ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
COURT OF ERRORS AND APPEALS OF MARYLAND.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT COMMISSION OF OHIO.[4]
SUPREME COURT OF WISCONSIN.[5]

ADMIRALTY.

Collision—Liability of Tug and its Tow.—Both a tug and its tow are liable for the consequences of a collision, when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation: *The Steam-tug Virginia Ehrman*; *Ehrman* v. *Curtis et al.*, S. C. U. S., Oct. Term 1877.

Ship-owners, if their ship is without fault, are entitled in a cause of collision, except where it occurs from inevitable accident, to full compensation for the damage their ship receives, provided it does not exceed the value of the offending vessel and her freight then pending, and the same rule applies where the injury is caused by the joint action of a tug and tow, if it be so alleged in the libel, and it appears that both were in charge of their own master and crew, and that each was in fault in not taking due care, or was guilty of negligence or of unskilful or improper navigation: *Id.*

Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent the collision by adopting any practicable precautions: *Id.*

AGENT. See *Insurance.*

Ratification of Acts of.—S. was the agent of a gold-mining company in working its mines in Colorado. He had no authority to borrow money in its name, but did, in fact, borrow large sums. The president of the company was informed of such borrowing and of the amounts. The company, however, failed within a reasonable time to disavow the acts of their agent in so borrowing the money. *Held*, that the company should be considered as assenting to what was done in its name: *Union Gold Mining Co.* v. *Rocky Mountain National Bank*, S. C. U. S., Oct. Term 1877.

Insurance Company—Responsibility for Acts of its Agents—Special

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1877. The cases will probably be reported in 6 or 7 Otto.

[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 46 Maryland Reports.

[3] From opinions delivered at the January Term 1878. The cases will probably be reported in 37 or 38 Michigan Reports.

[4] From E. L. De Witt, Esq., Reporter; to appear in 30 Ohio State Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 43 Wisconsin Reports.

Instructions to General Agents.—No company can be allowed to hold out another as its agent and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him on that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation: *Southern Life Ins. Co.* v. *McCain*, S. C. U. S., Oct. Term 1877.

Special instructions limiting the authority of a general agent, whose powers would otherwise be co-extensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal should be held by the acts of one, whom he has publicly clothed with apparent authority to bind him: *Id.*

ALLEY. See *Municipal Corporation.*

APPLICATION OF PAYMENTS.

When General Rule to be applied.—To make applicable the rule that in the absence of a specific appropriation of payments by either the debtor or creditor, the law will appropriate them, there must be some testimony tending to show that no such appropriation has been made by the parties: *Albert* v. *Lindau*, 46 Md.

ASSUMPSIT.

Substitution of Debtor—Promise—Consideration.—The complaint was, in substance, that on, &c., one M. was indebted to plaintiff in a certain sum, and defendant was indebted to M. in a still larger sum, and it was thereupon agreed between M. and the parties in this action, that defendant should pay plaintiff said first named sum, and be discharged from that amount of his indebtedness to M.; and that plaintiff accepted defendant's said promise, and released M.; but that defendant has made default in part, &c. *Held*, that the complaint goes entirely upon the substitution of defendant for M. as plaintiff's debtor, and no recovery can be had under it without proof of the averment that defendant, at the time of his alleged promise, was indebted to M. in the sum which he promised to pay plaintiff: *Gaston* v. *Owen*, 43 Wis.

Mere evidence that defendant made a payment for M. to plaintiff, and promised to pay the remainder of M.'s indebtedness at a future date, and that there was, at the time of such promise, a subsisting executory contract between M. and defendant by which the latter might probably become indebted to the former—without evidence of the relations of the parties or the state of their account on the foot of such contract at the time of the transaction—would not sustain a verdict for plaintiff: *Id.*

Services between Parties in the Relation of Father and Child.—In an action against plaintiff's stepfather, for labor and services performed by plaintiff after his majority, under an alleged agreement by defendant to pay what they were reasonably worth, one defence was, that during the time of such services plaintiff lived in defendant's family as a member of it, and performed the service in consideration of a home, clothing, &c. The court, after instructing the jury that plaintiff could not recover without showing an *express* contract of the kind alleged, further charged

that if they found, from the preponderance of testimony, that defendant, on or about a day named, agreed with plaintiff to pay him for services afterwards to be rendered, and that plaintiff, in pursuance of such agreement, rendered such services, then he was entitled to recover; and that the burden of proof was on plaintiff to show both the contract and the value of his services by a preponderance of proof. *Held*, that the charge was erroneous in failing to point out the distinction between circumstances from which a contract may be implied, and circumstantial evidence of an express contract, and in failing to inform the jury that an express contract of the kind alleged "must be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive": *Wells* v. *Perkins*, 43 Wis.

