

the power to remove the master, whether he be part owner or not, and to resume possession of her at their own pleasure.

2. That in the case of a part owner only a written agreement, entitling such part owner to possession, can defeat the exercise of such right.

3. That the contract set up here is not susceptible of specific enforcement, either by way of estoppel or by a direct proceeding for that purpose, and hence is no defence against the libel.

4. That the only remedy of the respondent for a breach of such contract, if he has any, is an action for damages.

There must, therefore, be a decree for the libellants.

## ABSTRACTS OF RECENT DECISIONS.

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

SUPREME COURT OF ERRORS OF CONNECTICUT

SUPREME COURT OF ILLINOIS.<sup>3</sup>

SUPREME COURT OF IOWA.<sup>4</sup>

SUPREME COURT OF NEW JERSEY.<sup>5</sup>

SUPREME COURT OF PENNSYLVANIA.<sup>6</sup>

### ADMIRALTY.

*Collision—Suits in Personam—Jurisdiction not Exclusive.*—The jurisdiction of courts of admiralty over suits *in personam* for damages by collision is not exclusive, but there is also a remedy at common law: *Schoonmaker v. Gilmore*, S. C. U. S., Oct. Term 1880.

### ATTACHMENT.

*Removal from State.*—The statute authorizing an attachment on the ground that the defendant is about to remove his property out of the state, without leaving sufficient to pay his debts, contemplates a permanent removal and not a temporary use of property by the owner out of the state: *Warder v. Thrilkeld*, 52 Iowa.

<sup>1</sup> Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1880. The cases will probably be reported in 12 Otto.

<sup>2</sup> From John Hooker, Esq., Reporter; to appear in 47 Conn. Reports.

<sup>3</sup> From Hon. N. L. Freeman, Reporter; to appear in 96 Illinois Reports.

<sup>4</sup> From Hon. John S. Runnells, Reporter; to appear in 52 Iowa Reports.

<sup>5</sup> From G. D. W. Vroom, Esq., Reporter; to appear in vol. 13 of his Reports.

<sup>6</sup> From A. Wilson Norris, Esq., Reporter; to appear in 90 Penn. St. Reports.

BILLS AND NOTES. See *Usury*.

*Draft—Payable on Demand—Grace.*—A draft in which no time for payment is mentioned is payable on demand, and is not entitled to grace. This rule of the law merchant is not changed by chapter 81, laws of 1876: *First National Bank v. Price*, 52 Iowa.

The fact that such a draft calls for interest after maturity does not indicate that it is not payable on demand: *Id.*

## BILL OF EXCEPTIONS.

*Signing after time limited by Rule of Court—Previous suing out of Writ of Error—Dating upon day subsequent to Trial.*—A rule of court requiring the presentation of a bill of exceptions for signature within five days after the trial, is not binding upon the judge, but he may sign the bill at any time during the term: *Hunnicut v. Peyton*, S. C. U. S., Oct. Term 1880.

The suing out of a writ of error before the signature of the judge is obtained to the bill of exceptions, is not a waiver of the exceptions: *Id.*

A bill of exceptions is not invalid because it is dated and filed as of a date subsequent to the trial during the same term, and not as of the day of trial: *Id.*

## CANAL.

*Liability of Company for Injury from Unknown Obstruction.*—A canal company is neither a common carrier nor an insurer, nor liable as such. As owner and operator of a public water highway, it is bound to so maintain and manage the canal, that it can be used with reasonable safety and convenience by the public, but it is not liable for an injury resulting from an unknown obstruction, which could not have been guarded against without the exercise of extraordinary and unreasonable care: *The Pennsylvania Canal Co. v. Burd*, 90 Penn. St.

COLLISION. See *Admiralty*.CONSTITUTIONAL LAW. See *Fishery*.

*Criminal Law—Repeal of Statute of Limitations—Ex post facto Laws.*—A statute which repeals an act limiting the time within which crimes shall be proscribed, is not an *ex post facto* law, within the meaning of the federal or state constitution: *State v. Moore*, 13 Vroom.

