

what has been done in this case, inasmuch as the ship in question was released upon an agreement that all remedies against the ship and against the owners should be tried in this country. Such an agreement would give jurisdiction by consent."

We may hope that such legislation may be adopted, where the rule still prevails, that a distinction founded upon reasons which have long since passed away, and which often causes a failure of justice, may be obliterated from our laws. A. S. B.

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## ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.<sup>1</sup>

SUPREME COURT OF KANSAS.<sup>2</sup>

SUPREME JUDICIAL COURT OF MAINE.<sup>3</sup>

COURT OF ERRORS AND APPEALS OF MARYLAND.<sup>4</sup>

SUPREME COURT OF RHODE ISLAND.<sup>5</sup>

ATTORNEY. See *Practice*.

BAILMENT. See *Bank*.

### BANK.

*National Bank—Bailment—Power of a National Bank to receive on deposit Bonds as collateral security for the existing Debts of a Customer, and for future Loans and Discounts—Liability of a National Bank for the loss of Bonds deposited for such purpose*—The Third National Bank of Baltimore was organized under the National Currency Act of 1864, ch. 106. The firm of W. A. B. & Co, of which W. A. B. was the senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th of February 1866, the firm was indebted to the bank about \$5000, and W. A. B. voluntarily proposed to the president of the bank to deposit with the bank about \$37,000 in bonds, as collateral security for his present and future indebtedness. Subsequently, as agreed between W. A. B. and the president of the bank, certain bonds and stocks were deposited as collateral security for the payment of all obligations of W. A. B. and W. A. B. & Co. to the bank, then existing, or that might be incurred thereafter, with the understanding that the right to sell such collaterals in satisfaction of such obligations, was vested in the officers of the bank. Some of the bonds were subsequently withdrawn and others deposited in their place. While these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about \$4000 on deposit, and from time to time as it needed, obtained discounts ranging

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<sup>2</sup> From Hon. W. C. Webb, Reporter; to appear in 17 and 18 Kansas Reports.

<sup>3</sup> From J. D. Pulsifer, Esq., Reporter; to appear in 66 Maine Reports.

<sup>4</sup> From J. Shaaf Stockett, Esq., Reporter; to appear in 44 Maryland Reports.

<sup>5</sup> From Arnold Green, Esq., Reporter; to appear in 11 Rhode Island Reports.

from \$2000 to \$15,000, on the security of the collaterals; it sometimes owed the bank nothing, but left the bonds in its vault; at times when the firm wanted money for a very short time, it obtained it from the bank, on the security of these collaterals, on what were called "call loans," by checks. The officers of the bank considered the account of the firm a very desirable one, and the arrangement by which every liability of theirs was secured by the collaterals, very advantageous to the bank. The firm was not indebted to the bank subsequent to July 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left in the bank under the original agreement. Between Saturday evening the 17th and Monday morning the 19th of August 1872, the bank was entered by burglars and certain of the bonds were stolen. By section 8 of the Act of Congress of 1864, ch. 106, a bank organized thereunder, is authorized "to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act." In an action by W. A. B. against the bank, to recover the value of the bonds which were stolen, it was held: 1. That the contract entered into by the bank was not a mere gratuitous bailment; 2. That the bank had the power to enter into the contract, it being within the terms of the Act of Congress; 3. That the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit, did not cease when the plaintiff's debt had been paid; 4. That the defendant was responsible if the bonds were stolen in consequence of its failure to exercise such care and diligence in their custody or keeping, as at the time, banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant; 5. That the proper measure of damages was the market value of the bonds at the time they were stolen: *Third National Bank of Baltimore v. Boyd*, 44 Md.

Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide: *Id.*

#### BANKRUPTCY.

*Assignment in Fraud of Creditors—Insolvency—Computation of Time.*—Transfers of property by an insolvent debtor, within four months before the filing of the petition in bankruptcy against such debtor, with a view to give a preference to any creditor are forbidden by the Bankrupt Act, and such transfer is void if the person receiving the same, or to be benefited thereby, had reasonable cause to believe that such debtor was insolvent, and that such transfer was made in fraud of the provisions of the Bankrupt Act: *Dutcher et al. v. Wright, Assignee*, S. C. U. S., Oct. Term 1876.

