a warranty, yet, where representations are made by the vendor, of the quality of the thing sold, or its fitness for a particular purpose, if intended as a part of the contract of sale, and the vendee makes the purchase relying upon such representations, they will in law constitute a contract of warranty. The evidence detailed in the exceptions had a tendency to establish such a contract, and it would have been error, by any ruling of the court, to have deprived the plaintiff of the benefit of it. Upon the claim made by the defendants, that there had been an acceptance of the machinery by the plaintiff, and a waiver of all defects in it, the charge was more favorable to the defendants than it should have been. Return of the property to the vendor, or notice of its defects, is never necessary, except to enable the vendee to withhold or recover back the price upon the actual disaffirmance of the contract, and thereby revesting the title in the vendor. But where there is a contract of warranty, the vendee is under no legal obligation to return the property, or to give notice of its defects; he has a right of action by proving the contract and its breach, and his retention and user of the property, and neglect to give notice to the vendor of its defects, are only material upon the question of damages. The claim of the defendants that it was part of the agreement that their mechanic should set up the machine, does not seem to us to be supported by the evidence, and all the benefit the defendants could legally claim from any unskilfulness in setting up or using the machine, was fully given them by the charge. Judgment affirmed.

ABSTRACTS OF RECENT DECISIONS.

COURT OF CHANCERY OF DELAWARE.[1]
SUPREME COURT OF INDIANA.[2]
COURT OF ERRORS AND APPEALS OF MARYLAND.
SUPREME COURT OF RHODE ISLAND.[4]
SUPREME COURT OF VERMONT.[5]
SUPREME COURT OF WISCONSIN.[6]

ACCRETION. See *Riparian Owner.*

Meandered Lake or Pond—Retirement of Water—Question of sudden or gradual Change.—The owner of land bounded by any *meandered lake or pond* in this state, takes, as such, no fee in the bed or soil

[1] From Hon. D. M. Bates, Reporter; to appear in 2 Delaware Chan. Reports.
[2] From A. N. Martin, Esq., Reporter: to appear in 55 Indiana Reports.
[3] From J. Shaaf Stockett, Esq., Reporter; to appear in 45 Maryland Reports.
[4] From Arnold Green, Esq., Reporter; to appear in 11 Rhode Island Reports.
[5] From Hon. J. W. Rowell, Reporter; to appear in 49 Vermont Reports.
[6] From Hon. O. M. Conover, Reporter; to appear in 42 Wisconsin Reports.

under the water, but has a right to accretions formed by slow and imperceptible degrees upon or against his land, and to those portions of the bed of the lake or pond adjoining his land, which may be uncovered in the same manner by reliction of the waters: *Boorman* v. *Sunnuchs*, 42 Wis.

The other rights, also belonging to the riparian owner as such, upon a *navigable* lake, such as that of access to and from the lake upon his land, that of building wharves and piers in aid of navigation, and that of having the waters flow to his land without artificial obstruction, belong to the riparian owner upon any meandered lake in this state, whether actually navigable or not, so far as they can be applied: *Id.*

The riparian rights above defined are subject to the paramount right of the public to use navigable lakes or ponds for the purposes of commerce and navigation: *Id.*

One who claims land by reliction, should show the several stages of the process through longer or shorter periods, as determined by the width of the strip uncovered or by comparison with the bank or other known and fixed objects, so that the court may have definite and satisfactory data upon which to determine the character of the reliction; and it was error in this case to determine such a claim in favor of the claimant upon mere proof that persons watching the process could not *see* the water recede: *Id.*

The pond here in question, when originally surveyed, had an area of 160 acres, and a depth of four or five feet. By the spring of 1874, a strip of the original bed, several rods in width, had become bare; and the depth of the water remaining was a little more than one foot. In the summer following, the water entirely disappeared. A little water gathered there in the spring of 1875, but soon disappeared; and the pond seems to have permanently dried up. Upon evidence of these facts, the court intimates an opinion that as to that portion of the lake bed, which was laid bare after the first-mentioned date, the water disappeared too suddenly and sensibly to vest the title in the riparian owner; but it was not necessary to decide that question on this appeal: *Id.*

Whether the United States or this state is the owner of that part of said lake bed (if any) to which the former riparian owner may fail to show title by reliction, is not here considered; plaintiff's right to the equitable relief sought, being dependent upon proof of his own title: *Id.*

Action.

Voluntary Payment—Liquor License.—In an action to recover moneys, paid by the plaintiff, to the defendant, a town, for a license to sell intoxicating liquors, under an invalid, penal ordinance of the latter, adopted under a void statute, the complaint averred that such payment was made "for the purpose of avoiding the penalty and forfeiture," &c., "and to save himself from arrest and imprisonment for violating the provisions of said ordinance, as provided for by statute:" *Held*, that such complaint does not show that such payment was not voluntary, and is therefore bad on demurrer for want of sufficient facts: *Town of Brazil* v. *Kress*, 55 Ind.