A person committed certain crimes at a time more than two years antecedent to the finding of an indictment, and at a time when the law barred the prosecution for such crimes by the lapse of two years; after two years had run and the prosecution was thus barred, the legislature repealed the Act of Limitation, and extended the time three years beyond the original limit. *Held*, such repeal and extension were valid: *Id.*

*Regulation of Commerce—Taxation—Discrimination against Imports from other States—Unconstitutionality of Portion of Statute—Enforcement of Remainder.*—A state statute which imposes a tax for selling spiritous, vinous, malt and other intoxicating liquors, with a proviso that it shall not apply to wine or beer manufactured in the state, is unconstitutional, so far as it makes a discrimination against wine and beer im-

ported from other states, but payment of the tax cannot be avoided on this ground by one who in addition to such wine and beer sells other intoxicating liquors within the terms of the statute: *Tiernan v. Rinker*, S. C. U. S., Oct. Term 1880.

CONTRACT. See *Insurance*.

CORPORATION.

*Insolvent—Preference to Creditor—Dealing with Stockholder or Director as a Creditor.*—A corporation transferred a quantity of its goods to two of its directors, to be sold by them and the proceeds applied in payment of a joint claim of large amount which they had against it. The corporation was in fact insolvent, but it was supposed by the parties at the time that it was able to pay all its debts. The transaction was in good faith and with no intention to defraud creditors. *Held*, that there was no principle of law that rendered the transaction fraudulent: *Smith v. Skeary*, 47 Conn.

The obtaining a preference by one creditor of an insolvent debtor over another is not fraudulent at common law: *Id.*

The two directors held, for another debt of the corporation, a mortgage of its warehouse, within which the goods were stored. The condition of the mortgage having been broken, the corporation delivered to them the goods as they were, and they at once, with consent of the corporation, took open possession of the warehouse under their mortgage and retained exclusive possession of the same and of the goods, selling portions of the latter as they had opportunity. *Held*, that there was a sufficient delivery: *Id.*

If a stockholder or director of a corporation deals with it in his individual capacity the law will protect him as well as any other party. His relation to the corporation only goes to the question of the good faith of the transaction: *Id.*

CRIMINAL LAW. See *Constitutional Law*.

*Summary Proceedings for Penalty.*—In a summary proceeding for a penalty, an exception in the statute, though not in the enacting clause, must be shown to be inapplicable in the case by proper averments: *Doughty v. Conover*, 13 Vroom.

The conviction must contain sufficient of the evidence to show the legal propriety of the judgment founded upon it: *Id.*

*Murder—Burden of Proof—Degree of Proof required to establish Defence on a Criminal Prosecution.*—Where the killing is proved on a trial for murder, the burden of proving circumstances in mitigation, or that justify or excuse the homicide, is thrown upon the accused, unless the proof on the part of the prosecution sufficiently manifests the same facts, and an instruction which imposes the burden of proving such facts upon the defence, without reference to whether they appear from the proof by the prosecution, is erroneous, as casting upon the defendant a greater burden than the law requires: *Alexander v. The People*, 96 Ills.

When the killing is proved, on a charge of murder, and the defendant seeks to show he was justified or excused, it is erroneous to instruct the jury that it is incumbent on him to establish satisfactorily such defence. The statute does not require such a high degree of proof. The defend

ant is only bound to prove the circumstances of mitigation, or that justify or excuse, as any other fact is to be proved. If the proof creates a reasonable doubt of the defendant's guilt, he is entitled to an acquittal: *Id.*

DEBTOR AND CREDITOR. See *Corporation.*

DEED. See *Equity.*

*Courses and Distances—Evidence in Ambiguous Cases.*—Where land is described in a deed of conveyance by courses and distances and also by calls for adjoining, the latter, where there is a discrepancy and there are no monuments on the land must govern: *Koch v. Dunkel*, 90 Penn. St.

If there is any ambiguity in a deed as to the quantity of land conveyed thereby, arising from a conflict between the calls or the courses and distances, articles of agreement in pursuance of which the deed was executed may be admitted in evidence, to show the intent of the parties; *Id.*

DELIVERY. See *Corporation.*

#### DOWER.

*Action to Recover—Statute of Limitations—Improvements.*—The Statute of Limitations does not commence to run against an action to recover a dower interest in lands until there is an adverse possession by the heirs or grantees of the husband: *Felch v. Finch*, 52 Iowa.