Insolvency in one sense of the Bankrupt Act means that the party whose business affairs are in question is unable to pay his debts as they

become due, in the ordinary course of his daily transactions; and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature, in the ordinary course of his business: *Id.*

Congress has defined the meaning of certain terms employed in the Bankrupt Act, and has regulated the mode of computing time "in all cases in which any particular number of days is prescribed by the act or shall be mentioned in any rule or order of court, or general order which shall, at any time, be under the same, for the doing of any act or for any other purpose," the rule enacted being that the computation "shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall" be *dies non* within the judicial sense: *Id.*

Where the computation is to be made *from an act done*, the day on which the act is done to be included: *Id.*

P. being insolvent was, on the 8th of April 1870, adjudged bankrupt pursuant to his own petition. On the 8th of December 1869, P. having been for a long time insolvent and largely indebted to D. and others for goods, wares and merchandise, with the knowledge of said D. and others, assigned to them certain portions of his property consisting of promissory notes and other evidences of indebtedness, with a view to give a preference to said D. and others over the other creditors of the bankrupt, and in fraud of the provisions of the Bankrupt Act. *Held*, that this was a transfer within four months before the filing of the petition in bankruptcy and therefore void, and further, that the day the petition in bankruptcy was filed must be excluded in making the computation *Id.*

BILL OF LADING. See *Shipping*.

#### BILLS AND NOTES.

*Inmaterial Alteration.*—A note payable to the order of W. was before issue endorsed by F. It was signed by G., and this signature was at the request of W. changed to "G., agent." The note was given for G.'s private debt. F. did not assent to the change, and there was no evidence to show that G.'s principals were accustomed to pay notes drawn in this form. In an action against F.: *Held*, that the change was immaterial: *Manuf. & Mer. Bank v. Follett*, 11 R. I.

*Held*, further, affirming *Mathewson v. Sprague*, 1 R. I. 8, and *Perkins v. Barstow*, 6 R. I. 505, that F. was not entitled to notice of non-payment: *Id.*

*Notice of Protest—Duty of Notary.*—It is no part of the official duty of a notary public by the general law merchant, or the statute of Kansas, to give notice of the protest or dishonor of a bill or note, and although it is usual and convenient for the notary to give the notice in such case, he is the mere agent of the holder or party authorized to give the notice: *Swayze v. Britton*, 18 Kans.

*Note signed in Blank—Authority to fill up.*—Where J. and C. endorse a negotiable promissory note, which, so far as the dates, the amount, &c., are concerned, is in blank, and give said note to L. to be negotiated in a

bank in paying and taking up another note for \$1000, then due and held by the bank against J. and L. and a third person, and J. and C. instruct L. to fill up said new note for \$400 only, but L., in violation of such instructions, fills it up or allows the bank to do so for \$1000, and then L. with said new note pays and takes up the old one, and the bank is fully aware that said new note was executed and endorsed in blank, but is not aware and has no notice that the note was filled up for a larger amount than was authorized by J. and C. : *Held*, that a promissory note may legally be executed and endorsed in blank, that the bank in this case is an innocent and *bonâ fide* holder of said new note for value, and is therefore not responsible for or chargeable with the wrong committed by L., and may therefore recover against J. and C. the full amount of said note : *Joseph v. First National Bank of Eldorado*, 17 Kans.

#### BOND.

*Joint and several Obligation.*—In debt on a writing obligatory, as follows: "Know all men by these presents that we, William J. Clark, of the city of Providence, R. I., as principal, and A. E. Burnside, Eben A. Kelly, and John Gorham, as sureties, are held and firmly bound unto the president, directors, and company of the Commercial National Bank of the city of Providence, R. I., in the sum of \$10,000, that is to say, the said William J. Clark in the whole of said sum above named, and the said A. E. Burnside, Eben A. Kelly, and John Gorham, each as surety respectively in the sum of \$3333.33 to be paid to them, the said Commercial National Bank, their attorney, successors or assigns, for which payment well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators firmly by these presents." *Held*, that the obligation was several, Clark being bound in one whole sum of \$10,000; and Burnside, Kelly, and Gorham, being each bound in one sum of \$3333.33 : *Commercial National Bank v. Gorham*, 11 R. I.

#### CONSTITUTIONAL LAW.

*Municipal Corporation—Constitutionality of the Act extending limits of Frederick City—Power of the Legislature over Municipal Corporations.*—The Act of 1870, ch. 314, extending the taxable limits of Frederick City, and authorizing the mayor, aldermen and common council thereof to assess, levy and collect taxes within the extended limits, is not repugnant to the provision of the constitution (Art. 3, sect. 40) which prohibits the taking of private property for public use, without just compensation. This provision of the constitution is a limitation on the exercise of the right of eminent domain, and has no reference whatever to the taxing power : *Groff v. The Mayor of Frederick City*, 44 Md.

