

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.¹COURT OF ERRORS AND APPEALS OF MARYLAND.²SUPREME COURT OF NEW JERSEY.³SUPREME COURT OF RHODE ISLAND⁴SUPREME COURT OF VERMONT.⁵

ACCEPTANCE.

Conditional.—An order was drawn by O. on B., an attorney-at-law, and was accepted by him in the following terms: "I will pay the within amount out of the money collected on O.'s judgment against N. as soon as the same is collected by me." B. was O.'s attorney. At the time of acceptance O. had recovered a verdict against N., which was afterwards set aside, and in a new trial O. recovered a much smaller verdict, on which judgment was entered. This judgment was collected by B. In an action by the payee of the order against B.: *Held*, that B. was not liable on the acceptance: *Rawson v. Beach*, 13 R. I.

ACTION. See *Easement*.

ADMINISTRATOR.

Borrowing Money by Administrator—Rights of Lender—Ignorance of Law.—An administrator has no legal power or right to borrow money, and pledge the property of the estate in payment: *Merchants' Nat. Bank v. Weeks*, 53 Vt.

A bill brought against an administrator, not joining the heirs, or any one interested in the estate, alleging that the orator loaned money to the defendant, as administrator, and took his note therefor; that the defendant has assets in his hands belonging to the estate sufficient to pay the same; that he is personally poor and in bankruptcy; and praying for a writ of sequestration, to sequester the goods of the estate, was held bad on demurrer, in that it presented no equity, and in that the heirs or creditors were not made parties: *Id.*

And the result is the same, although the orator "supposed" at the time the note was given, that the estate was held to pay it: *Id.*

If an administrator borrows money, he is personally liable; but whether it is to be repaid from the estate, is a question for the Probate Court, on the settlement of his account: *Id.*

BILLS AND NOTES.

Irregular Endorsement—Guaranty.—To hold a third party who irregularly endorses a promissory note, as joint maker, he must have

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² From J. Shaaff Stockett, Esq., Reporter; to appear in 52 Maryland Reports.

³ From G. D. W. Vroom, Esq., Reporter; to appear in vol. 14 of his Reports.

⁴ From Arnold Green, Esq., Reporter; to appear in 13 Rhode Island Reports.

⁵ From Edwin F. Palmer, Esq., Reporter; to appear in 53 Vermont Reports.

participated in the creation of the note or shared in the consideration for which it was given: *Hayden v. Weldon*, 14 Vroom.

Endorsing the note before the payee imports only the contract of second endorsee: *Id.*

Where the undertaking of a third party is to further secure the payment of a debt already created between the regular parties to the note, it is a collateral contract, within the Statute of Frauds, requiring a writing to prove, and a consideration to support it: *Id.*

Such an endorsement is not in itself authority to the holder of the note to write over it a contract of guaranty: *Id.*

A guaranty is not negotiable, nor does it become so by being endorsed upon negotiable paper, the payment of which it is designed to secure: *Id.*

Joint Maker or Endorser.—A. made a promissory note, payable on demand with interest, to the order of B. It was endorsed by B., and then by C.; B. and C. affixing their names for the accommodation of A., and to enable A. to borrow money from the plaintiff, on the note. *Held*, that C. was liable as an endorser, not as a joint maker, and was entitled to due notice of dishonor. *Held, further*, that C.'s liability was not varied by the fact that the note was payable on demand with interest: *Sawyer v. Brownell et al.*, 13 R. I.

BOND.

Bond given after Office has been Assumed—Bond must be Sealed when Signed, or some one Authorized by the Sureties to Seal—Date—Parol Evidence.—The bond of a town treasurer, given for the faithful performance of his official duty, not executed till near the close of his term, but ante-dated, binds his sureties to respond in damages for all malfeasance or misfeasance in office, during the year for which he was elected: *Town of Barnet v. Abbott*, 53 Vt.

The treasurer had appropriated the town's money to his own use; but the default occurred prior to his last election, and in fact not during the time covered by the bond. *Held*, in an action on the bond, that the sureties are not liable: *Id.*

When the bond was delivered to the selectmen by the treasurer, it was signed and sealed; but when it was executed it was not sealed, and the sureties never sealed it, and never authorized any one to affix a seal to it. *Held*, defectively executed: *Id.*

Parol evidence is admissible to prove that a bond was ante-dated; that it was not sealed at the time of signing; and that the sureties never authorized any one to seal it: *Id.*

CERTIORARI.

At Common Law—When it will Lie.—There are two classes of cases in which a common-law *certiorari* will lie: first, where it is shown that the inferior court or jurisdiction has exceeded its jurisdiction; and, second, where it is shown that the inferior court or jurisdiction has proceeded illegally, and no appeal or writ of error will lie: *Hyslop v. Finch*, 99 Ills.

