nothing in the business itself to distinguish it in this respect from any other kind of business; and we deny that the burden can be imposed on any corporation or individual not acting under a license or by virtue of a franchise, of buying property and hiring labor merely to furnish public statistics, unless upon due compensation to be made therefor.

So far as the owner or operator of a mine shall contract for the mining of coal or the selling of coal by weight, we see no objection to the statute as imposing upon him the duty of procuring scales for that purpose. But we do not think that he can be compelled to make all his contracts in these respects to be regulated by weight, and when he has no necessity for the use of scales in these respects, he cannot, in our opinion, be compelled to keep and use them. We think the court erred in its ruling in giving the one and refusing the other instruction.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.[1]
SUPREME JUDICIAL COURT OF MAINE.[2]
SUPREME JUDICIAL COURT OF MASSACHUSETTS.[3]
COURT OF ERRORS AND APPEALS OF MARYLAND.[4]
SUPREME COURT OF NEW HAMPSHIRE.[5]

ACTION. See *Insurance; Slander.*

AGENT. See *Insurance.*

ASSIGNMENT.

Partial Assignment of Debt may be enforced in Equity—Assignment not in Fraud of Insolvent Law.—A. had made a contract to erect a school-house for the city of N., but became insolvent, and, in order to secure funds to enable him to complete his contract, made an assignment to C. of $600, which was a part of the sum to be due to him from the city of N. upon the completion of the school-house, and C. thereupon advanced him certain sums of money. *Held*, that the assignment was

[1] From Hon. N. L. Freeman, Reporter; to appear in 117 Ill. Rep.
[2] From Joseph W. Spaulding, Esq.; to appear in 78 Me. Rep.
[3] The cases will probably appear in 142 or 143 Mass. Rep
[4] From J. Shaaf Stockett, Esq., Reporter; to appear in 65 Md. Reports.
[5] The cases will probably appear in 64 or 65 N. H. Rep.

not in fraud of the insolvent law, and could be enforced in equity: *James* v. *City of Newton*, 142 or 143 Mass.

Bills and Notes.

Promissory Note—Estoppel.—A promissory note reciting "we" promise to pay, and signed "D. P. Livermore, Treas'r, Hallowell Gas-Light Co.," is the note of the individual and not of the corporation: *McClure* v. *Livermore*, 78 Me.

An action on such a note against the corporation, and its default, will not estop the owner from maintaining an action against the individual, when it does not appear that the acts of the plaintiff caused the defendant to change his position, or to take some action injurious to himself: *Id.*

Criminal Law.

Homicide—Admissibility of Evidence—Res Gestæ.—On a trial for murder, evidence of what occurred at a saloon, a half a square from the saloon where the homicide occurred, and only four or five minutes before the killing, is admissible to show the movements and general conduct of the prisoner, immediately preceding the killing, and that he was armed and prepared for mischief, and in a frame of mind likely to result in mischief: *Kernan* v. *State*, 65 Md.

What was said and done by others at the same time and in company with the prisoner, was only a part of what he was directly connected with, and was inseparably connected with the history of his conduct at the time, and necessary to an intelligent appreciation of his actions: *Id.*

Conflict of Laws.

Insolvency—Jurisdiction — Discharge in another State.—A defendant's discharge under the insolvency law of Massachusetts is no bar to a suit in New Hampshire, on a contract made in that state before the insolvency, when the plaintiff has not resided there since the insolvency proceedings were begun, and has not submitted to the jurisdiction of the insolvency court: *Norris* v. *Atkinson*, 64 or 65 N. H.

Contract. See *Insurance.*

Corporation. See *Master and Servant.*

Municipal Corporation—Rules of Procedure—Quorum.—In authorizing the City Council of Baltimore to "settle their rules of procedure," the Legislature did not confer on the Council the power to declare by rule what number of their body should constitute a quorum for the transaction of business: *Heiskell* v. *The Mayor and City Council of Baltimore*, 65 Md.

In a municipal corporation consisting of a definite number, in the absence of any Legislative declaration of what number shall constitute a quorum or legal body, a majority of the members elected shall constitute such quorum or legal body: *Id.*

A mere majority of the members elected being present, the acts of the City Council of Baltimore are valid, notwithstanding the existence of a rule adopted by the Council, requiring that two-thirds of the members elected shall be necessary to constitute a quorum: *Id.*

A municipal corporation cannot, by a rule made by itself, either enlarge or diminish its own powers: *Id.*

DAMAGES. See *Eminent Domain; Slander; Trespass; Waters.*

EMINENT DOMAIN.