ATTORNEY.

Substitution of— Notice.—The substitution of one attorney for another in a cause is not complete and does not authorize any proceedings to be taken in the name of the new attorney until notice of his substitution has been served upon the attorney of the opposite party: *Comfort* v. *Stockbridge et al.*, S. C. Mich., Jan. Term 1878.

BOUNDARY.

Settlement acquiesced in becomes binding, though not in fact correct.—Where, by the title-deeds of adjoining proprietors of land, the dividing line is left open to be established by a survey or measurement, and is thereafter fixed and marked by mutual agreement between them, and they occupy to such established line for a period sufficient to create title under the Statute of Limitations, such proprietors will be held to the line so established, although it may not be the true line: *Smith* v. *McKay*, 30 Ohio St.

Under such agreement, one of the parties, holding under a deed, and in actual possession of part of the tract, is deemed to be in possession of the entire tract described in his deed, up to the division line, there being no actual adverse possession against him: *Id.*

CHATTEL MORTGAGE. See *Mortgage.*

CONSTITUTIONAL LAW.

Special Legislation— Change of Name of Corporation.—The constitution of the state of Alabama declared that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." An act of said state was passed authorizing the Wills Valley Railroad Company (a pre-existing corporation) to purchase the railroad and franchises of the Northeast and Southwestern Alabama Railroad Company (another pre-existing corporation), and, after doing so, to change its own name to that of the Alabama and Chattanooga Railroad Company: *Held*, that this act was not unconstitutional and that the above provision in the constitution could not be construed to prohibit the legislature from changing the name of a corporation, or from giving it power to purchase additional property: *Wallace* v. *Loomis et al.*, S. C. U. S., Oct. Term 1877.

CONTRACT.

Construction of, where quantity of Goods is named with qualification.—Where a contract is made to sell or furnish certain goods identified by

reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import; the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount in reference to which good faith is all that is required of the party making it. In such cases the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity: *Brawley* v. *The United States*, S. C. U. S., Oct. Term 1877.

But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words "about, more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight: *Id.*

If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope, or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions: *Id.*

Where there was a contract to deliver at the post of Fort Pembina, eight hundred and eighty cords of wood, "more or less, as shall be determined to be necessary by the post-commander for the regular supply, in accordance with army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 21st 1871," and where the post-commander, as soon as he learned of the contract, and within four days after it was signed, informed the claimant that but forty cords of wood would be required thereon, and forbade his hauling any more to the government yard, *Held*, that the quantity designated (eight hundred and eighty cords) was to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required, and that the substantial engagement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year, in accordance with army regulations: *Id.*

CORPORATION. See *Agent; Constitutional Law; Surety.*

Defence to Action against—Forfeiture of Charter.—It cannot be shown, in defence to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the state, instituted directly against the corporation for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits until it be judicially declared: *County of Macon* v. *Shores*, S. C. U. S, Oct. Term 1877.

In a suit on a bond issued by a county, the objection that the corporation was not organized within the time limited by the charter is unavailing: *Id.*

Where a corporation has power under any circumstances to issue such

securities, the *bona fide* taker has a right to presume they were issued under circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity, in the hands of the holder, than any other commercial paper: *Id.*

Impeaching the validity of Charter in a collateral proceeding.—The courts are bound to regard a company incorporated according to all the required forms of law, as a corporation so far as third parties are concerned, until it is dissolved by a judicial proceeding in behalf of the government that created it: *Laflin & Rand Powder Co.* v. *Sinsheimer*, 46 Md.

