ABSTRACTS OF RECENT DECISIONS.

ENGLISH COURTS OF LAW AND EQUITY.[1]

SUPREME COURT OF MAINE.[2]

COURT OF ERRORS AND APPEALS OF MARYLAND.[3]

SUPREME COURT OF MISSOURI.[4]

SUPREME COURT OF NEW JERSEY.[5]

SUPREME COURT OF VERMONT.[6]

ACTION.

Must be brought against the Party named in the Contract—Novation —Trustee.—An action, based upon a written contract itself, can only be brought against the party named in the instrument; hence, an action of assumpsit cannot be maintained against a railroad company, based upon a written contract, signed by, and in the name of, the trustees of the mortgage bondholders of such road: *Chaffee* v. *Rutland Railroad Co.*, 53 Vt.

There could not be a novation of parties in this case; because the trustees had bound themselves—not binding the company—and one of them was also president of the defendant company; and acting in this double capacity, he could not contract with himself; could not discharge himself and put the company in his place: *Id.*

A court of chancery could charge upon the trust property the legitimate expenses incurred in managing it; but not even this upon the bondholders personally. *Id.*

Distinction between the powers of an agent and trustee: *Id.*

The plaintiff, being a stockholder in the defendant company, is charged with knowledge of the capacity in which the trustee was acting: *Id.*

AGENT. See *Bills and Notes.*

Travelling Salesman—Apparent Authority to Collect as well as Sell. —An agent (a travelling salesman) of the plaintiffs sold goods to the defendants. By the contract the defendants were to pay the agent in three months; and did. *Held*, that such payment was a defence to an action brought by the principals; and this, on the ground that they held their agent out to the public, as having competent authority; that it was within the agent's apparent authority, though not his actual, to collect for what he sold: *Putnam* v. *French*, 53 Vt.

And this is so, although the bill, rendered by the principals to the defendants, on sending the goods, contained these words, "Payable at

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[1] Selected from late numbers of the Law Reports.

[2] From J. W. Spaulding, Esq., Reporter; to appear in 72 Maine Reports.

[3] From J. Shaaff Stockett, Esq., Reporter; to appear in 55 Maryland Reports.

[4] From T. K. Skinker, Esq., Reporter; to appear in 73 Missouri Reports.

[5] From G. D. W. Vroom, Esq., Reporter; to appear in Vol. 14 of his Reports.

[6] From Edwin F. Palmer, Esq., Reporter; to appear in 53 Vermont Reports.

office," the defendants never having seen them, and being guilty of no negligence in not seeing them: *Id.*

Effect of Mingling his Own and his Principal's Property.—Where an agent commingled the money of his principal with his own, without the knowledge of the principal, and with the commingled money purchased hides, in the execution of his agency, so far as the creditors of the agent are concerned, they belonged to the principal; but if the agent, without the knowledge or fault of the principal, commingles his own property with that of his principal, so that the same is incapable of separation, he and the principal become tenants in common of such property, as to the agent's attaching creditors: *Safford & Co.* v. *Gallup* 53 Vt.

Contract in his own Name, but for Principal—Partnership Firm as Agents—Act of One of them—Demurrer.—Where a sealed instrument is executed by an agent, with authority therefor, and it appears by the whole instrument that it was the intention of the parties to bind the principal, that it should be his deed and not the deed of the agent, it must be regarded as the deed of the principal, though signed by the agent in his own name: *Purinton* v. *Security Life Ins. Co.*, 72 Me.