In an action to recover dower in land conveyed by the plaintiff's husband, who died in 1862, where it appeared that his grantees purchased in good faith and without knowledge that he was married at the time of the conveyance, it was held that plaintiff was entitled to a life estate in one-third in value of the land, without improvements, and that money paid to secure the location of a depot on the land, and in surveying and platting in into town lots, was a legitimate expenditure for its improvement, and the enhancement in value by reason thereof should be considered as improvements in apportioning the plaintiff's interest: *Id.*

The widow is under no obligation to pay any portion of the taxes levied on the lands of her deceased husband before her dower has assigned: *Id.*

DRAFT. See *Bills and Notes.*

#### EQUITY.

*Relief against Judgment.*—A bill in chancery to set aside a judgment at law alleged that the complainant took no part at the trial, because his attorney of record was at that time engaged in professional business at another court, and that the attorney for the plaintiff in the suit at law fraudulently presented but a part of the record upon which the judgment was recovered. The charge of fraud was general, and the alleged defect in presentation of the record was not shown to have done any wrong to the complainant. *Held*, that the bill failed to show any equitable grounds for relief: *Dinet v. Eigenmann*, 96 Ill.

*Reforming a Deed—Waste—Right to dig Ore.*—The proper construction of a deed is not a subject of equity jurisdiction, and where there is neither averment or proof of fraud, accident or mistake, a court of equity cannot reform a deed: *Grubb's Appeal*, 90 Penn. St.

A person who is not a tenant in possession, but possesses a right to dig ore, is not guilty of committing a waste or trespass when he takes out more ore than his contract or his right calls for, and a court of equity cannot restrain him by injunction: *Id.*

Nor will a court of equity in such a case decree an account where the account is a mere matter of charge for a certain number of tons of ore, with no entries on the other side of the account. This is clearly the subject of an action of assumpsit at law: *Id.*

ERRORS AND APPEALS. See *Bill of Exceptions.*

ESTREPEMENT. See *Mulicious Prosecution.*

#### EVIDENCE.

*Private Boundaries—Declaration of Persons Deceased at time of Trial—When not admissible.*—In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons shown to have had knowledge of that whereof they spoke, or by persons on the land or in possession of it, and who made the declarations while pointing out or marking the boundaries, or discharging some duties relating thereto: *Hunnicut v. Peyton*, S. C. U. S., Oct. Term 1880.

#### EXECUTOR.

*De son Tort.*—A man died, leaving no property but his wearing apparel. His widow paid, out of her own means, the expenses of his last sickness and of his burial, and gave to his brother a suit of his clothes, of less value than the amount thus paid out by her. *Held*, that she had not made herself liable to a creditor of her husband as executrix in her own wrong: *Taylor v. Moore*, 47 Conn.

#### FISHERY.

*Right of State to Regulate.*—The state has the right, by legislation, to protect fish in rivers and streams not navigable: *Weller et al., Prosecutors, v. Snover*, 13 Vroom.

*Regulation of—Making use of Nets Penal.*—A statute regulating the fisheries throughout the state, is not unconstitutional with respect to a provision making penal the use of nets at certain times in particular counties: *Doughty v. Conover*, 13 Vroom

FRAUD. See *Corporation; Sale.*

*Fraudulent Conveyance by Wife to Husband.*—Where the only proof that a conveyance was fraudulent, was the fact that it was made by an indebted wife to her husband, and they both testified that the conveyance was executed in consideration that the husband undertook to pay certain specified debts of the wife, which was not a grossly inadequate price for the property, and that he had since paid the same, the intent to hinder, delay, or defraud creditors being expressly denied, and it appeared that the debt under which the conveyance was assailed was incurred by the wife as surety, and both she and her husband denied any knowledge of the existence of such debt when the deed was made, supposing it was paid, or otherwise secured, it was held there was not sufficient proof of fraud to defeat the husband's equitable title: *Tyberandt v. Raucke*, 96 Ills.

HUSBAND AND WIFE. See *Dower*; *Fraud*.

*Contract of Married Women*.—The statute (Gen. Statutes, tit. 19, ch. 5, sect. 9,) provides that "actions may be maintained against a married woman upon any contract made by her since her marriage upon her personal credit, for the benefit of herself, her family, or her separate or joint estate." *Held*, that her contract to convey her land does not come within this statute: *Gore v. Carl and Wife*, 47 Conn.

