ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
COURT OF ERRORS AND APPEALS OF MARYLAND.[2]
SUPREME JUDICIAL COURT OF MASSACHUSETTS.[3]
SUPREME COURT OF MISSOURI.[4]
SUPREME COURT COMMISSION OF OHIO.[5]

ACCOUNT.

Account Stated—For what Opened.—After the completion of a building the owner and the builder had an accounting and settlement, and the owner, without making any claim for damages caused by delay in the prosecution of the work, gave his note for the balance found to be due. *Held*, that in the absence of fraud in procuring the settlement, mistake in making it, or ignorance of his rights when it was made, the owner could not defend against the note on the ground that there had been such delay resulting in damages to him: *Pickel* v. *St. Louis Chamber of Commerce Association*, 80 Mo.

ACTION. See *Officer.*

Breach of Contract—Composition with Creditors.—T. made a contract with H. for the purchase of a large number of shooks, to be delivered and paid for in different quantities and at specified intervals between the 1st day of October 1875, and the last day of February 1877. On the 26th of April 1876, T. wrote to H. not to send him any more shooks. *Held*, that this action amounted to a repudiation of the contract, and it entitled the seller to consider it entirely at an end: *Textor* v. *Hutchins*, 62 Md.

Whether it entitled the injured party to an immediate action to recover damages in respect to each and every future delivery stipulated in the contract, *Quære: Id.*

On the 9th of June 1876, T. made a composition with certain of his creditors, including H., by which he agreed to pay in cash, to every creditor accepting the agreement, one-fourth of his claim, and to deliver to him two endorsed notes, each for one other fourth; it being stipulated that said cash and notes should be accepted by the creditors in full satisfaction of their respective claims. The claim of H., as stated by him, was duly settled according to the terms of the composition, and did not include any damages for the breach of the contract for the shooks. In an action subsequently brought by H. against T. to recover said damages, it was *held* that the action was barred by the composition proceedings: *Id.*

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 112 U. S. Rep.

[2] From J. Schaaff Stockett, Esq., Reporter; to appear in 62 Md. Rep.

[3] From John Lathrop, Esq., Reporter; to appear in 137 Mass. Rep.

[4] From T. K. Skinker, Esq., Reporter; to appear in 80 Mo. Rep.

[5] From E. L. De Witt, Esq., Reporter. The cases will probably appear in 41 or 42 Ohio St. Rep.

Conspiracy—Obtaining Judgment in other State.—No action lies by A. against B. for conspiracy between B. and C. in obtaining a judgment against A. in an action brought in a court of another state having jurisdiction of the subject-matter and of the parties, in which A. appeared and answered, but was defaulted, which judgment remains in full force, and to satisfy which A.'s property in that state was sold: *Engstrom* v. *Sherburn*, 137 Mass.

ADMIRALTY.

Charter-Party—Stipulation as to Sailing.—The words of the charter-party were "now sailed, or about to sail, from Benizof, with cargo, for Philadelphia." *Held*, to require that the vessel was already loaded, whether she had "sailed" or was only "about to sail:" *The Wickham*, S. C. U. S., Oct. Term, 1884.

AGENT. See *Evidence.*

ASSIGNMENT.

Tort—Assignment of Cause of Action.—A cause of action against a railroad company arising under the forty-third section of the Railroad Law, for double damages for the killing of live stock, cannot be assigned so as to invest the assignee with the right to sue: *Snyder* v. *Wabash, St. L. & Pac. Ry. Co.*, 80 Mo.

BAILMENT.

Storage—Property subject to Mortgage—Liability of Mortgagee.—If a mortgagor in possession of personal property removes and stores it with a third person, who has no actual notice of the mortgage, which is recorded, the mortgagee, who afterwards is informed of the removal and storing, and expresses no disapproval of the same, is not liable to such person for the charges for storage, although the storage is necessary for the preservation of the property, but may maintain an action against him for its conversion: *Storms* v. *Smith*, 137 Mass.

BANK.

Collateral Security for Note—Lien for General Balance.—A savings bank has no lien upon the surplus proceeds of the sale of stock, held as collateral security for the payment of a promissory note, for the general balance due from the maker of the note: *Brown* v. *New Bedford Inst.*, 137 Mass.

BILLS AND NOTES.

