PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ACTIONS.

In *Parmenter* v. *Barstow*, 43 Atl. 1035, the question was presented whether or not, in an action of trespass for personal damages occasioned by negligence, a previous judgment against a joint tort feasor for the same injury was a bar to the action.

Judgment Against Joint Tort Feasors, Estoppel

In deciding that the previous judgment was not a bar to the action, the Supreme Court of Rhode Island discusses a number of cases which have been decided *contra*: *Broome* v. *Wootom*, Yel. 67; *Adams* v. *Broughton*, And. 18; *Buckland* v. *Johnson*, 15 C. B. 145; *Rex* v. *Hoare*, 13 M. & W. 495; *Hunt* v. *Bates*, 7 R. I. 217; *Wilkes* v. *Jackson*, 2 Hen. & M. 355, and *Petticolas* v. *Richmond*, 95 Va. 456. The court points out that the English cases and *Hunt* v. *Bates*, *supra*, could have been decided upon the principle anciently applied, that where property had been taken by a tort feasor and a judgment in trover recovered against him, the title to the goods vested in the tort feasor from the date of the conversion, no matter whether the judgment was satisfied or not; therefore no action could be brought against another tort feasor, since the plaintiff had no interest in the goods from the time of the conversion. Of course such a principle could not possibly be applied to the case of successive actions for personal injuries brought against joint tort feasors, and so all the American courts have held, except those of Virginia: *Petticolas* v. *Richmond*, *supra*. See *Lovejoy* v. *Murray*, 3 Wall. 1; Cooley on Torts, § 137.

BILLS AND NOTES.

In Colorado a verbal acceptance of a bill of exchange is binding, even though the drawee has no funds of the drawer in his hands at the time of the acceptance, provided that he afterwards receives such funds. In the present case the acceptor was estopped from denying the receipt of such funds, since, after the acceptance,

Verbal Acceptance of Bill

BILLS AND NOTES (Continued).

he paid to the drawer, on account of the transaction, a sum greater than the amount of the acceptance: *Durkee* v. *Coughlin*, 57 Pac. (Col.) 486.

Parol Evidence to Vary Obligation of Indorser

In *Bank* v. *Ferguson*, 59 N. Y. Suppl. 295, which was an action by an indorsee of a note against his immediate indorser, the defence was that at the time of the indorsement to the holder, plaintiff agreed that, in case of non-payment, he would not sue defendant until he had realized on certain collateral and had exhausted his remedy against the maker, in which case he would merely collect the balance from defendant. The Supreme Court of New York, following the rule in most jurisdictions, held that this was an attempt to vary the terms of a written contract by parol evidence, which could not be done in the case of an indorser's contract any more than any other contract could be varied; therefore the defence was unavailing. Citing *Specht* v. *Howard*, 16 Wall. 564; *Brown* v. *Wiley*, 20 How. 442; *Ins. Co.* v. *Homer*, 9 Metc. 39; *Hoare* v. *Graham*, 3 Camp. 57; *Free* v. *Hawkins*, 8 Taunt. 92; *Abrey* v. *Crux*, L. R. 5 C. P. 37.

Conversion of Checks by Bank

Salomon v. *State Bank*, 59 N. Y. Suppl. 407, offers a valuable hint as to a manner in which a number of small suits may be rendered unnecessary. Plaintiff had received twenty-four checks for small amounts, drawn to his order, which were stolen and deposited in the defendant bank, plaintiff's name being forged. Defendant collected the checks and paid the amount to the depositor, and plaintiff brought an action of tort against defendant for the conversion of the checks and recovered their full amount. In this way plaintiff escaped the trouble of bringing twenty-four suits for small amounts against the makers of the checks, many of whom were non-residents, and by sounding his action in tort, he relieved himself from the rules governing actions on negotiable instruments, such as liability to deliver the checks to defendant, subrogation, etc.

CONSTITUTIONAL LAW.