The plaintiff sued certain members of a corporation to make them liable individually for goods sold and delivered to the corporation, upon the ground that said individuals had not been duly incorporated by reason of non-compliance with statutory requirements. Proof was offered by the plaintiff tending to show that certain requirements, which the plaintiff claimed to be conditions precedent to the incorporation of the defendants, had not been complied with. The certificate of incorporation disclosed no error upon its face, and was authenticated in such manner as was declared by the statute under which it was made should be sufficient evidence of the existence of the corporation. *Held*, 1st. That the plaintiff stood in this case in the attitude of a third person to the corporation, and could not by proof *aliunde* the certificate impeach its corporate existence; 2d. That the company was a corporation *de facto* at the time the goods were sold and delivered to it by the plaintiff, and its existence as a corporation could not be drawn collaterally in question: *Id.*

COUNTY. See *Corporation; Municipal Bonds.*

COVENANT.

Grantee's Right of Action—Construction of Deed—Covenantor, when concluded by Judgment—Ousting Covenantee—Notice to Covenantor to defend—Constructive Ouster.—Where land is conveyed to a minor, with provision reserving the whole of said premises for use as a homestead for his mother, himself and sister, until he arrive at the age of 21 years, or until his mother's death within that period, he takes an interest and present right capable of being so disturbed and infringed as to give him an immediate right of action and of suing alone, upon a remote grantor's covenant of quiet enjoyment: *Mason* v. *Kellogg*, S. C. Mich., Jan. Term 1878.

If the holder of a title guarded by covenant, has, when sued upon a ground, which, if adjudged valid, would show a breach of covenant, given proper notice to the covenantor to defend, a judgment against himself, will, in suit on the covenant, be conclusive proof of a breach; but if the covenantor was not adequately warned, and was not in substance a party, the judgment in the prior suit is merely *prima facie* evidence, and is disputable: *Id.*

Unless the record in the former suit, shows affirmatively that the point actually adjudged is the breach now sued for, it must be shown by further proof: *Id.*

Parol notice to the covenantor to appear and defend is not good. Considering the effect which the law gives to a notice, it is sufficiently near

being a fact of title to be within the policy favoring written memorials or titles to real estate: *Id.*

The verdict and judgment in an ejectment suit wherein the successful plaintiff elected to abandon the premises and receive their value, rather than pay for the improvements, show a constructive ouster, and are evidence of a breach of a covenant for quiet enjoyment. Physical expulsion is not necessary, compulsory surrender of a part of the value being enough: *Id.*

Whether Joint or Several.—If a question arises whether a covenant be joint or several with respect to the covenantees, that is to say, whether parties claiming the benefit of the covenant must sue thereon jointly or may sue severally, regard must be had to the interests of the covenantees in the covenant. But this rule has no application to the construction of a covenant, with respect to the obligation of the covenantors, in determining whether they are bound jointly, or jointly and severally, or severally only, and the extent of the obligation: *Boyd et al.* v. *Kienzle et al.*, 46 Md.

CRIMINAL LAW. See *Evidence.*

Homicide—Self-defence.—The right of an assailed party to self-defence does not depend on his believing or not believing at the moment that a call would bring some one else to interfere in his behalf, however it might bear upon the fact of the reality of his belief concerning his danger and his necessity to use the given means of defence. Except in special cases, no private person is bound in law, even if called on, to defend others: *The People* v. *Lilly*, S. C. Mich., Jan. Term 1878.

DEBTOR AND CREDITOR. See *Mortgage.*

Preference—Rights of Wife as Creditor.—Whatever remedy may be had in the bankrupt courts, preferences to creditors are allowed by the state laws: *Jordan* v. *White et al.*, S. C. Mich., Jan. Term 1878.

The fact that delay and hindrance to creditors were caused and intended by a debtor's transfer of his property, would avoid it even though for value, if the purchaser was not a creditor, but otherwise if he was: *Id.*

A wife, the same as other creditors, may obtain preferences from her husband as to debts due her: *Id.*

EQUITY.

