PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ANIMALS.

The rights of the owner of property in the case of trespassing animals are presented in *Cobb* v. *Sater*, 38 S. E. 114. The court below had held that a person has a right to put poison on his premises for the protection of his property, having due regard for the safety of human life, and will not be liable for damages to one whose dog eats the poison while trespassing. But if he places the poison, not to protect his property, but with intent to kill the dog, then he will be liable. On appeal the Supreme Court of South Carolina was evenly divided, and in consequence the judgment of the lower court was affirmed.

Trespassing Dog, Poison

ASSAULT AND BATTERY.

Without citing any authority whatever in support of its conclusion, the Supreme Court of Louisiana holds, in *Solanas* v. *Lupin*, 29 Southern, 309, that where in an action for damages for injuries resulting from an assault committed by a woman upon a man who had been her paramour, and who, while occupying that relation, had eloped with her minor daughter, it appears that he afterward induced her to assume upon occasions her former relations with him, assuring her that his suit for damages would be dismissed, the offence committed by the woman will be held to have been condoned in so far as concerns such action and the same will be dismissed. It seems hard to support the decision on principle, for when once the man's cause of action is complete, a contract to release it would have to be founded on legal consideration, and the only consideration that could be shown in this case was an illegal one, being the resumption of illicit relations.

Action for Damages, Condonation

BANKRUPTCY.

The rule in Pennsylvania that where a judgment bond is secured by a mortgage the lien of the judgment, when entered,

BANKRUPTCY (Continued).

Lien of Judgment, Fictitious Date

is carried back for certain purposes to the date of the recording of the mortgage, is well established. But the United States District Court (Eastern District, Pennsylvania) holds, in *In re Engle*, 105 Fed. 893, that such fictitious date will not be assigned to it under the bankruptcy law, where the judgment is entered after the proceeding in bankruptcy.

Debts Released by Discharge

In Montana a woman may sue in her own name for her seduction. It is held in *In re Maples*, 105 Fed. 919, that a judgment so recorded by her is one for a "willful and malicious injury to the person" within the meaning of the Bankrupt Act, 1898, § 17, a, subd. 2, from which the defendant cannot be released by a discharge in bankruptcy. Whether or not the defendant has actual ill will toward the plaintiff at the time of the injury, the court regards the consequences as of such a character as to constitute his act toward her malicious in the eye of the law.

CARRIERS.

Contract, Bill of Lading

The Supreme Court of Alabama, in *Tallassee Falls Manufacturing Co.* v. *Western Railway Co. of Alabama*, 29 Southern, 203, holds that notwithstanding a bill of lading provides that a railroad company shall not be liable as a common carrier after the freight has reached its destination, public policy so modifies such a contract as to give the consignee a reasonable time within which to remove the goods after arrival before such liability ceases. On the other hand, the court refuses to allow proof of a custom to grant more than a reasonable time for the removal of the goods, since to allow this would be to vary the express terms of the contract.

Loss of Baggage, Liability

A. purchased a ticket over a railroad for the sole purpose of checking his trunk. He did not intend to go on the train and did not go, but went by his own private conveyance. His trunk arrived ahead of him and was put in the baggage room, from which it was stolen. Under these facts the Supreme Court of Michigan holds that A. was not a *bona fide* passenger, and that the carrier was not an ordinary warehouseman, bound to the exercise of that care which the average man takes of his own property, but was a gratuitous bailee, liable only for gross negligence: *Marshall* v. *Pontiac, etc., Railway Co.*, 85 N. W. 242. "It is implied in the contract that the baggage and the passenger go together."

CONSTITUTIONAL LAW.

Ex Post Facto Laws, Habitual Criminals

Imposing a heavier punishment upon a person convicted of a felony, if he has twice before been convicted of a crime for which he has been sentenced to imprisonment for not less than three years, does not impose any additional punishment for the former crimes, and is therefore not a violation of the constitutional provision against *ex post facto* laws: *McDonald* v. *Massachusetts*, 21 S. C. Reporter, 389.

