

However, his interest being that of a judgment creditor, an injury to the property of his debtor was not necessarily a loss to him. That depended upon the condition in which it left the debtor. If he still had sufficient property liable to an execution wherewith to satisfy the judgment, the creditor lost nothing by the fire. As happens every day he simply insured against a possible loss, which he was fortunate enough not to sustain.

The demurrer is sustained.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ARKANSAS.²

SUPREME COURT OF ILLINOIS.³

SUPREME COURT OF MAINE.⁴

SUPREME COURT OF RHODE ISLAND.⁵

ADMIRALTY.

Effect of Destruction of Vessel before Breaking Ground on right to Freight and Expenses.—Where a vessel, before she breaks ground for a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for the carriage of cotton by her to a foreign port, evidenced by a bill of lading, containing the usual and customary exceptions, and providing for the payment of the freight money on the delivery of the cotton at that port, is thereby dissolved, so that the shipper is not liable for any part of the freight money, nor for any of the expenses paid by the vessel for compressing and stowing the cotton: *Ellis v. Insurance Co.*, S. C. U. S., Oct. Term 1882.

AGENT. See *Attachment*.

ATTACHMENT.

Right of Officer to break into Premises.—An officer may break into a shop or other building not connected with a dwelling-house in order to serve process of attachment, provided he first asks admission, if any person is present to grant it, and is refused: *Clark v. Wilson*, 14 R. I.

He is not obliged to seek elsewhere for chattels to attach before breaking into such shop or building: *Id.*

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 17 Otto.

² From B. D. Turner, Esq., Reporter; to appear in 39 Ark. Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 105 Ill. Reports.

⁴ From J. W. Spaulding, Esq., Reporter; to appear in 74 Me. Reports.

⁵ From Arnold Green, Esq., Reporter; to appear in 14 R. I. Reports.

Bank Deposit as Agent.—A. sued B. and attached B.'s funds on deposit in a bank. The bank in its disclosure as garnishee showed that the deposit was in the name of "B., agent;" that it knew nothing of any principal for whom B. was agent, and that B. had never made known any principal. It appearing that no one had, as principal, ever claimed the deposit either before or after the garnishment: *Held*, that the bank was liable as garnishee of B.: *Procter v. Greene*, 14 R. I.

BILLS AND NOTES.

Note signed as Treasurer.—In an action upon a note reading as follows: "For value received as treasurer of the town of Monmouth, I promise to pay D. M. Ross or order \$160 in one year from date with interest. Wm. G. Brown, treasurer," it was not shown or claimed that the treasurer was authorized or had the permission of the town in its corporate capacity to issue the note in its behalf: *Held*, that the note must be regarded as the note of Brown, and not the note of the town: *Ross v. Brown*, 74 Me.

Indorsement of paid Note—Warranty.—An indorser of a note or bill that has been paid is liable upon his indorsement as upon a new contract, and no notice or demand is necessary to fix his liability. For an indorser of past due or dishonored paper impliedly warrants that it is a subsisting, unpaid obligation; just as he warrants that it is genuine, and not a forgery, or that it is not tainted by an illegal consideration as gaming or usury: *Airy v. Nelson*, 39 Ark.

COMMON CARRIERS.

Liability as Insurers—Contract limiting Liability.—At common law, a common carrier is an insurer of the goods which he undertakes to carry; and a contract of exemption from liability as insurer for loss by fire, &c., must, like other contracts, be founded upon some consideration: *Taylor v. Little Rock, M. & T. Railroad Co.*, 39 Ark.

CONTRACT.

Broker—Suit for Moneys Advanced and Services Rendered in Carrying out Alleged Immoral Contract—Evidence.—Evidence that an overwhelmingly large proportion of all contracts made for sale of produce, at the Board of Trade of Chicago, are mere settlements of differences, is not sufficient to justify a jury in presuming that such was the nature of the transaction in any particular case: *Rountree v. Smith*, S. C. U. S., Oct. Term 1882.

Where plaintiffs do not sue on such contracts, but for service performed as brokers and for money advanced for defendant at his request, though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it if proved, they are certainly not in the same position as a party suing for the enforcement of the original agreement: *Id.*

CORPORATION.