Such a contract was executed by both husband and wife. *Held* not enforceable in equity against both jointly, nor against the husband alone: *Id*.

Payments made to the husband upon such a contract, without the consent of the wife, can not affect her rights: *Id*.

*Husband may Confess Judgment to Wife*.—A husband may confess or suffer a judgment to be entered against himself in favor of his wife, without the intervention of a trustee, and execution may be lawfully issued thereon: *Rose and Wife v. Latslaw et al.*, 90 Penn. St.

## INSURANCE.

*Violation of conditions of Policy—Pleading*.—Where the replication in a suit on a policy of insurance in reply to a plea that subsequent insurances had been taken out in violation of a condition, sets up notice of such subsequent policies, it is not necessary for the defendant to prove at the trial, the taking out of such policies, their existence being admitted by the issue: *Warbasse v. Essex County Mut. Ins. Co.*, 13 Vroom.

A policy issued to the owner of a building, in which the money is agreed to be paid, in case of loss, to a designated person, is a contract with such owner, and is liable to be defeated by the violation of any of its conditions by such owner: *Id*.

*Undelivered Policy—No Liability upon*.—An insurance company receiving an application through their agent and forwarding to the agent a policy conditioned not to take effect until payment of the premium, is not liable upon the death of the assured before the receipt of the policy and payment of the premium: *Giddings v. Northwestern Mut. Life Ins. Co.*, S. C. U. S., Oct. Term 1880.

## INTOXICATING LIQUORS.

*Negligence—Contributory*.—In an action to recover for injury caused by defendant to the estate of plaintiff's decedent by selling liquors to said decedent until he became intoxicated and unconscious, and then expelling him from a saloon at a late hour of the night, thereby causing his death from exposure, it was held erroneous to instruct the jury that the purchasing and drinking of the liquor by the deceased constituted contributory negligence, which would bar a recovery: *Weymire v. Wolfe*, 52 Iowa.

LIMITATIONS, STATUTE OF. See *Constitutional Law*; *Dower*.

*Possession by Intruder—Extent of Constructive Possession—Re-entry by Owner on Portion of Land—Effect of*.—Though actual possession of a part of a tract, by one claiming the whole under a junior title, gives to such claimant constructive possession of the whole tract, yet the subsequent entry of the true owner upon any part of the land, will

stop the running of the Statute of Limitations in favor of the holder of the junior title, except as to the portion in the latter's actual possession: *Hunnicut v. Peyton*, S. C. U. S., Oct. Term 1880.

#### MALICIOUS PROSECUTION.

*Abuse of Civil Process—Estrepelement.*—Although legal process may, by its malicious use, give rise to a cause of action, yet in such a case there must not only be a malicious use but there must be no reasonable or probable cause for such process, since if there be such cause, the intention goes for nothing: *Eberly v. Rupp*, 90 Penn. St.

As a writ of estrepelement is purely preventive, and neither arrests the person nor seizes the goods of a defendant, the use of such process cannot be the foundation of an action: *Id.*

#### MORTGAGE.

*Equitable Mortgage—Delivery of Contract for Deed.*—The delivery of a contract for the purchase of land by the purchaser to one to indemnify him against loss by becoming a guarantor for the purchaser, without any written assignment thereof, constitutes an equitable mortgage, and a subsequent written assignment to another party by mistake who has no interest in the same, is simply inoperative, where no word of conveyance are used. Even an endorsement of the contract to the guarantor after the delivery will not change the character of the transaction: *Allen v. Woodruff*, 96 Ills.

A written assignment of a deed or contract for the conveyance of land is not necessary to the creation of an equitable mortgage, and the only possible effect of such written assignment is, that when the instrument and assignment have been recorded, it will afford constructive notice of the mortgagee's rights, and also as evidence of the fact of the assignment in case of a dispute: *Id.*

#### MUNICIPAL CORPORATION.

*Regulation of Trade—License—Police Power—Taxation.*—Power in a municipal corporation to regulate and license a business or trade, confers no power to impose a tax upon such business or trade: *State, Muhlenbrink, Pros., v. Long Branch Commissioners*, 13 Vroom.