Taking Property Without Due Process of Law

The rule that the regulation of rates by the state legislatures is limited to the extent that the rates fixed must not be such as to compel the railroad to conduct its operations at a loss or without a fair remuneration for its investment, has been well established. But in its application many difficulties have still to be met in deciding what is a "fair remuneration for its investment." In *Matthews* v. *Board of Corporation Commissioners of North Carolina*, 106 Fed. 7, the United States Circuit Court (Eastern District, North Carolina) holds that in estimating the returns which are reasonable from the property invested, such property must be estimated at its present value; and its cost, past or probable future, or the cost to duplicate it are immaterial.

New York Labor Law

The New York Labor Law of 1897, amended in 1899, provided that laborers on public works should be paid the prevailing rate of wages; that contracts for such work should stipulate that they should be void unless complying with the act, and that the contractor should not be entitled to receive any sum, and no public officer should pay the same, for work done on a contract which, in form or manner of performance, should violate the statutory requisites of such contracts. In *People* v. *Coler*, 59 N. E. 716, the Court of Appeals of the State holds the act unconstitutional on the ground that it takes away the liberty of freely contracting both from municipalities and those contracting therewith, and deprives persons of property without due process of law. "With respect to property and contract rights of exclusively local concern," says the court, "the state has no right to interfere and control by compulsory legislation the action of municipal corporations." Two justices dissent. The principal dissent is by Chief Justice Parker, who takes the position that the court has assumed more of a legislative than a judicial attitude toward the act, and has been swayed in its decision by questions of policy.

CONTRACTS.

In *Brown* v. *Dobson*, 48 Atl. 415, the Supreme Court of Pennsylvania holds that where the defendant agreed within a year to pay the plaintiffs a certain sum in cash or in stock, at his option, he, by failing to make payment or tender within the year, loses his right to exercise the option.

Option as to Payment

The rule that a loan stipulating for payment in gold cannot be extinguished by a tender of anything else is well known. This appears in modified form in the case of *Caston* v. *Quimby*, 59 N. E. 653, where the plaintiffs had been employed to procure a mortgage on defendant's premises, and they claimed to have fulfilled their contract by procuring a man who was willing to loan, provided there should be a stipulation for the payment of principal and interest in gold. The defendant contended that this was not a fulfillment of their contract and the Supreme Judicial Court of Massachusetts upheld his contention. The court seems to think the defendant rather unreasonable, but says this is immaterial, since he had a right to insist on a mortgagee who would not demand payment in anything but money, and hence he is liable to pay no commissions to the plaintiffs.

Mortgage, Payment in Gold

In *Welch* v. *Walsh*, 59 N. E. 440, the Supreme Judicial Court of Massachusetts holds that in an action against a guarantor of rent, the fact that the landlord did not make demand on the guarantor for more than fourteen months, and that the guarantor had suffered from not knowing that the rent was not paid, constitutes no defence. The guarantor's obligation is to pay a definite sum at a definite time, and he must see that that sum is paid, and there is no duty on the creditor to give notice to the guarantor of a default in payment by the principal debtor.

Guaranty, Default by Principal

CORPORATIONS.

The Supreme Court of Pennsylvania, in construing the Colorado statute imposing an additional liability upon shareholders, making them in certain corporations "individually responsible for debts, contracts and engagements of said association," etc., holds that an action against a single stockholder to enforce this statutory liability cannot be maintained by a creditor, but such action must be by or for all the creditors; and the corporation and the shareholders should be made parties: *Bates* v. *Day*, 48 Atl. 407. This, the court says, is in line with the "trend of judicial opinion."

Additional Liability of Stockholders, Parties

CORPORATIONS—(Continued).

In *Lange* v. *Burke*, 61 S. W. 165, it appeared that two men owned the majority of the stock of each of two corporations, one man being the president of both, but the corporations were organized in different states and for different purposes, though there were accounts between them. These were kept as accounts with other parties, and, on the insolvency of both, the Supreme Court of Arkansas holds that they should be considered as separate corporations, and the payment of the claim of the creditor corporation should not be postponed until after the other creditors of the debtor corporation are paid.