Street Railway—Power to use Steam—Charter.—A charter authorizing a company thereby incorporated to maintain and operate a street railway along and over a public street in an incorporated town, which

is silent as to the character of the motive power to be used for propelling the company's cars, will be intended as giving the right to use that kind of motive power which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was, at the time of passing the charter, in ordinary use: *North Chicago City Railway Co. v. Town of Lake View*, 105 Ill.

DAMAGES.

Bond—Penalty—Liquidated Damages.—When a bond is given in the sum of five hundred dollars, to be paid on the failure to make a drain for a certain purpose and in a specified time, the sum is to be regarded as a penalty and not liquidated damages: *Smith v. Wedgwood*, 74 Me.

A sum of money in gross, to be paid for the non-performance of a contract is, as a general rule, to be considered as a penalty and not liquidated damages: *Id.*

Measure of—Neglect to Supply Articles Sold.—The true measure of damages for a breach of a contract to sell and deliver five hundred gross of fruit jars, a part of which only were delivered, is the difference between the contract price and the market value of such articles at the time and place fixed by the contract for delivery. If such articles can not be had in the market where by the contract they were to have been delivered, they may be bought in the nearest market, and the additional cost of getting them there will be the cost in the market where they were to be delivered: *Capen v. De Steiger Glass Co.*, 105 Ill.

DECEDENTS' ESTATES.

Payment by Debtor to Foreign Administrator.—When a debt due to a deceased person is voluntarily paid by the debtor at his own domicile in a state in which no administration has been taken out, and in which no creditors or next of kin reside, to an administrator appointed in another state, and the sum paid is inventoried and accounted for by him in that state, the payment is good as against an administrator afterwards appointed in the state in which the payment is made, although this is the state of the domicile of the deceased: *Wilkins v. Ellett*, S. C. U. S., Oct. Term 1882.

DEED.

Signature by Third Party in Name of one of the Parties—Subsequent Acknowledgment—Estoppel.—A deed signed by B. with A.'s name, in A.'s presence, and under A.'s direction, is the deed of A.: *Goodell v. Bates*, 14 R. I.

If one whose name is signed by another to a deed, so far acknowledges the deed as to induce third persons to act on it as his, he may, without evidence in writing of an estoppel, be held precluded from subsequently denying the deed: *Id.*

EQUITY. See *Limitations, Statute of.*

Practice—Bill of Review—Time for Filing Extended when an Appeal had been taken.—A decree was made by a Circuit Court, in December 1873, against two plaintiffs. In January 1874, they

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appealed to this court. In December 1875, the appeal was dismissed for the failure of the appellants to file and docket the cause in this court. In September 1876, a bill of review was filed for errors in law: *Held*, that the bill was filed in time, though not within two years from the making of the decree, because the control of the circuit court over the decree was suspended during the pendency of the appeal: *Ensinger v. Powers*, S. C. U. S., Oct. Term 1882.

Obstructing Public Way—Special Damage—Right to bring Suit.—A. filed a bill in equity against B. to prevent his obstructing a strip of land between their estates and houses, which originally belonged one-half to the estate of each, but which had become a public way by fifty years' use. A. charged that the only access to his back door and yard was through the way over this strip of land. On demurrer to the bill: *Held*, that the bill sufficiently charged special damage to the complainant.

Held, further, that the bill was maintainable to enjoin B. from obstructing the strip as a private way, A.'s right not being affected by the public rights subsequently acquired.

Held, further, affirming *Sprague v. Rhodes*, 4 R. I. 301, that the bill was maintainable to remove the nuisance complained of, though the complainant might have other remedies, and though the bill charged neither irreparable mischief nor a right established at law: *Gorton v. Tiffany*, 14 R. I.

ESTOPPEL.

When mere Silence not Sufficient.—If one stands by silent when he should assert his claim, and by that induces a purchaser to believe that he has none, he will be estopped; but a mere knowledge that one is about to purchase, does not, of itself, impose upon the owner of an equity the duty of seeking him out and advising him against it: *Bramble v. Kingsbury*, 39 Ark.

EVIDENCE.

Conversations as to Written Contract.—Conversation between the parties to a written contract, after it has been executed and delivered, relating to a change of some of its provisions, is admissible in evidence: *Oakland Ice Co. v. Mazzy*, 74 Me.

