

bear in mind that this condition is a reasonable one, in that it is of great consequence to the insurer as a protection against fraud to know whether other insurance exists; and it is said, therefore, that this provision is not regarded with the jealousy due to other provisions which work a forfeiture, but is upheld as a fair and just provision for a reasonable and proper purpose: May on Ins., sect. 346.

New trial granted.

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## ABSTRACTS OF RECENT DECISIONS.

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

SUPREME COURT OF ILLINOIS.<sup>2</sup>

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

COURT OF CHANCERY OF NEW JERSEY.<sup>4</sup>

SUPREME COURT OF WISCONSIN.<sup>5</sup>

### ATTORNEY.

*Liability to Officer for Fees.*<sup>1</sup>—An attorney at law is liable to the officer for his fees for the service of writs delivered by him to such officer, although he is neither the plaintiff nor a party in interest; likewise to the clerk of courts for his fees on writs delivered by him to such clerk for entry. And neither the officer nor the clerk is required to perform the services without a prepayment of their respective fees: *Tilton v. Wright*, 74 Me.

### CONSTITUTIONAL LAW.

*Criminal Law—Conspiracy against Civil Rights—Sect. 5519 Rev. Stat.*—Sect. 5519 Rev. Stat. making criminal a conspiring or going in disguise “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws” was not authorized by sect. 2, of art. 4, of the original constitution or by the 13th, 14th or 15th amendment thereof, and is unconstitutional: *The United States v. Harris*, S. C. U. S., Oct. Term 1882.

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<sup>1</sup> Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 16 Otto.

<sup>2</sup> From Hon. N. L. Freeman, Reporter; to appear in 105 Ill. Reports.

<sup>3</sup> From J. W. Spaulding, Esq., Reporter; to appear in 74 Me. Reports.

<sup>4</sup> From Hon. John H. Stewart, Reporter; to appear in 36 N. J. Equity Rep.

<sup>5</sup> From Hon. O. M. Conover, Reporter; to appear in 56 and 57 Wis. Reports.

CONTRACT. See *Master and Servant*.

*Agreement to pay Salesman Share of Profits—Construction of—Interest on Loans.*—A contract for the employment of a salesman for a series of years provided that the salesman should be paid for his services annually a sum equal to one-fifth of the net profits of the business, which sum it was guaranteed should not be less than \$7500 a year, and that at the end of each year the gross profits of the business should be ascertained, from which should be deducted the total expenses and losses incurred in such year in the business of the employers, and that a sum which should be equal to one-fifth of the residue should be the compensation, and provided further that the house should be charged with ten per cent. on the actual cost of certain goods manufactured elsewhere, on four months' time, with interest, and that the salesman was not to be regarded as a partner in the business. *Held*, that in the absence of any special agreement, or custom having the force of law, to the contrary, the employers could not charge in the expense account the interest paid by them on temporary loans for money used in the business, and that it was no concern of the salesman whether his employers had the ready means to carry on the business, or would be compelled to borrow the whole or any part of it for that purpose: *Selz v. Buel*, 105 Ill.

Where a salesman in a wholesale house is employed to be paid as his salary or compensation a sum equal to one-fifth of the net profits of the business of his employers at the place where he is employed, with a guaranty that such sum shall be equal to \$7500 per year, the compensation so to be paid him will not be estimated as a part of the expenses to be deducted from the gross profits of the business. A different construction would require the salesman to pay one-fifth of his own salary after reaching \$7500: *Id.*

CORPORATION. See *Railroad*.

*Powers of.*—The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited: *Green Bay Railroad Co. v. Union Steamboat Co.*, S. C. U. S., Oct. Term 1882.

CRIMINAL LAW. See *Constitutional Law*.

## DEBTOR AND CREDITOR.

*Recovery of Property transferred on a Contract malum prohibitum.*—In the case of a contract which is merely *malum prohibitum*, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received: *The City of Parkersburg v. Brown*, S. C. U. S., Oct. Term 1882.

DEED. See *Duress*.

## DURESS.

*What will avoid Deed.*—Mere vexation and annoyance, leading to the execution and acknowledgment of a conveyance of land in trust for the grantor and his heirs, is not sufficient to establish such duress as to avoid the deed, unless it be further shown that the grantor's mind was in that condition that by reason of such vexation and annoyance a state of insanity was produced, which existed at the time of the execution and acknowledgment: *Brower v. Callender*, 105 Ill.

EQUITY. See *National Banks*.