The common-law writ of *certiorari* simply brings before the court, for inspection, the record of the inferior tribunal or body, and its judg-

ment affects the validity of the record alone—that is, determines that it is valid or invalid: *Id.*

It being within the discretion of the court to grant or refuse the writ, extrinsic evidence to the record may be received to show that no injustice has been done; that if the proceedings shall be quashed the parties cannot be placed in *statu quo*, or that for any good reason the writ ought not to be granted. If such evidence is given by the respondent, the petitioner will have the right to rebut it. But when the record is before the court on the return of the writ, the court will look only at the record: *Id.*

Mere lapse of time, short of the limitation for prosecuting a writ of error, will not bar the issuing of the common-law *certiorari*; and in order that it may be barred by *laches*, it must appear that since the making of the record sought to be reviewed, and upon its assumed validity, something has been done so that great public detriment or inconvenience might result from declaring it invalid: *Id.*

CONTRACT

For Personal Service—Hiring by the Week.—Where one is hired to work by the week, and is receiving wages weekly, the burthen of proof is upon him to show a change in the contract of hiring, as to term of service: *State, Stanford, Prosecutor, v. Varnish Co., 14 Vroom.*

CORPORATION. See *Surety*

COSTS.

Liability of Assignee suing in name of Assignor for.—An assignee, beneficially interested, suing in the name of his assignor, and failing in the action, is liable to defendant for costs: *Davenport, for the use of Irwin, v. Elizabeth, 14 Vroom.*

CRIMINAL LAW.

Evidence—Almanac.—In a trial for murder, the state offered in evidence “an almanac for 1879,” for the purpose of proving at what hour the moon rose on the night of August 9th 1879. *Held*, that the evidence was admissible, though there was no proof of the character of the almanac, and though the time indicated by it for the moon’s rise was a *prediction* and not the declaration of a fact that had taken place when the almanac was published: *Munshower v. The State, 55 Md.*

DEBTOR AND CREDITOR. See *Power.*

DOWER. See *Husband and Wife.*

EASEMENT.

Cannot be created by Parol—Assumpsit.—An easement cannot be created by parol: *Banghart v. Flummerfelt, 14 Vroom.*

The declaration in *assumpsit* alleged that defendant made a parol unwritten agreement with a former owner of plaintiff’s mill, to erect on his own land a dam and make a certain aqueduct, and to keep up, perpetually, the same, assigning as a breach the not keeping up such dam. *Held*, that an action at law would not lie on such a contract: *Id.*

ESTOPPEL. See *Vendor and Purchaser*.

By Acquiescence and Acts.—A person who acts as secretary and treasurer of the trustees of schools of a township for eleven years, thereby sanctioning the validity of their acts, and who contracts to convey them a parcel of land for a school site, will be estopped from denying the legality of the election of such trustees, although the roll-books of the election may be lost: *Frick v. Trustees of Schools*, 99 Ills.

A person who has held office under a board of school trustees for several years, and who has held it out to the public as a legally constituted body, cannot avoid his contract with such board by setting up that it had no legal existence: *Id.*

GUARANTY. See *Bills and Notes*.

HIGHWAY. See *Negligence*.

HOMESTEAD.

Ante-nuptial Contract—Specific Performance—Release of Homestead.—The plaintiff and the intestate entered into an ante-nuptial agreement, in writing and under seal, by which she released all right to dower and homestead in his estate, in consideration of marriage, and the payment of \$50 per year during his natural life, if she outlived him, but \$50 per year during her natural life, if he outlived her. They were subsequently married; but it did not appear that the husband performed his part of the contract as to paying. *Held*, that the homestead, by force of the statute vests in the widow, on the death of the husband; and the contract, being a release or a discharge of something not in existence at the time it was given, cannot defeat this right: *Mann v. Mann's Estate*, 53 Vt.

The ante-nuptial covenant, not to claim a homestead, was executory, and could only be enforced by a court of general equity powers: *Id.*

The estate is in no condition, as presented by the agreed case, to ask a court of equity to restrain the plaintiff from claiming a homestead; since, there, if a party seeks the enforcement of the specific performance of a contract, he must be able to assert and establish, that he has performed on his part: *Id.*

Ante-nuptial and post-nuptial contracts are peculiarly subjects of equity jurisdiction and cognisance: *Id.*

HUSBAND AND WIFE.

Inchoate Right of Dower—Allowance to Wife in consideration of having united with her Husband in a Deed of Trust and Mortgage.—The interest of the wife in her husband's real estate is inchoate only during his life. It requires the husband's death to occur before it becomes a vested right. The wife's inchoate right is not such a right as may be bargained and sold. Her deed does not pass any title. It operates only by way of estoppel or release, and any words of release would be as effectual as words of grant. She cannot convey it to a stranger. It is only released to the owner of the fee. There is no scale or standard for ascertaining the present worth of a wife's inchoate right of dower: *Reiff v. Horst*, 55 Md.