Remedy at Law.—Where, in an action on an agreement to abandon a certain business in a specified town, the plaintiff alleged a breach of the agreement to his damage a specified sum for which he asked judgment, and then stated that, by reason of the defendant's insolvency, he would be remediless, unless the defendant was restrained from further violating the agreement, and prayed for a perpetual injunction; and the defendant answered denying the agreement: *Held*, That the action, though equitable relief was sought thereby, being primarily for money and a personal judgment being claimed, was one in which the parties had the right to demand a trial by jury: *Brundridge* v. *Goodlove*, 30 Ohio St.

EVIDENCE. See *Surety.*

Presumption—Burden of Proof—Rule as to Criminal and Civil Cases and Cases of Revenue Seizures.—Innocence is presumed in a criminal

case until the contrary is proved, or, in other words, reasonable doubt of guilt is in some cases ground of acquittal, where, if the probative force of the presumption of innocence were excluded, there might be a conviction; but the presumption of innocence as probative evidence is not applicable in civil cases, nor in revenue seizures: *Lilienthal* v. *The United States*, S. C. U. S., Oct. Term 1877.

In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment: *Id.*

Fraud— Written Misrepresentations do not exclude Oral ones.—The fact that in a fraudulent transaction some of the false representations were put in writing and delivered to the party, does not exclude proof of oral ones previously made and relied on. Whether anything outside of the writings was considered as representations still standing and relied on, should be decided upon a view of all the circumstances: *Match* v. *Hunt*, S. C. Mich., Jan. Term 1878.

Impeaching Party's own Witness.—Although the general rule is, that a party cannot impeach the general reputation for truth of his own witness, yet he may prove the truth of any particular fact relevant to the issue by any other competent testimony, in direct contradiction of what one of his witnesses has testified, even where such proof may *collaterally* show such witness to be generally unworthy of belief: *Smith* v. *Ehnert*, 43 Wis.

Thus, in an action on a promissory note alleged by the answer to have been without consideration, after plaintiff, as a witness for defendant, had testified that the note was for the price of specified chattels sold by him to defendant, the latter was entitled to show by his own testimony that he was not indebted to plaintiff on account of such chattels when the note was given: *Id.*

Former Adjudication.

Judgment without Prejudice.—A judgment dismissing an action without prejudice to a future action is an entirety, and, though it may have been so rendered erroneously, it will not constitute a bar to a subsequent action upon the same subject-matter: *Wanzer* v. *Self*, 30 Ohio St.

How far conclusive.—The complaint prayed that defendant's interest in certain real estate might be adjudged a mortgage; that deeds of partition between them might be adjudged void as against plaintiff; that an account might be taken of their advances to plaintiff and of the rents, issues and profits chargeable to them; and that, upon payment of any balance found due them, they might be adjudged to reconvey to plaintiff. A former opinion and judgment herein (26 Wis. 465) directed that plaintiff "have judgment for the relief demanded in the complaint, conditioned upon the payment of whatever may be due." *Held*, that even if such opinion and judgment were rendered without the court having its attention called to their effect upon the details of the accounting between the parties, no rehearing having been asked, they must control the present appeal so far as they apply: *Wilcox* v. *Bates and another*, 43 Wis.

Under such decision, the cause must now be considered as if the deeds in question had never been executed, and no attempt had been made by defendants to sever the trust estate or their administration of it; such estate must be surrendered to plaintiff in entirety, upon payment of what may be due them on the foot of the trust; and they cannot be allowed to account *severally*, each for so much of the property as he held in severalty under the partition, without regard to the aggregate state of the account for the whole trust: *Id.*

FRAUD. See *Evidence; Limitations, Statute of.*

FRAUDS, STATUTE OF. See *Assumpsit.*

Contract to be performed within a Year.—Although the parties may be longer than a year in the performance of a contract, still, if that performance may be completed within a year, and such performance is entirely in accordance with the intention and understanding of the parties, such contract is not within the statute, and need not be in writing, in order to maintain an action upon it: *Blakeney* v. *Goode*, 30 Ohio St.

GUARANTY. See *Surety.*

HABEAS CORPUS.

Cannot determine same questions as Writ of Error.—A writ of *habeas corpus* applied for by a prisoner on the ground that the place of imprisonment named in the sentence was not that ordered by statute, was refused, the court declining to pass upon the validity of the sentence until brought before them by writ of error: *In re Esther Coffeen*, S. C. Mich., Jan. Term 1878.