HUSBAND AND WIFE. See *Replevin*.

Irrevocable Power of Attorney—When valid.—An "irrevocable power of attorney" to collect rents, given as security for money loaned, is between the parties an equitable mortgage of the rents: *Joseph Smith Co. v. McGuinness*, 14 R. I.

Such a power of attorney executed by a married woman and acknowledged in the statutory form for a married woman's deed is valid against her: *Id.*

INJUNCTION.

When granted to prevent a Trespass.—An injunction will not lie to prevent a simple trespass to property, consisting of a single act, where the person committing or threatening the trespass is able to respond in damages: but if he is insolvent, and trespasses of a grave character

are threatened to be repeated, equity will interfere to prevent the wrong by restraining the threatened trespass: *Owens v. Crosssett*, 105 Ill.

INSOLVENT LAW.

Effect of United States Bankrupt Law on—Revival of.—The Maine insolvent law of 1878 was a valid law when enacted, though its operation was suspended by the United States bankrupt law then existing. When the repeal of the bankrupt law took effect the insolvent law went into operation, and took cognisance of all acts within its provisions done while it was so suspended, and applied to contracts made during that time: *Palmer v. Hixon*, 74 Me.

INSURANCE. See *Partnership*.

Description of Property by Location—Subsequent Removal.—A policy of insurance against fire was issued on articles of furniture described as "all contained in house No.—, McMillen street, Providence, R. I." The insured, without the knowledge of the insurer, removed these articles to a house in another street, where they were consumed. *Held*, that the statement of the locality of the furniture was to be construed as a continuing warranty. *Held, further*, reversing *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347, that the insured could not recover: *Lyons v. Providence Washington Ins. Co.*, 14 R. I. .

Fire—Right to abandon Property.—A policy of insurance is only a contract of indemnity against actual loss; and the consignee of goods damaged in transit, has no right to abandon them to the insurance company and claim the whole insurance, except in case of total loss, or of such serious damage as to render them unmarketable: *Hicks v. McGehee*, 39 Ark.

INTOXICATING LIQUOR.

License from United States—Omission to obtain State License.—A license from the United States to sell liquor does not excuse one from obtaining license also as required by the law of the State; and a sale either on a steamboat or on land, without license from the county court of the county, is unlawful: *Pierson v. The State*, 39 Ark.

JUDICIAL SALE.

Rule of Caveat Emptor—Warranty by Executor.—It is a general and well-settled rule, that the doctrine of *caveat emptor* applies to all judicial sales, under which falls an administrator's sale of lands of his intestate to pay debts of the estate: *Tilley v. Bridges*, 105 Ill.

An administrator or executor selling lands under a decree of court has no authority to warrant the title of the land he sells, and the purchaser at such sale is bound to examine the title, or purchase at his peril. If he buys without an examination, and obtains no title, he must, as a general rule, suffer the loss arising from his neglect, unless fraud or mistake has entered into the transaction: *Id.*

LIMITATIONS, STATUTE OF.

Suit against County.—The Statute of Limitations may be pleaded by a county in bar of an action against it: *Gaines v. Hot Springs County*, 39 Ark.

Action against Carrier for Delay.—In an action for damages against a railroad company for unreasonable delay in the transportation of merchandise, where a portion of such unreasonable delay occurred more than six years prior to the date of the writ, and continued so that a portion of the delay was within the six years: *Held*, that whatever damage was occasioned by such delay as occurred more than six years before the commencement of the suit, was barred, but such damage as was occasioned by inexcusable delay within that time was recoverable: *Jones v. Grand Trunk Railway Co.*, 74 Me.

MASTER AND SERVANT.

Liability of Master for Negligence—Duties as to Employees.—A master is not liable for an injury to a servant occurring from the negligence of a fellow-workman, unless the latter was known to be careless or incompetent, so as to impute negligence to the master in employing him: *Fones v. Phillips*, 39 Ark.

