toward the defendant in a threatening manner," the degree of force, whether it be reasonable or unreasonable, which defendant might employ, would depend measurably upon the known character, in that respect, of the plaintiff; whether he be a "man of war from his youth," or of peace; whether he had the temper, the will and ability, to inflict sudden and great bodily injury, and the danger was imminent, or whether he was known to the defendant as a man of mild temper and a stranger to violence. We think the evidence should have been received, and that the *apparent* danger which threatened the defendant would be somewhat affected by it, and the degree of force which defendant might lawfully use should be measured or modified by it.

The judgment is reversed, and the cause remanded.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF KANSAS.[1]

COURT OF APPEALS OF MARYLAND.[2]

SUPREME COURT OF NEW HAMPSHIRE.[3]

COURT OF CHANCERY OF NEW JERSEY.[4]

SUPREME COURT OF NEW YORK.[5]

SUPREME COURT OF VERMONT.[6]

ACCORD AND SATISFACTION. See *Contract.*

Promissory Note—Tender.—Where the holder of a promissory note surrenders it to the maker, and takes one of less amount in satisfaction, it is a full discharge, and no action can be maintained for the unpaid portion. The surrender is equivalent to a release under seal: *Draper* v. *Hitt*, 43 Vt.

A tender made subject to the condition that if the party take the amount offered, it is to be in full payment of all his claims, is invalid: *Id.*

ACTION.

Declaration—Causes of Action—Insufficiency of Highway—Verdict.—Where the subject-matter and causes of action are separate and divisible, and the declaration is single and in one count, the plaintiff cannot

[1] From W. C. Webb, Esq., Reporter; to appear in 7 Kansas Reports.

[2] From J. S. Stockett, Esq., Reporter; to appear in 34 Md. Reports.

[3] From the Judges; to appear in 49 N. H. Reports.

[4] From C. E. Green, Esq.; to appear in vol. 7 of his Reports.

[5] From Hon. O. L. Barbour; to appear in vol. 60 of his Reports.

[6] From W. G. Veazey, Esq., Reporter; to appear in 43 Vt. Reports.

duplicate the causes of action, and it would be error, after having given evidence of one, to allow him to attempt to prove another: *Hodge* v. *Town of Bennington*, 43 Vt.

If two causes of action should become disclosed by the evidence, the plaintiff should be required to elect for which he will claim a recovery: *Id.*

In this case the axle was broken, the plaintiff thrown from the carriage, and the horse having thereby become startled, ran along the insufficient road for some twenty rods, plunged into the ditch and was killed. *Held*, that this constitutes but one ground of action: *Id.*

The plaintiff claimed that the road was insufficient both where the horse was killed and the axle was broken, and also claimed a recovery by reason of the insufficiency at either or both said points, they both being in the section of the highway alleged to have been insufficient in the declaration, which contained but one count. *Held*, that it was not error for the court to refuse to compel the plaintiff to elect for which injury he would go to the jury: *Id.*

When the issues in a case are divisible and distinct, as when the want of a stamp or seal and payment are separate issues, and the jury find by their verdict the debt paid, evidence improperly admitted against objection upon the other issue becomes immaterial and is no ground for reversing the judgment: *Id.*

The jury in this case found that the horse was killed by reason of the insufficiency of the highway where the axle was broken, and evidence of the insufficiency of the road where the horse was killed thereby became immaterial, and, if improperly admitted against objection, would be no ground for reversing the judgment: *Id.*

It is the duty of towns to build and repair their roads in such manner that they will be reasonably safe from the consequences of such accidents as might justly be expected occasionally to occur on such roads: *Id.*

The axle was nearly severed by an old crack, and unsafe for use upon the road, but this was unknown to the plaintiff. The court instructed the jury that it was the duty of the plaintiff to use such care about the safety of the horse, the harness, and sufficiency of the wagon, and the manner of driving, as reasonably prudent men commonly used about their own affairs of like importance under like circumstances, and if the plaintiff failed to use such care about the wagon, axle, or about anything connected with the accident, and the want of such care in any degree contributed to the accident, he cannot recover. *Held*, that in this there was no error: *Id.*

AGENT. See *Railroad.*

Agency may be inferred.—Where the keeper of a boarding-house of a railroad company had been in the habit of purchasing provisions from the plaintiff, for the use of the boarding-house, and the bills for such provisions had been, from time to time, paid by the company, the plaintiff might properly regard him as an agent *pro tanto* of the company, and would be justified, in the absence of any notice to the contrary, in dealing with him as such: *P., W. and B. R. Co.* v. *Weaver*, 34 Md.

