report and the rendition of final judgment, the defendant moved to set the judgment aside, which motion was overruled, exceptions taken, and the case brought here by appeal.

There is no pretense that the land taken was not assessed at its true value, although it is urged that the commissioners failed to take into consideration the value of a crop of corn growing upon the premises, and that this fact is shown by the report. The report shows no such fact, and the objection fails. In my opinion the judgment should be affirmed. The other judges concur.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF MAINE.[1]

### COURT OF APPEALS OF MARYLAND.[2]

### SUPREME COURT OF MICHIGAN.[3]

#### Bills and Notes.

*A Negotiable Promissory Note—What Is.*—An instrument of the tenor following: "Nobleboro, October 4, 1869. Nathaniel O. Winslow Cr. By labor 16¾ days @ $4. per day $67.00. Good to bearer. Wm. Vannah,"—is a negotiable promissory note for sixty-seven dollars, payable to Nathaniel O. Winslow, or bearer, on demand: *Hussey* v. *Winslow*, 59 Me.

*Promissory Note—Construction of—Evidence in Action on.*—The liability of the defendant, as the maker of a negotiable promissory note, must be determined by the instrument alone: *Sturdivant* v. *Hull*, 59 Me.

A note of the tenor: "Portland, Dec. 20, 1869. Four months after date, I promise to pay to the order of Sturdivant & Co., two hundred and twenty-five dollars. Value received. John T. Hull, Treas. St. Paul's Parish," binds Hull, personally; and it cannot be shown, by parol, that the intention of both parties, at the time of giving the note, was that the parish and not Hull should be bound: *Id.*

#### Contract.

*Consideration—Mutuality.—Statute—Construction of.*—In the trial of an action of assumpsit, on an account annexed, the defendant offered in evidence an unsealed written agreement, signed by the plaintiffs and five other creditors of the defendant, therein stipulating to "take fifty per cent. of the amount due us in full, for account against" him; and oral evidence that the defendant, prior

1 From W. W. Virgin, Esq., Reporter; to appear in 59 Maine Reports.

2 From J. S. Stockett, Esq., Reporter; to appear in 35 Maryland Reports.

3 From H. K. Clarke, Esq., Reporter; to appear in 22 Michigan Reports.

to the commencement of this suit, presented to the plaintiffs the draft of a third person, of an amount equal to fifty per cent. of the account in suit, and claimed a receipt in full; but that the plaintiffs refused to accept the draft and give the receipt. *Held* (1), That the evidence disclosed no consideration for or mutuality in the written agreement; and (2) That the defense was not within R. S. c. 82, § 38: *Webb* v. *Stuart*, 59 Me.

CORPORATION.

*Legislative grant to a Railroad Company to cross a Turnpike. Contract of a State with the Turnpike Company implied in its Charter—Ultra vires.*—The legislature, in the exercise of the right of eminent domain, can empower a railroad corporation to cross another railroad or a turnpike road, on making compensation; and, whatever damage may result therefrom, the exercise of such a right cannot be considered as the condemnation of a franchise, nor the impairment of a contract within the meaning of the Constitution of the United States: *Turnpike* v. *Union Railroad Co.*, 35 Md.

A legislative grant of powers to a corporation sanctions only such implied powers as are necessarily incident to those expressly bestowed: *Id.*

The U. R. R. Co. was empowered by its charter to construct a railway between two *termini* so situated as to make it necessary to cross the B. and H. turnpike road. In addition to the main stem, the R. R. Co. built a lateral road, which also crossed the turnpike road, in order to connect with the P. W. & B. R. R. *Held*, that the right to build the lateral road across the turnpike could not arise by implication from a provision in the charter of U. R. R. authorizing all railroad companies upon equal terms to run their locomotives and cars over the tracks of the U. R. R. Co.: *Id.*

*Member of cannot make himself a creditor of, without authority.*—A member of a corporation, who is not its financial officer, cannot, without authority, make himself its creditor by the voluntary payment of its debts: *Blanchard* v. *First Association of Spiritualists of Portland*, 59 Me.