A deed from H. in which his wife united, conveyed all his property to trustees for the benefit of his creditors. The deed provided for the payment to the wife, in consideration of her uniting in the deed, of one-twelfth of the gross proceeds of the sale of the real estate thereby conveyed in trust, in lieu of her contingent right of dower therein. The wife had previously united with H. in several mortgages of his real estate, one of them being to the same parties afterwards trustees in the deed of trust; there was, however, one piece of land not mortgaged which passed by the deed of trust. The grantees in the deed sold the property as therein provided. In the distribution of the proceeds of the real estate, it was *Held*:

1. That though the wife could not bind H's creditors (except such as were parties to the agreement), to pay her from his estate, for her contingent right of dower, just such sum as she might have stipulated with H. and his trustees should be paid for uniting in the deed, and which was accordingly reserved therein; nevertheless, considering that the wife had barred herself in the larger part of the estate by uniting in the mortgages, and had united in the deed of trust, in the expectation of receiving an allowance from the whole estate, it was equitable she should receive the twelfth part of the proceeds of sale of the piece of land not mortgaged, after paying its proportion of the costs of the case, as an allowance to her for her release of expectant right of dower in that parcel:

2. That the wife should also be allowed the twelfth part of the sum awarded to the mortgage of the trustees, they being bound by the agreement contained in the deed of trust: *Id.*

JOINT TORTEASORS. See *Negligence.*

LANDLORD AND TENANT.

Liability of Tenant holding over.—Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law fixes the tenant's liability for holding over, independent of his intention. The legal presumption of a renewal from the holding over, cannot be rebutted by proof of a contrary intention on the part of the tenant alone: *Clinton Wire Cloth v. Gardner*, 99 Ills.

LIBEL.

Construction of Words.—On demurrer to a declaration for libel, the words must be construed in the sense imputed to them by the plaintiff: *Feder v. Herrick*, 14 Vroom.

Words having a tendency to bring a person into ridicule hatred or contempt, are actionable if written or published: *Id.*

Caution against imputing in the pleading a meaning to words which the facts will not sustain: *Id.*

LIMITATIONS, STATUTE OF.

Joint Contractors—Procuring Payment to be made.—It is not neces-

sary that the payment should be made from the funds of the party making it, to arrest the running of the statute; it is sufficient if he procures it to be done: *McConnell v. Merrill*, 53 Vt.

Where the surety procures a payment to be made, though out of the funds of the principal, and promises to pay the balance of the note, such, in effect, is payment by the surety himself: *Id.*

MUNICIPAL CORPORATION.

Office—Ordinance.—An appointment to, and acceptance of, a municipal office, does not constitute such a contract as will obstruct a vacation of the office: *Inhabitants of Burlington v. Estlov*, 14 Vroom.

An ordinance which occupies the entire field of a former one, will, as a general rule, repeal such former one by implication: *Id.*

Trespass by Highway Commissioners—Ultra Vires—Ratification.—The highway commissioners of the city of Providence, without the direction of the city council, made excavations on a private way. The cost of the work was paid by the city in the usual routine of payment for work done by the commissioners. In an action by the owner of the way against the city: *Held*, that under the ordinances of the city, the acts of the commissioners in excavating and of the financial officers of the city in paying for the work were all *ultra vires*: *Pierce v. Tripp*, 13 R. I.

Held, further, that the city, not having ratified these acts, was not liable: *Id.*

What Property to be taken in Payment of its Debts—In general, the Taxing Power is the only means of Payment.—The private property of individuals within the limits of a municipal corporation cannot be subjected to the payment of its debts except by taxation: *Lyon v. Elizabeth*, 14 Vroom.

Property used by such corporation in the exercise of its functions of government, cannot be taken in execution upon a judgment against the corporate body: *Id.*

The taxing power ordinarily furnishes the only means a public corporation possesses for raising the revenues necessary to discharge its obligations: *Id.*

The creditor may establish his claim by judgment, and it then becomes the duty of the proper officers to provide the means of payment out of the public revenues, which duty is enforceable by mandamus: *Id.*

NEGLIGENCE.

Highway—Object calculated to frighten Horses.—If an object calculated to frighten horses is left in a highway, and after reasonable notice negligently permitted to remain there by the town charged with the repair of the highway, such town is in Rhode Island liable for the injury sustained by a traveller whose horse is actually terrified by such object and runs away: *Bennett et ux. v. Fifield, Town Treasurer*, 13 R. I.