*Conveyance by Agent without consideration—Adequate Remedy at Law.*—If one authorized by power of attorney to sell and convey lands to another, convey the same without consideration, the owner of the lands may treat such conveyance as a nullity. *Campbell v. Campbell*, 57 Wis.

Such owner has, therefore, an adequate remedy at law, by action to recover the possession of the lands, and cannot maintain an *equitable* action to have the grantee in such conveyance declared a trustee and to enforce a reconveyance: *Id.*

*Same Person Plaintiff and Defendant—Practice.*—A person cannot be both a plaintiff and a defendant in the same suit at law. In such case the remedy is by bill in equity, in which such decree may be had as will effect a proper adjustment of the respective rights and liabilities of all the parties interested: *Hayden v. Whitmore*, 74 Me.

## ERRORS AND APPEALS.

*Order refusing to allow Party to become Defendant.*—An appeal will not lie from a mere interlocutory order in a suit in chancery, as, from an order refusing to allow one to become a party defendant to the bill, there being no final decree in the case. Until such decree is entered it cannot be known that the refusal has prejudiced the applicant's rights: *Young v. Matthiesen and Hegeler Zinc Co.*, 105 Ill.

## EXECUTORS AND ADMINISTRATORS.

*Power to Mortgage—Implied from power to Sell.*—A power to mortgage is sometimes implied in a power to sell: *Loebenthal v. Raleigh*, 36 N. J. Eq.

Where a power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter: *Id.*

A will contained this clause, "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power to do so, either at public or private sale." The estate included a very large tract of land, which could only be sold to advantage as a whole, and whose value would be greatly depreciated by selling any part or parts of it, and by reason of its character and value a purchaser could only be obtained exceptionally and by effort. On an application by the executors (in which the beneficiaries under the will joined)—*Held*, that authority to mortgage it to

raise sufficient money to pay the debts after applying the personal estate, should be given : *Id.*

#### FIXTURES.

*Portable Furnace.*—A portable iron furnace for heating a church, standing on the cellar floor, and held in position by its own weight, and capable of being detached, and also its pipes, &c., without injury to the building, is not, as between mortgagor and mortgagee, a fixture : *Rahway Sav. Inst. v. Irving Street Baptist Church*, 36 N. J. Eq.

#### GUARDIAN AND WARD.

##### HUSBAND AND WIFE.

*Alimony—When not allowed.*—Alimony and counsel fees were originally allowed in divorce suits, because the wife was without other means of support, or of obtaining the money necessary to defray her expenses in the suit : *Westerfield v. Westerfield*, 36 N. J. Eq.

When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either : *Id.*

#### INJUNCTION. See *Railroad.*

*Violation of—Damages—Subsequent hearing on merits.*—A party not entitled to an injunction can suffer no legal damages for its violation. *Kaehler v. Dobberpuhl*, 56 Wis.

A court may, in vindication of its injunctive order, punish a party for a wilful violation thereof, notwithstanding such order ought not to have been granted; but it may not, in such case, order the party disobeying to pay any sums as an indemnity to the opposite party. *Id.*

A party against whom an injunction is issued upon an *ex parte* application has the legal right to demand a hearing upon the question of the regularity and propriety of issuing the same, and the fact that he may have violated such injunction does not deprive him of that right. *Id.*

#### INSANITY. See *Insurance.*

##### INSURANCE.

*Destruction of Property by insured while Insane—Suicide not conclusive Evidence of Insanity.*—The mere fact that a man commits suicide does not raise a presumption of his insanity at the time; but that fact, in connection with other evidence, is pertinent to the issue of insanity, especially where the suicide is immediately preceded by the murder or attempted murder of members of his family and the destruction of his property without any apparent motive or provocation. *Karow v. The Continental Ins. Co.*, 56 Wis.

Where there is nothing in the policy to the contrary an insurer is not released from liability because the property was burned by the assured while insane, nor unless the burning was caused by the voluntary act, assent, procurement or design of the assured. *Id.*

##### INTEREST.

*Contract to pay Interest on Interest—Consideration—Burden of Proof.*

—In a suit where the plaintiff seeks to recover interest on interest after due, the burden of proof is upon him to prove a promise to pay such interest, for a consideration deemed valuable in law, and an acceptance of such promise, either actual or constructive. *Edgerton v. Weaver*, 105 Ill.