The plaintiff, a member thereof, sued the corporation known as the "First Association of Spiritualists," for a balance of an account wherein was charged various sums paid for rent, carpets, furniture, gas and oil bills for their hall of worship, and credited sums subscribed and contributed by different members and received from other persons for the use of the hall. The by-laws provided for the election of a treasurer, who thereby had charge of the funds, collections, and debts, and was required to pay the bills of the association, ordered by "the government." The plaintiff, with others, having been appointed a "committee on the hall," without any specific duties assigned, or powers conferred, purchased the carpets, etc., for the association, and on its credit, considering themselves personally bound to pay therefor, provided the association

did not. *Held*, (1) That the plaintiff had no authority thus to make himself creditor of the association; and (2) That the bare vote of the association to accept the report of the committee could not be construed such a ratification as would authorize one of the committee to maintain the suit: *Id.*

## Criminal Law.

*The fact that the Defendant in Criminal prosecution did not Testify may be considered by the Jury.—Husband's coercion—presumption of.—Instruction.*—In the trial of a married woman on an indictment for being a common seller of intoxicating liquor, the fact that she did not testify in her own behalf is proper to be considered by the jury in determining the question of her guilt or innocence: *State of Maine* v. *Cleaves*, 59 Me.

If a married woman sell intoxicating liquor contrary to law in the presence of her husband, the law presumes that she acts under the coercion of her husband; but this presumption may be rebutted: *Id.*

Hence, in the trial of a married woman on an indictment for being a common seller of intoxicating liquor, where it appeared that at some of the sales her husband was present, the presiding judge properly declined to instruct the jury, that if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under his coercion, compulsion, or direction, and would not be liable for such sales: *Id.*

## Deed

*Evidence—Parol Agreement.*—Evidence of a parol agreement alleged to have accompanied the delivery of the deed, by which, upon certain conditions, the deed should be re-delivered to the grantor, is inadmissible, there being no evidence of fraud, or any other circumstance which could prevent the operation of the deed as an absolute conveyance: *Beers* v. *Beers*, 22 Mich.

## Easement.

*Estoppel—Extinguishment and Abandonment of an Easement—Constructive Notice—Power of Lessee to bind Reversioner—Construction of Deeds.*—Where G having been a party to a chancery suit for the partition of real estate, wherein was included a certain dominant tenement, afterward became seized of the servient tenement, it was *Held*, that G was not estopped, as party to the chancery suit, from maintaining that, either by the true construction of the title deeds creating the easement, or by subsequent agreement of the parties in interest, the easement had been extinguished: *Glenn* v. *Davis*, 35 Md.

An agreement by a lessee for years to abandon an easement cannot bind the reversioner, unless he be a party to it, or it be made with his acquiescence: *Id.*

Where a paper is not entitled by law to be recorded, placing it upon record does not operate as constructive notice: *Id.*

A deed from W to B, made in 1823, conveying a lot on the principal street, in the city of Baltimore, contained a stipulation that notwithstanding a deviation of the existing partition wall from the true dividing line between the lot therein described, and the adjoining lot belonging to W, the said wall should remain undisturbed, "so long as the said houses shall endure." The houses then existing, were two-story brick dwellings. In 1870, many radical changes having meantime been made in the condition of the houses, and the house of the party claiming under B having become incapable of safe and beneficial occupation, he sought to build a new wall upon the true dividing line. Upon appeal from an order granting an injunction against the disturbance of the old wall, the true construction of the clause above quoted being disputed, it was *Held*, 1. That this provision must be taken most favorably for the grantee. 2. That the evident design of this provision was, that whenever the grantee should find it necessary, either by reason of the decaying condition of his house, or its unfitness for the locality, to erect in its stead a more substantial structure, suitable for the business purposes of that part of the city, his enjoyment of the property according to its true lines should no longer be restricted: *Id.*

## Equity.

*Bill to Quiet Title—Possession.*—A bill to quiet title, filed by a complainant, who, though averring possession of the premises, is not shown to be in actual possession, against a defendant shown to be in possession, and nothing appearing to prevent proceedings at law, cannot be maintained: *Barron* v. *Robbins*, 22 Mich.

