ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ARKANSAS.[2]

SUPREME COURT OF IOWA.[3]

COURT OF ERRORS AND APPEALS OF MARYLAND.[4]

SUPREME COURT OF TENNESSEE.[5]

ACTION

Insurance—Party to whom Loss Payable—Right to Sue in own Name.—An insurance policy issued to Coates & Bro. contained the clause, "loss, if any, payable to the Savings Bank of Baltimore, mortgagee." *Held*, that C. & Bro, with the express written consent of the Savings Bank of Baltimore, could, in case of loss, bring an action on the policy, in their own names: *Coates* v. *The Pennsylvania Fire Ins. Co.*, 58 Md.

ADMIRALTY.

Jurisdiction—Tort—Injury to Consignee boarding Vessel at Wharf—Negligent Stowage.—The jurisdiction of courts of admiralty extends to a suit against the owners of a vessel by one who, expecting a consignment of goods by the vessel, and in accordance with a general custom, went aboard of her upon her arrival at the wharf, and, while proceeding to the office, was injured by the fall of bales negligently stowed: *Leathers* v. *Blessing*, S. C. U. S., Oct. Term 1881.

Act of Feb. 16th 1875—Constitutionality of—Limitation of Appeal to Question of Law—Refusal to find certain Facts—Bill of Exceptions.—The Act of Congress of Feb 16th 1875, confining the appellate jurisdiction of the Supreme Court in admiralty to questions of law arising on the record, is constitutional: *Duncan* v. *Steamship Francis Wright*, S. C. U. S., Oct. Term 1881.

If the court below refuses to make a finding as to a material fact, or finds a fact which is not supported by any evidence whatever, the ruling may be brought up for review by bill of exceptions, but this rule does not apply to mere incidental facts which only amount to evidence bearing upon the ultimate facts of the case: *Id.*

Where the ground of the appeal is the refusal to find a certain fact, it should appear that appellants called the attention of the court to the fact as a material one in the cause and to the testimony which conclusively proved it, and such testimony should be contained in the bill of exceptions. And so if the exception is as to facts that are found, it should be stated that it was because there was no evidence to sustain

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 15 Otto.

[2] From B. D. Turner, Esq., Reporter; to appear in 38 Arkansas Reports.

[3] From Hon. John S. Runnells, Reporter; to appear in 57 Iowa Reports.

[4] From J. Shaaff Stockett, Esq., Reporter; to appear in 58 Maryland Reports.

[5] From Hon. Benjamin J. Lea, Reporter. The cases will probably appear in 8 or 9 Lea.

them, and then so much of the testimony as is necessary to establish this ground of complaint should be incorporated in the bill of exceptions: *Id.*

AGENT. See *Bills and Notes.*

BANKRUPTCY. See *Debtor and Creditor.*

BILL OF EXCEPTIONS. See *Admiralty.*

Statement of Charge.—The bill of exceptions should not set forth the charge of the court in full. Only such parts should be given as will point the exceptions; all else is unnecessary and produces only inconvenience. The judges of the court below should withhold their signatures to the bill until it is freed from all matter not essential to explain and point the exceptions: *United States* v. *Rindskopf*, S. C. U. S., Oct. Term 1881.

BILLS AND NOTES.

Signing—Fraud—Negligence—Agent.—What constitutes reasonable care and diligence in the execution of an instrument is ordinarily a question of fact for the jury. Where a party trusts to the agent of the payee to read a note correctly, without calling upon a member of his family to read it for him before signing, it is not, as a matter of law, negligence: *Hopkins* v. *Hawkeye Ins. Co.*, 57 Iowa.

The fraudulent acts of an agent, committed in the direct line of his employment, will render the principal liable: *Id.*

It is competent to show by parol, that because of the fraud of a party to an instrument, it does not express the real agreement: *Id.*

Want of Consideration—Evidence.—As between the immediate parties to a negotiable promissory note, while the note itself is *prima facie* evidence of the consideration, the question of consideration is always open; and it is competent to the defendant to show, by parol, that there was no sufficient consideration, or that the consideration had failed, or that the paper had been given for accommodation merely: *Ingersoll* v. *Martin*, 58 Md.