ARBITRATION AND AWARD.

Submission—Remedy for Breach.—A submission to arbitrators is a

contract, implying an agreement of each party with the other, to abide the result: *Whitcher* v. *Whitcher*, 49 N. H.

Where the submission is by parol, *assumpsit* is the appropriate form of action in which to recover damages for the non-performance of the award; whether the party be directed by the award to pay money or to do any collateral act: *Id.*

Non assumpsit puts in issue every material averment, and even intrinsic defects in the award: *Id.*

An award may be good in part and bad in part; and the valid part may be sustained and will support an action for breach of the promise to perform the general award when, and only when, it clearly appears that the void part is so disconnected from the valid part that it could not have affected the decision of the arbitrators in other respects; so that, the void part being rejected, the remaining parts will yet express the judgment of the arbitrators truly: *Id.*

If that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void: *Id.*

ASSISTANCE. See *Equity.*

ATTORNEY. See *Husband and Wife.*

Estoppel—Costs.—When a party employs an attorney in a cause he has the right to his services about the litigation therein in his behalf, and to confide to him all facts concerning the subject of litigation, without being exposed to having the facts used by the person employed in any manner against his advantage: *Davis* v. *Smith*, 43 Vt.

An attorney employed in a cause, by purchasing the interest of the adversary party, acquires no right as against his client that he can enforce by judicial proceedings against him, and the client may treat the purchase as made for himself: *Id.*

While the orator was the defendant's solicitor and legal adviser in a foreclosure suit in favor of the defendant against P. and in other litigation upon the same subject-matter between them, the orator purchased of P. his interest in the premises and then tendered the defendant the amount due thereon under his sale to P. and his costs in the foreclosure suit. The defendant declined to receive the same and claimed the benefit of the purchase, offering to pay the orator what he paid P. The orator then brought this suit in chancery praying for an order on the defendant to convey said premises to the orator upon payment by him of the amount tendered as aforesaid. *Held*, that the defendant was entitled to take the benefit of the orator's purchase by paying him the amount that he paid, whether the orator made the purchase by instructions of the defendant to purchase for him or not, and although he intended to purchase for himself; and there being a question of rents and profits of the premises while the orator was in possession, that could be settled in this suit: *Id.*

The fact that the orator before making the purchase, but while he was the attorney of the defendant in his litigation with P., heard the defendant say to P. that all he wanted was his money, would not estop the defendant from claiming the benefit of the purchase, he not having told the defendant that he proposed to make the purchase in reliance upon that saying: *Id.*

BAILMENT.

Diligence required of Gratuitous Bailees—Measure of Damages.—A. deposited with M. & Co., bankers, for safe-keeping, certain coupon-bonds of the United States, bearing interest, payable in gold, on the 1st of May and November, in each year. These bonds were subsequently abstracted from their custody. After their abstraction, a receipt dated as of the day when the deposit was made, was given by the bankers to A., in which they promised to return the bonds on demand, or pay the full value thereof, including gold interest. The bonds were never returned. In an action against the bankers, tried on the 5th of April 1869, to recover the value of these bonds, it was *Held:*

1st. That the plaintiff was entitled to recover, if the loss or abstraction of the bonds occurred through the failure of the defendants to use such care as persons of common prudence, in their situation and business, usually bestow in the custody and keeping of similar property belonging to themselves.

2d. That the measure of damages was the value of the bonds at the time demand was made for them, and the value of the gold interest thereon, from the day when the same was payable, with interest on the value of the several instalments of such gold interest, due semi-annually, and interest on the principal sum from the 1st of November 1868.

3d. That if the receipt did not express the terms of the deposit, but it was a simple bailment of the bonds, to be safely kept without reward, the plaintiff was entitled to recover, unless the same care and diligence were exercised by the defendants in their custody, and the measure of damages would be the same: *Maury & Co.* v. *Coyle*, 34 Md.