## Exceptions, Bill of.

*Objection to the admissibility of Evidence.*—From an order refusing to sign and seal a bill of exceptions, no appeal lies: *Marsh* v. *Hand*, 35 Md.

Where a judge before whom a case is tried refuses to sign and seal a bill of exception tendered in time under the rules of the court, the party aggrieved by such refusal may have a compulsory writ from the Court of Chancery, grounded upon the Statute of Westm. 2 (13 Edw. 1,) ch. 31, commanding the judge to sign and seal the bill of exception; or he may apply to the Court of Appeals, which has power to issue the compulsory writ under the Statute, as incident to the proper exercise of its appellate jurisdiction: *Id.*

## Forcible Entry.

*Evidence.*—On the trial of a complaint for a forcible entry, evidence of force employed to maintain a possesion is not admissible to characterize, by relation, acts otherwise peaceable, by which the possession had been previously obtained: *Latimer* v. *Woodward*,

2 *Doug.* 368, and *Seitz* v. *Miles*, 16 Mich. 456, cited and approved: *Hoffman* v. *Harrington*, 22 Mich.

Every forcible entry is forbidden; but a forcible detainer after a peacable entry is not forbidden unless the detainer is unlawful; and in neither case is the possessory remedy given to any one who is not entitled to the possession: *Id.*

INFANT.

*Infant's Contract—Rescission of by Administrator.*—A contract between a minor and his master whereby the former paid his bounty money to the latter in consideration of his consent to the minor's enlistment, may, after the minor's decease, intestate, be rescinded by the administrator of his estate, and the money recovered back: *Dinsmore* v. *Webber*, 59 Me.

INSURANCE.

*Enforcement by an Insurance and Loan Company of the payment of the Weekly dues of a Member, by Fines and Forfeitures.*—The appellee, incorporated under the Act of 1868, ch. 471, loaned to the appellant, a member of the corporation, $6,000, on fifteen shares of its stock held by him, re-payable in weekly instalments, including principal, interest and premium of $33.75, each, and took from him a mortgage to secure the re-payment thereof. The appellant failed to pay the instalment due on Monday, the 19th of December, 1870, but tendered the amount on the succeeding day; the secretary of the corproation refused to receive it, unless he would pay the fine of $3.37 claimed to be due under a by-law of the corporation, which provided that any person who refused to pay his weekly dues at the time required, should be fined ten cents weekly, for each and every dollar remaining unpaid. The appellant tendered on each suceeding Monday, up to the 16th of March, 1871, the date of the passage of a decree for the sale of the mortgaged premises, the amount of the accrued and accruing instalments as named in the mortgage, but refused to pay the fines claimed to be due by the appellee, and the appellee refused to accept the instalments without the fines. *Held:* That while the appellant, by his failure to pay punctually the weekly instalment due on the 19th of December, 1870, subjected himself to the fine provided by a by-law of the appellee for such default, his tender thereafter of the weekly instalments as the same fell due, exempted him from liability to further fines. His refusal to pay the first fine did not give the appellee the right to impose additional fines: *Pentz* v. *Citizen's Fire Insurance Co.*, 35 Md.

JUDGMENT.

*Scire Facias to Revive—Plea of Payment and Satisfaction—Evidence.*—An agreement entered into prior to the date of a judgment, as to the mode of its discharge, but which was not to be executed until afterward, and all payments made in pursuance of such agreement, are admissible in evidence in support of the plea of

payment and satisfaction to a *scire facias* to revive the judgment: *Downey* v. *Forrester*, 35 Md.