CHARITY.

Uncertain designation of Beneficiaries—Next of Kin.—The residuary clause of a will, provided as follows: "Whatever balance, if any, shall remain after payment of my debts and all necessary expenses, I direct my executor to divide proportionally between benevolent associations of this city, for the benefit of white and colored children." On a bill filed by the executor to obtain a judicial construction of said clause, it was *held:* 1st. That said clause was void; first, because the benevolent associations to which the testator referred, were not named or designated in the will; and second, because the beneficiaries for whose use the gift was intended, were undefined and uncertain. 2d. That the next of kin of the testator were entitled to the fund: *The Henry Watson Children's Aid Society* v. *Johnston*, 58 Md.

COMMON CARRIER.

Railroad—Liability for Baggage—Check to Point beyond its own Line.—A carrier contracting, without any limitation of responsibility, to

carry the baggage of a passenger, and giving a check therefor, to a given point beyond the terminus of the carrier's line, becomes liable for the carriage of such baggage to the point to which it is checked, notwithstanding that its owner may purchase and travel upon a coupon ticket: *Louisville and Nashville Railroad Co.* v. *Weaver*, 8 or 9 Lea.

Plaintiff bought tickets from the defendant railroad for transportation for herself and family from Memphis to San Francisco, each ticket having separate coupons for each carrier over whose road the route lay. Defendant gave plaintiff a check for the carriage of her baggage to Omaha, a point beyond its own line. The baggage was lost before reaching Omaha, but after leaving defendant's line. *Held*, that defendant was liable for the loss: *Id.*

CONSTITUTIONAL LAW. See *Admiralty.*

CONTRACT.

Consideration—Release—Subsequent Promise.—If a debtor by paying part of his admitted debt, obtains from his creditor an agreement to release the residue, such an agreement is *nudum pactum*, and therefore inoperative. But a release under seal imports consideration, and such a release is a sufficient discharge without anything more: *Ingersoll* v. *Martin*, 58 Md.

A promise to pay a debt, after it has been voluntarily released by the creditor, is not supported by a sufficient legal consideration to make it binding: *Id.*

Charge for use of Railroad—Use of Road while refusing to pay Price —Quantum Valebant.—A., who was the proprietor of a railroad, informed B., who had been previously using it, that for all cars subsequently shipped over it, he would charge $2 each; B. immediately replied that he would not pay that amount, and continued to use the road. Upon bill filed by A., seeking to collect from B. $2 for each car, it was *held*, that he could only recover the reasonable value of the use of the road: *Curtis* v. *Giers*, 8 or 9 Lea.

CORPORATION.

Assets a Trust Fund for Creditors—Purchase by Director.—The assets of an incorporated company are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust. A director of the company is conclusively presumed to know its pecuniary condition, and his purchase of the assets will not be *bona fide*, and without notice of the trust: *Jones* v. *Ark. Mech. and Agl. Co.*, 38 Ark.

The purchase of the assets of an incorporated company by a director of the company, is not void, but only voidable at the instance of a party in interest: *Id.*

COST. See *Trustee.*

DAMAGES. See *Equity.*

DEBTOR AND CREDITOR. See *Partnership.*

Fraudulent Conveyances, when impeachable by Subsequent Creditors. —A voluntary conveyance may be impeached by a subsequent creditor

on the ground that it was made in fraud of existing creditors; but to do so, he must show either that actual fraud was intended, or that there were debts still unpaid which the grantor owed at the time of making it: *Toney* v. *McGehee*, 38 Ark.

Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, and circumstances of mere suspicion, leading to no certain results, are not sufficient proof of it: *Id.*

Fraudulent Conveyance—Intent to avoid Claim for Tort.—To render a conveyance invalid, as between a fraudulent grantor and his grantee, it is not necessary that the fraudulent intent, or knowledge, should be traced to the grantee: *Weir* v. *Day*. 57 Iowa.