Bailee without Reward.—A banker receiving a package of money as a special deposit without compensation, is bound only for slight care, and responsible only for gross negligence: *Hale et al.* v. *Rawallie*, 7 Kans.

A mere showing to a depositor of the facilities and security of a bank, is not such a representation as increases the obligation of the banker in the keeping of a deposit. *Id.*

BANKER. See *Bailment.*

BANKRUPTCY. See *Replevin.*

Discharge—Judgment in rem—Trustee Process.—A discharge in bankruptcy will not prevent a creditor of the bankrupt, who obtained a lien upon a fund by trustee attachment more than four months prior to the commencement of proceedings in bankruptcy, from taking a decree *in rem* against the said fund: *Stoddard* v. *Locke and others*, 43 Vt.

BILLS AND NOTES. See *Accord.*

BOND.

Of Indemnity.—The obligee of a bond of indemnity has no cause of action against the the obligor, which he can set up as a counter-claim or set off in an action brought by the obligor against the obligee, unless he has sustained some loss covered by the bond, or would sustain some such loss by reason of a recovery against him in such action: *Abeles* v. *Cohen*, 7 Kans.

Broker.

Commissions.—Where a broker is employed to procure a purchaser for a house, and through his agency negotiations are begun, and a sale is finally effected, he may recover his commissions from the party at whose instance and request the services were rendered, whether he held the legal title of the property *beneficially*, or in trust for his wife: *Jones* v. *Adler*, 34 Md.

Where by a special contract, a broker is not to be paid commissions unless he sells the property at a stipulated price, the sale by him at such a price is a *condition precedent* to his right to compensation, unless pending the negotiations and whilst his agency remains unrevoked, the owner consents to a sale at a different price: *Id.*

If a broker introduces the purchaser or discloses his name to the seller, and through such introduction or disclosure negotiations are begun and the sale of the property is effected, the broker is entitled to his commissions, although, in point of fact, the sale may have been made by the owner: *Id.*

Where property is sold at a particular price with the consent of the owner, the broker who effected the sale is entitled to his commissions, although he may not have been requested by the owner to sell at that price, under an agreement to pay commissions: *Id.*

Collateral Security. See *Guaranty*.

Common Carrier.

Liability modified by Special Contract—Presumption of Negligence.—B. entered into a contract with the Baltimore and Ohio Railroad Company, for the transportation of certain live-stock over its road, and in consideration of a reduction in the charge for freight, agreed to "release the railroad company from any and all claims which might arise for damage or injury to said stock, whilst in the cars of the company, or for delay in its carriage, or for escape thereof from the cars, and generally from all claims relating thereto, except such as might arise from the gross negligence or default of the agents or officers of the company acting in the discharge of their several official duties." In an action by B. against the railroad company to recover damages for certain cattle, which were lost and injured in their transportation over its road, it was *Held:*

1st. That by the contract the burden was imposed on the plaintiff of proving not merely that the live-stock was injured and damaged by accident and delay occurring in their transportation, but also that these were caused by the gross negligence or default of the defendant's agents.

2d. That the fact that some of the cattle were injured and lost by accidents on the railroad, while in the course of transportation, that considerable delays occurred in their carriage, and that they were damaged and lessened in weight and value from this cause, does not raise the presumption of negligence or default on the part of the agents of the railroad company within the meaning of the contract: *Bankard* v. *B. and O. Railroad Co.*, 34 Md.

Pleading—Negligence—Variance.—It is not unusual to insert in a

declaration averments which affect only the rule of care and negligence which should govern the case. Thus declarations alleging the defendants to be common carriers, and at the same time averring gross negligence on their part in the transportation of the goods, are usual and well approved. In such cases the failure to prove the allegation of negligence is no variance, and the plaintiff may recover without such proof, provided the evidence shows a case under the general rule respecting the liability of carriers. On the other hand, if the plaintiff does prove the allegation of negligence, he may recover, even though there are circumstances limiting the responsibility of the carrier below the common-law rule: *Sargent* v. *Birchard & Page*, 43 Vt.

Where the declaration averred that the plaintiff conveyed a strip of land to the railroad company, describing it and setting forth the conditions in the deed, one of which was that the plaintiff assumed no risk of fires happening by reason of the railroad passing through said land, and averring that the railroad company accepted the deed, and thereby assumed responsibility for fires, and built and operated the road, and by carelessly managing their engines, &c., the plaintiff's timber land was set on fire, &c., it was held sufficient on special demurrer: *Id.*

Conspiracy.