Alteration—Agreement.—A material alteration in a note, made in accordance with an agreement between the maker and payee, does not avoid the note as to the maker, although the change was made some time after the agreement and without knowledge on the part of the maker that the agreement had been made effective by the actual alteration of the note: *Wardlow* v. *List*, 41 or 42 Ohio St.

COMMON CARRIER.

Railroad—Excursion Ticket.—Expulsion of Passenger.—The appellant purchased of an agent of the appellee at a reduced rate of fare an excursion ticket, to be used, between the stations designated, within three days, including the day of sale. He made the journey in one

direction, and after the expiration of the time limited, he attempted to return on the ticket, which the conductor declined to receive for his passage, and upon his refusal to pay the fare demanded, he was expelled from the train. In an action against the railroad company to recover damages for such expulsion, it was *held* that the plaintiff's rights were limited by the ticket, and he was rightly required to leave the train upon refusing to pay the fare demanded; and after being expelled he had no right to be readmitted except upon payment of full fare for the whole distance: *Pennington* v. *Phila., Wil. and Balt. Rd. Co.*, 62 Md.

CONFLICT OF LAWS. See *Corporation.*

CONSPIRACY. See *Action.*

CONSTITUTIONAL LAW. See *International Law.*

Regulation of Commerce—Duty of fifty cents for each Foreign Passenger.—The Act of Congress of August 3d, 1882, "to regulate immigration," which imposes upon the owners of steam or sailing vessels who shall bring passengers from a foreign port into a port of the United States a duty of fifty cents for every such passenger not a citizen of this country, is a valid exercise of the power to regulate commerce with foreign nations: *Head Money Cases*, S. C. U. S., Oct. Term, 1884.

Though the previous cases in this court on that subject related to state statutes only, they held those statutes void on the ground that authority to enact them was vested exclusively in Congress by the constitution, and necessarily decided that when Congress did pass such a statute, which it has done in this case, it would be valid: *Id.*

The contribution levied on the shipowner by this statute is designed to mitigate the evils incident to immigration from abroad by raising a fund for that purpose, and it is not, in the sense of the constitution, a tax subject to the limitations imposed by that instrument on the general taxing power of Congress: *Id.*

CORPORATION.

Mortgage of Charter—Exemption from Taxation.—An act incorporating a railroad company authorized a mortgage of its "charter and works" and exempted it from certain taxation. After a foreclosure sale under such a mortgage and a reorganization of the company, *Held*, that the franchises embraced in the mortgage were limited to those which had been granted as appropriate to the construction, maintenance, operation and use of the railroad as a public highway and the right to make profit therefrom; that the exemption from taxation did not extend to the reorganized corporation, and that the right of the purchasers at a sale under the mortgage to organize as a corporation, even if it had been conferred in express terms in the charter, would be a right to so organize according to such laws as might be in force at the time of the actual organization, and subject to such limitations as they might impose: *Memphis Railroad Co.* v. *Commissioners*, S. C. U. S., Oct. Term, 1884.

Foreign Corporation—Suit by—Receiver—Dissolution.—A fire insurance company incorporated under the laws of Pennsylvania is entitled to bring an action in a Maryland court, for the use of the receiver of such company, to recover from a Maryland policy holder assessments

upon his premium note where the suit is not brought by such receiver in his official capacity: *Lycoming Fire Ins. Co.* v. *Langley*, 62 Md.

Although it is settled law that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, yet it may do business in all places where its charter allows and local laws do not forbid; and in the absence of such prohibition by local laws, may institute suits in the courts of states other than those under whose laws it has been established: *Id.*

By the decree of a court in Pennsylvania a receiver was appointed for a fire insurance company created under the laws of that state. The decree also declared the company to be dissolved, but at the same time it referred to the act of assembly under which it was passed. That act provided that when an insurance corporation is dissolved the court decreeing such dissolution may appoint a receiver to take charge of its effects and collect the debts and property due and belonging to it, "with power to prosecute and defend suits *in the name of the corporation*, or otherwise, and to do all other acts which might be done by such corporation, if in being, that are necessary for the final settlement of the unfinished business of the corporation." In an action in Maryland brought in the name of the corporation for the use of the receiver, it was *held* that the decree of dissolution was no bar to the action: *Id.*

DAMAGES. See *Equity.*

EQUITY.

Jurisdiction—Trespass—Damages.—A court of equity has no inherent power to ascertain the amount of damages by reason of tortious acts unattended by profits to the wrongdoer. There must be some joint interest, or interest in common of the parties in the property for a court of equity to assess the damages: *Atlantic, &c., Coal Co.* v. *Maryland Coal Co.*, 62 Md.