Insolvency, Preferences

Where a creditor has been enjoined from suing a debtor corporation, it is no objection to an action by him, in behalf of himself, and other creditors who may join, against the directors thereof to enforce their statutory liability, that he had not obtained judgment first against the corporation: *Whitney* v. *Pugh*, 68 N. Y. Supp. 992.

Judgment Against Corporation

DAMAGES.

In an action against a common carrier to recover for damage done to oil portraits of the parents of the plaintiff's husband, the Supreme Court of Mississippi holds that plaintiff's evidence as to the worth of the pictures to her from association and the fact of their being family portraits is improperly admitted, though such articles have no market value; the true measure of recovery, it is said, is their monetary value to the owner, taking into account the cost and practicability of replacing them: *Louisville & N. R. Co.* v. *Stewart*, 29 Southern, 394.

Family Portraits

DEEDS.

In *Carr* v. *Maltby*, 59 N. E. 291, the plaintiff had been induced by fraud to convey her land in consideration of an agreement, the rentals and profits of the premises, and for her support, but she remained in posession. Her grantee mortgaged to the defendant. The Court of Appeals of New York holds that she cannot avoid her deed, as against the defendant, since he innocently took a mortgage thereon for seven years, relying on her deed, and since her possession imputed notice to him of *such facts only* as he would have learned on inquiry of her; and she could not have disclosed the fraud, as she did not then know it, or if she did know it would be estopped by her negligence. Three judges dissent, holding that the mortgagee takes subject to the rights of the person notoriously in possession.

Fraud, Notice, Possession

DESCENT AND DISTRIBUTION.

Kindred of the Half Blood

The modern tendency to get away from the old discriminations of the common law against the half blood appears in the construction of the portion of the California Code dealing with their capacity to inherit. The statute, not unlike those of many states, provides that "kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case *all* those who are *not of the blood* of such ancestor must be *excluded* from such inheritance." Nevertheless, the Supreme Court of the state holds in *In re Smith's Estate*, 63 Pac. 729, that in the excepted case thereunder the kindred of the half blood were not absolutely excluded from inheriting, but merely postponed to those of the whole blood, and that the provision had no application between kindred in different degrees.

DIVORCE.

Cruelty

The reluctance of courts to grant a divorce on the ground of cruelty appears again in the case of *Maddox* v. *Maddox*, 59 N. E. 599. There the husband, though an able-bodied man and well able to do otherwise, cruelly and heartlessly neglected his wife, failing to provide her with suitable shelter, clothing and food, but the Supreme Court of Illinois holds that this is not sufficient cruelty to justify a divorce. "There must be acts or threats which may raise a reasonable apprehension of bodily hurt. The causes must be grave and weighty, and show a state of personal danger incompatible with the duties of married life."

ESCHEAT.

Trusts

Real estate was conveyed to A. in trust to pay the rents to a married woman during her life, and after her death to her appointees by will. The wife died before her husband, and by her will directed the trustee to hold the property in trust for her husband during his life, and after his death for such persons as would have taken it had she survived her husband and died intestate. On the death of the husband it appeared that she had no next of kin. Under these facts the Supreme Court of Pennsylvania holds in *In re Linton's Estate*, 48 Atl. 298, that since trust estates may now escheat, the trustee holds for the commonwealth, which was entitled in preference to the husband's heirs. Two justices dissent, without assigning any reason.

EVIDENCE.

A strange change of mind on the part of both parties to a suit as to a certain document gives rise to the ruling in *Lewis* v. *Healey*, 48 Atl. 212. The case was an action for services rendered, and certain books were offered in evidence by the defendant; plaintiff objected, and they were excluded. Later these same books were offered by the plaintiff, then the defendant objected. The court admitted the books. On appeal the Supreme Court of Errors of Connecticut holds this correct; that if there was any error in excluding the books in the first place when offered by the defendant, it was cured by their later admission, and after that defendant could not claim to have been harmed.