HUSBAND AND WIFE. See *Debtor and Creditor.*

Proof of Marriage—Dower barred by Statute of Limitations—Conduct and reputation are sufficient proof of marriage in cases involving property rights: *Proctor* v. *Bigelow*, S. C. Mich.; *Scott* v. *Bigelow*, Id., Jan. Term 1878.

Rights of dower are barred by the Statute of Limitations: *Id.*

Debts not contracted with direct reference to Separate Estate.—In order to charge the debts contracted by a married woman upon her separate estate as a lien in equity, it is necessary that it should affirmatively appear that her contract was made with direct reference to her separate estate, and that it was her intention to charge the same: *Wilson* v. *Jones*, 46 Md.

A bill was filed against a *feme covert* and her trustee for the purpose of charging her separate estate with a lien for materials furnished by the complainants for the improvement of the same; the bill did not aver that there was any contract by her to bind her separate estate, or any intention on her part to create a charge or specific lien thereon for the payment of the complainant's claim. On demurrer to the bill, it was *held*, That the bill stated no case entitling the complainants to relief in equity, and that the demurrer should be sustained: *Id.*

INSURANCE.

Proofs of Loss—Estoppel—Agency—Stipulations against Authority of Agent—Variation by Parol.—If an insurance company, with notice,

actual or constructive, of facts rendering the policy voidable at its option, objects upon other grounds only to proofs of loss furnished, and subjects the insured to trouble and expense in furnishing new proofs, it will be *estopped* from setting up such facts in avoidance of the policy. And this estoppel arises although such first proofs did not, and the new proofs do, furnish the company cumulative evidence of the facts relied upon as a breach: *Gans* v. *St. Paul F. & M. Ins. Co.*, 43 Wis.

Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company; and the effect of such knowledge is not varied by stipulations in the policy, that "the use of general terms, or anything else than a distinct, specific agreement clearly expressed and endorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein;" that the agent "has no authority to waive, modify or strike from the policy any of its printed conditions;" that his assent to an increase of risk is not binding upon the company until it is endorsed upon the policy, and the increased premium paid; and that, in case the policy shall become void by violation of any condition thereof, the agent has no power to revive it: *Id.*

Where A. is authorized by an insurance company to receive applications for and issue its policies, a provision in a policy so issued, that "any person, other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured, and not of this company under any circumstances whatever, or in any transaction relating to this insurance" cannot substitute the assured for the company as A.'s principal: *Id.*

A clause in an insurance policy declaring that a waiver of any condition thereof, to be binding, must be endorsed upon it, may itself be waived by parol, or by acts *in pais*: *Id.*

Evidence—Proofs of Death.—By the terms of a policy of life insurance the amount insured was payable in ninety days after satisfactory proofs of death. At the trial, the proofs of death furnished in compliance with this requirement were offered in evidence by the plaintiff, for the purpose of showing such compliance. *Held*, 1st. That the same were admissible for that purpose and for no other, and their sufficiency was a question for the court to determine. 2d. That the said proofs being also offered in evidence by the defendant, were admissible as declarations of the plaintiff: *Mutual Life Ins Co.* v. *Stibbe*, 46 Md.

The statement of the plaintiff as to the cause of the death of the insured, accompanying said premliminary proof, did not properly constitute any part of the proof of death required by the policy, but was the mere declaration made by her of her opinion and belief as to the cause of the death, and as such the defendant was entitled to rely upon it before the jury though not conclusive: *Id.*

The statement of the physician was, that the disease of which the insured died, was "*cerebral congestion*, caused proximately by mental anxiety and remotely by drink." By the terms of the policy, it was to be void, "if the death shall be caused by the use of intoxicating drink or opium." *Held*, that the meaning of this provision was, that the things prohibited should be the *direct* cause of the death, in order to avoid the policy, and it was not error so to instruct the jury: *Id.*

INTERNAL REVENUE LAW. See *Evidence.*

LIEN. See *Mortgage.*

LIMITATIONS, STATUTE OF. See *Boundary; Husband and Wife.*

Conditional Promise not Sufficient.—In an action by G. against K. as executrix, the plaintiff, for the purpose of taking his case out of the operation of the Statute of Limitations, offered in evidence a letter addressed to the plaintiff's attorney by the attorney for the defendant, in these words: "About claim against Mrs. K. please inform me what it is. The executrix will pay it if just." *Held*: That said letter was inadmissible for that purpose: *Goldsmith* v. *Kilbourn*, 46 Md.