Power to Free Convicted Prisoners, Pardon

A statute of Kansas, Gen. Stat. 1897, c. 134, §§ 11, 20, provided that upon the conviction of prisoners between the ages of sixteen and twenty-five and their sentence to terms in the state penitentiary, they should be removed to a state reformatory and detained for the length of their sentence or

CONSTITUTIONAL LAW (Continued).

released to liberty at the discretion of the managers of the institution. The Supreme Court of Kansas decided (1) that the power given to the managers did not encroach on the power of the legislature to punish for crime, since the legislature fixed the punishment, but merely made it conditional, and (2) that it did not encroach on the governor's pardoning prerogative, because the managers only gave the prisoners their liberty and did not pardon in the legal sense of the word, *i. e.*, remove the existence of their guilt in the eye of the law: *State* v. *Page*, 57 Pac. 514.

Due Process of Law, Trial by Eight Jurors

The Supreme Court of Utah has affirmed a conviction for felony, where the trial took place before eight jurors instead of twelve, in accordance with Art. I, § 10, of the new constitution of Utah and Rev. Stat. (1898), § 1295, which provided the procedure for the new form of trial. The constitutional provision was attacked as being in violation of the sixth and fourteenth amendments to the Constitution of the United States, providing, respectively, for the continuance of the jury trial and for the protection of citizens of the United States against deprivation by the states of life and liberty without due process of law. In respect to the fourteenth amendment, the court shows, by a steady line of decisions of the Supreme Court of the United States from *Hurtado* v. *California*, 110 U. S. 516, to *Hodgson* v. *Vermont*, 168 U. S. 262, that there is nothing in this amendment which requires that the jury of twelve shall be preserved forever; while, as to the sixth amendment, the court was obliged to repeat the old and well-worn proposition, that the first eight amendments to the Constitution of the United States do not constitute restraints on state action. Although the Supreme Court of the United States has consistently adhered to this doctrine ever since the time of Chief Justice Marshall, yet lawyers never seem to grow tired arguing the question, since, to our knowledge, the point has been raised four times in appellate courts within the last few months: *In Re Maxwell*, 57 Pac. 412.

CONTRACTS.

Restraint of Trade, Sale of Goodwill by Stockholder

An interesting decision has been rendered in regard to the proper interpretation of the provisions of the California Code in regard to contracts in restraint of trade, which provisions may be regarded as typical of the various codes which are in force, or about to be adopted, in several states.

CONTRACTS (Continued).

The Civil Code, § 1673, prohibits all contracts in restraint of trade, except as allowed by the next two succeeding sections. § 1674 provides that the vendor of the goodwill of a business may bind himself to refrain from carrying on the business within a specified city or county, so long as the business shall be carried on by the vendee. § 1675 provides that a retiring partner may do the same.

In *Merchants' Avtg. Co.* v. *Sterling*, 57 Pac. 468, the general manager of a corporation, who was a large stockholder, sold his stock to the plaintiff, stipulating that he would not engage in the business within the county as long as it should be carried on by the plaintiff. In a bill for an injunction to restrain the vendor from breaking the agreement, the question was whether or not the vendor of the stock was a "vendor of the goodwill of the business," within § 1674. It was strongly urged on behalf of the plaintiff that the defendant was such a vendor, because the value of the goodwill of the business entered into and formed an element in the value of the stock; that plaintiff would not have paid so much for his stock if he had not obtained defendant's stipulation to refrain from the business. However, the Supreme Court of California decided that it must adhere to the strict letter of the code; that the goodwill of a corporation is an attribute of the corporation itself, and not of the stock thereof; that only the corporation, and not a stockholder, can be a "vendor of the goodwill" of its business, within § 1674; therefore, even though an enhanced price had been paid for the stock on the strength of the stipulation, yet that defendant could not possibly be a "vendor" within § 1674, but defendant's stipulation not to engage in business was void under § 1673. The decision, while technically correct, is very unfortunate, since it is directly in the teeth of modern tendencies, both legal and economic, which seek to legalize these contracts in partial restraint of trade when they are *bona fide*, founded on a valuable consideration, and are necessary for the legitimate protection of the vendee.

CORPORATIONS.