Where two persons, constituting a firm, are made agents, and the power conferred upon them is joint and several, the execution of any instrument within the scope of their authority, by one or both, would be a valid execution: *Id.*

Thus, upon an agreement commencing, "This agreement made between Fletcher & Bonney, of Boston, superintendents of New England agencies for the Security Life Insurance and Annuity Company, of New York, of the first part, and Stephen O. Purinton, of the second part," and ending, "In witness whereof the said parties have set their hands and seals. John W. Fletcher, Supt. N. E. Agen. (seal), Stephen O. Purinton, (seal)," everything in the body of the instrument being appropriate to an agreement with the company, and inappropriate to an agreement with the agents of the company, an action may be maintained by Purinton against the company, if the agreement is authorized by the company, for a breach of the covenants of such agreement: *Id.*

Where the declaration alleges an instrument to be the deed of the defendant, it must be so regarded upon a demurrer to the declaration, if it could be, legally, the deed of the defendant: *Id.*

Assignment.

Debts—Indivisible without Consent of Debtor.—A creditor cannot, without the consent of his debtor, make a valid assignment of a part of his claim: *Beardslee* v. *Morgner*, 73 Mo.

Bills and Notes.

Evidence not Admissible to Change the Meaning of the Acceptance of a Draft, as apparent on its Face.—On the 25th of July 1877, L. & C. drew on H.: "You will please pay to E. & Q. $2583, to be taken from amount of purchase-money of the house purchased by you, when they have entirely completed their contract dated June 18th 1877." Across the face H., on the 26th July, wrote: "Accepted; payable when due under the contract, out of the purchase-money." At the

same time E. & Q. receipted as follows: "Received of H. his acceptance of L. & C's. order of $2583, payable when due under the contract out of the purchase-money of $4500." On the 16th February 1878, L. & C endorsed on the draft: "The contract of E. & Q., dated June 18th 1877, for painting, glass and glazing of nine houses on North Boundary Avenue, is completed to our entire satisfaction, according to their specifications." The acceptor refused to pay the draft, and in the action against him, he offered evidence of a contract other than that referred to on the draft, between him and the drawers, and of which the payees had no knowledge. *Held*, that no such evidence was admissible; and that the acceptor was liable: *Hunting* v. *Emmart*, 55 Md.

Promissory Note—Secured by Deed of Trust—Bona fide Purchaser—Trustee—Agent of.—One who purchases a negotiable promissory note, secured by a deed of trust, before maturity and without knowledge of payments made upon it, is entitled to have the deed of trust enforced for the full amount of the note: *Goodfellow* v. *Stillwell*, 73 Mo.

One who purchases a note secured by a deed of trust which authorizes the trustee to receive payment, will be deemed to have constituted the trustee his agent for that purpose, if he does not revoke the authority so given: *Id.*

Promissory Note—Stipulation for Attorney's Fee.—If an obligation for the payment of money, otherwise in the form of a promissory note, contain a stipulation that in the event of failure to pay the same at maturity the maker shall pay, in addition to the debt and interest, an attorney's fee for collecting the same, it will lose its character as a promissory note; and in determining the time within which the defendant must answer in a suit on such an instrument, it will be treated as a mere contract: *First National Bank of Carthage* v. *Jacobs*, 73 Mo.

Club.

Power of Expulsion of Member—Validity of Rule—Conduct Injurious to Character and Interests of Club.—The court will not interfere against the decision of the members of a club professing to act under their rules, unless it can be shown, either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been *mala fides* or malice in arriving at the decision: *Dawkins* v. *Antrobus*, L. R., 17 Chan. Div.

One of the rules of a club provided, that a general meeting might alter any of the standing rules affecting the general interests of the club, provided this was done with certain formalities and by a certain majority. *Held*, that a rule providing for the expulsion of members who should be guilty of conduct injurious to the interests of the club, was within the regulation, and could be validly passed by a general meeting: *Id.*

The plaintiff, a member of the club, sent a pamphlet which reflected on the conduct of S., a gentleman in a high official position, also a member of the club, to S., at his official address, enclosed in an envelope on the outside of which was printed "Dishonorable Conduct of S." The committee being of opinion that this action was injurious to the character and interests of the club, called upon the plaintiff for an explana-

tion, which he refused to give. They then, in pursuance of the by-laws, called on him to resign; and as he did not comply with their recommendation, they duly summoned a general meeting, at which a resolution was passed by the requisite majority expelling the plaintiff from the club. *Held*, that the court would not interfere to restrain the committee from excluding the plaintiff from the club: *Id.*

Conflict of Laws.