Error Cured

In *Com.* v. *Fry*, 48 Atl. 257, a challenge for bias was made by the defendant, but disallowed by the court. The Supreme Court of Pennsylvania holds that this cannot be treated as reversible error where the defendant did not exhaust all his peremptory challenges, since no harm could have been done to him, as he himself could have corrected the court's error, if any, without any detriment to himself. This principle is somewhat extended in *State* v. *Breaux*, 29 Southern, 222, where the Supreme Court of Louisiana holds that, where several defendants are tried together, if any one has any peremptory challenges left, the refusal of the trial judge to allow a challenge for cause is not reversible error.

Challenge of Juror for Cause

The Court of Appeals of Maryland, interpreting the statutes of that state in reference to married women, and following the trend of modern authority, holds in *Wolf* v. *Frank*, 48 Atl. 132, that the wife may maintain an action for the alienation of her husband's affections; and in the view of the court even though the alienation occurred prior to the passage of the statute. In this case the defendant sought to show the unfaithfulness of the wife. This was refused in the lower court, but on appeal it was held material, not as extinguishing plaintiff's right of action—unless it shall appear that that was the cause of the husband's estrangement—but on the ground that it affected the measure of damages, inasmuch as "no woman who permitted another man to have improper relations with her could have the desire for the society and affection of her husband that the law assumes exists between husband and wife when it authorizes a suit for the unlawful interference with those conjugal rights, and a jury would not likely allow such a woman the same amount of damages as would be awarded to a plaintiff free from fault."

Alienation of Husband's Affections, Damages

EVIDENCE (Continued).

Evidence of a Deceased Witness

The Supreme Court of Appeals of Virginia, admitting that in civil cases where the witness is since dead, what he swore on a former trial may be given in evidence, holds in *Montgomery* v. *Comm.*, 37 S. E. 841, that this rule has never been allowed in criminal cases and refuses to admit the testimony of one who had testified on a former trial and was since dead, though the evidence was offered for the defendant.

Confession of Accomplice in Presence of Accused

In *Porter* v. *Commonwealth*, 61 S. W. 16, the Court of Appeals of Kentucky holds that the confession of an alleged accomplice, implicating the accused, made in his presence when both were in the custody of an officer, is not admissible against the accused, although he remain silent and later accept from the alleged accomplice a part of the money they are charged with having stolen. "If the defendant is in custody . . . at the time the statement is made . . . his silence, if he makes no answer, cannot be regarded as raising any inference against him." This principle quoted with approval by the court, is the basis of the decision.

Libel, Resemblance of Picture

It is held in *Squire* v. *Press Publishing Co.*, 68 N. Y. Supp. 1028, that in a libel for publishing a picture alleged to be the plaintiff as that of a woman married to one A., evidence of people's recognition of plaintiff's resemblance to the published picture was properly excluded, since it was merely the expression of an opinion on a question which was for the jury. Two out of the five judges dissent, but without assigning reasons.

FORGERY.

Character of Writing Forged

With one judge dissenting, the Court of Appeals of Kentucky refuses to sustain a conviction for forgery, either under the common law or under the Kentucky statute providing punishment for the person who should forge "any writing whatever, whereby fraudulently to obtain possession of or deprive another of any money or property, or cause him to be injured in his estate or lawful rights," where it appeared that the alleged forgery was a writing to which an imitation of a woman's name had been attached, purporting to be an invitation to a man to come to her house: *Colson* v. *Comm.*, 61 S. W. 46. The writing, says the court, must be apparently such as will deprive him of a "legal right." And a "legal right" is said to be one which may be enforced in a civil action.

HOMICIDE.

Abortion

The status of the crime of abortion in its relation to the common law and modern statutory modifications is continually presenting questions of interest where such crime results in the death of the woman upon whom it is practiced. In *Worthington* v. *State*, 48 Atl. 355, the Court of Appeals of Maryland reviews the common law upon the subject, and holds, contrary to some dicta of cases and text writers which it cites, that at common law death resulting from an abortion was manslaughter and not murder, unless there is an intent to kill or to inflict grievous bodily injury. This certainly seems in line with the general rule of the common law that the death must either be intended or occur in the perpetration of a felony, abortion being merely a misdemeanor.