The cases of *The Town of Princeton* v. *Vierling*, 40 Ind. 340, and *The Town of Ligonier* v. *Acherman*, 46 Ind. 552, are overruled, in so far as they conflict with the above decision: *Id.*

ADMINISTRATOR. See *Executor.*

ADVANCEMENT.

The question of advancement can only arise in cases of total intestacy: *Pole* v. *Simmons & Pole, Ex'rs, et al.*, 45 Md.

APPLICATION OF PAYMENTS.

Credits on Official Bonds—Sureties.—The general rule of law as to the appropriation of credits is, that the debtor has the right, if he pleases, to make the appropriation. If he omit to do so, the creditor may make it. If both omit, the law will apply the payments according to its own notions of justice; and, in cases of long and running accounts, where debts and credits are perpetually occurring and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due: *Pickering* v. *Day*, 2 Del. Ch.

An exception to such general rule is the case of several official bonds executed by a collector or receiver of public revenue, at different times, with distinct sets of sureties. In such case in the absence of any appropriation of payments made by the parties, money collected under a subsequent bond will not, before it is discharged, be applied in payment of a prior one; but a court of equity will so appropriate the payments as to give each bond credit for the money due and collected under it: *Id.*

An apportionment of the amounts due on several successive official bonds, respectively, endorsed on the bonds and signed by the sureties therein, is conclusive, in the absence of fraud or mistake: *Id.*

Mistake, to avoid an agreement, must be a mistake, not of *law* but of *fact;* and it must be a plain mistake, clearly made out by satisfactory proof, not resting upon evidence loose, equivocal or contradictory: *Id.*

The omission of a collector of public revenue to remove a deputy collector, after knowledge of default by the latter, does not discharge the sureties of deputy collector: *Id.*

The provision of the Act of Congress of June 30th 1864, that a collector of internal revenue shall, before entering upon the duties of his office, execute an official bond, does not apply to collectors appointed under a prior act and who are continued in office under a saving clause in such act: *Id.*

Provisions in statutes for the taking of official bonds, are directory only and not conditions precedent to the exercise of the office, unless expressed to be such: *Id.*

ASSUMPSIT.

Suit for Money paid for use of another.—In a suit to recover for money alleged to have been paid by the plaintiff, to a third person, for and at the request of the defendant, it is immaterial as to whether such third person had or had not a valid claim upon the defendant for such or any sum of money. But to recover therefor, the plaintiff must establish the facts that he had made such payments, and that it was made on the authority of the defendant: *Lucas* v. *Jarrell, Ex'r.*, 55 Ind.

Where A. subscribes a certain sum of money, for a certain purpose, to be paid, on a certain condition, to B., who is to procure therewith, a

certain writing for A.; and B., without the express request of A., advances such sum, and procures such writing for A., and then institutes suit for such sum, against A., the latter may introduce evidence that such condition has never been performed; but, in the absence of proof of such request, or proof of the performance of such condition, B. cannot introduce such writing in evidence: *Id.*

ATTORNEY. See *Corporation.*

BANKRUPTCY.

Discharge of Bankrupt—Contribution between Sureties—Tort—Trespass—Officer.—Where a judgment has been rendered, upon a promissory note, against the principal maker thereof and his sureties as such, and subsequent to the payment of such judgment by one of such sureties the other is adjudged and discharged as a bankrupt, in a proceeding in a district court of the United States, the claim of such paying surety upon the bankrupt surety for contribution is not one exempted by the bankrupt law of the United States from, but is included in, the operation of such discharge; and such paying surety and an officer holding an execution on such judgment, for the benefit of such paying surety, may be enjoined from selling the property of such bankrupt, on such execution: *Hays* v. *Ford et al.*, 55 Ind.

A judgment for damages for a tort, rendered against a person prior to the commencement of proceedings against him, wherein he is finally discharged as a bankrupt, is embraced in such discharge: *Id.*

Where, upon a judgment rendered against a duly discharged bankrupt before such discharge the creditor subsequently causes a writ to be issued to, and the goods of such bankrupt seized thereon by, the proper officer, the creditor is liable to such bankrupt *ab initio*, as a trespasser, whether he knew of the discharge of such bankrupt or not, but such officer will be protected by such writ, if regular upon its face: *Id.*

Where, to avoid the payment of a debt due from him to another, before his discharge as a bankrupt, the latter undertakes to avail himself of such discharge, it is only necessary for him to plead such discharge by a general averment thereof; and a certified copy of the judgment of the court decreeing such discharge, under the hand of the judge thereof, and authenticated by its seal, is conclusive evidence thereof: *Id.*

Promise to pay the Debt of a third Person—Claim provable in Bankruptcy.—A mere promise to pay the debt of a third person, without any new or superadded consideration moving to the promisor from the plaintiff, is within the Statute of Frauds, and to be binding, must be in writing, and must state the consideration; but it is not necessary to allege in the declaration that the promise is in writing; it is sufficient if that appear in proof at the trial: *Ecker* v. *Bohn*, 45 Md.