A person having a claim for a tort is a creditor, and where the conveyance was made with the intent in part to evade fines and judgments which might be obtained for torts, it renders the conveyance wholly fraudulent: *Id.*

Mortgage to Creditor to Defraud other Creditors.—A mortgage executed by an insolvent mortgagor and covering his entire estate, to a creditor who knows of his insolvency and who for the purpose of giving him a fictitious credit, conceals the mortgage and withholds it from the record and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he cannot pay. is void at common law: *Blennerhasset* v. *Sherman*, S. C. U. S , Oct. Term 1881.

Such mortgage is void under the Bankrupt Act although executed more than two months before the filing of the petition: *Id.*

Decedents' Estates.

Insolvent Estate—Liability of Land—Improvements by Heirs.—An executrix, who was authorized by the will to convey portions of the realty to the female heirs upon their marriage, conveyed a lot to N., whose husband, believing the estate solvent, erected valuable improvements thereon; the estate subsequently became insolvent. *Held*, that the husband, upon paying what would be the present value of the lot without the improvements, could hold the lot: *Gillespie* v. *Murphy*, 8 or 9 Lea.

Deed.

Consideration—Support of Parents—Failure of.—A conveyance made upon the consideration of support of parents will be set aside when the evidence shows an abandonment by all the parties, of the contract of support: *Jewell* v. *Reddington*, 57 Iowa.

Descent.

Illegitimate Children—Transmission of Inheritance—Change of Laws of Descent.—Children of the same mother, whether legitimate or illegitimate, may transmit an inheritance to any and all collateral relations on the mother's side who are of her blood: *Gregley* v. *Jackson*, 38 Ark.

Laws of inheritance rest in public policy; and during the life of the person owning the property, may be changed at will, without any violation of contractual or vested rights. No one has a vested right to be the future heir of one living: *Id.*

DURESS.

Deed by Married Woman—Evidence.—To set aside a deed made by a married woman, on the ground of duress or undue influence, where it appears from the proof that she was a lady of good intelligence and capacity, in full possession of her mental faculties, and the deed shows upon its face that she appeared with her husband before a justice of the peace, and solemnly acknowledged it to be her act, requires the clearest and most satisfactory evidence: *Linnenkemper* v. *Kempton*, 58 Md.

EQUITY. See *Husband and Wife.*

Injunction—Taking of Bond—Jurisdiction of Court over Question of Damages—United States Courts—Appeal.—Where in an equity cause an injunction has been granted and an injunction bond required, the court has, on the final disposition of the cause, power to make a decree granting or denying damages on account of such injunction: *Russell* v. *Farley*, S. C. U. S., Oct. Term 1881.

Such power is an inherent one not depending on any provision in the bond, nor on express law or rule of court, and it may be exercised by a circuit court of the United States into which the suit had been removed, although the state court from which it was removed could not, under the state statutes, have determined the question of damage: *Id.*

Semble. The court may also assess the amount of the damages without requiring an action of law upon the bond: *Id.*

The decision of the court on the question of damages approaches so near to an exercise of discretion that it would require a very clear case to induce the appellate court to reverse: *Id.*

Cause Cognisable at Law—Failure of Ground of Equitable Relief.—Where a cause of action cognisable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law: *Mitchell* v. *Dowell*, S. C. U. S., Oct. Term 1881.

ERRORS AND APPEALS. See *Bill of Exceptions.*

EVIDENCE. See *Bills and Notes.*

EXECUTION.

Levy—How Made.—To make a legal, valid levy upon personal property, the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass. A levy under which the officer does not have actual control of the personal property levied upon, with power of removal, is invalid: *Rix* v. *Silknitter*, 57 Iowa.

EXECUTORS AND ADMINISTRATORS.

