court, is not in the nature of a private contract founded upon a consideration, which can only be set aside for fraud. It is a proceeding in court, which is liable to be changed or modified or set aside by order of the court, in its discretion, upon a proper showing. And where the circumstances are changed, as in the case of a change in judges, or other conditions, such a discretion to relieve from a waiver might very properly be exercised even on the first trial. . . . And where, upon a proper application, the circumstances seem to justify it, we think that a liberal discretion should be exercised by the trial court in allowing either party to withdraw from such a waiver, and to claim his right under the constitution:" *Burnham* v. *North Chicago St. Ry. Co.*, 88 Fed. 627.

Form of Averment in Affidavit of Defence

The Supreme Court of Pennsylvania has recently reaffirmed the point of practice that it is not necessary in a positive affidavit of defence to aver that affiant "is informed, believes and expects to be able to prove" the facts set up as a defence. Such a formula is necessary only where the affiant cannot state the facts of his own knowledge: *Wolff* v. *Jacobs*, 41 Atl. 27.

PROPERTY.

Liquor Tax Certificate, Assignment, Replevin

Anchor Brewing Co. v. *Burns*, 52 N. Y. Suppl. 1005. In April, 1896, A lent B $300 to enable the latter to take out a liquor tax certificate and B executed an assignment to A in form of a chattel mortgage whereby he sold and assigned "the liquor tax certificate then in force" for his premises and any and every renewal of the same. Not having been paid, A, in November, 1897, brought suit to recover possession of the liquor tax certificate for the year 1897 to 1898, or its value. The court, treating the action as one of replevin, held that the mortgage could not create a lien on a certificate which was not in existence at the time, even if the certificate should be treated as a chattel; but the court was further of opinion that a tax certificate is not a chattel at all, but merely a chose in action, in which case replevin would clearly not be maintainable.

REAL PROPERTY.

The rule in *Dumpor's Case*, 4 Co. 119, exists in full force in Maryland. Plaintiff leased to M for five years, M covenant-

REAL PROPERTY (Continued).

Lease, Covenant Against Assignment, Waiver

ing not to assign or sublet the premises without plaintiff's written consent. Having obtained plaintiff's consent, M assigned the lease to defendant, who assigned it to J. This action was brought against defendant for rent accruing during the time J was in possession of the premises.

The Court of Appeals of Maryland held (1) that the obligation to pay rent depended upon privity of estate alone, and defendant was not liable for the rent of J's tenancy, provided he had a right to assign the lease, (2) and that defendant possessed this right of assignment, since plaintiff, having waived the covenant in respect to M, waived it respect to all other sub-leases: *Reid* v. *Brewing Co.*, 40 Atl. 877.

Willow River Club v. *Wade*, 76 N. W. (Wis.) 273. The Willow River, although not meandered, is a public navigable

Navigable Waters, Right of Fishery

stream. It appears to be sufficient to constitute a stream of that class, if rivers are capable of floating the products of the country, such as logs or rafts of lumber, to mill or market, even if it is possible to do so during only a part of the year. The defendant was not guilty of trespass in fishing from a boat in the Willow River, although the bottom was owned by the plaintiff, since (Wisconsin) Laws 1893, c. 307, § 20, provides that all persons may fish in public waters. The court was not unanimous.

Defendant's predecessor in title, the owner of several adjoining lots numbered 2, 3, 4, 5 and 6, put them up at auction,

Sale of Land, Express Covenants, Implied Restriction

the terms of the sale being that the purchasers of lots 3, 4, 5 and 6 should covenant with their vendors to erect a dwelling house of specified value on the lots within a certain time. Plaintiff bought lot No. 2 at the auction, but lots 3, 4, 5 and 6 were not sold. They subsequently became the property of the Urban Council, defendant, under the Local Government Act of 1894. This was an action for an injunction to prevent defendant from erecting a fire-engine house on lots 3, 4, 5 and 6.

The Chancery Division of England, in an opinion by Stirling, J., refused to grant the injunction, holding that since there was no express provision that the houses to be erected on lots 3, 4, 5 and 6 should be always maintained as dwelling houses, the court would not imply a restriction to that effect. Since the purchasers of these lots at the sale could have

REAL PROPERTY (Continued).

erected dwelling houses and then torn them down to use the land for other purposes, there was no implied restriction that the land should forever remain for dwelling purposes, and defendant had a right to use the land as it pleased: *Holford* v. *Acton Urban Council* [1898], 2 Ch. 240.

SALES.

An agreement under which goods were consigned to A for sale contained the following provisions: That the goods should continue the property of the consignors until a sale was made, "approved by them;" that A should notify the consignors "whenever a sale is made, stating the terms thereof;" and that A should sell the goods "for account of consignors, and account to them therefor." In an action of trover by the consignors against A for the value of the goods, held, that A had the right to sell the goods without the approval of the consignors: *Hassett et al.* v. *Cooper* (Sup. Ct. of R. I.), 40 Atl. 841.

Consignment Contract, Construction

The general rule in the sale of personal property—*caveat emptor*—applies as far as practicable to sales of choses in action. For example, on a sale of stock, there is a warranty of genuineness, but none that the thing sold is free of liens or defences. This principle was considered, though not actually necessary to the decision, in *M'Clure* v. *Central Trust Co.*, 53 N. Y. Suppl. 188. The defendant offered subscriptions to a certain stock and the plaintiff took a number of shares. Finding that the stock was encumbered, the plaintiff brought suit and endeavored to prove an implied warranty. The court, however, applied the rule as above, refusing the plaintiff's contention.

Stock, Subscription, Warranty

TRADE-MARKS.

In a suit in equity to enjoin unfair competition in trade, it appeared that the defendant made and sold gin which he labelled "Plymouth," with the design of palming off the article as imported, when in fact it was made in this country; and that the label which was affixed to the goods, though containing variations, was designed to simulate a resemblance to the complainant's goods sufficiently strong to mislead the consumer.

Unfair Competition, Injunction

Held, that such a false use of a geographical name would be enjoined: *Collinsplatt et al.* v. *Finlayson et al.* (Cir. Court, S. D. N. Y.), 88 Fed. 693.