Fraud—Statute runs from Time of Discovery.—The Act of 1868, ch. 357, provides, that "In actions hereafter brought where a party has a cause of action, of which he has been kept in ignorance by the fraud of the adverse party, the right to bring the suit shall be deemed to have first accrued at the time at which such fraud shall, or with usual and ordinary diligence might have been known or discovered." *Held*, that it was not thereby meant that in all cases a party must commit a fraud *distinct* from, and *independent* of the original fraud, for the purpose of keeping the injured party in ignorance of his cause of action, nor that the mere concealment of the fraud is insufficient: *Wear* v. *Skinner*, 46 Md.

Where one practises fraud to the injury of another, the *subsequent concealment* of it from the injured party is *in itself a fraud*, and if he is thereby kept in ignorance of his cause of action, he is kept in ignorance by "the fraud of the adverse party:" *Id.*

In an action of deceit brought to recover damages for an alleged fraud, by which the plaintiff was induced to assign to the defendant his interest in a firm of which the two had been members; upon a plea of the Statute of Limitations and replication thereto, it was *held*, that if the plaintiff was induced to assign to the defendant his interest in said firm by fraud practised on him by the defendant, and such fraud was concealed from him by the defendant, whereby he was kept in ignorance of his cause of action, then his right to bring the suit must be deemed to have first accrued when such fraud was, or with usual and ordinary diligence might have been discovered: *Id.*

MORTGAGE.

Of Chattels—Lien of.—Because a mortgagee of a chattel temporarily uses it with the assent of the mortgagor, and then returns it to him, the mortgage lien upon it is not thereby extinguished: *Albert* v. *Lindau*, 46 Md.

Of Chattels—Possession of Mortgagor—Fraud against Creditors.—A chattel mortgage and a written agreement to govern the same subject-matter between the parties, executed contemporaneously, must be treated as one contract: *Blakeslee* v. *Rossman*, 43 Wis.

Where such a contract mortgages to creditors a merchant's entire stock of goods, licensing the mortgagor to remain in possession and dispose of the goods in the course of his trade, and apply one-half of the proceeds of the sales upon his liability to the mortgagees, without making any provision for the disposition of the other half, this in effect

leaves such other half at the absolute disposal of the mortgagor for his own use: *Id.*

A chattel mortgage permitting the mortgagor to remain in possession, and to sell and apply the proceeds or any part of them, to his own use, is fraudulent and void in law as against creditors: *Id.*

The mortgage itself, as put on record, purported to cover the entire stock, for money lent to the mortgagor; but the contemporaneous agreement, not recorded, shows it to be in effect a mortgage of half the stock, for indemnity against liabilities assumed by the mortgagees. *Quere*, whether such failure of the record to disclose fully the consideration and nature of the lien would not avoid the mortgage as against creditors: *Id.*

The mortgage being void in law, as against creditors, in a controversy between one claiming under it and a creditor of the mortgagor, there is no question for the jury of good faith in fact: *Id.*

While the holder of a chattel mortgage may relinquish his rights as such, and accept the chattels from the mortgagor in payment of his debt, or as a pledge, such a shifting of title must be open, express and explicit—both debtor and creditor being expressly parties to the payment or pledge, and their acts in that behalf established as expressly and satisfactorily as payment or pledge in any other case: *Id.*

Marshalling Liens—Liens partly valid and partly bad.—In a proceeding at the suit of sundry mortgagees to foreclose their respective mortgages, it appeared that the wife of the mortgagor had united with her husband in the execution of only one of the mortgages, in which she had released her contingent right of dower. At the instance of the mortgagee holding such release the wife was made a party, and the premises were sold pursuant to an order, free from her contingent claim to dower: *Held*, that the mortgagee holding such release is entitled, on distribution, to receive the proportionate value of such inchoate right of dower, though the net proceeds of the sale are insufficient to satisfy the prior mortgages: *Adm'r of Black* v. *Kuhlman et al.*, 30 Ohio St.