Gist of the Action—Special Damage sustained by the Plaintiff—Conspiracy as matter of Aggravation—When Case is not a proper Remedy.—In an action on the case against several, founded on an alleged conspiracy to injure the plaintiffs, they are not entitled to recover, even if there were such unlawful conspiracy among the defendants, unless the plaintiffs can show that they have in fact been aggrieved, or have sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy: *Kimball* v. *Harman*, 34 Md.

No action lies for simply *conspiring* to do an unlawful act; it is the doing the act itself, and the resulting actual damage to the plaintiff which furnish the ground of the action: *Id.*

An act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie: *Id.*

The fact of conspiracy is matter of aggravation, and it only becomes necessary, in order to entitle the plaintiff to recover in one action against several, that the combination or conspiracy should be proved: *Id.*

In an action on the case against several, for an alleged conspiracy to defeat the right of the plaintiffs to receive and possess a certain lot of bedsteads, which they had purchased of one of the defendants, the plaintiffs cannot recover damages against such defendant, for a breach of the contract of sale to them: *Id.*

Constitutional Law.

Constitutionality of the Acts of Assembly exacting for the use of the State one fifth of the amount received by the Baltimore and Ohio Railroad Company from Passengers over its Washington Branch—Such Exaction not a Capitation Tax—Right of the State to recover from the

Railroad in an Action for Money had and received—Set-off as a Plea to an Action by the State.—The Acts of Assembly (1832, ch. 175, 1836, ch. 261, 1844, ch. 103, 1845, ch. 370, and 1852, ch. 328,) in so far as they provide that the Baltimore and Ohio Railroad Company shall pay semi-annually to the treasurer of the state, for its use, the one-fifth of the whole amount that may be received by the company for the transportation of passengers over its road between Washington and Baltimore, are not in conflict with the Constitution of the United States: *State of Maryland* v. *B. and O. RR. Co.*, 34 Md.

The exaction by the state of the one-fifth of the passenger fare collected by the Baltimore and Ohio Railroad Company over the Washington branch, is not a capitation tax, or in any proper sense a tax upon the passenger for the right of transit, but a tax imposed upon the corporation with its consent, and therefore free from all constitutional objection: *Id.*

Even if the one-fifth of the passenger fare secured to the state under the provisions of the Act of 1832, ch. 175, and its supplements, were a capitation tax unconstitutionally imposed upon passengers for the right of transit, the railroad company having collected the money in pursuance of their provisions, could not be allowed to retain it as against the claim of the state; and the same may be recovered by the state in an action of *assumpsit* for money had and received: *Id.*

A state being sovereign is not liable to be sued by an individual or corporation; the right therefore of set-off which is in the nature of a cross-suit, does not exist in actions instituted by the state, except where such defence is expressly allowed by statute: *Id.*

CONTRACT. See *Evidence.*

False Warranty—Conditional Sale—Rescission.—The plaintiff and defendant exchanged horses, the plaintiff letting the defendant have a colt on which there existed an outstanding claim in favor of a conditional vendor. The defendant was never damnified nor disturbed in his possession of the colt, and after this suit for false warranty was brought, and before trial and before the defendant had ever interposed any objection to the contract on account of this defect of title, the plaintiff paid up said claim. *Held*, that this objection cannot avail the defendant as a defence in this suit: *Clayton* v. *Scott*, 43 Vt.

And in order to entitle the defendant to make it, if it were a proper defence, the defendant should have first offered to rescind: *Id.*

Accord and Satisfaction.—After a simple contract is broken and damage thereby accrued, it cannot be discharged by parol without satisfaction or some consideration, though it may be before. But if the new agreement is upon good consideration and performed, it is a satisfaction and a defence, and it makes no difference that the prior agreement is in writing, and the new agreement verbal: *Cutler* v. *Robbins*, 43 Vt.

DAMAGES. See *Bailment.*

Compensative and Exemplary—Control of the Court over.—Where there is neither fraud, malice, or gross negligence or oppression, damages will be confined to compensation for the plaintiff's injury: *Belknap* v. *Boston & Maine Railroad*, 49 N. H.