In a case of trespass where no such relations exist, there is no ground upon which a court of equity can set up any other rule of damages than that which prevails at law: *Id.*

The right to maintain the action of *quare clausum fregit* exists in this state, whether the defendant committed the trespass unwittingly, or wilfully and wantonly: *Id.*

The owner of adjoining property is held to know the boundaries between him and his neighbor. If he has made a mistake *bona fide* as to his title or boundaries, in mining coal, the lowest measure of damages applicable is the value of the coal immediately upon its conversion into a chattel, without abatement of the cost of severance: *Id.*

If the trespass has been committed through negligence or design, punitive damages in addition may be recovered: *Id.*

An unwitting trespasser, merely as such, could not change the amount of his liability by simply changing the forum. No lower measure of damages for trespasses not negligent nor wilful could be substituted in equity for that fixed at law on general principles for such trespasses: *Id.*

ERRORS AND APPEALS.

The Opinion not a part of the Record.—Rule 8, sect. 2, of the Supreme Court of the United States requiring a copy of any opinion

that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or appeal, does not make the opinion a part of the record: *Enoland* v. *Gebhardt*, S. C. U. S., Oct. Term, 1884.

ESTOPPEL.

Consent to building of Wall—Mistake of Fact.—If A. is informed by B., who owns land adjoining that of A., that B. proposes to erect a wall on his own land at his own expense, and A. assents that the wall shall be built according to the line of B.'s land as established by the survey of C., A. is not estopped to maintain a writ of entry against B., after the wall has been built, for land erroneously included in such survey, if, in assenting to the building of the wall, he acted under a mistake of fact, and not with intent to mislead B.: *Proctor* v. *Putnam Mach. Co.*, 137 Mass.

EVIDENCE.

Agent's Declarations and Verbal Acts.—The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railway company, while away from the baggage-room of the company and engaged in the transaction of his private business on his own premises, gave directions to a stranger with reference to the delivery of baggage, *Held*, that they were not binding on the company: *City of Chillicothe* v. *Raynard*, 80 Mo.

EXECUTORS AND ADMINISTRATORS.

Executor as Trustee.—The fact that the same person is both trustee and executor under the will, will not operate to enlarge, transpose or transfer the powers from one capacity to the other, but the powers assigned to each capacity must be executed by the party in the capacity to which the powers are assigned: *Long* v. *Long*, 62 Md.

HUSBAND AND WIFE.

Disappearance of Husband—Presumption of Death—Partition—Payment of Share to Administrator—Presumption of Payment to Wife for her Support.—In 1864, Henry First, then a resident of Knox county, Ohio, absconded, deserting his wife and four children, and nothing was ever heard of him in that community until he reappeared in 1880. In 1873 land in said county belonging to him, in common with others, was partitioned at suit of co-tenants, and his share of the proceeds came to the custody of Brent, the clerk of the Common Pleas. In 1879, with his wife's assent, the probate court appointed Bennett administrator of W. H. First, supposing that to be the true name of the absentee, and he collected from Brent $174.21, the said proceeds of said partition. In October 1880, First demanded said sum from Brent, and on his refusal to pay, brought suit. *Held:* 1. In the absence of a showing to the contrary, the presumption, from the facts stated, is that the money was paid to the wife, who was entitled to a year's support, on the supposition that her husband was dead. 2. As she was entitled to support out of his property during his life, First's conduct estops him from claiming that the payment to her was unauthorized: *Brent* v. *First*, 41 or 42 Ohio St.

INFANT.

Suit—Prochein Ami—Attorney—Appeal—Costs.—An infant brought a suit by her *prochein ami*, in a court of law. Afterwards she employed an attorney and requested him to dismiss the suit, which was accordingly done. A motion was subsequently made in the name of the infant by her *prochein ami*, asking the court to strike out the entry of "off," which had been made in the case, and reinstate it on the docket for trial. On appeal from the order of the court overruling this motion, it was *held:* 1. That the infant, until she reached the age of twenty-one years, was incompetent to appoint an attorney or to take any step in the suit which could bind her rights. 2. That the appointment of an attorney by her being nugatory, his dismissal of the suit was simply void. 3. That the court below was therefore in error in refusing to reinstate the case. 4. That an appeal could be taken from such refusal. 5. That it was not in the power of the infant, after attaining the age of twenty-one years, to ratify and approve the act of her attorney. Where an infant sues by *prochein ami*, the latter is the only person who is authorized to prosecute the suit, and is responsible for the costs. While it is competent for the court, after the infant has arrived at the age of twenty-one years, to discharge the *prochein ami*, and give the infant control over her suit, it must make such equitable order as will protect the *prochein ami* from costs already incurred and relieve her from liability in the future: *Wainwright* v. *Wilkinson*, 62 Md.