Assessments, Registered Owner

In *May* v. *Genesee County Bank*, 79 N. W. 630, the Supreme Court of Michigan decided that under a statute of that state exempting any but the real owner of stock from assessments on account thereof, a bank which was registered on the books of a corporation as the owner of the stock, might show that it was, in fact, the

CORPORATIONS (Continued).

pledgee thereof. The facts were that a person gave the stock in question to a bank as collateral security by executing an assignment on the back of the stock certificate. Subsequently the vice-president of the bank requested the corporation to cancel the old certificate and issue a new one in the name of the bank as pledgee. He was informed that it would do as well to have the stock stand simply in the name of the bank without adding the word pledgee, and he consented to have the certificate issued in that form. Subsequently the corporation failed and the receiver sued the bank for the assessment due on the stock held by it. It appeared that the bank in its corporate capacity had never ordered the certificate taken out in its name and proof was offered that the stock had never been held as anything but collateral security for debt. The court held that the bank might show that it was only a pledgee and not liable to the assessment. This interpretation of a statute which provides that a pledgee shall not be liable for assessments, seems to be in accord with the decision of the Supreme Court of the United States in *Burgess* v. *Seligman*, 107 U. S. 31, and *Pauly* v. *Trust Company*, 165 U. S. 606. It seems, however, that where there is no such statute, the person in whose name the stock stands is liable for the assessments: See *Altman's Appeal*, 98 Pa. 505.

Foreign Corporation, Transaction of Business Without Compliance with Statute

The Court of Errors and Appeals of New Jersey has recently rendered an interesting decision on the construction of the New Jersey Act of 1896 (P. L 1896, p 307, § 97, *et seq.*), which provides that no foreign corporation shall do business in New Jersey until it files a certificate of incorporation with the secretary of state and in other ways complies with the statute. The D. & H. Canal Company, a Pennsylvania corporation, sold coal to a person in New Jersey and obtained a guaranty for the payment of the price from defendant, who resided in Jersey City. In an action on the contract of guaranty, defendant pleaded that plaintiff was attempting to "do business" in New Jersey without having complied with the above statute.

The court decided that the object of the statute was to prevent foreign corporations from transacting a general business, in New Jersey and that it had no application to a single act of business, such as a sale or a contract of guaranty, as in this case, citing with approval *Mfg. Co.* v. *Ferguson*, 113 U. S. 727; Thompson, Corp., § 7936. As the court said, if this

CORPORATIONS (Continued).

single transaction came within the term "doing business" in the above statute, then it would also come within the statute which requires fines, taxes and license fees from foreign corporations "doing business in the state," and it would be unreasonable to subject the corporation to the burden of the statute on account of a single act. Judgment for the plaintiff was therefore affirmed: *D. & H. Canal Co.* v. *Brock*, 43 Atl. 978.

In the same volume of the reporter there appears a decision of the Supreme Court of Pennsylvania to the same effect, holding that a corporation of Illinois, which sends an agent into Pennsylvania to effect a single sale of a machine, does not violate the Pennsylvania Act of April 22, 1874 (P. L. 108), relative to terms upon which foreign corporations may "do business" in Pennsylvania: *Wolff Dryer Co.* v. *Bigler*, 43 Atl. 1092.

Officers, Recognition by Courts, "Business Manager"

In *Topeka Capital Co.* v. *Remington Paper Co.*, 57 Pac. (Kas.) 504, an action was brought against the defendant corporation on a note signed: "The Topeka Capital Company, Dell Keiser, B. Mgr." The defendant's answer set forth the fact that there was no such officer in a corporation as a "business manager" known to the law, and that plaintiff had not averred that any authority had been given to the said business manager to make the note. On demurrer to the answer, the court ordered judgment for defendant on the ground that only the statutory officers of a corporation are presumed to have power to perform corporate acts; that the "business manager" was not such an officer; that, while everyone knows that the business manager of a corporation commonly does have the power to transact such business, yet that the court could not take judicial notice of the fact; and that it was necessary for the plaintiff to aver and prove that power to make the note had been conferred by the directors upon the business manager.

DEEDS AND MORTGAGES.

Acknowledgment, Evidence to Establish Invalidity

Where the acknowledgment of a mortgage by a married woman is regular on its face, it requires very strong evidence to establish the fact that it is void. Thus, in *Gray* v. *Law*, 57 Pac. 435, a suit brought to cancel a mortgage by a married woman on the ground that it had not been acknowledged apart from her husband, plaintiff rested his case on the evidence

DEEDS AND MORTGAGES (Continued).

of the husband and wife, who testified that the wife had signed the acknowledgment in her own house and before her husband, who then took the mortgage to the notary, where the acknowledgment was filled in and completed. However, the testimony of the husband was so very contradictory that it was thrown out altogether, and the Supreme Court of Idaho held that the unsupported testimony of the wife was insufficient to rebut the strong presumption of regularity arising from the face of the acknowledgment.