Distributions, Statute of—Intestate domiciled in England—Child Legitimated by Subsequent Marriage—Foreign Law.—The *Statute of Distributions* being a statute not for Englishmen only but for all persons, English or not, dying intestate and domiciled in England, and applying universally to persons of all countries, races and religions whatsoever, the proper law for determining the "kindred" under that statute, is the international law adopted by the comity of states. Therefore, a child born before wedlock, of parents who were at her birth domiciled in Holland, but legitimated according to the law of Holland by the subsequent marriage of her parents, *held* (by James and Cotton, L. JJ., *dissentiente* Lush, L. J.), entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next of kin, under the *Statute of Distributions: In re Goodman's Trusts*, L. R., 17 Chan. Div.

Boyes v. *Bedale*, 1 H. & M. 798, disapproved: *Id.*

Criminal Law.

False Pretences.—To constitute a criminal false pretence, a misrepresentation must relate to a past event or existing fact, not to something to be done in the future: *Stocking* v. *Howard*, 73 Mo.

Damages. See *Interest.*

Equity. See *Action.*

Receiver—Injunction.—The discharge of a receiver furnishes no ground of appeal. Nor does the rescission of an interlocutory order of sale, which determined no right: *Washington City, &c., Railroad Co.* v. *Southern Maryland Railroad Co.*, 55 Md.

Where one creditor cannot be injured by the dissolution of an injunction, granted on the filing of a bill by creditors against a corporation; and its continuance would defeat the plans for the re-organization of the corporation entered into by the creditors: and would be inconsistent with previous orders in the cause; there is no equity that would justify the court in maintaining the injunction at the sole instance of one creditor as against all the other creditors, as well as the corporation: *Id.*

Estoppel.

Delivery Bond for Goods taken in Execution.—The obligors in a delivery bond, which recites a levy of execution, are estopped in an action on the bond from pleading that there was no levy: *Hundley* v. *Filbert*, 73 Mo.

Evidence. See *Negligence.*

Admissibility—Practice.—Where an offer is made generally of a mass of testimony complex in its character, and the whole of it is

objected to, it is error to exclude the whole, if any part of it is admissible; but in such case it must appear, that some part of the testimony offered is clearly admissible: *Eckenrode* v. *The Chemical Co. of Canton*, 55 Md.

Depositions—Practice.—It is too late after the trial has commenced to object to depositions, on the ground, that they were taken without notice. That objection should be made before trial by motion to suppress: *Holman* v. *Bachus*, 73 Mo.

Husband not a Competent Witness—When—Accompanying Circumstances—Damages—Punitory and Compensatory.—When the wife is the substantial party to a suit, her husband is not a competent witness. Evidence of the circumstances under which an assault was committed, is admissible, either in aggravation or in mitigation of damages. Not to excuse defendant from making full compensation for any actual injury he has inflicted, but for the purpose of showing either that circumstances of malice, gross outrage, oppression or insult, did or did not accompany the act. If there were no such circumstances, compensatory damages only can be recovered; and if such damages only are asked, the motive of the defendant is wholly immaterial, and can have no bearing on the amount of recovery: *Joice* v. *Branson*, 73 Mo.

Gift.

Voluntary Conveyance of Furniture and Articles to Wife by Letters—No Declaration of Trust—Subsequent Will of Husband.—A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees, in trust for his wife for life, with remainder to six nieces absolutely. The furniture and other articles were, at the time of her husband's death, in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way. *Held*, that the furniture, &c., formed part of the husband's estate: *In re Breton's Estate*, L. R., 17 Chan. Div.

Baddeley v. *Baddeley*, 9 Ch. D. 113 and *Fox* v. *Hawks*, 13 Ch. D. 822, observed upon; and *Milroy* v. *Lord*, 4 D. F. & J. 264, followed. *Id.*

Guaranty.