In such cases the character, standing, condition, or circumstances of the defendant are entirely immaterial: *Id.*

But where exemplary or punitory damages are to be given, the condition and circumstances of the defendant may be material. What would be sufficient damages, by way of example and of punishment for a day laborer without means, would be nothing either by way of punishment or of example in case of a wealthy corporation: *Id.*

Excessive damages are good ground for setting aside a verdict, where from their exorbitancy, the court may reasonably presume that the jury in assessing them were influenced by passion, partiality, prejudice, or corruption: *Id.*

So a verdict will be set aside when the damages are too small, as well as when they are too large: *Id.*

Where the verdict is set aside on the ground of excessive damages, the court, instead of simply ordering a new trial, will give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will give him judgment for the residue, and will deny the motion for a new trial, and this in actions of tort as well as upon contract: *Id.*

DEBTOR AND CREDITOR. See *Husband and Wife.*

Fraudulent Conveyance by Debtor—Husband and Wife—Where a debtor has transferred his property to his wife, who holds it for his use, and permits him to control and enjoy it, and he thereby defies and defrauds his creditors, it will not protect him in a court of equity, that the forms of law have been pursued: *Metropolitan Bank* v. *Durant and others*, 7 C. E. Green.

No payment of consideration will protect any sale contrived and accomplished to defraud creditors when the purchaser has knowledge of the object of the sale: *Id.*

DEED. See *Equity.*

ENTRY.

Disclaimer—Amendment of.—In a writ of entry, if the tenant disclaims a part or all of the land demanded, he is held thereby to admit the demandant's title to the land disclaimed and is estopped afterwards to deny it. But such admission and estoppel is not rendered final and absolutely conclusive until after judgment: *Wells* v. *Jackson Iron Manufacturing Co.*, 49 N. H.

Therefore, in such case, if the tenant disclaims a part of the land demanded, and pleads the general issue as to the residue, and the plaintiff accepts the disclaimer and joins the issue, the tenant may at any time before judgment, for cause shown, have leave to amend his disclaimer, so as to cover a greater or less amount of land than that originally disclaimed: *Id.*

EQUITY. See *Debtor and Creditor.*

Injunction—Settlement of Rights at Law prior to.—To entitle a party to a preliminary injunction his right in the subject matter in dispute, and to the remedy applied for, must be clear to the court and free from reasonable or serious doubt, or established by proceedings at law: *Hackensack Improvement Commission* v. *New Jersey Midland RR. Co.*, 7 C E. Green.

If the facts upon which the right depends are established or admitted, and the principles of law which on those facts would give the right,

are settled and established in this state, it is not always necessary that the claim of the complainant should have been established in a suit at law. The chancellor may in such case apply the principles as settled by the courts of law, to the facts, and allow the injunction: *Id.*

But when the principles of law on which the right rests are disputed, and will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, may not, upon the opinion of the equity judge, without a decision of the courts at law establishing such principles, grant the injunction: *Id.*

An injunction must not issue, where the benefit secured by it is of little importance, while it will operate oppressively and to the great annoyance and injury of the defendant, unless the wrong complained of is wanton and unprovoked: *Id.*

The right of the complainants to an injunction depending upon the construction of conflicting provisions in a statute, and the construction of such provisions never having been settled by the courts of law, this court cannot interfere: *Id.*

Correction of Mistakes in Deeds and Records.—To correct deeds for fraud or mistake in them is one of the ancient and well established heads of equity jurisdiction, and it is the duty of the court where such fraud or mistake is clearly proved, to correct it by any means in its power to effect the amendment and the object of it: *Loss* v. *Obry*, 7 C. E. Green.

Mistakes are corrected even where they occur in the records or proceedings of courts, and exist in the records themselves. This is done not by reviewing the judgments or proceedings of the courts, but by restraining the parties who may take advantage of such mistakes from doing so, or by compelling them to execute proper papers for the purpose of such correction: *Id.*

Misrepresentation—Deed—Specific Performance.—A representation that a public alley over part of the premises is only a private right of way in a few persons when made by mistake, and when the rights in the property are substantially the same in either case, is not such a misrepresentation as will bar specific performance: *Wuesthoff* v. *Seymour*, 7 C. E. Green.