EMINENT DOMAIN.

Separate Buildings Under One Roof, Damages

It is well settled in New York that when an elevated railroad is constructed along the streets of a city, only those property owners can recover damages whose properties front on the street where the road is located: *Mooney* v. *R. R.*, 9 N. Y. Suppl. 522. But it will easily be seen that a difficult question arises when a railroad is built in front of a large apartment house which has stores opening upon both the front and rear streets. Is the damage to be confined to that portion of the building which fronts on the road, or is the general damage to the whole building to be taken into consideration? The Supreme Court of New York says that if, as in *Reilly* v. *Manhattan Rwy. Co.*, 59 N. Y. Suppl. 335, the stores in the rear of the building are separate and distinct from the stores in the front, the damages must be confined to the latter, and evidence of the depreciation in value of the rear stores is inadmissible.

EVIDENCE.

Proof of Foreign Law, Reports of Decisions

In *Musser* v. *Stauffer*, 43 Atl. 1018, an action was brought on promissory notes, the defence to which was that the notes were given on the strength of a contemporaneous parol agreement, the performance of which was a condition precedent to the payment of the notes, and which agreement had not been performed by the plaintiff. The notes were made and payable in Virginia. A previous action had been brought on these same notes and carried to the Supreme Court of Pennsylvania (178 Pa. 100), where the case had been decided according to the law of Pennsylvania, in favor of the plaintiff, there being no evidence that the law of Virgina was different.

EVIDENCE (Continued).

In the present case, at the trial in the court below, counsel furnished decisions of the highest court of Virginia, appearing in the authenticated reports of such decisions, showing that, according to the law of Virginia, a contemporaneous parol agreement afforded no defence to an action on a written contract, and the lower court decided the case in accordance with these decisions, on the familar principle that the law of the place of performance of a contract governs the performance. On appeal to the Supreme Court it was contended that the law of Virginia on the subject had not been sufficiently proved, but it was held that the reported decisions, being unanswered, constituted a sufficient rebuttal of the presumption that the law of the forum was the same as the law of the contract. This point, although argued by counsel and decided by the court, is not noted in the syllabus of the case in the Atlantic Reporter.

Judicial Notice, Opening of Railroad

In *Knowlton* v. *N. Y., N. H. & H. R. Co.*, 44 Atl. (Conn.) 8, Baldwin, J., said, "The Superior Court had the right to take judicial notice of the historic fact that the railroad between New Haven and New York was opened by January 1, 1849. The opening of a new railroad for public use is one of those events of public notoriety which are to be taken as known by the courts, because they are known to everybody. It is a great geographical change, like the bursting out of a new river from the earth, to serve as a highway of commerce in new directions."

HUSBAND AND WIFE.

Alienation of Husband's Affections

Unlike the rule in Maine and a few other jurisdictions, it is settled in New York that a woman who entices a husband away from his wife is liable to an action by the wife: *Bennett* v. *Bennett*, 116 N. Y. 584; *Jaynes* v. *Jaynes*, 39 Hun, 40; *Baker* v. *Baker*, 16 Abb. N. C. 293. The Supreme Court of New York has extended this doctrine a trifle further in *Kuhn* v. *Hemmann*, 59 N. Y. Suppl. 343, where it was held that the parents of the girl with whom the married man had gone to live must respond in damages to the wife, when it was shown that they had assented to and encouraged the adulterous intercourse between the married man and their daughter, had furnished the pair with money and apartments in which to live, and had been present at a bigamous marriage which took place between

HUSBAND AND WIFE (Continued).

their daughter and plaintiff's husband. Van Brunt and Ingraham, JJ., dissented, but the grounds of their dissent are not stated.

INJUNCTIONS.