When the performance of duties peculiar to the master, and properly appertaining to him as such, is intrusted to one who is, in other respects, a mere workman, upon the footing of others, such workman, *quo ad hoc*, and to the extent of the master's duty intrusted to him, stands in the master's place, and his negligence binds the master: *Id.*

Whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle-man whom he has selected as his agent, and to the extent of the discharge of these duties by the middle-man, he stands in the place of the master, but as to all other matters he is a mere co-servant, and the question is not whether the master reserved oversight and discretion to himself, but whether he did in fact clothe the middle-man with power to perform the duties to the servant injured: *Id.*

It is the duty of a master, in assigning a servant to duty at or about dangerous machinery, to give to the servant detailed and special warnings as to all latent dangers not discoverable by a reasonable and ordinary exercise of diligence by the servant; but the master is not required to explain patent dangers at all, which are ordinarily incident to the service, and which it may be reasonably expected, under the circumstances, the particular servant can see and appreciate: *Id.*

MORTGAGE. See *Husband and Wife*.

MUNICIPAL CORPORATIONS. See *Limitations, Statute of*.

Power to Declare a Nuisance—Use of Steam on Street Railways.—Under a general grant of power to declare what shall be a nuisance, town authorities will have no right to pass an ordinance declaring a thing a nuisance which is clearly not such, such as the trade and calling of a physician, druggist and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt to so declare them would be an unwarranted abuse of the power: *North Chicago City Railway Co. v. Town of Lake View*, 105 Ill

In doubtful cases, however, when a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power to declare and define what shall be nuisances, their action, under such circumstances, would be conclusive of the question: *Id.*

On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances, as, for instance, the digging of a pit, or erection of a house, or other obstruction in a public highway, and an ordinance declaring such things a nuisance would be valid on its face, and a conviction might be had under it without any extrinsic proof to show the act complained of was in fact a nuisance; and of this character is the use of steam for the purpose of propelling street cars along a public street in a thickly populated town: *Id.*

Right of Creditor—Power of Court to compel Levy of Taxes.—Where a city is, by its charter, limited to the levy of one per cent. of taxes for all purposes whatever, and the charter provides that three-tenths of that per cent. shall be for the payment of its bonded indebtedness, and the city does levy a one per cent. tax, the court, on the application of a creditor having recovered judgment on bonds of the city, will compel the city authorities to apply three-tenths of such taxes to the payment of such judgment, if that much is necessary. In such case the creditors are entitled to have this levy annually made, so long as necessary to discharge their debts, and the city cannot lawfully devote more than seven-tenths of that levy for any fiscal year to current expenses: *City of East St. Louis v. Underwood*, 105 Ill.

NEGLIGENCE.

Injury to Passengers by Joint Negligence of two Railroads—Right to Sue either Company.—Where a passenger on a railway train is injured by the mutual negligence of the servants of the company on whose train he is rightfully travelling, and of the servants of another company with whom he has no contract, there being no fault or negligence on his part, he or his personal representative may maintain an action against either company in default, and will not be restricted to an action against the carrier company on whose train he was travelling: *W., St. L. & P. Railway Co. v. Shacklet*, 105 Ill.

When not Contributory Negligence for Passenger to Ride with his Arm on Windowsill of Railroad Car.—A freight car was left standing on a side track so near the main track as to make a collision with an approaching train inevitable. A passenger on the train was sitting with his right elbow on the sill or base of an open window resting his head on his right hand. The corner of the coach, in which the passenger was riding, struck the freight car so that it jarred the passenger's elbow outside the window and his arm was crushed between the two cars: *Held*, that the managers of the road were culpably negligent in leaving the freight car in the position it occupied, and that it was not, under the circumstances, contributory negligence for the passenger to ride with his elbow on the sill of the open window: *Farlow, Receiver, v. Kelly*, S. C. U. S., Oct. Term 1882.

OFFICER.

Power to Remove.—In the absence of constitutional or legislative restriction, where no definite term of office is prescribed by law, the power of removal is incident to the power of appointment; and it is a corollary of this rule that where the appointing power may remove for cause, he is the sole judge of the existence of the cause: *Patton v. Vaughan*, 39 Ark.

Action on Official Bonds—Settlement with County Court.—In an action on a treasurer's official bond, his settlement with the county court is conclusive against him and his sureties: *Hunnicut v. Kirkpatrick*, 39 Ark.