A conveyance of lands described by courses with the addition of the words "being the same premises conveyed to K. the grantor, by H. by deed dated," &c., will convey the whole premises in that deed, although the description leaves out a small strip, such being the evident intention of the parties: *Id.*

Specific Performance.—Specific performance will not be enforced where the contract does not designate with certainty the lands to be conveyed: *Carr* v. *Passaic Land Improvement Co.*, 7 C. E. Green.

A resolution "that two acres be sold," is vague and uncertain upon its face. The uncertainty is patent, and parol proof is inadmissible to explain it: *Id.*

Writ of Assistance.—The writ of assistance can only issue against persons who are parties to the suit, or who came into possession under a defendant after its commencement. But in all cases the parties in possession and against whom the writ is applied for, should have notice of

the application and are entitled to be heard on it: *Blauvelt* v. *Smith*, 7 C. E. Green.

This writ is a summary process, only used when the right is clear, and when there is no equity or appearance of equity in the defendant, and where the sale and proceedings under the decree are beyond suspicion: *Id.*

Practice—Payment of Money into Court.—Money will not be ordered to be paid into court, which is not asertained to be due by an account or decree in the cause, or admitted to be due by the answer or other proceedings in the cause, a parol admission proved by affidavit is not sufficient: *McTighe* v. *Dean*, 7 C. E. Green.

Estoppel.

Contract—Construction—Acts in pais.—When the lessee of property agrees to pay all assessments that may be made thereon, he in fact agrees to pay such assessments only as are valid, or such as can be legally enforced against the lessor, or against the property: *Clark* v. *Coolidge*, 7 Kans.

When an assessment which is void has been made against the property, and the lessor comes to the lessee and tells him the amount thereof, and also asks why the lessee does not pay the same, and the lessee says it is all right, and he will pay the same, but does not do so, and afterwards the lessor pays it, and then brings suit against the lessee to recover from him the amount thereof, the lessee is not estopped from showing that the assessment is void: *Id.*

It is a general rule of both law and equity, that a party may always plead, prove and rely upon the truth of any transaction, in the determination of his rights, unless he would be committing a fraud upon the rights of the adverse party by doing so: *Id.*

Estoppels *in pais*, as a general rule, can apply only where the party doing the act or making the admission knows the truth of the matter connected therewith, or pretends to know it, or has better means of knowing it than the adverse party; where the adverse party does not know it; where the act or admission is expressly designed to influence the conduct of the adverse party; and where the adverse party relies upon and is influenced by such act or admission: *Id.*

Evidence. See *Husband and Wife.*

Of a Conversation merged in a Contract.—Evidence of a conversation between the parties at the time the defendants delivered to the plaintiff a writing claimed to be a contract, was objected to, on the ground that what was said, at the time, was merged in the written contract, *Held* that as the plaintiff was proceeding on the theory that the writing was *not* the agreement, and that the conversation proved it was not, the evidence was admissible for that purpose: *Hoag* v. *Owen*, 60 Barb.

Declarations of Parties.—Under the Act of 1864, ch. 109, making parties to suits competent witnesses, a party cannot offer in evidence his own declarations in his own behalf, in relation to the subject of controversy, or matter in issue. The act does not change any of the rules relating to the admissibility of evidence: *Friend et al.* v. *Hamill*, 34 Md.

FIXTURE. See *Mortgage.*

GUARANTY.

Extension of Time of Payment of a Bond—Collateral Security.—An extension of the time of payment of a bond, given by the holder thereof to the principal obligor, does not operate to discharge a guarantor of such bond, if the agreement for the extension were entered into after the maturity of the bond: *Hays* v. *Wells*, 34 Md.

An agreement, which will operate to discharge a surety in a bond, or a guarantor of its payment, must be an actual agreement between the creditor and the principal to extend the time of payment, and it must be upon sufficient consideration, and must amount in law to an estoppel upon the creditor sufficient to prevent him from bringing a suit before the expiration of the extended time; when such an agreement is made, the surety is discharged: *Id.*

The agreement for extension must not only be valid and binding in law, but the time of the extension must be definitely and precisely fixed: *Id.*

The possession of an additional or collateral security, does not impair the right of a creditor to enforce payment of the obligation, to secure which the collateral was given and accepted, so long as it does not appear that the debt has been paid: *Id.*

An agreement to extend the time of payment of a bond will not be inferred from the acceptance by the holder, of a collateral security which did not mature until after the maturity of the bond: *Id.*

HIGHWAYS. See *Action; Nuisance.*

Insufficiency.—A person must be in the use of a highway *for the purpose of travel* in order to be entitled to recover damages on account of its insufficiency: *Sykes* v. *Town of Pawlet*, 43 Vt.