The Supreme Court of Nebraska in a very unsatisfactory opinion (*Miskell* v. *Prakap*, 79 N. W. 552) has decided that where a plaintiff has built up a business, which has become well known by the name or designation of the "Racket Store," and the defendant then opens a store close by, which he styles the "New York Racket Store," the words "New York" being printed in very small letters, there has been no infringement of the plaintiff's rights. The evidence in the case tended to show that the use of the word "racket" was very common in the district for the designation of such stores as those of the plaintiff and defendant. The court must have based its decision on this ground alone. It says, "In some cases it has been decided that such designations are but descriptive in their character, and subsequent similar use by a near rival will not be enjoined at the instance of one who had made the prior selection and application." See *Cray* v. *Koch*, 2 Mich. N. P. 119; *Choynski* v. *Cohen*, 39 Cal. 501.

Trade-Name, Infringement

INSURANCE.

In *Cummins* v. *German, etc., Ins. Co.*, 43 Atl. 1016, one of the questions at issue was whether or not the proof of loss furnished by the insured sufficiently complied with the policy to warrant the bringing of the suit. The trial judge sent the proof to the jury for their determination of this question.

Proof of Loss, Sufficiency, Question for Court

An appeal by the defendant, the Supreme Court of Pennsylvania decided that the action of the trial judge was error, since the only point at issue was one which could be determined from an examination and comparison of the proof and the policy, and this was clearly a question of law for the court and not one of fact,—following *Ins. Co.* v. *O'Neill*, 110 Pa. 548; *Cole* v. *Assurance Co.*, 188 Pa. 345, and *Sutton* v. *Ins. Co.*, 188 Pa. 380. Judgment for the plaintiff was therefore reversed.

MASTER AND SERVANT.

In *Madara* v. *Shamokin, etc., Rwy. Co.*, 43 Atl. 995, plaintiff proved that she was a passenger in an electric car of the

MASTER AND SERVANT (Continued).

Presumption of Employment from Acts of Servant

defendant company; that the car became stalled by reason of some defect in the motor; that one V., who was on the car, assisted in attempting to get it started and gave directions to the conductor and motorman; that V., finding his efforts were unavailing, said that he would go back to the car barn and bring out a new car, which he did; and that in negligently operating the new car he ran it into the other one, where plaintiff was sitting, whereby she was injured.

The trial judge refused defendant's request for binding instructions, but left it to the jury to determine whether V. acted as a mere volunteer or whether he acted as an agent of the company by virtue of the authority or instructions of the motorman. On an appeal by defendant, the Supreme Court of Pennsylvania was even more unfavorable to defendant's case than the trial judge, as appears by the following language: "Being injured by one of the carrier's cars while occupying that relation, the presumption is that it was through the negligence of the carrier. The burden is on it to rebut the presumption by showing that V was a mere intruder upon the relieving car, acting wholly without authority. The burden is not upon the passenger to prove that one apparently in authority, having access to the car barn and the power to assume control of a car, and run it on the road to the relief of the stalled car, was a servant of the company. If the accident had apparently been caused by the act of a stranger while the plaintiff was a passenger, as in *Railway Co.* v. *Gibson*, 96 Pa. 83—a collision with a hay wagon—the burden would have been on her to show negligence on part of defendant. But when it arose from a collision between defendant's cars, operated on its own rails, the presumption of negligence arises, and the burden is on the defendant to rebut it."

MECHANICS' LIENS.

Release of Liens, Repugnancy in Contract

The third clause of the printed contract between the owner and the contractor provided that the owner could require of the contractor sufficient evidence that the premises were free from all liens before payment could be demanded, and that he could retain an amount sufficient to indemnify him against any liens which might be filed without regard to the contract. The tenth clause of the contract, which was written in ink, provided that "no liens shall be filed by any sub-contractors or any other persons for or on account of work, etc."

MECHANICS' LIENS (Continued).

In dismissing the lien filed by the contractor himself, the Supreme Court held (1) that the tenth clause contained all the requirements necessary to bring it within *Schroeder* v. *Galland*, 134 Pa. 277, and barred the contractor himself from filing a lien, and (2) that if any repugnancy existed between the third and tenth clauses of the contract, the tenth clause must prevail, in accordance with the rule stated in *Grandin* v. *Insurance Co.*, 107 Pa. 26, that "where the written and printed portions are repugnant to each other, the printed form must yield to the deliberate written intention:" *Comm. Trust Co.* v. *Ellis*, 43 Atl. 1034.