Power of Sale—Does not Include Power to Mortgage—Renewal of Decedents' Notes—Personal Liability of Executrix—Subrogation.—An executrix has no authority, unless it is expressly or impliedly conferred by the will, to mortgage real assets of the estate for money borrowed by her for the purpose of paying debts of the estate; and the

fact that she is authorized by the will to sell realty for reinvestment or distribution, will not impliedly empower her to borrow money and mortgage realty therefor: *Gillespie* v. *Murphy*, 8 or 9 Lea.

An executrix cannot borrow money and charge her estate for its repayment, and persons lending her money for use in payment of the debts of the estate, do not thereby become creditors of the estate but personal creditors of the executrix, who may limit her personal liability by agreeing to pay only out of the assets of her testator, but she cannot thereby charge her estate: *Id.*

An executrix renewing notes of her testator makes them her personal obligations, even though she expressly contracts as executrix: *Id.*

Persons lending money to an executrix, payees of notes renewed by an executrix, and mortgagees for sums loaned the executrix, cannot prove as creditors of the estate under an administration bill; but the executrix may prove as creditor to the extent that sums so borrowed by her have been used in satisfying valid charges against the estate, and such creditors may by cross-bill be substituted to her rights, and thus become general creditors of the estate: *Id.*

Express Company.

Privilege Tax—Railroad doing Express Business.—A foreign railroad company having an office within a state, and which carries on as part of its business a regular "express business," is liable to pay a privilege tax which is by statute required to be paid by "all express companies doing business in the state:" *Memphis & Little Rock Railroad* v. *State*, 8 or 9 Lea.

Fraud.

Misrepresentation—Expression of Opinion.—Whenever property of any kind depends for its value upon contingencies which may never occur or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character, and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance on it may produce: *Gordon* v. *Butler*, S. C. U. S., Oct. Term 1881.

Semble. For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them where deception is designed and injury follows, an action may lie: *Id.*

Husband and Wife.

Alimony—How Enforced—Jurisdiction of Chancery—Courts of chancery have jurisdiction to order the husband to pay *ad interim* alimony to his wife to enable her to prosecute her suit for divorce, and to enforce it by all or any of the means by which courts usually compel obedience—whether by execution or other orders, or by proceedings as for contempt; and if he be the plaintiff, and his wife's answer a cross-

complaint, his complaint may be dismissed for disobedience to the order, and the cross-complaint prosecuted to final decree. An appeal from an order for *ad interim* alimony may be taken immediately: *Casteel* v. *Casteel*, 38 Ark.

Alimony should not be declared a lien upon the husband's lands. Its payment may be secured by sequestration or by exacting securities from him: *Id.*

INJUNCTION. See *Equity*.

INSURANCE. See *Action*.

JUDICIAL SALE.

Covenants of Warranty—Right of Purchaser to Benefit of.—A covenant of warranty runs with the land and enures to the benefit of a purchaser at a judicial sale. One who buys the land at a sale in a vendor's suit, to enforce his lien, may sue the vendor for a subsequent eviction, which constitutes a breach of vendor's warranty to his vendee: *Williams* v. *Berg*, 8 or 9 Lea.

LANDLORD AND TENANT.

Right to Crop as against Mortgagee.—When a tenant abandons his crop and fails to perform the terms of his lease, the landlord may gather, gin and bale the cotton cultivated by him, and take out of it and retain against the tenant's mortgagee of the crop the expenses of preserving it from waste and preparing it for market, as well as the rent: *Fry* v *Ford*, 38 Ark.

LIMITATIONS, STATUTE OF.

Fraudulent Conveyance—Right of Creditor—Joint Friendly Possession.—The Statute of Limitations in favor of a fraudulent or voluntary grantee begins to run against the creditor of the grantor who seeks to enforce his debt against the property conveyed, from the time when such creditor has a right of action to test the validity of such conveyance: *Ramsey* v. *Quillen*, 8 or 9 Lea.