The legislature has the power to create municipal corporations, to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action, whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether in the legislative discretion : *Id.*

Where the legislature in the exercise of its constitutional power extends the taxable limits of a city, a court of equity will not interfere by injunction to restrain the collection of taxes, imposed by the municipal authority upon property within the limits thus extended, to defray the expenses of the corporation, because such property is used for farming and pasturing purposes : *Id.*

## CONTRACT.

*Unpire—Estoppel.*—H. sued the city of Omaha on a contract for the construction of two public wells in the streets of that city. The contract was in writing, and by its terms H. was "to sink and construct two wells, said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall nine inches in thickness, and arched over in a secure and proper manner, the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city. H. proved the construction of the wells under the supervision of the engineer to his entire satisfaction, and his final acceptance of them. But it was also proved that while the main part of the wells was sunk to the depth of twenty to twenty-three feet of the diameter of twelve feet, the brick curbing of nine inches in thickness, built inside the shaft so sunk, reduced this diameter to ten and a half feet, and that smaller shafts of four or five feet in diameter were sunk below the bottom of the main well to the depth of several feet. These two circumstances constituted the defence of the city. *Held*, that the city was concluded by the action of its own officer, the engineer, who was also by the terms of the contract authorized by the parties to it to decide these questions: *City of Omaha v. Hammoul*, S. C. U. S., Oct. Term 1876.

*Modification of—Guaranty—Waiver—Mutuality.*—D. and F. sent certain bonds of the California Central Pacific Railroad Co., to certain brokers in New York who had agreed to purchase them, and at the same time sent a letter containing the following language: "We would further add that we have purchased the bonds from a party strange to us; and not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and upon being found correct, telegraph immediately (*Central all O. K.*). We do not doubt the bonds, but coming to us through strange parties, we use this as a precaution, and are not willing to take any risk." *Held*, that this language did not amount to a proposal to waive the warranty that the bonds were genuine. STRONG, CLIFFORD and HUNT, J.J., dissenting: *Utley et al. v. Donaldson et al.*, S. C. U. S., Oct. Term 1876.

There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting, and it is as indispensable to the modification of a contract already made as it was to making it originally: *Id.*

*Entire and Divisible—Waiver of Condition—Delivery Monthly—Waiver of Breach of a Condition Precedent.*—The plaintiffs contracted with the defendant to deliver to it 12,000 carboys of oil of vitriol of a specified quality and price, free of charge, in tanks at the defendant's factory. The delivery to be 2000 carboys monthly, in daily deliveries as wanted, during the months of September, October, November and December 1873, and January and February 1874, settlements to be made monthly in the defendant's paper, at four months. *Held*: 1. That said contract must be construed by the standard of intention apparent on its face; 2. That the parties could not have considered it entire and indivisible either in quantity or in the details of its performance: *Maryland Fertilizing and Manufacturing Co. v. Lorentz*, 44 Md.

The plaintiffs failed to make any delivery under the contract in the month of September, but with the consent of the defendant made partial deliveries in October and November, which were settled for, and the defendant then stopped them from delivering any more in said last two months, and sent them a letter declining to receive any more. *Held*, that a prayer of defendant founded on the breach of the covenant to deliver the September instalment, without submitting to the jury the question of a waiver of such breach by the subsequent dealings between the parties, was founded upon too narrow a view of the contract: *Id.*

A condition precedent may be waived by the subsequent dealings between the parties to the contract: *Id.*

#### CORPORATION.

*Agreement to take Stock—Conditions.*—The defendant subscribed an agreement to take the amount of shares set against his name in the capital stock of the plaintiff railroad company agreeably to conditions, one of which was that no assessment except for a preliminary survey and location should be made, nor any work upon the road commenced until the full amount was secured for its completion to (or as far as to) Newport. The subscriptions were less in amount than the actual cost; and, if a deduction be made of invalid conditional subscriptions, were much less than the cost estimated by the engineer. *Held*, that the defendant's subscription was invalid: *Belfast & Moosehead Lake Railroad Co. v. Cottrell*, 66 Me.