NEGLIGENCE.

Trespasser on Railroad, Child, License from Company

In *Brague* v. *North Cent. Rwy.*, 43 Atl. 987, which was an action to recover damages from a railroad company for the death of a child, it was shown that the deceased was about seven years old; that the railroad had given him permission to get water at a spring belonging to the company, across the track from the place he resided; that he had filled his pail with water and was walking across the track, not at the public crossing a short distance from the spring, but directly from the spring to his house; and that he was struck by an engine and killed while crossing, or walking along the track.

In affirming a judgment for defendant, the Supreme Court of Pennsylvania decided that (1) the license from the company gave the deceased simply the right to take the water from the spring, which could be obtained by crossing the track at the public crossing, and no permission to otherwise trespass on the track could be implied, and (2) the rule that a railroad owes to a trespasser only the duty of abstaining from wanton negligence applies even where the trespasser is a child, as in this case. In support of the last proposition, *R. R.* v. *Hummell*, 44 Pa. 375, *Moore* v. *R. R.*, 99 Pa. 301, and *Cauley* v. *R. R.*, 95 Pa. 398 were cited.

PERPETUITIES.

Devise to Corporation to be Created in futuro

Property was devised to A. for life, and after his death to a corporation, which the testator directed his executors to form under the laws of New York within the lifetimes of B. and C. The devise being attacked on the ground that the remainder to the corporation violated the rule against perpetuities, it was held,

PERPETUITIES (Continued).

that the remainder was valid, since it was necessary for the corporation to be formed within lives in being, *i. e.*, the lives of B. and C. The mere fact that there might be a hiatus between the death of A. and the creation of the corporation did not affect the question, since the property would revert to the heirs of the testator, subject to being divested by the creation of the corporation within the lives of B. and C.: *Jessup* v. *Pringle Memorial Home*, 59 N. Y. Suppl. (Supreme Court), 207.

PRINCIPAL AND AGENT.

Insanity of Principal, Revocation of Agency

When an agent has been appointed, and subsequently the principal becomes insane, the agency is revoked as regards all persons except those who deal with the agent in ignorance of the insanity of the principal. But when one of these latter persons attempts to hold the principal on a contract made by the agent subsequent to the insanity of the principal, it is well for him to remember that as soon as the insanity of the principal has been proved, a *prima facie* case in favor of the defendant has been made out, and the burden is then on the plaintiff to show that he dealt with the agent in entire ignorance of the fact that the principal was insane: *Merritt* v. *Merritt*, 59 N. Y. Suppl. 357.

REAL PROPERTY.

Party Wall Agreement, Incumbrance on Title

A. and B., adjoining owners, executed a party wall agreement providing for the building of the wall and stipulating that if it should ever be in need of repairs, the expenses should be borne by both parties, and it was stipulated that the covenant should run with both properties. A. having agreed to convey his lot, the question was whether the title was clear or whether the party wall agreement formed an incumbrance. Held, that it constituted an incumbrance on the property, since at any time the owner might be forced to contribute with his neighbor for the repair of the wall: *Corn* v. *Bass*, 59 N. Y. Suppl. (Supreme Court) 315.

Abatement of Rent where Portion of Leased Premises are Taken by Eminent Domain

The question whether or not rent abates when a portion of the leased premises are taken under the power of eminent domain has been touched upon by the Supreme Court of Pennsylvania, though no binding position has been taken by the court as yet. *Uhler* v. *Cowan*, 44 Atl. 42, was an action against the tenant for rent for the quarter from Jan. 1, to April 1, 1897. The affidavit of defence admitted

REAL PROPERTY (Continued).

the liability for rent up to Jan. 26, 1897, but averred that on Oct. 26, 1896, the City of Philadelphia gave plaintiff notice that three months after that date a portion of the leased premises would be taken for a public wharf; that plaintiff gave defendant notice of the city's intention; and that on Jan. 26, 1897, defendant surrendered that portion of the premises to the city. The lower court gave judgment to the plaintiff for want of a sufficient affidavit of defence, and defendant appealed to the Supreme Court.