Where, in marshalling liens, the court awards to a portion of a claim secured by mortgage, priority over a subsequent mortgage, but finds that the residue of the claim secured by the prior mortgage is fraudulent and void, as against the lien of the subsequent mortgage, the partial preference thus given to the elder lien is not necessarily erroneous. Where no positive illegality enters into the consideration of a claim, it may be valid in part, and in part invalid: *Id.*

MUNICIPAL BONDS. See *Corporation.*

Bonds issued by County—Defence to.—By a law of Nebraska, any county or city was authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, the amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city: Provided, the county commissioners or city council should first submit the question of issuing such bonds to a vote of the legal voters of said county or city in the manner provided by chapter nine of the Revised Statutes of Nebraska for submitting to the people of a county the question of borrowing money. By a subsequent section of the same act it was enacted that any precinct

in any organized county of the state should have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities; and that in such cases the precinct election should be governed in the same manner so far as applicable, and the county commissioners should issue special bonds for the precinct: *County Commissioners of Dodge Co.* v. *Chandler*, S. C. U. S., Oct. Term 1877.

An action was brought to recover the amount of certain coupons attached to certain bonds issued by the board of county commissioners of the county of Dodge, on behalf of the precinct of Fremont in said county. The plaintiff purchased the coupons sued on before maturity, and for a valuable consideration. It was conceded that the precinct regularly voted for an issue of bonds to the amount named therein, to be appropriated for building a bridge across the Platte river, which fact was recited in said bonds; but the defendant in its answer set forth the notice of the election, by which it appeared that the proposition submitted to the people was to build a toll-bridge, and not a free bridge; and that the bridge was accordingly built, and operated as a toll-bridge. The notice of election further declared that the tolls were to be used for the purpose of raising a sinking fund to pay the principal, interest, repairs and expenses of the bridge, and were to be regulated from time to time by the county commissioners. The plaintiff demurred to this answer: *Held*, that the fact that the bonds were issued for a toll-bridge of the character of the one set forth in the proposition submitted to the votes of said Fremont precinct, as shown in the answer, did not make them invalid in the hands of a holder thereof for value, before due, without other notice than that imparted on the face of the bonds: *Id.*

All bridges, intended and used as thoroughfares, are public highways whether subject to toll or not: *Id.*

Municipal Corporation.

Obstruction of Alley — Violation of Municipal Ordinance — Title to Easement — Purpose of Alleys.—The object of the power granted to a city to prevent obstruction to various easements of a public character is not to settle the title, which cannot be tried by a municipal court under city ordinances: *Beecher* v. *The People*, S. C. Mich., Jan. Term 1878.

A summary proceeding cannot be had to prevent an interruption in the use or enjoyment of a mere theoretical easement not actually used: *Id.*

A city cannot try as a violation of an ordinance an invasion of its private property: *Id.*

The purpose of alleys is not as substitutes for streets, but as a means of accommodation to a limited neighborhood for chiefly local convenience: *Id.*

Nothing can be treated as a punishable obstruction of an alley that does not interfere with its accustomed uses. Covering it in by a roof is not necessarily any obstruction whatever: *Id.*

Negligence.

Action for Damages by falling into an Excavation on a Private Lot — Right of Way — License by Implication — Nuisance.—In an action of damages for a personal injury, it was alleged in one of the counts, that the defendants were owners of a certain open and unenclosed lot of

ground, within the limits of the city of Baltimore, and that persons were in the habit of passing over the same; and that the defendants cut on such lot in a dangerous and exposed position thereof, a deep excavation, and left the same in a dangerous condition, and liable to injure persons passing over the said lot; and that the plaintiff while passing over said lot on a certain night, being ignorant of the excavation, fell therein and was injured. On demurrer, it was *held*, 1st. That said count entirely fails to state a sufficient cause of action. 2d. That the fact that persons were in the habit of passing over the lot gave the plaintiff no right to do so; and unless there were such right, there was no breach of duty on the part of the defendants in cutting and leaving open the excavation. 3d. That a party has the right to use his land as he pleases, except as he may be restrained by duty to the public or to private individuals: *Maenner* v. *Carroll*, 46 Md.