The rules and regulations which a corporation may make in respect to business or trade, under its police power, are such only as have relation to the public health, morals, and order of the community: *Id.*

A municipal corporation having power to regulate and license peddling, &c., passed an ordinance that no pedlar should drive a cart, &c., without a license, and for every license there should be paid, &c. *Held*, to be a tax for revenue, and beyond the powers of the corporation: *Id.*

#### NATIONAL BANK. See *Usury*.

#### NEGLIGENCE. See *Intoxicating Liquors*.

*Contributory Negligence of Plaintiff.*—The plaintiffs owned a toll-bridge, under a charter which provided that they should maintain in good repair a suitable draw at some convenient place sufficient to admit the free and easy passage of vessels. The defendants' vessel, in passing through, was, by their negligence, allowed to run against and knock off the corner of one of the piers supporting the bridge. *Held*, in a suit

by the bridge company for the damage, that the plaintiffs were not to be regarded as contributing to the injury by reason of the fact, which was found, that if the pier had been protected by piles the damage would have been lessened or prevented: *Toll-bridge Co. v. Langrell*, 47 Conn.

The plaintiffs were bound only to use ordinary care in protecting the pier, and a finding that piles would have prevented the injury could not be regarded as equivalent to a finding that ordinary care required the plaintiffs to maintain them: *Id.*

*Contributory and Comparative—Railroad—Duty of Persons Crossing.*—In an action to recover damages resulting from the alleged negligence of the defendant, if it appears that the plaintiff has been guilty of negligence, no recovery can be had unless his negligence was slight, when compared with that of defendant, which was gross: *Chicago & Northwestern Railway Co. v. Dimick*, 96 Ills.

Where both parties have been guilty of negligence, a mere preponderance in degree will not render the defendant liable. So it was held an instruction did not lay down the correct rule, which declared that although the plaintiff, by his own negligence, may have in some degree contributed to the injury, yet if the negligence of the defendant was of a higher degree, or so much greater than that of the plaintiff that the negligence of the latter was slight in comparison, the plaintiff might recover: *Id.*

It is the duty of a person approaching a railroad crossing upon a highway to look and listen for a train on the railroad, and it is negligence to omit that duty: *Id.*

PLEADING. See *Criminal Law ; Insurance.*

*Duplicity—Title in Plaintiff.*—It is not duplicity to allege in a single count various kinds of damage resulting from a single wrongful act: *Wolfe v. Beecher Manufacturing Co.*, 47 Conn.

Where a declaration alleged an injury caused by a nuisance maintained by the defendants, both to a house owned and occupied by him, and to himself personally and to his family in the use of the house, and it appeared that during the time the title to the property had been in another party and only the possession in the plaintiff, it was held, that he could not recover for the injury to the freehold: *Id.*

The property had been owned by the plaintiff, and he had conveyed it to a third person without consideration, for the purpose of evading an attachment. *Held*, that the plaintiff had no title that the law would recognise even as an equitable one: *Id.*

But an equitable title would not have been sufficient to enable him to recover in his own name for injuries to the freehold: *Id.*

After the plaintiff had put in his evidence as to the nuisance and its effects, the defendants offered evidence that the plaintiff was not the owner of the freehold. To meet this, the plaintiff offered evidence of his actual occupation during all the time that the title was in the third person, of his letting a part of the house, and of his paying the taxes upon the property and doing other acts of ownership. To this evidence the defendants objected, but the court admitted it. *Held*, that the ruling of the court could not be sustained, on the ground that the evidence was admissible for the purpose of showing possession on the part of the plaintiff, and an injury to his possession, it having clearly been

offered by him in support of his claim to recover as owner, especially as the court did not explain to the jury that they were not to give any damages for injury to the freehold: *Id.*

And *held*, that such an explanation ought, in the circumstances, to have been made by the court to the jury, although the counsel for the plaintiff had stated to the court and jury that he did not claim any damages for the injury to the freehold: *Id.*

POSSESSION. See *Limitations, Statute of.*

RAILROAD. See *Negligence.*

#### SALE.

*Fraudulent Representations by Vendor.*—Fraudulent representations by a vendor may be as well by acts or artifices calculated to deceive, as by positive assertions: *Croyle v. Moses*, 90 Penn. St.