Damages, Measure of—Destruction of Pond Supplying Water to a Steam Mill—Evidence to show other Sources of Supply.—In a proceeding to condemn a strip of land for a railroad track, which crossed a pond supplying the land-owner's steam-mill with water, on the question of damages to the mill property not taken, the defendant gave estimates on the basis that the pond would be destroyed as a source of supply of water for the mill, and there would be no other means of supply. The petitioner then offered to show that a certain water-works company would furnish the mill regularly with all the water it might require, at a less cost than that of pumping from the pond, and also that a creek flowing nearer the mill than the pond had a capacity to furnish better water and an abundance, for the use of the mill, which the court refused to admit. *Held*, that the court erred in excluding the evidence: *Railroad and Coal Co.* v. *Switzer*, 117 Ill.

EQUITY. See *Assignment; Mortgage.*

ESTOPPEL. See *Bills and Notes.*

EVIDENCE. See *Criminal Law; Eminent Domain; Insurance; Negligence; Stocks.*

EXECUTORS AND ADMINISTRATORS. See *Insurance.*

INSOLVENT LAW. See *Assignment; Conflict of Laws.*

INSURANCE.

Contract—Evidence—Executors and Administrators—Action.—C. obtained a certificate of life insurance from the United Order of the Golden Cross, which provided that the sum insured should be paid to H. at C.'s death. That was done: *Held*, in an action by C.'s executor against H., that evidence was admissible to prove the defendant promised C., that, after deducting whatever sum might be due him from C., at C.'s death, from the insurance money, he would pay the balance over to C.'s heirs. *Held, further*, that C.'s executor was the proper party to bring suit on such a promise: *Catland's Exec'r* v. *Hoyt*, 78 Me.

Marine Policy—Spontaneous Combustion.—In an ordinary marine policy, the insurance against fire does not cover the case of spontaneous combustion, caused by the inherent infirmity of the goods insured: *Ins. Co.* v. *Adler*, 65 Md.

Insurance Company.—Stock and Mutual Departments—Rights of Stockholders.—The surplus of earnings accumulated from the operations of the stock-department of an insurance company, run upon the stock and mutual principles, the business of the two departments being entirely distinct and conducted separately, the taxes of the guaranty-stock department being paid by the company, and charged to the stock department, and none of the earnings of the stock department being

paid to the holders of mutual policies, upon the winding up of the affairs of the stock department, belongs to the stock department, and should be distributed among the share holders of the fund of that department according to their several shares: *Ins. Co.* v. *Brown*, 142 or 143 Mass.

Fire Insurance—Cancellation of Policy—Liability of Agent for Negligence—Usage—Action.—The question of whether an agent of a fire insurance company has used reasonable diligence in cancelling a policy after being instructed so to do by the company, is a mixed question of law and fact; and where it appears that the agent could have notified the insured of the refusal of the company to take the risk within half an hour, but did not do so for several days, it will not be held that the court before whom the case was tried, without a jury, erred in finding that the agent did not exercise that diligence which it was his duty to use, and in refusing to rule that the company could not recover of the agent the amount paid by them under the policy; and an offer by the agent to show that it is customary for agents of insurance companies to notify the insured, in such cases, at their own convenience, and that they are given from five to ten days to cancel a policy, is inadmissible: *Phœnix Ins. Co.* v. *Frissell*, 142 or 143 Mass.

An insurance company having paid a policy after proof of loss, in consequence of a liability caused by the negligence of an agent in not using reasonable diligence in cancelling a policy, after having been instructed to do so, may bring an action against the agent for the amount so paid, immediately after such payment, although the sixty days which it reserves as a time within which to pay the loss has not expired: *Id.*

LEX LOCI CONTRACTUS. See *Stocks.*

MASTER AND SERVANT.

Injuries on Machine—Corporation not Obliged to Fence Machine—Contributory Negligence—Peculiarly Dangerous Machine—Risks of Employment—Charge.—A manufacturing corporation is not bound to fence a machine used in their business, where the machine is not of a peculiarly dangerous character; and is not liable for personal injuries caused by the machine to an employee who was obliged to pass the machine in going to his work, and to whom suitable instructions had been given, having reference to his age and capacity, so as to enable him to understand the dangers of the employment in which he was engaged. Neither is the corporation liable for injuries because the machine might have been placed in a different or less dangerous position. Evidence that a gate might have been placed in front of the machine is immaterial: *Rock* v. *Indian Orchard Mills*, 142 or 143 Mass.