The latter reversed the judgment of the court below, but the opinion of Justice McCollum distinctly states that this is not to be regarded as a final adjudication of the general question involved, but that the court wishes to postpone its decision until it has before it a record which presents the facts more clearly than those given in the statement of claim and the affidavit of defence. However, in commenting upon the question involved, the court says that notwithstanding the contrary decisions of other states, such as *Stubbings* v. *Evanston*, 136 Ill. 37, yet it sees no reason why it should not apply to the case of the partial taking of the rented premises the rule laid down by Justice Sharswood, in *Dyer* v. *Weightman*, 66 Pa. 425, namely, that where the whole of the demised premises are taken, the rent abates. The court cites with approval Mills, Em. Dom., § 69, Lewis, Em. Dom., 483, and an interesting article upon the subject by Joseph H. Taulane, Esq., of the Philadelphia Bar, 29 Am. Law Rev. 351.

TRIAL.

Improper Conduct of Jury, New Trial, Evidence

A motion for a new trial in an action against a city for injuries received by reason of a defective sidewalk was made upon affidavit of one B., who deposed that during the progress of the trial he had seen A., one of the jurors, together with other persons, who, he was informed, were other members of the jury, visiting the scene of the accident and measuring off the ground. A. filed an affidavit denying B.'s allegations. The Supreme Court of New York refused to disturb an order denying a new trial, since, even if the conduct of the jury had been to the prejudice of the petitioner, the fact that the single affidavit charging it was denied, justified the trial judge in refusing the new trial: *Haight* v. *Elmira*, 59 N. Y. Suppl. 193.

TRUSTS.

In *St Peter's Church* v. *Brown*, 43 Atl. (Rhode Island) 642, a bequest in trust to a church, to use and apply the income

TRUSTS (Continued).

Charities

therefrom for church purposes, was upheld, and a trustee appointed to administer the trust, though such church, at the time of the death of the testator and at the time of the probate of the will, was not an incorporated body. See *Cocks* v. *Manners*, L. R. 12 Eq. 574.

Disavowal of Relationship by Trustee

It requires very strong evidence to establish the fact that a trustee has repudiated the trust and claimed the property as his own, so that statute of limitations will run in his favor against the *cestui que trust*. In *In re McCormick*, 59 N. Y. Suppl. 374, the Surrogate's Court of New York did not think that such a disavowal of the trust had been established by the fact that for twenty years the trustee had characterized his payments to the beneficiary as gifts from himself to the beneficiary.

WATERS.

Raise of Grade of Street, Prevention of Surface Water Flow

An action was brought against a city, in which the complaint stated that the city had raised the grade of the street in front of plaintiff's property, and that by reason of such change of grade the natural flow of surface and other waters from plaintiff's lot was impeded and the waters flowed back into plaintiff's dwelling. The plaintiff seemed to have based his claim on the idea that the street was a sort of a servient tenement, under the civil law rule that where two properties adjoin, the owner of the lower one may not raise the level of his land so as to obstruct the natural flow of surface water from the upper.

The Supreme Court of California very properly held, that, however this doctrine might apply to lands situate in the country, the rule in cities was different where both streets and lots may be improved without any thought of what becomes of the surface water from the neighboring properties: *Lampe* v. *San Francisco*, 57 Pac. 461.

Waters, Damages, Pleading

In *Baumgartner* v. *Sturgeon River Boom Co.*, 79 N. W. 566, the Supreme Court of Michigan has reiterated its ruling in *Booming Co.* v. *Jarvis*, 30 Mich. 308, that no matter how necessary it may be for the preservation of logs to catch them at a certain boom, if in so doing the owner of the boom backs up water on the land of riparian owners he is liable at all events. The question of negligence is unimportant. In the present case a demurrer to a statement which failed to aver negligence on the part of the boom company was overruled.

WILLS.

A testator gave his son the income of $6000, for life, thereafter it was to be held and enjoyed by the son's widow, if he should leave one, while she remained such. After his son's death and the death or marriage of his widow, he bequeathed said $6000 to his son's children and to the legal representatives of such of them as might be dead, to be divided equally between them, giving to the legal representatives of any deceased child the same share to which said deceased child, if living, would be entitled. The son died leaving one child who died before her mother. Held, that the child took a vested remainder on the testators death, and that on her death the mother inherited the $6000: *Thyng* v. *Lane*, 43 Atl. (N. H.) 616.

Vested Remainder