NOTICE. See *Covenant.*

NUISANCE. See *Negligence.*

PARENT AND CHILD. See *Assumpsit.*

PARTNERSHIP.

Surviving Partner—Power to give Note in Firm's name.—After the dissolution of a firm by the death of a partner, one surviving partner has no implied power to bind another—who, since the death, has shown no assent to the continuance of the business in the old name—by a note given in the name of the late firm, even for an acknowledged indebtedness accruing before the firm's dissolution: *Matteson et al.* v. *Nathanson*, S. C. Mich., Jan. Term 1878.

Retiring Partner—Liability of.—A retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become partners thereto: *Rawson* v. *Taylor*, 30 Ohio St.

R. held the promissory note of the firm of T. G. & Co. After it was given, some members of the firm retired, leaving assets sufficient to pay all debts, and taking the obligation of the succeeding new firm, to pay all debts and save the retiring partners harmless: *Held*, that unless R., by some valid contract, express or implied, had made himself a party to this new arrangement, or had so acted as to be estopped, his rights on the note against all the members of the old firm remained unchanged; that while, as between the partners themselves, the relation of principal and surety existed, yet as to the payee of the note, all were principals and joint debtors, although notice of such obligation was brought home to him: *Id.*

Where the payee of such note has received from the new firm a chattel mortgage of the partnership property sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had such notice of the subsequent contract between the partners: *Id.*

PATENT.

What Assignments of are required to be in Writing—Jurisdiction of State Courts.—The interest in a patent to the transfer of which writing is necessary, under sect. 11 of the Act of 1836, is an interest in the legal title of the patent. An equitable interest or an interest in the proceeds resulting from sales of the patent, with a right to an account, need not be in writing: *Blakeney* v. *Goode*, 30 Ohio St.

Although a cause of action may relate to the subject-matter of a patent right, it is within the jurisdiction of state courts, if it does not involve the validity of the patent right: *Id*

SLANDER.

Charge of burning Property to defraud Insurers—Aggravation of Damages—Opinion of Officer—Evidence of Public Rumors—Mitigation of Damages.—In an action for slander in charging plaintiff with having burned his property to defraud the insurers, proof of actual insurance is not necessary, the fact being immaterial: *Fowler* v. *Gilbert*, S. C. Mich. Jan. Term 1878.

Charges made to plaintiff himself of the same slanderous nature as those counted on, are admissible in evidence in aggravation of damages, whether made to him alone or in presence of others: *Id.*

Alleged frauds of plaintiff against third persons concerning agreements regarding insurance, are irrelevant: *Id.*

The opinion entertained by a public officer as to the cause of a fire, is inadmissible in an action of slander brought by one charged with making it to defraud insurers: *Id.*

The effect of evidence of public rumors against the plaintiff on the subject of the slander, is properly confined to mitigation of damages: *Id.*

SURETY.

Evidence—Judgment Record—Notice to Guarantor of default by Principal.—In an action against a surety, the record of a judgment against his principal, unless shown to be on account of matters connected with his guaranty, is inadmissible. But where the record shows a liability embraced by the guaranty of the surety, it is *prima facie* evidence for that purpose: *Roberts* v. *Woven Wire Mattress Co.*, 46 Md.

Where a party has given a bond to another to secure the faithful performance of the contract of a third person, it is the duty of the obligee to give reasonable notice to the guarantor of any defalcation on the part of the contractor. It is the prerogative of the court to define the character of the notice, and the duty of the jury to determine whether such reasonable notice has been given: *Id.*

Where a guaranty is subsequent to the contract between the principal and the guarantee, and forms no part of the consideration thereof, it requires a distinct consideration to give it efficacy as a collateral undertaking: *Id.*

But where a guaranty expressly referred to a previous agreement between the principal and the guarantee, which was executory in its character, and embraced prospective dealings between the parties, then the guaranty purports upon its face and by necessary construction a sufficient consideration: *Id.*