A being indebted to B on a promissory note in the sum of $447, it was agreed that A would continue to pay the dues on ten shares of Building Association stock held by him, until the payment should equal the amount of his indebtedness, and in case he did not otherwise discharge such indebtedness, he would transfer the stock in payment thereof. Subsequently, on the 3d of August, 1867, A confessed judgment for $449.39, in favor of B. At the time of the agreement, $90 had been paid into the Building Association on the stock, and A continued to pay the sum of $5 weekly until June, 1868, when the money on the shares amounting to $642, was drawn out by B, it being agreed that the same should be applied to the note for which the judgment was confessed. On the 3d of September, 1870, B sued out a *scire facias* to revive the judgment. A pleaded payment and satisfaction. *Held*, 1. That in support of this plea, evidence of the receipt by B of the sum of $642, was admissible, the same having been received by him subsequently to the date of the judgment. 2. That the deposits in the Building Association from time to time, on the shares of stock, were not payments to B as of the date when made; being left to accumulate under the agreement, they constituted but one payment when received by him in the aggregate: *Id.*

### Limitations, Statute of.

*Mutual and open Account—Non-residence, and absence from the State—Residence—Domicil.*—Items of credit to defendant entered on plaintiff's books for goods or money "returned," have no tendency to prove the existence of a mutual and open account between the plaintiff and defendant, within the meaning of § 5361 *Comp. Laws.* Such entries denote merely that the transactions to which they relate are stricken out of the account entirely: *Campbell* v. *White*, 22 Mich.

Neither absence from the State, nor residence out of it, will, of itself, suspend the running of the statute of limitations within the meaning of § 5369 *Comp. Laws:* both must exist to take the case out of the statute. Where the absence has not been continuous, the different occasions when the debtor has been within the State —if his presence were sufficiently notorious, or continued for such length of time as would afford the creditor, by the exercise of reasonable diligence, a fair opportunity to subject the debtor to the service of process—may be reckoned together, and during the period thus computed, the statute will run; it being the legislative intent that the operation of the exception should be concurrent with the existence of the obstacle which prevents a service upon the debtor: *Id.*

Residence out of the State, in order to take a case out of the statute of limitations, must be something more than a mere place of abode; it must be the *domicil* of the party, which can only be in one place; and it must have the incidents, which may vary under different

circumstances, but which determine the place of his *home*, which he has adopted with the intention of remaining, and to which, when he is absent, he intends to return: *Id.*

LANDLORD AND TENANT.

*Claim by Lessees for a Covenant in the Lease, exempting them from Liability for Damage by fire to the Premises, resulting from their own Negligence.*—A receiver appointed to take charge of certain trust property, entered into a written agreement to lease a house and lot, part of the trust estate, for a term of five years, at a specified annual rent—the agreement to be subject to the approval of the Circuit Court of Baltimore city. The receiver tendered a form of lease, containing the usual covenants for repairs on the part of the lessees—together with a covenant on his part to keep the premises insured; the lessees were also to be liable for any injury by fire to the building caused by their own negligence. This form of lease the lessees refused to accept, insisting that inasmuch as the premises were to be insured by the receiver, and they were to pay the extra premium consequent upon having a steam-engine on the premises, they were entitled to be exempted from all responsibility for injury by fire to the premises, though occurring by their own negligence or that of their employees; and that in case of the destruction of the building by fire, it should be rebuilt by the lessor without delay, the rent, in case of accidental fire only, to be suspended in the meantime. The Circuit Court passed an order directing a lease in the form suggested by the lessees. On appeal by a *cestui que trust*, this order was reversed, it being *Held*, That in the absence of previous express stipulations to that effect, the lessees were not entitled to the covenants demanded by them: *Bodman* v. *Murphy*, 35 Md.

MALICIOUS PROSECUTION.

*Absence of Probable Cause—Definition of Probable Cause.*—To support an action for malicious prosecution, the plaintiff must prove affirmatively that he was prosecuted, or that a prosecution was instigated by the defendant; that it terminated in his discharge or exoneration from the accusation against him; and that it was both malicious and without probable cause on the part of the defendant: *Boyd* v. *Cross*, 35 Md.

Malice is a question of fact for the jury, and its existence may be, and most generally is, inferred from the want of probable cause for the prosecution; but the absence of probable cause is not conclusive of the presence of malice. The presumption of malice, resulting from the want of probable cause, is only *prima facie*, and may be rebutted by the circumstances under which the defendant acted. But from the most express malice, the want of probable cause cannot be implied: *Id.*

The want of probable cause is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury; but what will