*Subscription to Stock.*—After the grant of a charter providing that the capital should not exceed 2000 shares of \$100 each, subscriptions were received as follows, "The subscribers severally agree to and with the Warwick Railroad Company that we will take the number of shares of \$100 each in the capital stock of said company, set opposite our respective names under the provisions of its charter, and that we will pay for the same in such manner as the board of directors may, under the charter, direct." In an action by the corporation against a defaulting subscriber: *Held*, that the contract was good, and the subscriber liable, notwithstanding the whole capital was not subscribed for: *Warwick Railroad Co. v. Cady*, 11 R. I.

*Held*, further, that the word *share* did not imply a proportion of a definite capital: *Id.*

*Held*, further, that subscribing for a share was equivalent to subscribing for \$100: *Id.*

This case distinguished from those in which a definite capital was fixed, or a definite proportion or sum was required as a condition precedent to organization, or conditional subscriptions were made: *Id.*

#### CRIMINAL LAW.

*Homicide—Self-defence.*—Where one commences an altercation with another, and strikes his adversary with his hand, with no purpose or design to kill or cause great bodily injury to him, and his adversary repels such assault with a deadly weapon, and after the assailed has shot and wounded the assailant, and has retired behind a wall and the assailant ceases to follow, but has neither retreated nor attempted any abandonment of the conflict: *Held*, that the assailant is not justified in defending his

own life to the taking the life of the other, even if the assailed attempts at the time to shoot the assailant: *State v. Rogers*, 18 Kans.

#### CURTESY.

*Liability to Attachment.*—Tenancy by the curtesy initiate, is not subject to attachment in Rhode Island for the husband's debts: *Greenwich Nat. Bank v. Hall*, 11 R. I.

DAMAGES. See *Bank*.

#### DEED.

*Boundary by Highway.*—A deed bounding the grantee by a highway conveys the fee to the centre of the highway, when the title of the grantor extends so far. *Thus*: where plaintiff's land was north of and adjoining the defendant's; and the defendant's deed, which was the earlier, described his land as being the south part of the west half of lot number 23, and bounded on the north by a line parallel with the north line of said half lot, and so far south of the north line as to leave forty acres and no more north of the first mentioned line; on the east by a line dividing lot number 23 in the centre from north to south; on the south by lot number 26; and on the west by the county road. *Held*, that the divisional line between the lands of the parties is one drawn from east to west over the west half of lot number 23 to the centre of the highway parallel with, and so far south of, the north line of the lot as to leave forty acres in the west half of the lot north of it: *Webber v. Overlock et al.*, 66 Me.

#### DOMICILE.

*Abandonment of.*—The domicile of a party in any particular locality is acquired by a union of intent and of presence. *Thus*: The defendant, a shipmaster, left his home in Stockton, in September 1871, on a voyage, intending to abandon Stockton as his home and, on his return from sea, to go to Searsport and make it his home thereafter. On his return in June 1872, he married a resident of Searsport, and remained there a few days, then went to sea with his wife, returned to Searsport in May 1874, and left his family there, not having been in Stockton except on a visit since 1871. *Held*, in an action by Stockton, for taxes for the years 1872-3-4, that from and after June 1872, when there was a union of intent and of presence in Searsport, his domicile was in Searsport, and not in Stockton: *Inhabitants of Stockton v. Staples*, 66 Me.

DOWER. See *Legacy*.

#### ERRORS AND APPEALS.

*Supersedeas—Practice in U. S. Supreme Court.*—It was not the intention of Congress, under the Act of 1789, to interfere at all with the practice of the state courts as to executions upon their judgments until a supersedeas was actually perfected: *Doyle v. State of Wisconsin ex rel. Drake*, S. C. U. S., Oct. Term 1876.

If an execution is issued upon a judgment in the courts of the United States after the expiration of ten days, a supersedeas afterwards obtained will prevent further proceedings under the execution, but will not interfere with what has already been done: *Id.*

When on a peremptory mandamus from a state court, the secretary

of state of Wisconsin revoked the license of a foreign insurance company within ten days, a writ of error perfected afterwards will not interfere with what had already been done under the state writ: *Id.*

## EVIDENCE.

*When to be submitted to Jury.*—Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence: *County Commissioners v. Clark*, S. C. U. S., Oct. Term 1876.

Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case the judge is bound to leave it to the jury, but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed: *Id.*

FRAUDS, STATUTE OF. See *Real Estate*.

GUARDIAN. See *Trust*.