Before proceedings in bankruptcy have been commenced, a creditor may take from a third person a contract, covenant or security for the payment of money, as an inducement to forbear instituting proceedings in bankruptcy against his debtor, without violating any provision of the Bankrupt Act, or contravening public policy: *Id.*

A promise to pay the debt of a third person, in consideration that his creditor would abstain from instituting proceedings to have him declared

a bankrupt, furnishes no sufficient cause of action, the creditor having at the time the promise was made, no right to proceed in bankruptcy against his debtor: *Id.*

Mere liability as surety for a bankrupt, does not constitute a claim which may be proved against him under the Bankrupt Act. The debt must be actually paid by the surety before he has a claim provable in bankruptcy: *Id.*

Bills and Notes.

Endorsement cannot be varied by Parol.—One who has endorsed a note in blank without qualification expressed in the writing, cannot show *by parol*, as against the person to whom he delivered it, a contemporaneous agreement between them that he should not be liable as endorser, where no mistake or fraud in procuring the endorsement is alleged: *Charles* v. *Denis*, 42 Wis.

Charitable Uses.

Not within Laws against Perpetuities—Jurisdiction of Chancery.—Charitable uses are not within the rule of law against perpetuities: *The State* v. *Griffith*, 2 Del. Ch.

A devise of real estate, with a direction that the same be not sold but rented, "the proceeds arising from such rents" to be applied to certain charitable uses; *Held* not be within the law against perpetuities: *Id.*

Prior to the English statute of 9 Geo. 2, charitable uses in England were subject to no restriction: *Id.*

The English mortmain acts did not extend to the British colonies: *Id.*

The Delaware statute of 17 Geo. 2, for the relief of religious societies, &c., considered; its history and objects. The prohibitions in this statute against testamentary gifts of real estate to religious societies do not affect charitable uses generally: *Id.*

A devise to certain charitable uses of a fund, to be distributed "by agents, to be appointed by the Orphans' Court or the Levy Court of Kent county, as may be deemed most proper," is not void for uncertainty as to which one of the two courts shall appoint the agents. Either court may exercise the power of appointment. If both refuse, this court will appoint. So, were the power of appointment void for uncertainty, this court would have power to create the necessary agency: *Id.*

Distinction between limitations of the legal estate and limitations by way of trust, with respect to the degree of certainty requisite in the objects to take: *Id.*

A devise of lands in trust "to and for the support, maintenance and education of the poor white citizens of Kent county generally," coupled with a direction that no part of the bequest should "be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof," is not void for uncertainty in the description of the objects: *Id.*

Uncertainty of persons until appointment or selection is characteristic of a charitable use: *Id.*

An equitable interest vests in the beneficiaries of a charitable use, from the time of their appointment or selection; such as entitles them to enforce their equitable rights: *Id.*

The jurisdiction of the court of chancery to protect and enforce charitable uses considered at large and sustained. Such jurisdiction in England, existed in the court of chancery prior to the statute of 43 Elizabeth, and is not founded on that statute: *Id.*

The cases of *Baptist Association* v. *Hart's Ex'rs*, 4 Wheat. 1, and *Vidal et al.* v. *Girard's Ex'rs*, 2 How. U. S. 127, reviewed: *Id.*

Common Carrier.

Negligence—Sale—Vesting of Title.—A carrier of freight is as against the acts of the shipper, bound to the exercise of reasonable care and diligence only. Thus, where plaintiff loaded heavy machinery upon a platform car, and blocked its wheels with insufficient blocking insecurely nailed, by reason whereof the machinery, while being transported by defendant, broke from its fastenings without fault of defendant in the running of the train or in maintenance of the track, and was injured, it was *held*, that defendant was not liable therefor, although its yard-master and forwarder of freight cars saw the fastenings and noticed their insufficiency before the injury was done: *Ross* v. *Troy & Boston Railroad Co.*, 49 Verm.

The shipper of the machinery, who lived in R., was under contract to erect a building for the consignees, in P., and furnish it with machinery for a gross sum, the consignees paying freight on the machinery. *Held*, that the shipper might maintain an action against the carrier for injuries done to the machinery while in transit.

Constitutional Law. See *Venue.*

Corporation.