Contract—Collateral and Original.—Where C. H. signed a contract with L., the concluding paragraph of which was: "I, C. H., hereby agree to be responsible that said L. shall faithfully perform and keep this agreement on his part;" *Held*, 1. That C. H. was a guarantor only; 2. That an action upon that contract against L. and C. H., jointly, cannot be maintained: *Smith* v. *Loomis*, 72 Me.

The case of *Norris* v. *Springer*, 18 Me. 324, considered: *Id.*

Husband and Wife. See *Evidence.*

Right of Distress by a Landlady—An Agreement by her Husband to the Contrary.—A tenant's property was distrained on by Mrs. L., for rent in arrear due her. The tenant had previously agreed in writing to surrender his lease to Mrs. L's. husband in his own right. He acted

as her agent to collect her rents. There was no proof that Mrs. L. authorized or ratified the agreement or a suspension of her right of distress. In an action against Mrs. L. and her husband to recover damages for an alleged illegal distress, it was *Held*, that the tenant could not recover: *Cahill* v. *Lee*, 55 Md.

General Engagements of Married Woman—Separate Estate.—Held, by MALINS, V. C., that the general engagements of a married woman entitled to separate estate will be enforced by a court of equity against such separate estate as she has at the time when judgment is given, including (if her husband be then dead) estate limited to her separate use, without power of anticipation. *Held*, on appeal, that they can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation; *Pike* v. *Fitzgibbon*; *Martin* v. *Fitzgibbon*, L. R., 17 Ch. Div.: *Id.*

INJUNCTION. See *Equity*.

INTEREST

Action for Damages—Negligence.—Interest is not recoverable in an action for the loss of property destroyed through negligence: *DeSteiger* v. *The Hannibal & St. Joseph Railroad Co.*, 73 Mo.

LEGACY.

Rule as to Time of Payment and the Allowance of Interest.—With respect to general legacies, the law has prescribed, as a general rule, that such legacies shall be raised and satisfied out of the testator's estate at the expiration of one year from his death. If not paid at the expiration of the year, interest from that time will be allowed as damages, and interest on a legacy will not be computed from a period prior to that time, unless the will clearly expresses the intention that interest shall be reckoned from an antecedent time or event: *Welsh* v. *Brown*, 14 Vroom.

To this general rule there are certain exceptions, in cases of (1) a legacy in satisfaction of a debt; (2,) a legacy to the testator's minor child or one to whom the testator is *in loco parentis*, and there is no provision for the maintenance of the legatee; (3,) where the bequest is of an annuity; (4,) where the bequest is of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust, to pay the interest or income to a legatee for life, with a gift of the principal over at his death. In these cases interest will be allowed from the testator's death *Id.*

A legacy of a specific sum of money—the interest whereof is payable annually to one for life—the principal being payable after his death to other persons, is not an exception to the general rule with respect to the payment of interest on legacies. The executor is not required to set apart the principal sum before the end of the year; and, until that be done, there is no fund to produce interest for the life tenant: *Id.*

LIBEL.

Pleadings—Newspaper.—In a declaration for publishing a libellous article in a newspaper, it is not necessary to aver that the publication was made to divers persons or to any third person; it is enough to aver that the libel was printed and published in a newspaper: *Sproul* v. *Pillsbury*, 72 Me.

MALICIOUS PROSECUTION.

Arrest on Insufficient Affidavit.—It is no defence to an action for malicious prosecution, to show that the affidavit made by the prosecutor was insufficient in law to authorize the arrest and prosecution which followed: *Stocking* v. *Howard*, 73 Mo.

MORTGAGE.