Adverse possession for the statutory period after the creditor's claim matured, first by a son to whom the debtor had conveyed, then by the wife of the debtor to whom the son conveyed, and then by another son to whom the wife had conveyed, is sufficient to bar the creditor's right: *Id.*

In cases of joint friendly occupation of land the benefit of such possession enures to him who has the legal title: *Id.*

Occupation by husband and wife, where the legal title has been conveyed to the wife and registered, and possession is held openly under such deed, enures to the benefit of the wife. She cannot be deprived of the benefit of the Statute of Limitations by such joint possession, nor is she required to live apart from her husband in order to hold her land: *Id.*

MASTER AND SERVANT.

Contract for Particular Time—When entire—Action for Part Performance.—When a contract for service is for a particular time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly,

without a sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit*: *Hibbard* v. *Kirby*, 38 Ark.

MORTGAGE. See *Landlord and Tenant; Surety.*

After acquired Title—Judgment Liens.—A mortgage of lands not owned by the mortgagor, will attach and become a lien thereon, there being no intervening equities, the moment the mortgagor acquires title to the land, and it cannot be divested by, or rendered subordinate to, the lien of subsequent judgments: *Rice* v. *Kelso*, 57 Iowa.

Holders of judgment liens, not made parties in the foreclosure of a superior mortgage, have their right of redemption, but cannot acquire titles under execution sales that will defeat the mortgage title: *Id.*

MUNICIPAL CORPORATION. See *Negligence.*

NEGLIGENCE. See *Railroad.*

Municipal Corporation—Diversion of Stream—Contributory Negligence.—In an action against a city to recover for an injury to a building, alleged to have been caused by the wrongful and negligent obstruction of the natural channel, and diversion of the course of a stream by the defendant, the failure of plaintiff to use ordinary diligence and effort to prevent damage, and to incur moderate expense, if thereby the injury might have been prevented, would constitute contributory negligence, and entirely bar recovery; and an instruction that in such case he would still be entitled to recover such sum as would have prevented the injury if it had been expended, was erroneous: *Hoehl* v. *City of Muscatine*, 57 Iowa.

Where a stream meanders through a city, and lots and streets have been platted without reference to it, nor bounded by it, the doctrine of riparian proprietorship is not applicable: *Id.*

Railroad—Burden of Proof.—An action in the name of the state was brought against a railroad company to recover damages for a death alleged to have been caused by the negligence of the defendant. The deceased was found under the cars of the defendant mortally wounded. There was no testimony showing in what manner he got under the cars. Whether he was attempting to get on them while in motion, or fell while attempting to cross the track, was not explained by the evidence. The cars were on a siding, and going at the rate of one mile an hour. *Held*, 1. That the jury were properly instructed that "under the pleadings and evidence in the cause the plaintiff was not entitled to recover." 2. That the burden was upon the plaintiff in the first instance to prove negligence or want of ordinary care on the part of defendant's agents causing the accident: *State, to use of Miller*, v. *The Baltimore and Ohio Railroad Co.*, 58 Md.

The place where the accident happened was not at a street, or highway, or a crossing-place. The defendant was entitled to a clear unobstructed track, and could not presume that any one would intrude thereon. There was no evidence that the deceased had any right to go upon the track. *Held*, that even assuming that there was some evidence that the cars had no brakeman on them while being run upon the sid-

ing, that fact would be no ground for charging the defendant with culpable negligence: *Id.*

PARTNERSHIP.

Voluntary Conveyance—Constructive Fraud—Subsequent Creditors.—Where a member of a partnership, which was largely indebted, made a voluntary conveyance of all his individual property, but without any purpose to defraud the firm creditors, such conveyance would be constructively fraudulent, and liable to be avoided: *Barhydt* v. *Perry*, 57 Iowa.

Where the conveyance was voluntary, and included all of the individual property of one member of a partnership, which was largely indebted at the time, subsequent creditors whose means have been used to pay off the prior indebtedness will be subrogated to the rights of the prior creditors, and they may avoid such conveyance: *Id.*

Unauthorized Suit by one Partner—Ratification by Silence—Ignorance of the Law.—Where a suit is brought in the name of a firm by one partner, without the knowledge or consent of his copartners, and the latter upon learning of it express their disapproval, but take no steps to have it dismissed, and wait until a decree entered by the lower court in their favor is reversed on error and a decree entered against them, they cannot escape responsibility or claim relief against the execution of the final decree: *Harris* v. *Mosby, Receiver*, 8 or 9 Lea.