Ultra vires.—A corporation was created by the legislature of Rhode Island under the name of the W. Co. Nothing in the act of incorporation specified the business to be done, nor did anything in the corporate name suggest it. All its stock was held by a single stockholder. The corporation entered into a partnership with A. to be terminated at will by the corporation. *Held*, that the partnership was not *ultra vires* on the part of the corporation: *Allen* v. *Woonsocket Co.*, 11 R. I.

Semble, that if A. was to have no control as partner, and was to receive part profits for his services, the partnership could not on any principle be *ultra vires* on the part of the corporation: *Id.*

Service—Acceptance by Attorney.—Where a statute provided that service upon a corporation should be upon "the president or any director or manager or other officer," an attorney is not such officer: *Northern Central Railroad Co.* v. *Rider*, 45 Md.

Where an attorney endorsed upon a writ "service admitted, B. C., Att'y," but did not enter an appearance, and judgment was entered by default against the corporation: *Held*, that service on an attorney not being sufficient, his admission could not have any greater effect than an actual service on him, but that as an attorney is presumed to have authority to waive service by entering an appearance, the memorandum of service admitted should be taken as a waiver and treated as an appearance, and the judgment by default was therefore erroneous: *Id.*

COVENANT.

To pay Taxes.—Covenant by lessee "to pay the taxes of every name and kind that should be assessed on the premises at any time during the said term," does not cover an assessment for benefits accruing from street improvements: *Beals* v. *Providence Rubber Co.*, 11 R. I.

CRIMINAL LAW.

Error in the Sentence of a Prisoner—Power of the Court of Appeals.—Where a sentence not authorized by law has been imposed upon a prisoner, a court of error can only reverse the judgment; it has no power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose. No such power existed at common law, and unless conferred by statute it cannot be assumed: *McDonald* v. *The State*, 45 Md.

DEBTOR AND CREDITOR.

Voluntary Conveyance in Fraud of Creditors—Marshalling of Remedies.—A voluntary conveyance, though without a fraudulent intent, is void, as against creditors, under the statute of 13 Elizabeth. Such a conveyance is void *if it tend to hinder and delay creditors*, though it may not otherwise injure them: *Logan* v. *Brick*, 2 Del. Ch.

A creditor having the security of two funds out of which he can satisfy his debt, upon one of which only another creditor has a junior lien, will be compelled in equity to resort first to the fund which the junior creditor cannot reach: *Id.*

EQUITY. See *Debtor and Creditor; Landlord and Tenant; Set-off.*

Remedy at Law not always a Bar.—Equity will, in some cases, decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the court entertains bills *quia timet*: *Reynold* v. *Herdman, Sheriff, et al.*, 2 Del. Ch.

EVIDENCE. See *Husband and Wife.*

Admissions for the purpose of Compromise.—Evidence of admissions made on the occasion of an attempted compromise of a pending controversy, if of a fact admitted because it *is* a fact, and not because the party admitting it is willing to *treat* it as one to effect a settlement, is admissible: *Doon* v. *Ravey*, 49 Verm.

Letter.—Where a person to whom a letter was addressed, has been dead for several years, leaving no personal representative of whom inquiry could be made, concerning it, and the letter is not shown to have been of such importance as to require its preservation, it may well be presumed that the letter has been lost or destroyed, and secondary evidence of the address written on it, may be admitted: *Jones* v. *Jones*, 45 Md.

EXECUTOR AND ADMINISTRATOR.

Powers of Administrator.—An administrator succeeding an executor takes only the powers inherent in the executor's office. Special powers given the executor do not go to such an administrator, unless the will explicitly or implicitly continues them to such administrator: *Belcher* v. *Branch*, 11 R. I.

FRAUDS, STATUTE OF. See *Bankruptcy.*

Verbal Promise—Satisfaction of Execution.—A verbal promise by one person to the creditor of an execution on a judgment against a third person, that, if such creditor will satisfy execution, such promisor will deliver certain personal property, and pay a sum of money to such creditor, is not a promise to pay the debt of another, and is not within the Statute of Frauds, but is a valid contract, for a breach of which an action may be maintained and damages recovered by such creditor, upon his satisfying such execution: *Palmer* v. *Blain*, 55 Ind.

HUSBAND AND WIFE.

Personal Property of Married Woman—Reduction to Possession by Husband.—Plaintiff, while covert, recovered judgment against a town in the name of herself and husband, for personal injuries caused by an insufficient highway. The judgment was paid to the attorney by a town order drawn in his favor. The attorney endorsed the order to plaintiff's husband, in the husband's last illness, and the husband delivered it immediately to plaintiff, saying, "This is yours, take care of it," and plaintiff put it with other papers belonging to the husband. It had previously been agreed between the plaintiff and her husband that the proceeds of the judgment should be applied in payment of a mortgage upon their homestead, and that the homestead should be conveyed to plaintiff. The husband's administrator took the order with other papers, and collected the money thereon. *Held*, that the husband did nothing to convert the judgment nor its proceeds to his own use, and that the order remained the property of the plaintiff: *Perry* v. *Wheelock*, 49 Verm.