A. left such an object in a highway; B.'s horse was frightened by it; B. sued A. for the injury caused by the nuisance, recovered judgment, and committed A. on execution. A. was discharged under the United States Bankrupt Act; B. then sued the town. *Held*, that A.

and the town were not joint tort-feasors, A. being liable at common law ; the town for the neglect of a statutory duty : *Id.*

Held, further, that A. and the town were liable for distinct though related torts resulting in the same injury : *Id.*

Held, further, that B.'s action against the town could be sustained : *Id.*

OFFICE. See *Municipal Corporation*.

ORDINANCE. See *Municipal Corporation*.

POWER.

Exercise of, not enforced for benefit of Creditors.—Courts of equity will not aid creditors of a donee of a power, where there is a non-execution of the power, by compelling him to execute the same in his own favor. But where there has been a defective execution, the court will supply the defective execution in favor of a purchaser, creditor, wife or child : *Gilman v. Bell*, 99 Ills.

No title or interest in the thing vests in the donee of a power until he exercises the power. It is virtually an offer to him of the estate or fund, that he may receive or reject at will, and like any other offer to donate property to a person, no title can vest until he accepts the offer, nor can a court of equity compel him to accept the property offered, against his wish, even for the benefit of creditors : *Id.*

SURETY. See *Bond ; Limitations, Statute of*.

For Treasurer of Corporation—Liability of—Damages.—Where the office of treasurer of a corporation is annual or limited, the sureties on his official bond will not be liable for a breach of the duties of such officer beyond the definite term, when the condition is for good behavior during his continuance in office ; but if there be added thereto "whether of the present term for which he has been elected, or of any succeeding terms to or for which he may be elected," their liability continues : *People's Building & Loan Association v. Wroth*, 14 Vroom.

The monthly dues and fines of a building and loan association being payable in cash, the presence and acquiescence of the executive officers when promises to pay are given by members, or others for them, and accepted by the treasurer, will not discharge sureties on his official bond from liability for credit thus given, and loss : *Id.*

The unauthorized acts or laches of one agent of a corporation cannot annul its rules relating to the duties of another agent, nor discharge him or his sureties from liability for a breach of its regulations : *Id.*

Where fines and dues are not actually received by the treasurer, the damage sustained thereby is the rule for making the assessment : *Id.*

TORT.

For breach of Statutory Duty.—In case, for the neglect of a statutory duty, the plaintiff must show that the duty was imposed for his benefit or existed for his security from the injury suffered : *Smith v. Tripp*, 13 R. I.

TRESPASS.

Trespass on a Burial Lot—Punitive Damages.—An action of trespass *quare clausum fregit* can be maintained for breaking and entering

a burial lot; the trespass complained of being the digging a grave in the lot and burying therein the corpse of a child without the consent of the plaintiff, who had acquired the privilege and right to make interments in the lot to the exclusion of others, so long as the ground belonging to a society of which the plaintiff was a member (in which ground was the lot purchased by the plaintiff), remained a cemetery: *Smith v. Thompson*, 55 Md.

There being evidence before the jury from which they could find that the defendant was actuated by malice in committing the trespass, the plaintiff was entitled to punitive damages: *Id.*

USURY.

Contract, so far as void for, cannot be cured by subsequent Legislation.—A contract made in 1856, so far as it provided for the payment of interest in excess of that allowed by law, was absolutely void, and could not be rendered valid and binding by any subsequent repeal of the law governing when it was entered into, but such contract as to the principal and such rate of interest as was allowed by law, at the time of its execution, to be contracted for, was not void: *Woolley v. Alexander*, 99 Ills.

A penalty for reserving usurious interest in a contract, until enforced, is subject to legislative control, and may be abolished wholly or in part: *Id.*

VENDOR AND PURCHASER.

Waiver of Lien—Estoppel.—One may waive by parol a lien on lumber reserved in a conditional deed, to secure the purchase price of the land on which the lumber was cut: *Stone v. Fairbanks*, 53 Vt.

If he does so waive it, he is estopped from setting up title to the lumber against a third party purchasing of the plaintiff, who had bid it off at a sheriff's sale to satisfy his debt against the grantee for cutting: *Id.*

The facts—that the lien-holder saw the plaintiff cutting the timber; that he made no objection to it; and that the evidence tended to show that he knew he was cutting on *some* contract with the grantee, *tended to prove a waiver*, and should have been submitted to the jury: *Id.*

WAIVER. See *Vendor and Purchaser*.

WILL.

Apportionment of an Annuity charged on Real Estate.—An annuity having been charged by will on several parcels of real estate devised to one person, the right of the annuitant to enforce the charge against any or all of the property devised, can be waived only by agreement on the part of the annuitant, and is in no manner affected by deeds, mortgages or transactions to which the annuitant was not a party: *Perkins v. Emory*, 55 Md.