In such case it makes no difference that their acquiescence was in ignorance of the law, and in consequence of the advice of counsel that they were legally bound by the institution of the suit: *Id.*

RAILROAD. See *Express Company.*

Negligence—Rate of Speed.—In an action against a railroad company for the killing of plaintiff's mules by a train, the court charged that if at the rate of speed the train was running it could not have been stopped within the distance at which the headlight upon the locomotive would discover obstructions upon the track, and the jury should be of the opinion from these facts that defendants were reckless in so running the train, the defendants were liable notwithstanding all the prescribed precautions were observed. *Held*, that this was error, as the fact that the train could not be stopped within the distance mentioned was not the true test of negligence, although it might be evidence to be considered with all the other circumstances: *Milam* v. *L. & N. Railroad Co.*, 8 or 9 Lea.

SALE.

Warranty—Patent Defects—Fraud.—Neither warranties nor false representations bind the maker, regarding things patent to any observer who would take the trouble to examine the article, where the aggrieved party has the opportunity of seeing it. But where one of the parties declines the examination on the grounds of his want of experience and judgment, and expressly declares that he confides in the judgment of the other, this imposes upon the other, if he accepts the trust, the duty of fair representations, even as to matters which might easily have been seen by one well acquainted with the subject of the negotiation; but even then he is bound only for a fair exercise of his judgment, and is not liable for an honest mistake: *Hanger* v. *Evins*, 38 Ark.

If a vendor, experienced in the manufacture and use of an article, knows that the purchaser is without experience in such things, and that there are material defects in it, which are not apparent to ordinary observation, and he deceitfully induces the purchaser not to inquire into its condition, he is guilty of a fraud, for which the purchaser may recover: *Id.*

If a vendor knows the purposes for which an article is intended by the purchaser, and so represents to him, and also knowingly and fraudulently represents that he knows the purchaser's business, and that the article is well fitted for it, and the purchaser rely on such representations in making the purchase, and they are untrue, it is a fraud, for which he may recover: *Id.*

Warranty—Particular Purpose.—Where a known, described and defined article is ordered, even of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known. described and defined thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. In such case the buyer takes upon himself the risk of its effecting its purpose: *Rasin* v. *Conley*, 58 Md.

This doctrine applies to sales of fertilizers by those who manufacture them: *Id.*

Specific Performance.

Decree for Part only—Compensation for Residue—Measure of.—Where a vendor cannot convey all the lands he has contracted to, the vendee may have specific performance for the part he can convey, and as an incident to the suit, compensation for the residue; but courts of equity will not assume jurisdiction for the sole purpose of awarding damages for a breach of contract to convey, where the vendee knows at the institution of the suit that the vendor cannot convey: *Bonner* v. *Little*, 38 Ark.

Where a vendee of land by title-bond elects to take under the contract the part which the vendor can convey, and compensation for the residue, the price should be abated in the same proportion to the whole amount, as the value of the whole tract is diminished by the deficiency: *Id.*

Subrogation. See *Executors; Partnership.*

Surety.

Joint Note—Verbal Release of one Maker—Mortgages—Application of Proceeds.—Where two persons gave their joint note for borrowed money, of which, by an agreement known to the lender, each was to have one-half, it was not a case of suretyship, but each was a principal for the whole amount; and a verbal agreement of the lender upon payment of one-half by one maker to look to the other for the balance due on the note, not shown to have been based upon a consideration, was not binding: *Small* v. *Older*, 57 Iowa.

Where the proceeds of mortgages executed to secure an individual note and a joint note were not sufficient to pay both, the holder of the notes was under no obligation to apply the sum realized upon both notes, *pro rata*, but might apply the entire sum upon the individual note: *Id.*

Taxation. See *Express Company.*