Wife's Chose in Action—Husband's Failure to reduce to Possession—Trusts.—A legacy charged upon land was bequeathed to a married woman, subject to the deduction of a book account held by the testator against her. The testator held a note of the legatee's husband, but no reference to this note was made in the bequest. The husband also became indebted to the executor of the testator for goods purchased at a vendue of the personal estate. The husband died before the wife, without having reduced the legacy into his possession and without any settlement with the executor touching the same or his own indebtedness to the estate of the testator: *Held*, that on a bill filed by the administrator of the wife (who had survived her husband and died) to recover the legacy from the devisee of the land charged, the husband's indebtedness to the estate of the testator could not be treated as payment of the legacy: *Cartmell* v. *Perkins*, 2 Del. Ch.

The mere omission of a husband to reduce his wife's *chose in action* into his possession, for a lapse of time ordinarily sufficient to raise a presumption of payment, does not raise such presumption, so as to bar the wife's right, by survivorship, to recover such *chose in action* after the husband's death: *Id.*

Marriage, Presumptions as to.—In a case involving the question of marriage, where there is no impediment to marriage, and the connection between the parties was illicit in its commencement, it will be presumed to continue to be of the same character; and in order to overcome that presumption it will be necessary to adduce other evidence

than that of the cohabitation of the parties to establish their marriage: *Jones et al.* v. *Jones*, 45 Md.

If after the birth of a person claiming to be the legitimate child of his parents, though born as a bastard, there be cohabitation of his father and mother, the latter assuming the name of the former, and the parties treat each other as man and wife, and treat the claimant as their child, and they are treated as, and reputed to be man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection between the parties: *Id.*

The presumption of marriage will not arise from the cohabitation of a man with a woman, if during her life and without any proof of a divorce, he marries another woman: *Id.*

On questions of marriage, births, deaths, &c., entries in a family Bible or Testament are admissible, even without proof that they have been made by a relative, provided the book is produced from the proper custody. Proof of the handwriting or authorship of the entries is not required, when the book is shown to have been the family Bible or Testament: *Id.*

INFANT. See *Master and Servant.*

Fraud.—Infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged: *Doran* v. *Smith*, 49 Verm.

Contract — Disaffirmance — Marriage Contract.—Where an infant judgment creditor, by the promise of the judgment defendant and his replevin bail, that, upon her entering satisfaction of such judgment, the former will marry her, is induced, upon that consideration alone, to enter such satisfaction, she may, upon her arriving at the age of twenty-one years, and upon the failure of said defendant to marry her, disaffirm such contract, and in a suit against such judgment defendant and his replevin bail, have such entry of satisfaction vacated, notwithstanding the fact that at the time of making such marriage contract she was of the age of eighteen years: *Reish* v. *Thompson*, 55 Ind.

INNKEEPER.

Negligence.—Defendant, an innkeeper, but declared against as bailee for hire, by himself or servants, hitched plaintiff's horse, which was in his care, next a horse that he or his servants knew to be in the habit of kicking other horses, whereby plaintiff's horse was kicked and injured. *Held*, though plaintiff knew where his horse was hitched, and made no objection thereto, but did not know of the vicious habit of the other horse, that defendant was guilty of actionable negligence as such bailee in thus hitching plaintiff's horse: *Clary* v. *Willey*, 49 Verm.

JUDGMENT.

Extent of Estoppel.—The estoppel of judgment on a verdict applies in the case of title to realty only to those portions of the realty whereof the title was formally put in issue: *City of Providence* v. *Adams*, 11 R. I.

United States District Courts—How attached Collaterally—Jurisdiction—Presumption.—Where a judgment, rendered by a district court

of the United States, not showing upon its face a lack of jurisdiction of such court, over the parties to or subject-matter of the cause so adjudicated, comes in question, collaterally, in an action in a court of this state, it will be presumed, until the contrary is affirmatively shown by plea, that such district court had such jurisdiction: *Hays* v. *Ford et al.*, 55 Ind.

Power of Court over, after the Term—Setting aside Execution.—After the lapse of four and a half years from the entry of judgment, the court has no power to set it aside for a mere irregularity—as for want of notice of the taxation of costs—even where the judgment defendant had no knowledge or notice of its entry until about the time of his application to vacate; but it may set aside a sale upon execution under such judgment, for sufficient cause shown: *Grede* v. *Dannenfelser*, 42 Wis.