Power of Sale—Notice to Mortgagor or his Assigns.—A mortgage contained a power of sale with a proviso, that the mortgagee was not to execute the power, without giving notice to the mortgagor or his assigns. The mortgagor assigned his equity of redemption by way of mortgage to a second mortgagee. *Held*, that such second mortgagee was entitled to receive notice of the first mortgagee's intention to exercise his power of sale, and was entitled to damages from him for default in giving such notice: *Hoole* v. *Smith*, L. R., 17 Chan. Div.

NEGLIGENCE.

Burden of Proof—Practice—Surprise.—The burden is on the plaintiff, in an action on the case for an injury arising from the negligence or want of care of the defendant, to show that he was in the exercise of ordinary care, or that the injury was in no degree attributable to want of proper care on his part: *Benson* v. *Titcomb*, 72 Me.

When a party is surprised by new and unexpected evidence, he should at once move for delay, and not await the chances of a verdict: *Id.*

ORDINANCE. See *Statute.*

PARTNERSHIP. See *Agent.*

Dissolution by Court—Date from which Dissolution is ordered.—In an action for dissolution of partnership on the ground of disputes between the partners, where there is no distinct breach of the partnership articles, the dissolution will not be made retrospective, but will be ordered from the date of the judgment: *Lyon* v. *Tweddell*, L. R., 17 Chan. Div.

Besch v. *Frolich*, 1 Ph. 172, followed: *Id.*

Subrogation—Attaching Creditor—Mortgage on Partnership and Private Property to Secure Partnership Debt.—When a partner mortgages his private property to secure a partnership debt, which is also secured by a mortgage on the partnership property, he stands surety for the partnership; and is entitled to be subrogated to the rights of a mortgagee; and the creditors of such surety, are entitled to the same right of subrogation as the surety himself; the partnership property

being a primary fund, the private property a collateral, pledged to pay the debt: *Bank of Royalton* v. *Cushing*, 53 Vt.

As between a subsequent mortgagee of the partner's private property, who, having attached the other partner's interest, and having purchased the original mortgage, foreclosed the one on the partnership property and an attaching creditor of the partnership property, who, having paid the decree in the foreclosure suit, brings his bill to foreclose both mortgages, such creditor is not entitled to be subrogated to the rights of the first mortgagee. The redemption was payment: *Id.*

Doctrine of subrogation and its application stated: it rests in justice, not contract; it applies to sureties, and not to a stranger, nor, ordinarily, a levying creditor: *Id.*

PLEADING. See *Agent.*

POWER.

Intention to Execute.—The intention to execute a power, either by will or any other instrument, must appear by a reference in the instrument to the power, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power: *Foos* v. *Scarf et al.*, 55 Md.

SALE.

Contract—Goods to be Delivered by Instalments—Failure as to one Instalment—Right to Cancel Contract.—The defendant in October 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2000 tons of pig iron, at 42*s.* a ton, to be delivered to the plaintiff free on board at maker's wharf, at Middlesborough, "in November 1879, or equally over November, December and January next, at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November. *Held*, in an action by the plaintiff for damages, in respect of the defendant's refusal (BRETT, L.J., dissenting), that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-thirds afterwards: *Honck* v. *Muller*, L. R., 7 Q. B. Div.

The decision in *Hoare* v. *Rennie* (5 H. & N. 19), held to be right by BRAMWELL and BAGGALLAY, L.JJ., and wrong by BRETT, L.J. *Id.*

SALVAGE. See *Shipping.*

SHIPPING

Pilot—Salvage.—When a pilot has assisted in navigating a vessel from a dangerous situation to a safe anchorage, the test, whether he is entitled to be remunerated for salvage services, is not, on the one hand, whether the vessel was at the time of succor in distress, or, on the other hand, whether she was then damaged; but the test is whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward. A vessel was,

during a heavy storm, being driven to leeward towards dangerous sands; her captain was ignorant of the locality, and her loss appeared almost inevitable: some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea; but by preceding her and signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage. *Held*, that the pilots were entitled to be renumerated for salvage services: *Akerblom* v. *Price*, L. R., 7 Q. B. Div.