Where upon the sale of a horse the vendor knew him to be unsound in a certain respect, and by artifice concealed the defect, or in answer to inquiries gave evasive and artful replies, with intent to deceive the vendee, and did thereby deceive him to his injury, it was such a fraud on the vendee as would justify him in rescinding the contract: *Id.*

#### SPECIFIC PERFORMANCE.

*By Assignee for Security—Payment—Waiver of Forfeiture.*—If the purchaser of land cannot maintain a bill for the specific performance of the contract of purchase, his assignee taking the contract as an indemnity against loss as a guarantor cannot maintain a bill to enforce the same for his benefit: *Allen et al. v. Woodruff et al.*, 96 Ill.

Every case in which a specific performance of a contract is sought, depends largely upon its own circumstances, and a decree of specific performance is, to a large extent, a matter of discretion. But this discretion is not an arbitrary one, but a legal discretion, to be exercised in conformity with certain fixed and well recognised principles which govern courts of equity: *Id.*

Where a vendor of land, long after the payments mature, accepts payments, this will be a waiver of his right at that time to declare a forfeiture for want of prompt payment, and if he afterwards accounts with the purchaser as to the balance due, and stands by and allows the purchaser to pay all the taxes and make expensive improvements upon the land, a tender to him of the sum due by either the purchaser or his assignee at any time before a forfeiture is declared will be good, and the contract may be specifically enforced, notwithstanding time is made of the essence of the contract and there has been a considerable delay in offering to pay: *Id.*

TAX AND TAXATION. See *Constitutional Law; Dower; Municipal Corporation.*

UNITED STATES COURTS. See *Admiralty.*

#### USURY.

*National Banks—Promissory Note—Renewal.*—Where a national bank loans money upon a usurious contract, only such penalties can be enforced as are provided in the National Banking Act. Without regard

to the question whether or not the state courts would have jurisdiction of an original action to enforce those penalties, when the bank sues upon such contract in a state court, the defendant has the right to maintain the plea of usury as a defence in the same court: *National Bank of Winterset v. Eyre et al.*, 52 Iowa.

A note given in renewal of one which is usurious, and covering the usurious interest, is itself affected with usury although bearing but the legal rate of interest, and it cannot be purged of such usury by having the amount credited thereon as a payment, without the concurrence of the maker: *Id.*

VENDOR AND PURCHASER. See *Specific Performance*.

WAIVER. See *Specific Performance*.

WASTE. See *Equity*.

WATERS AND WATERCOURSES. See *Fishery*.

*Artificial Channel for Watercourse—Liability of Person Constructing such Channel for Injury by Overflow—Acts of other Parties contributing to the Result.*—The defendant had constructed a covered channel for a small brook that ran through his premises in the city of N. This channel proved insufficient for the flow of all the water that came down the brook in times of heavy rain, and by its obstruction caused the water to overflow upon and injure the adjoining premises of the plaintiff. The city, since the defendant's channel was made, had constructed several sewers and drains which emptied into the brook above his premises, by which a considerable quantity of sewage, and of surface water that, it was claimed, would have gone in other directions, was let into the brook. In a suit for the damage to the plaintiff's property, it was held:

1. That the defendant was not liable for any damage beyond that caused by the natural flow of the water, including its increased flow from heavy rains and other ordinary natural causes.

2. That it was no reason for holding the defendant liable for more than this, that the proportion of the damage done by the overflow of the natural water of the brook was difficult of ascertainment.

3. That the defendant and the city could not be regarded as joint tort-feasors: *Sellick v. Hall*, 47 Conn.

The defendant claimed that the city had, before the injury, by legal proceedings taken the entire brook for a public sewer, and that the channel within his own premises had, under those proceedings, passed out of his control and into that of the city. The plaintiff claimed that the proceedings were not regular and complete, and had not vested a legal right to the sewer in the sewer in the city. *Held*, that the question was, whether the city had, in fact, taken possession and control of the channel for a sewer, the defendant being liable for the continuance of the nuisance without reference to the legal proceedings, so long as the actual possession and control had not passed from him to the city: *Id.*