INTERNATIONAL LAW.

Enforcement of Treaty—Effect of Act of Congress upon same.—A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial courts have nothing to do: *Head Money Cases*, S. C. U. S., Oct. Term, 1884.

But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnishes a rule of decision in such cases. The Constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried: *Id.*

But in this respect, so far as the provisions of a treaty can become the subject of judicial cognisance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification or repeal: *Id.*

JUDGMENT. See *Action.*

LIMITATIONS, STATUTE OF.

Foreign Cause of Action.—Whether a suit brought in one state on a cause of action originating in another state is barred by limitation, is to be determined by the law of the state where the suit is brought: *Stirling* v. *Winter*, 80 Mo.

MORTGAGE. See *Bailment.*

Collateral Security—Renewal of Debt without consent of Mortgagor.

—A married woman mortgaged her property to secure the note of her husband given for the purpose of raising money to pay the debt of a lumber company, of which he was president. The money was raised by loan from an insurance company, on the note of the lumber company at one year, with the mortgage as collateral thereto, and the insurance company had knowledge that the mortgaged property was designed by the mortgagor to serve as surety for the payment of the loan. Without the mortgagor's knowledge or consent, the note of the lumber company, at the end of the year, was renewed, and soon thereafter surrendered, cancelled and marked "paid" upon the books of the insurance company, and a new note, with other and different parties, was substituted in its place, and twice renewed, and then extended, the mortgage being all the while held as collateral. *Held*, that the mortgage was released: *People's Ins. Co.* v. *McDonnell*, 41 or 42 Ohio St.

MUNICIPAL CORPORATION. See *Negligence.*

Negligence—Fireworks—Injury to Spectator.—A city which undertakes the celebration of a holiday, under the authority of the Pub. Sts. c. 28, § 13 (which provides that the city council may appropriate money for such a purpose), exclusively for the gratuitous amusement of the public, is not liable to an action by one who sustains personal injuries through the negligence of servants of the city in discharging fireworks for the purposes of the celebration: *Tindley* v. *City of Salem*, 137 Mass.

NEGLIGENCE. See *Municipal Corporation.*

Independent Contractor—Supervision of Owner.—A contractor entered into a written contract with the trustees of an estate, by which he agreed "to take down the entire building known as the A. house, belonging to said trustees, or so much thereof as the trustees may request;" and which also provided as follows: "All of said work to be done carefully, and under the direction and subject to the approval of the trustees." *Held*, that the trustees were liable for injuries occasioned to a third person by the negligence of the contractor, or of his servants, in doing the work named in the contract; *Linnehan* v. *Rollins*, 137 Mass.

Independent Contractor—Supervision of Work—Municipal Corporation.—Where a city contracted for the construction of a cistern eighteen feet wide and twenty feet deep, in a street, and before the cistern was completed a horse fell into it and was killed for want of sufficient protection around and over the excavation to guard animals in the proper use of the street from danger. *Held*, that the city was liable for the loss of the horse, although it did not reserve or exercise any control or direction over the manner of doing the work, except to see that it was done according to specifications which were a part of the contract: *City of Circleville* v. *Nending*, 41 or 42 Ohio St.

Contributory Negligence—Crossing Track—Presumption that Company is obeying Ordinance.—When a city council, by ordinance, prohibited the running of railroad trains through its limits at a rate of speed greater than that named in the ordinance, a traveller upon a street, in such city, crossing the track of a railroad, has a right to presume that the company will conform to such regulation. If he acts in accordance with such presumption, in the absence of knowledge of the fact that the rail-

road company is exceeding such limit in running a train, it will not of itself be an act of negligence: *Meek* v. *Penn. Co.*, 38 Ohio St. 632, followed and approved. The trial judge did not err in substantially directing the jury to take into consideration all the objects and things at the crossing of the railroad and street, and to consider what was done by the deceased under all these circumstances, and in saying that if they found that his action was that of a person of ordinary prudence, they must also find that he was not guilty of contributory negligence: *Hart* v. *Devereux*, 41 or 42 Ohio St.