Where forbearance is relied on as the consideration of a promise, the proof must show more than that it was followed by forbearance. It must appear, not only that the promise was made for the purpose of obtaining time, and that time was actually given, but also that the indulgence thus accorded was in pursuance of the request implied by the promise. *Id.*

#### LEGACY.

*Power given to Life Tenant to sell—Effect of.*—A gift of personal property for life, with power to the legatee to use it as she may deem proper, or to sell it, or any part of it, for her benefit, as she may deem needful or best—*Held*, to be an absolute gift. *Kendall v. Kendall*, 36 N. J. Eq.

MASTER AND SERVANT. See *Negligence*.

*Entire Contract—Unreasonable Hours—Extra Compensation—Discharge.*—A contract to work for a period of seven months for \$14 per month is an entire contract, and recovery can be had thereon only by showing full performance or a valid excuse for non-performance. *Kopitz v. Powell*, 56 Wis.

A servant is not required to work during unseasonable hours unless the contract or the nature of the employment makes it reasonable that he should do so. But if he voluntarily does so, it is no ground for claiming extra compensation, or that there is a breach of the contract by the employer. *Id.*

A mere request to perform such unseasonable service would not of itself justify a servant in quitting the employment; nor would his refusal to perform justify his discharge. *Id.*

MORTGAGE. See *Executors and Administrators*.

*Trustee in Deed of Trust—Agent of the Debtor as well as of the Creditor.*—A trustee in a deed of trust is the trustee of the debtor as well as of the creditor, and his relation imposes the duty of acting fairly, honestly, and for the best interests of all parties having rights in the property pledged, or fund, and to use all reasonable efforts to protect their several interests. For this purpose he must use the same efforts that prudent men usually employ in the protection of their own interests. *Ventres v. Cobb*, 105 Ill.

#### MUNICIPAL CORPORATION.

*When bound by Acts of Officers.*—The unauthorized acts of municipal officers are regarded as the acts of the corporation, when they are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular act relates: *City of Chicago v. The Chicago and Western Indiana Railroad Co.*, 105 Ill.

#### NATIONAL BANKS.

*Liability of Stockholders—Collusive Transfer of Stock—Form of*

*Remedy.*—Where the holder of shares of stock in a national bank, possessed of information showing that there is good ground to apprehend the failure of the bank, collusively transfers his shares to a person known to be irresponsible, with the design of substituting the latter in his place and thus leaving no one with any ability to respond for the individual liability imposed by § 12 of the Act of June 3d 1864, the transaction will be decreed a fraud on the creditors of the bank, and the transferrer will be held to the same liability to them as before the transfer: *Bowden v. Johnson*, S. C. U. S., Oct. Term 1882.

A bill in equity filed in such a case, praying for discovery as well as relief, the transfer being good between the parties, sustained: *Id.*

#### NEGLIGENCE.

*Accident from Fault both of Company and Fellow-Servant.*—If the negligence of a railroad company contributes to an injury the company is liable, even though the negligence of a fellow-servant was contributory also: *The Grand Trunk Railway Co. v. Cummings*, S. C. U. S. Oct. Term 1882.

*Water Fixtures—Liability of Landlord for—Damages from Overflow.*—When a bowl is set by the landlord in a tenant's room for his exclusive use, in which the apertures for the outflow of the water are not sufficient to carry off all the water delivered by the faucet if left open, and this defect and the tenant's negligence in using the bowl are together the cause of damage, the landlord is subject only to the liability of an owner, as distinguished from that of an occupant: *McCarthy v. York County Savings Bank*, 74 Me.

The liability of the landlord does not follow, from the fact that the building does not contain the latest and most improved system of water pipes. He does not insure against the negligence of his tenants, nor is he bound to construct his building so as to reduce the possibilities of damage from such negligence to an absolute minimum: *Id.*

There is no rule of law which forbids the use of faucets adjusted so as to be readily shut to prevent the escape of water, or which holds it an actionable negligence to maintain one in any instance without an outflow for all the water that the open faucet can deliver at full pressure, or a tort to put a tenant, who is responsible for his own acts in the possession of such a fixture: *Id.*

#### OFFICER. See *Municipal Corporation.*

*Liability of in Performance of Duty—Erroneous Return of Sheriff to Writ—Remedy.*—In cases where an officer is called upon by the nature of the service to be performed, to find some person or thing, or ascertain some fact, or determine some question, upon an inquiry and investigation to be instituted by him after the process comes into his hands, he is required to exercise reasonable care, skill and diligence in the performance of the duty, but he is not liable as an insurer: *Street v. Pennell*, 74 Me.