HIGHWAY. See *Municipal Corporation*.

HUSBAND AND WIFE. See *Mortgage*.

*Wife's separate Property—Wife's Earnings.*—Real estate purchased by the wife, so far as paid for by money or means of her own, cannot be taken to pay her husband's debts; but is, in equity, liable therefor, so far as it may be proved to have been paid for by money earned through her personal services jointly with his, while living in the marital relation, upon such real estate, carrying on a farm, and keeping a public house thereon: *Sampson et al. v. Alexander et al.*, 66 Me.

INSOLVENCY. See *Bankruptcy*.

## INSURANCE.

*Agreement as to Amount of Loss subject to Terms of Policy*—After loss by fire the parties in interest fixed the amount of loss and damage, "subject to terms and conditions of several policies." In an action against the insurers: *Held*, that this adjustment meant "subject to" all the "terms and conditions of the policies" not superseded by the agreement: *Whipple v. N. Brit. & Mer. Fire Ins. Co.*, 11 R. I.

*Held*, further, that the question of liability was not affected by this adjustment, which only determined the amount due in case of liability: *Id.*

*Failure of the Insured to disclose Mortgages on the Property.*—A policy insuring certain buildings therein particularly described against loss or damage by fire, provided that the conditions thereunto annexed should form part of the instrument, and were to be resorted to in order to explain the rights and obligations of the parties to it. By one of the conditions it required every applicant for insurance in the company to

state any encumbrance that might exist on the property to be insured; and by another, it declared that "if any person insuring any building or goods in this office shall make any misrepresentation or concealment, such insurance shall be void." Prior to, and at the time the policy was issued, there were two mortgages on the insured buildings, the existence of which was never communicated to the insurance company or its agent. The main building insured was destroyed, and the building adjoining greatly damaged by fire, during the time covered by the policy. In an action by the insured to recover on the policy, it was *held*, that the failure by the assured to disclose the existence of the mortgages, avoided the policy and defeated the action: *Beck v. Hibernia Ins. Co.*, 44 Md.

JOINT AND SEVERAL OBLIGATION. See *Bond*.

#### LANDLORD AND TENANT.

*Implied Obligation of Tenant to Repair—Liability of United States as Lessee.*—In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it or to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee: *The United States v. Bostwick, Adm'x*; *Bostwick v. The United States*, S. C. U. S., Oct. Term 1876.

This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant which the contract creates: *Id.*

It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs as far as possible. It is in effect a covenant against voluntary waste, and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild if the buildings are burned down or otherwise destroyed by accident: *Id.*

The United States when they contract with their citizens are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them: *Id.*

L. leased a certain property to the United States without making any express covenant as to repairs. During the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, materials used for sidewalks and the erection of other buildings were carried away and stone was quarried and gravel dug and taken away. *Held*, that this was voluntary waste and within the prohibition of the implied agreement in the lease and that the United States were liable: *Id.*

#### LEGACY.

*In lieu of Dower—Abatement.*—A general pecuniary bequest in lieu of dower is not subject to abatement *pro rata* with the other pecuniary bequests in case of insufficient assets: *Potter v. Brown*, 11 R. I.

LIMITATIONS, STATUTE OF. See *Trespas*.

## MALICIOUS PROSECUTION.

*Malice in Fact.*—Though malice in fact, as distinguished from malice in law, is essential to the maintenance of an action for malicious prosecution, yet such “malice in fact” is not restricted to its popular meaning of ill-will, resentment, personal hatred, or the like; any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, in a legal sense, malicious, and is also in fact malicious; but malice in fact is found by the jury, while malice in law is found by the court. *Pullen v. Glidden*, 66 Me.

MORTGAGE. See *Usury*.

*Demand.*—The plaintiff made a demand on the mortgagee at a store two miles from his residence, to render an account, under R. S., c. 90, § 13, to which the reply was that about eleven hundred dollars was due on the mortgage; and when requested to render a more particular account, he replied that he would not until obliged. No objection was taken to the place where the demand was made. The parties were acquainted with each other. The mortgagee shortly after left the state and did not return. Four years intervened between the demand and the suit. *Held*, that under the circumstances the demand was sufficient: *Wallace v. Stevens et als*, 66 Me.