Contributory Negligence—Independent Contractor—Negligence of Owner—Partnership —Where there is evidence tending to prove negligence on the part of the defendant, and also evidence from which the proper inference to be drawn as to fault on the plaintiff's part is doubtful, it should be submitted to the jury to determine whether the plaintiff was injured by his own fault or that of the defendant.: *Kelly* v. *Howell*, 41 or 42 Ohio St.

A contractor agreed with the owner of a mine to do certain work therein, the owner engaging to furnish and put up such props or supports for the roof of the mine as would render the miners secure, whenever notified by the contractor that the same were necessary. *Held*, that although such notice from the contractor may not have been received by the owner, the owner, if he had actual knowledge that such supports were necessary, became liable in damages to an employee of the contractor, who, without negligence on his own part, had been injured while at work in the mine, through the want of such supports for the roof. If the overseer of the mine acted in behalf of a partnership of which he was a member, and the mine, at the time of the injury of the emloyee, was in the occupation of the firm, and the work was being done therein for the firm's use and benefit, the partnership will be liable for the neglect to furnish and put up the supports necessary for the safety of the contractor's employees: *Id.*

Officer.

Public Porter—Action on his Bond.—A person whose baggage has been lost through the negligence of a public porter licensed by the city as such, may maintain an action on a bond given by him to the city pursuant to charter and ordinance, for the faithful performance of the requirements of the ordinance and the safe delivery of all articles entrusted to his care: *City of Chillicothe* v. *Raynard*, 80 Mo.

Partnership. See *Negligence.*

Possession.

Estates for Life and in Remainder—Adverse Possession.—The possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater or different estate, make it adverse, so as to enable himself or others claiming under him to invoke the statute of limitations: *Keith* v. *Keith*, 80 Mo.

Acceptance of a deed from the true owner granting a life estate to the acceptor, with remainder over, waives any rights the latter may have acquired by a former adverse possession, and precludes him and those

claiming under him from asserting that his subsequent possession is adverse as against the remainderman: *Id.*

PRACTICE.

Trial by Court without Jury—Review of Questions of Law—Waiver of Jury.—In an action at law, submitted to the decision of the circuit court, waiving a trial by jury, in which the record does not show the filing of the stipulation in writing required by section 649 of the Revised Statutes, this court, upon bill of exceptions and writ of error, cannot review rulings upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, but may determine whether the declaration is sufficient to support the judgment: *Bond* v. *Dustin*, S. C. U. S., Oct. Term, 1884.

The filing of a stipulation in writing, waiving a jury, under section 649 of the Revised Statutes, is not sufficiently shown by a statement in the record or in the bill of exceptions, that "the issue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial by agreement of parties, by the court, without the intervention of a jury:" *Id.*

PRESUMPTION. See *Husband and Wife.*

RAILROAD. See *Common Carrier; Negligence.*

REMOVAL OF CAUSES.

Suit on Administrator's Bond.—Where the bond of an administrator is by law taken to the state, but is held for the security of persons interested in the estate of the deceased, a suit thereon, so far as the jurisdiction of the United States Circuit Court is concerned, must be treated as though the person for whose use the suit is brought was alone named as plaintiff: *Maryland* v. *Baldwin*, S. C. U. S., Oct. Term, 1884.

REPLEVIN. See *Tax.*

SET-OFF.

Setting off Joint Judgment against Separate Note.—The maker of a separate note in suit who holds an overdue joint note made by the plaintiff and another who are both insolvent, may, in equity, set off the joint demand. The holder of a promissory note who took it after maturity holds it subject to every objection, including equitable set-off, to which it was subject in the hands of his assignor. The merger of a debt into judgment is not so perfect in equity as to preclude the judgment-creditor from resorting to the original demand and the relations of the parties to it, for the purpose of enabling him to disclose and assert an equitable set-off: *Baker* v. *Kinsey*, 41 or 42 Ohio St.

SUBROGATION.

Deed of Trust—Satisfaction by Stranger.—Where a land owner, to save his land, pays a note secured by a deed of trust executed by a former owner, upon which he is not legally liable, the debt is not thereby extinguished; he is subrogated to the rights of the holder as against the maker: *Allen* v. *Dermott*, 80 Mo.