Slander.

Of Title—Pleading.—In actions for slander of title, the 124th sect. of the Practice Act is applicable, so that any meaning deemed advisable by the plaintiff, may be imputed to the words: *Andrew* v. *Deshler*, 14 Vroom.

In pleading, it is sufficient to allege that the words are false and malicious, without laying a *scienter*, even when the words may have been part of a privileged communication: *Andrew* v. *Deshler*, 14 Vroom.

Statute.

City Ordinance imposing Penalty—Authorization by Councils after Penalty Incurred.—After a building was erected in violation of a city ordinance, and the right to recover the penalty under it had accrued to the fire department, the common council passed a resolution authorizing its erection. *Held*, that such after-authority, without any resolution to remit the penalty already incurred, constitutes no defence to the action to recover the penalty: *State, Clark, Pros.*, v. *Fire Department of Elizabeth*, 14 Vroom.

Subrogation. See *Partnership*.

Surety.

Judgment against Principal—Liability of Surety.—In the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor: *Ex parte Young; In re Kitchen*, L. R., Ch. Div.

Douglass v. *Howland*, 24 Wend. 35, followed: *Id.*

Trial.

Trial on Merits—Effect of Argument.—When, at the trial, the parties agree to amend the issue and try the case on the merits, such agreement has the effect merely of waiving exceptions as to matters of form, and does not, in any other respect, affect the legal rights, on either side: *Banghart* v. *Flummerfelt*, 14 Vroom.

Trust and Trustee. See *Action*.

Liability of Trustee.—When a trust has been determined by the accomplishment of the purposes for which it was created, and the trustee's bond has been surrendered, and he has been practically discharged by a performance of all the trusts, he is not thereby necessarily released

from responsibility. When the trustee has performed all the trusts, reconveyed the balance of the trust property, and rendered his accounts to the *cestui que trust*, which are by the latter received in final settlement, subject to rectifications in relation to interest and compensation, assumpsit for money had and received may be maintained by the *cestui que trust* against the trustee to correct the accounts, and receive any balance in his favor, upon a proper re-stating of the accounts: *Howard* v. *Patterson*, 72 Me.

Vendor and Purchaser.

Restrictive Covenant—Constructive Notice—Lessor's Title.—A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title: *Patman* v. *Harland*, L. R., 17 Chan. Div.

Way.

Adverse Possession—Way occupied by the Public—Presumption.—Merely using a way, open to, and occupied by the public, for the purpose of getting water for cattle and the family, has no tendency to prove that the use is adverse; but permissive: *O'Neil* v. *Blodgett*, 53 Vt.

Such occupancy or use, with the public, raises the presnmption that it is not adverse; which the defendant must meet and overcome by evidence: *Id.*

The use must not only be open, notorious and continuous; but under a claim of right, brought to the attention of the plaintiff: *Id.*

Right of Way from Necessity, or by Implication.—When the real estate of a deceased person is divided among the heirs by commissioners appointed by the Probate Court, a right of way, of necessity or by implication, may exist over one part to another part of said real estate: *Goodall* v. *Godfrey*, 53 Vt.

If such right of way is appurtenant to that portion set out as dower, and not simply appurtenant to the freehold estate of the dowager, it is not extinguished on the death of the widow; and passes to a grantee, or purchaser: *Id.*

Distinction, as to a right by implication, between a partition among heirs, and a purchase by a stranger; *Id.*

So far as it is a question of necessity, reasonable, not strict, necessity is the test; but such right is determined not on the ground of necessity alone, but by the acts of the parties and in the light of circumstances: *Id.*

Witness.

Examination of—Practice.—A witness cannot, without leave of the court, be re-examined on a matter as to which he has been previously examined; but the ground of objection must be specifically stated when he is recalled, or his testimony will not be excluded. The rule, however, does not prevent the recalling of a witness in rebuttal: *Osborne* v. *O'Reilly*, 34 N. J. Eq.