Applications to set aside sales on execution for irregularities are largely addressed to the discretion of the court, but that discretion should be exercised so as to secure the ends of justice; and (with a view to those ends) full weight will sometimes be given to technical irregularities: *Id.*

Real estate of a judgment defendant residing in another county was sold on execution in 1873, and in 1876 the sheriff executed a deed to the purchaser, *without having filed a duplicate certificate of the sale* in the proper register's office; the judgment defendant had no knowledge of the entry of judgment or of the execution, levy or sale until *after* the issue of the deed; and the land, which was worth $1100, was sold for $186, the amount of the judgment debt, including costs. *Held*, that the sale should be set aside on defendant's paying the latter amount, with interest at ten per cent: *Id.*

LACHES. See *Landlord and Tenant.*

LANDLORD AND TENANT.

Lease for Ninety-nine Years, Renewal for ever—Equity will relieve the Owner who has failed to obtain a Renewal—Laches.—Where the original term of a lease for ninety-nine years, renewable for ever, has expired, and the owner of the leasehold interest has failed to obtain a renewal *within the term*, according to the literal wording of the covenant for renewal, equity will relieve him, and compel the owner of the reversion to execute a new lease, provided the application be made in a reasonable time, and all arrearages of ground-rent and the renewal fine be first paid: *Banks* v. *Haskie*, 45 Md.

But *gross laches* on the part of the owner of the leasehold interest in making his demand for a new lease after the term has expired, and in seeking his remedy, will, as in other cases, be an insuperable bar to relief in equity: *Id.*

LEASE.

Uncertainty—A written agreement under seal, for the lease of a store for a term certain at a fixed rent, contained the following words: "The said A. D. (the lessee,) to have the preference of renting said property so long thereafter as it shall be rented for a store." In an action for the breach of this stipulation in the contract, it was *held*, that the stipulation was void and inoperative for uncertainty: *Delashmutt* v. *Thomas*, 45 Md.

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

When it begins to run as to Partners.—Lindley's statement (Partnership, vol. ii. 1024) adopted: that the statute has no application "so long as a partnership is existing, and each partner is exercising his rights, and enjoying his own property; but that it begins to run" as soon as a partnership is dissolved, or there is any exclusion of one partner by the other: *Allen* v. *Woonsocket Co.*, 11 R. I.

MARRIAGE. See *Husband and Wife; Infant.*

MASTER AND SERVANT.

Negligence—Hazardous Employment—Infant.—In an action by an employee against his employer to recover damages for injuries suffered by the former, whilst in the employment of the latter, one paragraph of the complaint alleged, that the defendant, being a contractor engaged in the construction of a railroad, employed the plaintiff, a minor, of the age of but fifteen years, to assist in certain non-hazardous work; but, that the defendant, without giving to the plaintiff sufficient caution, warning or instruction, placed the latter in control of a wild, fractious and ungovernable horse, in a narrow, unsafe and dangerous space between two trains of cars, moved by steam power in opposite directions, upon a high embankment; and that the plaintiff, whilst exercising due care and engaged in such hazardous employment, was thrown beneath and injured by one of said trains of cars. *Held*, on demurrer for want of sufficient facts, that the paragraph was sufficient: *Hill et al.* v. *Gust*, 55 Ind.

Where an employer places an employee of tender years, at work, in a dangerous place, the former is bound to give to the latter due caution and instruction. And if the employee, whilst so employed, be injured, the fact that he could, by the use of his eyesight, have seen that such place was dangerous, is not sufficient evidence to hold such employee accountable for contributory negligence in causing such injury; the question of negligence being one for the jury to determine from all the facts: *Id.*

MORTGAGE. See *Partition.*

MUNICIPAL CORPORATION.

Liability for Damages from change of Grade.—In the absence of a statute creating such liability, a municipal corporation is not liable for damages resulting from an *authorized* change in the grade of a street, made with reasonable skill and care: *Dore* v. *The City of Milwaukee*, 42 Wis.

If a statute requires compensation for injuries in such cases, and provides specific means for recovering it, other than an ordinary civil action, the statutory remedy is *exclusive: Id.*

In case of injuries to a city lot from the alteration of the grade of a street made pursuant to an *unauthorized* or illegal order of the city council, the city is liable in an ordinary civil action for damages: *Id.*

Pleading—Presumption.—In an action against a town, the contrary not appearing by the complaint or otherwise, it will be presumed that such defendant was incorporated under the general law of this state, for the incorporation of towns: *Town of Brazil* v. *Kress*, 55 Ind.

NAVIGABLE STREAM.

What constitutes—Capacity to float Logs.—Under the uniform decisions of this court, one who owns both banks of a stream, navigable or unnavigable, has title to the bed of the stream. (A suggestion by DIXON, C. J., in *Wis. R. I. Co.* v. *Lyons*, 30 Wis. 61, and *Wright* v. *Dag*, 33 Id. 260, as to the effect of certain federal decisions on the subject criticised.): *Olson* v. *Merrill*, 42 Wis.