INSURANCE.

Indorsement of Incumbrance on Policy

Against the dissent of three judges, the Court of Appeals of New York holds in *Skinner* v. *Norman*, 59 N. E. 309, that where an agent, applying for insurance, stated that he did not know whether the property was incumbered or not, and the insurer agreed to inquire regarding it of the owner, but issued the policy without making the inquiry, a failure to indorse a note of an incumbrance on the policy did not invalidate it, though the property was in fact mortgaged. "The defendant should not be allowed to plead its ignorance of a fact as to which it has agreed to obtain knowledge."

Materiality of Facts

In *Louis* v. *Connecticut Mut. Life Insurance Co.*, 68 N. Y. Supp. 683, the Supreme Court, Appellate Division, holds that where an applicant for insurance is asked the question whether there was any fact not stated in his previous answers which the company ought to know, it is left to his judgment to decide whether the fact asked for is material, and though the fact may be material, a false answer is not sufficient to avoid the policy, unless the materiality is known to him. The court further holds that though it may be a custom of insurance companies not to issue a policy to one who has attempted suicide, this will not, as a matter of law, be held a material fact. One judge, Judge Ingraham, dissents.

The usual provision in a policy of accident insurance, insuring against death by accident, exempting the company from

INSURANCE (Continued).

Accident, Intentional Injury

liability for death from "intentional" injury inflicted by the insured or by any other person, is construed by the U. S. Circuit Court of Appeals (Sixth Circuit), in *Corley* v. *Travelers' Protective Association*, 105 Fed. 854, not to preclude recovery where the insured is killed by an insane person. The ground is that such injury is not "intentional" within the meaning of the contract, since such person cannot form a rational intent.

Foreclosure of Mortgage, Knowledge of Insured

The Supreme Court of California holds in *Schroeder* v. *Imperial Insurance Co.*, 63 Pac. 1074, that where a fire policy provided that, unless otherwise indorsed thereon, it should become void if with the knowledge of the insured foreclosure proceedings should be commenced against the property covered by the policy, the policy became void on the service of process in foreclosure and failure to secure the insurer's consent to the increased risk, notwithstanding insured had no knowledge of the proceedings commenced until such service of process. A decision to the contrary is cited, but the court regards its holding as supported by the weight of authority.

NATIONAL BANKS.

Pledgee as Stockholder

The Supreme Court of the United States holds, in *Robinson* v. *Southern National Bank of New York*, 21 S. C. Rep. 383, that a bank which receives as collateral security for a note the stock of a national bank, and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank. As between the pledgee, bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt.

NAVIGABLE WATERS.

Test

It is generally stated that the American rule as to navigability is, that a stream is navigable in law which is navigable in fact. But in *Walsh* v. *Hopkins*, 48 Atl. 390, the Supreme Court of Rhode Island applies the test, which seems settled in England, that navigability in law, *i. e.*, whether the waters of a stream are public waters, depend on whether the tide therein ebbs and flows; and where this is the case the riparian owners have only such rights as they are allowed along navigable streams, though the stream is not in fact navigable.

NEGLIGENCE.

In *Currier* v. *Trustees of Dartmouth College*, 105 Fed. 886, the U. S. Circuit Court (D. New Hampshire) holds that a college, by reason of its eleemosynary nature and its relation to its students, is not liable for a personal injury to a student caused by negligence of the superintendent of college buildings in clearing land owned by the college preliminary, and erecting thereon a heating plant for college purposes. Recovery is accordingly denied to a student who sustained personal injuries by the alleged careless throwing down of a chimney by the superintendent of college buildings.

Liability of Colleges

NUISANCE.