*Mortgage by Married Woman—Evidence admissible to prove the Consideration.*—A. being indebted to B. in the sum of \$2000, gave his note under seal for the amount. Some time afterward B. told A. that he would like to have a mortgage on his wife's property to secure the payment of the note. A. expressed his willingness to give the mortgage, and promised to ascertain whether his wife would consent to execute it. The mortgage was accordingly prepared, and executed by A., who then took it to his wife, accompanied by a justice of the peace, and told her that there was another paper to which he wanted her name. She did not read the paper or ask what it was; nor did she seek any explanation either from her husband or the justice of the peace as to its character or contents, but executed and acknowledged it, and it was afterwards delivered to B. the mortgagee. A. testified that he did not tell his wife that the paper was a mortgage, because he knew that she was opposed to giving mortgages. The wife stated that she would not have executed the paper, if she had known it was a mortgage. The mortgagee had no knowledge, until long afterwards, that the wife of A. had executed the mortgage in ignorance of its character. *Held*, that under these circumstances the wife had no right of relief by injunction to restrain the mortgagee from the foreclosure of the mortgage, upon the ground that its execution was procured by fraud and deceit: *Comegys v. Clarke*, 44 Md.

A mortgage stated that the consideration therefor was \$2000, “cash in hand paid,” and the evidence showed that it was a note under seal for the same amount, a pre-existing debt due to the mortgagee, by one of the mortgagors. *Held*, that the consideration proved was not different in character from that stated in the mortgage, and the proof was therefore admissible in support of the consideration stated in the mortgage: *Id.*

It is competent for a married woman to give a mortgage upon her property to secure the payment of a debt due by her husband; and a mortgage executed by her for such purpose cannot be said to be without consideration: *Id.*

MUNICIPAL CORPORATION. See *Constitutional Law*.

*Bonds of—Issued to aid construction of a Railroad—When negotiable.*  
—Bonds executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in the case of bills of exchange and promissory notes: *County Commissioners v. Clark*, S. C. U. S., Oct. Term 1876.

Such a power is frequently conferred to be exercised in a special manner or subject to certain regulations, conditions, or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity to the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations which it is alleged were not fulfilled: *Id.*

*Highway—Negligence—Who are Agents of City.*—A statute of the state, enabling a city to introduce pure water, empowered the city to elect water commissioners for a fixed term, and for such subsequent terms as the city might determine, to prescribe the duties and compensation of the commissioners, and to regulate the mode and causes of their removal from office. The city owned the waterworks, received rents for water, and controlled the use and distribution of the water. In an action against the city for damages resulting from an unsafe highway, the damage being caused by a stream of water thrown from a city hydrant across the highway by the employees of the water commissioners. *Held*, that the water commissioners and their employees were the servants of the city, and that the city was responsible for their acts: *Aldrich v. Tripp*, 11 R. I.

A city or town charged with a public duty in consideration of valuable privileges, is liable to an individual who suffers special injury from a neglect of duty, and a city or town which derives an emolument from the exercise of powers conferred upon it is liable for the negligent or unskilful exercise of these powers by its agents, or for the neglect of a duty which is imposed by or results from the exercise of them: *Id.*

In such cases the officers engaged in the execution of the powers are to be regarded as the agents of such city or town: *Id.*

NATIONAL BANK. See *Bank*.

NEGLIGENCE. See *Municipal Corporation*.

*Contributory Negligence—Remote Negligence of Plaintiff.*—Because a plaintiff is himself negligent, or is acting in violation of a law, he is

not therefore prevented from recovering damages for an injury which has resulted from the negligence of a defendant, where but for the want of ordinary care on the part of the defendant the misfortune would not have happened: *Klipper v. Coffey*, 44 Md.

The plaintiff sued the defendant for an injury to his carriage and horses, occasioned by the horses becoming frightened by the alleged negligent act of the defendant. The plaintiff was warned of the danger in time to reach his horses before the accident, and had he reached them he might possibly have held them in check and the injury have been avoided. *Held*, that his failure to reach them sooner did not constitute in law contributory negligence: *Id.*

The question of contributory negligence is properly presented to the jury by a prayer which instructs them that they cannot find for the plaintiffs, if they "shall find that the injury to the plaintiffs' hack and horses is attributable to the combined negligence of the plaintiffs and defendants:" *Id.*

*Railroad—Injury to Person in another State.*—Section 422 of the civil code of Kansas, General Statutes 1868, p. 709, has no extra territorial force and does not confer a right of action for an injury inflicted in another state: *McCarthy, Adm'r, v. Chicago, Rock Island & Pacific Railroad Co.*, 18 Kans.