It is the settled law of this state, that streams of sufficient capacity to float logs to market are navigable; and it is not essential to the public easement that this capacity be continuous throughout the year, but it is sufficient that the stream have periods of navigable capacity ordinarily recurring from year to year, and continuing long enough to make it useful as a highway: *Id.*

If the capacity of a stream is such that it can be used as a highway without trespass upon the banks, the right of the public therein is not affected by the fact that such trespass is convenient and habitual: *Id.*

The right of A. to float his logs down a navigable stream, unimpeded by the dam of B., is not affected by the lawfulness or unlawfulness of A.'s dam on the same stream: *Id.*

NEGLIGENCE. See *Innkeeper; Master and Servant.*

OFFICER. See *Bankruptcy.*

OFFICIAL BONDS. See *Application of Payments.*

PARTITION.

Owelty—Mortgage of undivided Interest.—When owelty is required to equalize partition between two tenants in common, the estate of one being mortgaged, it should, if to be paid by the unencumbered owner, be paid to the mortgagee of the other and credited on the mortgage note: *Green* v. *Arnold*, 11 R. I.

On a bill in equity for partition between two tenants in common, the estate of one being unencumbered and that of the other being subject to various mortgages covering the mortgagor's undivided interest in various parcels; *Held*, that a decree of partition could not extend any mortgage to property not described and included in such mortgage: *Id.*

Held, further, that the aggregate parcels covered by each single mortgage of the one tenant in common must, for purposes of partition, be considered as one separate estate: *Id.*

Held, further, that as between tenants in common a sale or mortgage by one of them is valid, provided such sale or mortgage covers the vendor's or mortgagor's interest in the whole of any separate parcel or estate, notwithstanding the tenancy in common may extend to other parcels or estates: *Id.*

Of two tenants in common one mortgages his interest in the common estate to the other and no entry or foreclosure has taken place. *Held*, the mortgagee can have partition in equity: *Id.*

PARTNERSHIP. See *Limitations, Statute of.*

Note given in Firm Name by one Partner—Death of Partner.—In an action against G. and others upon a promissory note, where no ground

of recovery against the defendants was alleged or attempted to be shown other than that they were partners, or had held themselves out to the world as such, and that the note had been made by G. in the firm name, for the price of chattels delivered to him by the plaintiff, it was error to instruct the jury that it was "unnecessary to decide whether G. had power to execute a promissory note in the name of the firm or not;" and that "if on any ground, G. had authority to purchase the chattels on the credit of himself and the other defendants, plaintiff was entitled to recover against the defendants: *Sherman* v. *Kreul*, 42 Wis.

Where one of several joint obligors (in this case partners liable on a firm note) dies, the *legal* remedy is against the *survivors* only, and the estate of the decedent is discharged at law; though his administrator may be proceeded against in equity upon showing that the remedy against the survivors has been exhausted, or that they are insolvent: *Id.*

But where, during the pendency of an action against alleged partners upon an alleged obligation of the firm, one of the defendants died, and his administrators asked and obtained leave to defend, filed a separate answer, and litigated the cause upon the merits: *Held*, that this was a waiver of all objections to the plaintiff's right to proceed against the estate *at law* instead of in equity; though in order to recover against the administrators, plaintiff must allege (by supplementary complaint), and must prove, that the surviving obligor is insolvent: *Id.*

PLEADING. See *Municipal Corporation.*

POSSESSION. See *Trespass.*

RIPARIAN OWNER. See *Accretion.*

Rights of—Wharf—Protection of Bank—Purpresture.—Riparian rights proper rest upon title to the *bank* of the water, and are the same whether the riparian owner own the soil under the water or not. And distinguished from the right arising in case of gradual and insensible accretion or reliction, the general right of occupying the soil under the water, when such right exists, is not properly a riparian right; resting not upon title to the bank only, but more directly upon title to the soil under the water: *Dietrich* v. *N. W. Union Railroad Co.*, 42 Wis.

Distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water, whether or not he own the soil to the thread of the stream, has a right (unless prohibited by local law) to construct in shoal water in front of his land, proper wharves or piers, in aid of navigation, and at his peril of obstructing navigation, through the water far enough to reach actually navigable water: *Id.*

As a right of necessity, when water, navigable or not navigable, is by natural causes wearing away and intruding upon its banks, the riparian owner, whether or not he own the soil to the thread of the stream, may, as against the public, at his peril of obstructing the public use when the water is navigable, and at his peril of the necessity, intrude as far as may be necessary to protect his land against the action of the water: *Id.*

In the case of navigable waters, any extension of possession, or intrusion into the water, beyond the natural shore, other than those mentioned in the foregoing propositions, whether by the riparian owner or a stranger,

without express and competent grant from the public, is a purpresture, vesting no title in the person who makes it: *Id.*

Rights of—Navigable Stream and Lake.—It is the settled law of this state, that the proprietor of lands on a navigable stream takes *usque ad filum aquæ*, subject to the public right of navigation, which includes the right of the public to improve, regulate and control the bed of the stream, and the flow of the waters therein, in the interest of navigation and commerce: *Delaplaine* v. *C. & N. W. Railway Co.*, 42 Wis.