A sheriff, who erroneously certifies in a levy upon land of an execution-debtor that the appraisers were disinterested, when they were in fact interested, is not liable in damages therefor to the debtor, or to the person standing in the condition of the debtor, if not guilty of negligence in making such erroneous return: *Id.*

The remedy for an error thus committed by an officer lies in a motion to the court for leave for the officer to amend his return, and in the power of the court, under such motion, to extend the necessary relief upon just and equitable principles: *Id.*

PARTNERSHIP. See *Contract*.

PATENT.

*What is a Patentable Improvement—What use can be made of a Patent not set up in the answer.*—The design of the patent laws is, to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never their object to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures: *The Atlantic Works v. Brady*, S. C. U. S. Oct. Term 1882.

A patent not set up by way of defence, where there is no dispute as to the time it was issued, may be referred to, in connection with other testimony as to the invention, to fix the date thereof: *Id.*

PRACTICE.

*Demurrer.*—When judgment is rendered for the plaintiff on demurrer, the defendant has no right to have damages assessed by a jury: *Hanley v. Sutherland*, 74 Me.

RAILROAD.

*Contract between two Roads for Division of Earnings—Validity of.*—A contract between two connecting railroads for the division of earnings, according to the distance which each corporation shall have carried the passenger or freight for which the money is paid, is within the discretionary powers of the directors, and its execution cannot be enjoined at the instance of a stockholder, who does not show a dishonest or fraudulent purpose on the part of the directors in making such contract, and that he will be injured thereby: *Elkins v. Camden and Atlantic Railroad Co.*, 36 N. J. Eq.

A stockholder applied for an injunction to prevent the execution of a contract between connecting railroads, for the division of earnings on freight and passengers carried over such roads, making only the company of which he was a stockholder, a defendant. *Held*, that the other railroad company with which the proposed contract was to be executed, was a necessary party: *Id.*

*Purchase of other Road—Ultra vires—Injunction.*—The directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval.—*Held*, (1) That the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders. (2)

That it was void and against public policy, in that its object was to prevent lawful competition: *Elkins v. Camden and Atlantic Railroad Co.*, 36 N. J. Eq.

#### SALE.

*Acceptance of Goods—Waiver of Defects.*—Upon the delivery of goods on an executory contract of sale, the purchaser, having full opportunity for examination, waives defects in the goods unless he refuses to accept them under the contract, or accepts only on condition. A mere objection that the goods are defective will not prevent a waiver if they are accepted as a compliance with the contract. *Locke v. Williamson*, 40 Wis. 277. *Bonnell v. Jacobs*, 36 Id. 59; *Pearson v. Martin*, 28 Id. 265; *Merriam v. Field*, 39 Id. 578; *Morehouse v. Comstock*, 42 Id. 630 distinguished: *Olson v. Mayer*, 56 Wis.

SHERIFF. See *Officer*.

#### SHIPPING.

*Demurrage—Unreasonable Delay in Discharging.*—Where under a charter-party or contract of affreightment the duty of discharging the vessel rests upon the affreighters, and they unreasonably neglect to perform the same seasonably, they will not be relieved from the payment of just damages in the nature of demurrage by the omission of all express provisions in the contract for the payment of demurrage, or express agreement as to the number of lay days: *Hayden v. Whitmore*, 74 Me.

In such case due diligence in the performance of their duty is impliedly required of the charterers, and they will be answerable to the owners of the vessel for want of it: *Id.*

#### TRUST.

*What constitutes Trust—Rights of cestui que trust.*—A widow set apart a portion of a sum of money received from insurance on her husband's life, in trust for her infant daughter, to be paid her on reaching her majority, and loaned the same, the notes and mortgages running to herself as trustee for the benefit of the daughter. With a portion of the fund she afterwards purchased land, the deed running to herself as trustee for the benefit of her daughter. The real estate so conveyed was by her procurement conveyed to her second husband (through a third person) without consideration on the part of the husband, he having full knowledge of the trust. Upon a bill in equity, brought by the daughter after arriving at full age, to compel her mother and step-father to convey the land, *Held*: 1. That the mother was trustee for her child; 2. That a trust of personal property is not within the Statute of Frauds, and may be created by parol; 3. That the trust was not revocable by the trustee; 4. That a trustee of personal property cannot rightfully change the same into real estate, but when so changed the *cestui que trust* may follow the substituted property, and such property will be subject to the trust originally created in the hands of a grantee without consideration and with notice of the trust; 5. That the complainant is entitled to a conveyance: *Cobb v. Knight*, 74 Me.