PARENT AND CHILD.

Right to Custody.—The father of an infant child is entitled to its custody rather than the mother: *State v. Barney*, 14 R. I.

When the father has entrusted the child to its grandmother, the custody of the grandmother is in legal intendment that of the father: *Id.*

Hence, when the mother, assisted by her brother, forcibly took the child so entrusted from its grandmother, the force being exerted by the mother's brother and at the mother's request: *Held*, that the brother was criminally liable for assault and battery; *Id.*

PARTNERSHIP.

Insurance with Firm Moneys.—Where insurance against loss by fire is effected by a member of a firm in the firm's name, upon property of the firm, and the premium therefor is paid for from funds of the firm, though charged by such member to himself, the insurance will be for the benefit of the firm notwithstanding the member thus effecting it intends it for his own private benefit: *Tebbetts v. Dearborn*, 71 Me.

Right of Retiring Partner to Lien on Partnership Assets for Payment of Firm Debts.—If one partner, on a dissolution of the firm, sells his interest in the partnership stock of goods to his co-partner, relying alone upon the agreement of the latter to pay the firm indebtedness, the retiring partner will have no equitable lien on the goods for the payment of the partnership liabilities, that can be enforced in equity: *Parker v. Merritt*, 105 Ill.

But where, on the dissolution of a partnership, an amount of the stock of goods equal to the firm indebtedness is left with one who continues the business, to be converted into money, with which he is to pay the partnership indebtedness, he can not be held a purchaser, so as to subject the goods to the payment of his individual debts as against the equities of the retiring partner, but he is a trustee of such goods for the payment of the firm liabilities, and the trust may be enforced in equity by the retiring partner for the benefit of the partnership creditors, as against subsequent purchasers or execution creditors with notice of the equities of the retiring partner.

PATENT.

Practice—Dismissal of Bill.—The practice of dismissing a bill because the inventions described in the patent are not patentable, when no such defence is set up in the answer, is not unfair to the complainants

nor of doubtful propriety: *Slawson v. Railway Co.*, S. C. U. S., Oct. Term 1882.

PLEADING.

Averment of Time.—The general rule in torts and parol contracts is that the day when the tort was committed or the contract made, is not material. When made material by the defendant's plea, the plaintiff may reply by another day: *Duffy v. Patten*, 74 Me.

Joinder of Trover and Case.—Trover is an action on the case and may be joined with case. When the action is originally trover new counts in case may be added by way of amendment: *McConnell v. Leighton*, 74 Me.

RAILROAD. See *Corporation*.

REMOVAL OF CAUSES.

Effect of not filing Record in Time—Second Petition for Removal.—Where, upon the removal of a cause from a state court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the federal court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised: *Railway Co. v. McLean*, S. C. U. S., Oct. Term 1882.

If, upon the first removal, the federal court declines to proceed and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled, under existing laws, to file in the state court a second petition for removal upon the same ground: *Id.*

REPLEVIN.

Personal Property inadvertently left on Premises—Right of Owner to Reclaim.—The owner of a tannery, when removing his hides, omitted to remove all. The tannery was sold, and many years after, the plaintiff, while laboring for the defendant in erecting a factory on the premises, discovered the hides so left. *Held*, 1. That the owner of the hides or his representative, had not lost their title to the same, 2. That the finder acquired no title to the same, they being neither lost, abandoned, nor derelict, nor treasure trove: *Livermore v. White*, 74 Me.

Title to Personal Property obtained by Fraud—Bona fide Purchaser.—A. exchanged horses with B., then B. exchanged with C., without notice to C. of any infirmity of title. It turned out that B. did not own the horse he let A. have, and A. had to give him up to the true owner. Then A. sought to reclaim from C. the horse he (A.) let B. have: *Held*, that C.'s title to the horse was good against the claim of A.: *Tourtellott v. Pollard*, 74 Me.

Bond—Married Woman as Surety—Obligations of Co-sureties.—One of the principals to a replevin bond was a married woman and a minor: *Held*, that her co-obligors could not take advantage of her disability to avoid the bond: *Held, further*, that only the married minor and the defendant in replevin could take advantage of her disability: *Goodell v. Bates*, 14 R. I.