In an action for damages for maintaining a garbage field near plaintiff's land, the Court of Appeals of Maryland holds good a defence that the plaintiff sold the field to the defendant, knowing the use to which it was to be put: *Roland Park Co. of Baltimore City* v. *Hull*, 48 Atl. 366. The court proceeds on the ground that the plaintiff is equitably estopped from claiming damages at law, and consequently refuses to grant an injunction against his bringing such action.

Estoppel, Injunction

PRINCIPAL AND AGENT.

Where under his contract an agent was not required to pay interest on general balances, the Supreme Court of Pennsylvania holds him liable, nevertheless, for interest where it appears that he made sales at prices greater than reported by him, on the amount thus tortiously retained: *In re Horey's Estate*, 48 Atl. 311. These moneys, it is said, were held "outside of the relation of principal and agent."

Interest on Balances

RAILROADS.

The Court of Civil Appeals of Texas, declaring that under the law of Texas an action may be maintained for physical injuries occasioned by fright, sustains a suit to recover for the miscarriage of a woman alleged to be caused by fright due to defendant company's negligence, under the following circumstances: She was driving with her husband, and they had just about reached a railroad crossing when a train was discovered approaching, it having given no previous signal. The husband thought the safest plan was to urge his horses over the track. He got across safely, but his wife was greatly frightened, with the result above indicated: *St. Louis S. W. Ry. Co. of Texas* v. *Mitchell*, 60 S. W. 891.

Fright as a Cause of Action

STATUTE OF LIMITATIONS.

Avoidance of Deed Duress

In *Allen* v. *Leflore Co.*, 29 Southern, 161, a husband having defaulted in his accounts as county treasurer, his wife was induced to deed her land to the county by threats of the district attorney to prosecute him criminally. These threats were made when the grand jury were in session and apparently were backed by a strong public sentiment. The Supreme Court of Mississippi holds this sufficient duress to avoid the deed, and further, that the statute of limitations does not begin to run until the death of the husband, the duress being regarded as continuing so long as he lived. It might well be argued that the statute should begin to run from the time when the prosecution is barred.

Contract in Reference to Limitation

In *Smith* v. *Herd*, 60 S. W. 841, the Court of Appeals of Kentucky holds valid a provision in a policy of insurance limiting the time within which an action may be brought to a period less than that fixed by the statute of limitations. The principles upon which the case proceeds are that the purpose of the statute is to encourage prompt enforcement of claims, and this is not contravened by a voluntary agreement like the present, and that the insurers have a right to designate the terms upon which they will be responsible for losses. The court claims to decide in accord with the weight of authority; however, three judges dissent.

Contract to Make Provision by Will

A cause of action does not accrue upon a contract to make provision for another by will until the death of the obligor, and the statute of limitations does not run until that time: *Story* v. *Story*, 61 S. W. 279 (Ky.). The same case also holds that such a contract is not within the statute of frauds, as the event upon which it depends may happen within a year.

STREET RAILROAD.

Passenger, Refusal to Pay Fare

In *Kiley* v. *Chicago City Ry. Co.*, 59 N. E. 794, it appeared that the plaintiff had received from a street-car conductor a wrong transfer slip, and when she boarded a car on the connecting line she tendered this. The conductor refused to take it, and she declined to pay her fare. He then used reasonable force to eject her. The Supreme Court of Illinois holds under these circumstances that she cannot recover for the injuries sustained, since it was her duty to leave the car peaceably and seek redress in the courts. Many cases, it is admitted, hold to the contrary.

TAXATION.

The questions as to the situs of intangible property for the purposes of taxation seem better settled in regard to such property when owned by natural persons than when owned by corporations. The Court of Civil Appeals of Texas holds, in *State* v. *Austin & N. W. R. Co.*, that the county in which is owned the principal office of a railway, which owned a road extending through other counties, cannot collect a tax on the entire intangible property of the road within the state, consisting of franchises, good-will, etc., since the situs of such property is distributed wherever its tangible property is located and its work done. One judge dissents, citing numerous authorities as sustaining his contention. Probably the greater uncertainty in regard to the law on this subject as to artificial circumstances arises from the preliminary difficulty of giving to the *persona ficta* a local habitation.