A party having voluntarily and for his own convenience deviated from a highway which in its travelled track was in good condition, and having met with an accident causing damages to him by backing his horse over a bank outside of the highway, but which extended up to the travelled track so as to make the highway itself dangerous and insufficient outside of the travelled track, is not entitled to recover against the town for the injury: *Id.*

The plaintiff left the highway, which in its travelled track was in good condition, to drive into a private shed outside of the highway, for the purpose of leaving his team there while attending to some business in the village. In getting out of the shed he backed over a bank extending from the shed to the travelled track of the highway, and having no muniments on the margin. The place of the accident was outside of the highway. *Held*, that the plaintiff could not recover against the town for the injury: *Id.*

HUSBAND AND WIFE. See *Debtor and Creditor.*

Liability of Husband for Services to Wife.—A husband is not liable to an attorney for professional services rendered his wife, in defending a libel for divorce by the husband against her upon the ground of her adultery, even though such defence may prove successful: *Ray* v. *Addin*, 49 N. H.

Wife's Interest in Land as against Husband's Creditors.—Where a

wife has an equitable interest in land conveyed to her husband, by reason of her having paid a part of the purchase-money, such interest will be protected, as against her husband's *subsequent* creditors: *Lormore et al.* v. *Campbell et al.*, 60 Barb.

Evidence of Husband against Wife.—In an action against husband and wife, brought by judgment creditors of the husband, to set aside conveyances made by the defendants, as fraudulent, the examination of the husband, taken in supplementary proceedings against him, instituted by another creditor, is legitimate evidence so far as it affects the husband: *Id.*

But neither the testimony, the acts, nor the declarations of the husband can be used as legal evidence to implicate the wife, or to fix her conduct as fraudulent, or to divest her of her estate. And if such testimony is given before a referee, it is his duty, upon the motion of the wife, to strike it out, if he does not intend to consider it evidence against her: *Id.*

INJUNCTION. See *Equity.*

INSURANCE.

Title in Insured.—A policy of insurance, together with the application therefor, is *primâ facie* evidence of the title of the insured, to the property embraced in the policy: *Kansas Insurance Co.* v. *Berry*, 7 Kans.

LANDLORD AND TENANT. See *Entry; Estoppel.*

MORTGAGE.

Conditional Sale—Machinery—Fixture.—Where a person sells machinery under a condition that it shall remain the property of the vendor until the price is paid, but it is of such character that when it is put in its place in a mill it would pass under a mortgage of the real estate, and the vendor had reason to suppose it would be, and it was so placed, before it was paid for: *held*, that the equity of a subsequent mortgagee, without notice of the vendor's claim and in reliance upon the vendee's title being absolute, is paramount to that of the conditional vendor: *Davenport* v. *Shants*, 43 Vt.

But for machinery so sold and delivered, and being in the yard of the mill but not actually placed in the mill at the time of the execution of the mortgage, but put in afterwards, the right of the conditional vendor is paramount to that of the mortgagee. But the mortgagee would hold it as against the mortgagor: *Id.*

Machinery consisting of a circular saw-mill and saw, belts to drive the saw, waterwheel-gears, shaft and box to the same, and drum flanges, all put in its place in a saw-mill, pass under a mortgage of the real estate, as between the mortgagor and mortgagee: *Id.*

NUISANCE.

Obstruction of a Highway— What constitutes Special Damage.—The obstruction of a highway is a common nuisance and being a wrong of a public nature, the remedy is by indictment; it is not in itself a ground of civil action by an individual, unless he has suffered from it some

special and particular damage, different not merely in degree, but different in kind from that experienced in common with other citizens. In such case the actual damage constitutes the gist of the action, and must be averred and proved: *Houck* v. *Wachter*, 34 Md.