The riparian proprietor upon navigable lakes and ponds takes the land only to the water's edge: *Id.*

The riparian proprietor upon a navigable lake has, as such, the exclusive right of access to and from the lake in front of his land, and of building there piers and wharves in aid of navigation, not interfering with the public easement: and these private rights grow out of his title to the land, and have a pecuniary value: and their destruction or material abridgement is in general an injury, entitling him to redress: *Id.*

Plaintiffs own lots abutting upon a navigable lake in this state; and defendant, without their consent, constructed its railway within the water of the lake, but so near the front of their lots as to cut off their access to the body of the lake, leaving along such front a pool of stagnant water; and by reason thereof, said lots have been greatly depreciated. *Held*, that plaintiffs are entitled to recover damages for the injury. *Chapman* v. *O. & M. Railway Co.*, 33 Wis, 629, approved and followed: *Id.*

SET-OFF.

Of Judgments.—A judgment debtor, having recovered a judgment in another court against his creditor, is entitled to relief in equity by a decree for set-off: *Webster* v. *McDaniel*, 2 Del. Ch.

Though both judgments are legal demands equity will relieve, because they are not judgments recovered in the same court, so that they could be set off at law under the equitable control of the court over its own judgments; and there is, therefore, no remedy but in equity: *Id.*

STREET. See *Municipal Corporation.*

SURETY. See *Application of Payments; Bankruptcy.*

TENANTS IN COMMON. See *Partition.*

TORT.

Several.—Torts are always several, whatever number of persons unite in committing them; and though defendant and one O. were named together in an order of the supervisors as having encroached upon a highway, it was not error to reject evidence offered by defendant that he and O. occupied in common the land to which the obstruction was appurtenant: *State* v. *Babcock*, 42 Wis.

TRESPASS. See *Bankruptcy.*

Constructive Possession—Possessory Acts.—In trespass *qua. clau.*, it appeared that plaintiffs had paid taxes on the *locus in quo*, and in surveying the gore of which it was a part, had surveyed some of its outer

lines. *Held*, that those acts were not acts of possession, but evidence of a claim of right merely: *Paine & Slocum* v. *Hutchins*, 49 Verm.

The effect of possessory acts done upon parts of a gore under color of title to the whole, will not be extended by such color of title to the other parts: the land in the gore being at the time subject to ownership by various persons, and occupied by them by different kinds of possession: *Id.*

TRUST AND TRUSTEE.

Negligence—Liability for Acts of Co-trustee.—Mere negligence of a trustee, as well as his active default, may be a breach of trust: *Richards* v. *Seal*, 2 Del. Ch.

Ignorance of the act or default of a co-trustee is no excuse, if that ignorance results from neglect: *Id.*

An investment of a trust fund having been made by trustees, one of them without the knowledge of his co-trustee, collected the fund and held it until his death without re-investment. *Held*, that the co-trustee, who had given no attention to the fund after its original investment, was liable: *Id.*

UNITED STATES COURTS. See *Judgment.*

VENUE.

Change of is not Unconstitutional.—An act authorizing change of venue to secure an impartial trial and to avoid local prejudice, is not in violation of Art. 1, § 15, of the Constitution of the state, which declares, "The right of trial by jury shall remain inviolate." This provision of the Constitution not meaning "trial by jury of the vicinage or county:" *Taylor* v. *Gardiner*, 11 R. I.

WASTE.

Cutting Timber.—The cutting of timber is an injury of an irreparable nature and remediable in equity by whomsoever committed: *Flemming* v. *Collins*, 2 Del. Ch.

Equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed: *Id.*

Upon the death of the party committing the waste the liability to account survives against his administrators: *Id.*

WATERS AND WATERCOURSES. See *Accretion; Navigable Stream; Riparian Owner.*

WILL.

Signing as Witness in presence of Testator.—Under our statute, which requires that a will (not nuncupative), to be valid, "shall be attested and subscribed *in the presence of the testator*, by two or more competent witnesses," no subscription to a will by a witness is valid unless made where the testator (if he so desires, and is not blind) can see the witness subscribe; and it is not sufficient that the witness, *after* signing as such in an adjoining room outside of the testator's range of vision brings such subscription to the attention of the testator, who assents to and approves the act: *Downie's Will*, 42 Wis.