Intangible Property of Railroad

TRUSTS.

In *New York Life Ins. and Trust Co.* v. *Baker*, 59 N. E. 257 it appeared that the plaintiff, a trustee, had received from its predecessor in the trust certain United States bonds, purchased at a premium. Some of these it sold at a less premium and all interest on the fund was paid to the beneficiaries as it accrued. The will creating the trust provided for a payment to A. for life and at his death the principal over. Under these facts the Court of Appeals of New York holds that, instead of paying all the interest, the trustee should have retained so much thereof as was necessary to offset the premium paid for the bonds, so as to keep the fund intact, and that consequently he was liable to the beneficiary. The same is held as to bonds purchased at a premium and held until maturity. One judge dissents on the ground that such bonds were authorized by the will, and testator must have intended whole income thereof for the life tenant during his life.

Preservation of Trust Fund

In *Brinton* v. *Martin*, 47 Atl. 841, a will devised a farm to testator's son A., "this farm to be held by him for his own use during his life; at his death the same to descend to his children, or in default of children to his legal heirs." The Supreme Court of Pennsylvania holds that A. takes the fee. Emphasis is laid on the use of the word "descend."

Rule in Shelley's Case

TRUSTS—(Continued).

It is held by the New York Supreme Court (Appellate Division, Fourth Department) in *In re Fidelity Trust and Guaranty Co., of Buffalo*, 68 N. Y. Supp. 257, that where personal property alone is devised to the heirs of a testator who dies intestate as to the bulk of his estate, consisting of real and personal property, and the will does not show that he has employed the term "heir" in its technical sense, it will be presumed that he has used it to indicate next of kin, who succeed to personal property in case of intestacy.

Designation of Devisees, "Heirs"

By a decision of three judges to two of the Supreme Court, Appellate Division (N. Y.), in *Everdell* v. *Hill*, 68 N. Y. Supp. 719, the following holding is declared: Nieces alleged that their three aunts made an oral agreement that the one first dying should leave her property to the other two, the one next dying should leave hers, including what she received from the first, to the third, and this survivor should leave all to the nieces. The two who died first substantially complied with the agreement, but the survivor executed a will not in pursuance of the agreement. The nieces are denied the right to compel a specific performance by having it declared that the trustee under the last will held in trust for them. The dissent is based on the theory of the creation of a trust by the original agreement, and hence the conclusion is reached that the case cannot be affected by the third will, and the nieces are not simply strangers to a contract made for their benefit, but are *cestuis que trustent.*

Oral Agreement

TRUSTEES.

In *In re Lafferty's Estate*, 48 Atl. 301, it appeared that a will provided for a certain trust, and that when the number of trustees should be reduced to two they should petition the court to appoint another, and nominate to it "such person as shall be a satisfactory colleague, to be approved by the court for capability and good character." The trustees nominated the son of the only trustee capable of attending to the business. The court below refused to appoint him on the ground that it would be contrary to good policy, and that he was objectionable to a number of the *cestuis que trustent.* On appeal to the Supreme Court of the State (Pennsylvania) the court was evenly divided, and consequently the decision of the lower court was affirmed.

Appointment by Court

WATERS AND WATER COURSES.

Artificial Lake, Percolations

It will be remembered that the Court of Appeals of New York recently held that an injunction might be maintained against one who sank a well, so as to drain by means of the underground streams the land of others: *Forbell v. City of New York*, 58 N. E. 644. A case somewhat the converse of this arose in Texas, where A. built a dam on his land to a height higher than it had previously been. This caused percolation through the ground to B.'s land, and more than two acres of B.'s land became marsh in consequence. In *Texas & P. Ry. Co.* v. *O'Mahoney*, 60 S. W. 902, the Court of Civil Appeals holds A. liable to B., and that, too, though there was no negligence in his method of erection. These cases appear perfectly consistent, and in line with the thought that with modern scientific knowledge the course of water underground must be treated much the same as its course in surface channels.