The mere fact that, by reason of the obstruction, the plaintiff was obliged to travel a longer and more circuitous route, is not such special damage as to entitle him to maintain an action: *Id.*

Though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain an action: *Id.*

The rules of law allowing such actions ought not to be extended: *Id.*

Parent and Child.

Obligation to support Minor Child.—A parent is under no legal obligation, independent of statutory law, to maintain his minor child: *Kelley* v. *Davis*, 49 N. H.

The Statute applies only to the case of the reimbursement of towns for the support of paupers: *Id.*

A parent cannot be charged for necessaries furnished by a stranger to his minor child, except upon the promise of the parent, express or implied, to pay for them: *Id.*

Such promise is not to be implied from an omission of duty resting in moral obligation merely: *Id.*

The law will not imply a promise, against the party's express declaration, except in the case where a positive *legal* duty is imposed on the party making the negative declaration: *Id.*

Partnership.

Secret—what is meant by.—A secret partnership is where the existence of certain persons as partners is not avowed or made known to the public by any of the partners: *Deering et al.* v. *Flanders*, 49 N. H.

Where all the partners are publicly made known, whether it be by one or all the partners, it is no longer a *secret* partnership: for this is generally used in contradistinction to notorious and open partnership. And it makes no difference in this particular, whether the business of the firm be carried on in the name of one person only, or of him and company: *Id.*

Where business is thus transacted by A. & B., under the firm of A. & Co., B. cannot be considered as a dormant partner; and if he retires from the firm, he is bound to give notice of his retirement, or else he will remain liable upon contracts subsequently made in the name of the firm: *Id.*

As to the public, such notice need not be actual; it may be constructive and may be implied from circumstances; but a person accustomed to deal with the firm will hold a retiring partner for debts subsequently contracted in the name of the firm, unless such person had actual knowledge of the retirement, or was put upon inquiry: *Id.*

Railroad.

Right of Conductor to put off a Passenger refusing to pay Fare—Agency—M. on the 1st of May, purchased a through ticket from N.

Y. to B. over the P., W., & B. R. R., and on that day took the through train. The conductor of the train took up the ticket and gave M. a "conductor's check," with the words "good for this day and train only." and with the numerals 5 and 1, showing the month and day, punched out of the "check." M., desiring to leave the train, at a way station, inquired of some one at the window of the company's ticket office at the station, if the "check" would take him to B. on another train and day, and was told that it "was good till taken up." On the 6th of May, M. entered another train going to B., and, being called upon for his ticket, offered the "check." The conductor refused to receive the "check," and M. having refused to pay fare, the train was stopped at a point intermediate between two stations, and by direction of the conductor, M. left the train. *Held:* 1st. That M. had no right to leave the train at the way station, and afterwards to enter another train and proceed to his original point of destination without procuring another ticket, or paying his fare. 2d. That on the refusal of M. to pay his fare, the conductor had the right to put him off the train, using no more force than was necessary to effect his removal, and was under no obligation to put him off at a station. 3d. That even if the person, by whom M. was told that the "check" was good until taken up, was an agent of the company, the presumption is, that a ticket agent at a way-station has no authority to change or modify contracts between the company and through passengers, and the *onus* of rebutting this presumption rested on M.: *McClure* v. *P. W. and B. R. Co.*, 34 Md.

RECORD. See *Equity*.

SALE. See *Mortgage*.

SHERIFF'S RETURN.

Evidence to contradict.—The general rule is, that as between parties to an action the return of the sheriff is conclusive, but this rule is not to be carried so far in cases of original process as to preclude an inquiry into the facts on which jurisdiction depends; and when the return of the sheriff is that a copy of the summons was left at the residence of the defendant, the court may hear and determine whether the place where the copy was left was at the time the residence of the defendant: *Bond* v. *Wilson*, 7 Kans.

TENDER. See *Accord*.

TRESPASS.

By adjoining Owner to make Partition Fence.—Although it is a general rule that where a party is the owner of personal property which is upon the land of another, the former cannot commit a trespass by entering and taking it away, yet the rule does not apply to that entry of a party which is necessary to enable him to make a partition fence between him and an adjoining owner: *Carpenter* v. *Halsey*, 60 Barb.

The law compels each owner to make his portion; and this carries with it the right to such necessary occupation for the time being, as is required to comply with such legal duty: *Id.*