Where an inhabitant of this state is injured in the state of Missouri by the wrongful acts of a railway company operating a railroad in the latter state, and thereupon is brought to this state and dies here from the effects of such wrongful acts: *Held*, that the personal representative of the intestate, appointed under the laws of this state, cannot maintain an action therefor in this state against such railway company under sect. 422 of the civil code: *Id.*

#### PARTNERSHIP.

*Dissolution—Who entitled to actual Notice.*—Only those who are in the habit of dealing with a partnership are entitled to actual notice of its dissolution: *Merritt v. Williams*, 17 Kans.

A single cash sale of cattle to a partnership dealing in cattle does not make the vendor such a dealer as entitles him to actual notice of the dissolution of the partnership, or through lack of such notice to hold both partners on a sale made two years thereafter and eighteen months after the dissolution of the firm, where the actual dealings are had with only one of the former partners: *Id.*

PRACTICE. See *Errors and Appeals*.

*Agreement of Counsel.*—Stipulations between counsel relative to the course of proceeding in a cause pending in this court, as *e. g.* to submit the case on printed briefs, cannot be withdrawn by one party without the consent of the other, except by leave of the court upon cause shown: *Muller et al. v. Dows et al.*, S. C. U. S., Oct. Term 1876.

PURPRESTURE. See *Waters*.

#### REAL ESTATE.

*Grass—Action for Trespass must be by Owner.*—Wild grass growing on wild, unoccupied, uncultivated land, is a part of the realty, and an

attempted transfer of such grass by parol agreement is void, as a conveyance of the grass under the Statute of Frauds (Gen. Stat. 505, sects. 5, 6), and where such grass was destroyed by the cattle of a third person, the owner of the land only, and not the person to whom such grass was attempted to be transferred, can maintain an action for the destruction of the grass: *Powers v. Clarkson*, 17 Kans.

RIPARIAN OWNER. See *Waters*.

#### SHIPPING.

*Authority of Master—Bill of Lading*—The master of a ship, has no authority to sign a bill of lading for goods *not actually* put on board, and therefore the owner of the ship is not responsible to parties taking, or dealing with, or making advances on the faith of such an instrument which is untruthful in this particular. The consignee and every other party thus acting does so *with notice* of this limitation of the power of the master, and acts at his own risk both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped: *Baltimore & Ohio Railroad Co. v. Wilkens*, 44 Md.

Bills of lading are not *negotiable* in the same sense in which bills of exchange or promissory notes are. They stand in the place of the goods they represent, and delivery or endorsement of them transfers the right of property in the goods, but not in the contract itself so as to enable the endorsee to maintain at the common law an action on it in his own name: *Id.*

A railroad company is not liable for advances made by a commission merchant upon the faith of a bill of lading fraudulently signed by one of its station agents, the goods therein specified never having been shipped or received at the depot for transportation: *Id.*

TAXATION. See *Constitutional Law*.

TIME. See *Bankruptcy*.

TRESPASS. See *Real Estate*.

*Continuing—Ditch on another's Land—Statute of Limitations*.—Where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of the rights of B., a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. And the fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled: *K. P. R. W. Co. v. Muhlman*, 17 Kans.

A party may be responsible as a continued wrongdoer, as for permitting a nuisance to remain upon his lands, but no one can be charged as such continuing wrongdoer who has not the right and is not under the duty of terminating that which causes the injury: *Id.*

A party who enters another's land and commits a trespass by digging a ditch does not thereby acquire a right to re-enter and fill up the ditch. He would be liable as a trespasser if he did so re-enter: *Id.*

Though from a completed wrong there afterwards results new and unforeseen injury, there does not arise a new cause of action, and if a recovery has been had for the wrong prior to the occurrence of the new injury, no recovery can be had for such injury: *Id.*

After a wrong has been committed, it is the duty of the injured party to make reasonable efforts to prevent an increase or extension of the injury, and if he fails to do so he cannot recover for such increased injury: *Id.*

TRIAL. See *Evidence*.

#### TRUST.

*Guardian and Ward*.—Where a guardian receives a conveyance of the estate of his ward in his own name and includes it in the inventory as his ward's property, charging the estate of his ward with the expenses incurred in its management and accounting for its proceeds, he is to be regarded as holding the estate in trust: *Fogler, Guardian, v. Buck et als., Adm'rs*, 66 Me.

UNITED STATES. See *Landlord and Tenant*.

#### USURY.

*Only available to Party*.—The plea of usury is a personal privilege, and if the debtor declines to avail himself of it no stranger to the transaction can: *Pritchett v. Rollins et al.*, 17 Kans.

A second mortgagee cannot plead usury in a prior mortgage either to defeat or postpone its lien: *Id.*

#### VENDOR AND PURCHASER.

*Misrepresentation as to the Title—When the Vendee may rescind his Contract*.—The defendant agreed to sell the plaintiff a parcel of ground, and the latter paid her in advance a portion of the purchase-money, and afterwards brought an action against her to recover it back, on the ground of a misrepresentation made by her in regard to her title. Evidence was offered tending to show that during the negotiations for the sale the defendant represented that she held a fee-simple estate in the property, but that in fact she held only a leasehold estate as assignee of a sub-lease. There was also evidence tending to show that after the part payment of the purchase-money the plaintiff made objection to the title, and that by agreement the contract of purchase was rescinded and abandoned, and the defendant offered to repay the money. *Held*, that if these facts were found by the jury and stood alone, there could be no doubt of the right of the plaintiff to recover: *Gunby v. Sluter*, 44 Md.

If the misrepresentations are material and substantial, they vitiate the contract, though made by mistake, being to the advantage of the party making them: *Id.*

To entitle a purchaser to rescind his contract upon the ground of material misrepresentations made by the vendor as to the title, it must appear that he was actually misled by them: *Id.*

The original contract of purchase was not in writing, but was proved by parol evidence without objection, and this evidence, offered in the first instance by the plaintiff, was relied on by both sides as establishing a valid agreement of purchase, and in the same manner parol evidence was offered of an agreement to rescind and abandon the contract and to return the money. *Held*, 1. That no exception having been taken to the admissibility of the latter evidence the defendant cannot on appeal object to its admissibility; 2. That the abandonment and surrender by

the plaintiff of his interest in the property under the original contract was a sufficient consideration for the promise on the part of the defendant to repay the money; 3. That the effect of the rescission, if proven, was to entitle the plaintiff to the return of the money, and no express promise was necessary: *Id.*

#### WATERS AND WATERCOURSES.

*Riparian Owner—Harbor Line—Purpresture.*—The establishment of a harbor line in Rhode Island, gives to proprietors within the line the privilege of filling out and extending their land to it: *Engs v. Peckham*, 11 R. I.

A. and B. each owned a projecting wharf. These wharves were separated by a dock. B. also owned the land at the inland end of the dock. After the establishment by the state of a harbor line, running in front of the wharves, B. proceeded to fill up the dock. A. filed a bill of complaint asking that B. may be enjoined. A. claiming relief—1. Because he has a private right or easement in the dock which will be destroyed by filling it; 2. Because the fee of the dock is in the state, and filling it, if not a public nuisance, is an unlawful intrusion or purpresture which will be especially injurious to him. *Held*, that the bill could not be sustained: *Id.*

*Stream—Right of Riparian Owners to natural Flow.*—Every man through whose land a stream of water runs is entitled to the flow of that stream without diminution or alteration: *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kans.

The Council Grove Peerless Mill Co. in 1874, with the assent of an upper riparian owner, dug a channel through the lands of such owner from a point on the Neosho river to its mill, and thereby diverted from its natural channel through the land now belonging to plaintiff in error a portion of said stream, and this without the assent of the then owner of said plaintiff in error's land. *Held*, that thereby the mill company acquired no right to continue said diversion or to restrain plaintiff in error from removing any obstruction, natural or artificial, in the bed of said river on his lands: *Id.*

Where at the time of digging said channel the lands now belonging to plaintiff in error were the property of a minor held by said minor under a will, and where no legal proceedings were had to acquire the right to the use of any portion of the stream, and no conveyance or permission obtained from the executor of said will and guardian of said minor, the mere knowledge on the part of said executor and guardian that said company was engaged in digging said channel, and failure on his part to object to said work or to take measures to prevent it, will work no estoppel upon the minor, or prevent said minor from asserting her right to the flow of the entire stream in its natural channel: *Id.*

The right to the use of the flow of water in its natural course is connected with and inherent in the property in the land, and passes by a conveyance of the land. Hence a deed of the land made by the executor and guardian, under orders of the probate court, conveyed to plaintiff in error the right to the flow of the entire stream in its natural channel, as before the digging of said artificial channel: *Id.*