Exceptions to the judge's charge will not be sustained unless it is made to appear that there is some substantial error in the charge which misled the jury; and, where there was evidence that the plaintiff was playing about the machine on which he was injured, a statement in the charge, that if the jury found that to be the fact, the plaintiff was guilty of contributory negligence, which would prevent him from recovering, is not open to objection: *Id.*

It is not charging upon the facts for a judge to state in his charge that a machine on which the plaintiff was injured, was not a peculiarly dangerous one, the fact being self-apparent: *Id.*

An employee of a manufacturing corporation, who has been properly instructed as to the use of a machine upon which he is set to work, is supposed to undertake the risk of his employment, and cannot recover for injuries resulting from use of the machine, and the company is not obliged to fence the machine, or place it in a less dangerous part of the room: *Id.*

Dangerous Employment—Duty of Master to give Notice.—It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth or inexperience or want of capacity of the servant; and this duty is not confined to cases where the servant is a man of manifest imbecility: *Atkins* v. *Merrick Thread Co.*, 142 or 143 Mass.

MORTGAGE.

Surety—Equity.—Where a surety on a mortgage debt pays the same to the holder and receives the note and mortgage, without any assignment or discharge written thereon, he cannot maintain a bill in equity against the owners of the equity of redemption, praying that the mortgage "may be decreed to be still subsisting, that he may be subrogated to the rights of the mortgagee therein, and may be empowered to foreclose the same according to law:" *Lynn* v. *Richardson*, 78 Me.

NEGLIGENCE. See *Master and Servant.*

Death of Employee—Evidence—Defect in Machinery.—In an action to recover damages for personal injuries to the plaintiff's intestate, where the evidence showed that the deceased was burned by a quantity of starch which escaped from a boiler, the action cannot be maintained where the evidence does not disclose that the boilers were improperly constructed or out of repair, and that the accident did not occur by reason of the carelessness of the deceased. *Blanchette, Adm'r* v. *Border City Manufacturing Co.*, 142 or 143 Mass.

Evidence—Railroads—Unsuitable Stopping Places.—In an action for personal injuries sustained on leaving the rear car of a train at a station, evidence that others had previously been directed to take that car, and in alighting from it as the plaintiff did, had been injured, is competent to show negligence in the defendants in not providing a suitable stopping place, and to show want of negligence in the plaintiff: *Bullard* v. *Boston & M. Rd.*, 64 or 65 N. H.

NOTICE. See *Master and Servant.*

PRINCIPAL AND AGENT.

Commission Merchant — Consignor — Separate Accounts — Usage.—Where the plaintiff, a commission merchant, receives consignments from the defendant, a manufacturer, who is the owner of three different mills, run under three different names, one being carried on in the name of defendant, the plaintiff being ignorant that the three mills are owned by the defendant, and the accounts of the three concerns being kept separate, in an action brought by the plaintiff to recover the balance of an account with the mill run under the name of the defendant, where the answer is a general denial and payment, the defendant will not be

allowed to show that a balance is due him upon the account between plaintiff and another of the mills, which should be credited him in this suit, and such balance can only be availed by way of set-off; and defendant cannot show that there were in the plaintiff's hands, goods from the mill run in defendant's name, which were not included in the account sued on: *Talcott* v *Smith*, 142 or 143 Mass.

In an action against the defendant, a manufacturer, by a commission merchant, to recover a balance due for advances on manufactured goods, the latter will be allowed to charge in his account for printing the goods, it appearing that this was done under the usage of commission merchants, and was a necessary charge: *Id.*

QUORUM. See *Corporation.*

REDEMPTION. See *Tenants in Common.*

RES GESTÆ. See *Criminal Law.*

SET-OFF.

Defendant holding Affirmative—Time when Right of Action on Cross-Demand must Accrue.—In pleading a set-off, the defendant assumes the position of a plaintiff, and, in order to recover, is required to prove the same facts which he would be required to prove if he had brought his action on his demand: *Ellis* v. *Cothran*, 117 Ill.

A defendant cannot recover on a matter by way of set-off, when his claim or demand was not due at the time plaintiff brought his action: nor can he, after suit brought, purchase a demand against the plaintiff and set it up as a defence: *Id.*

SLANDER.

Actionable Words—Special Damage.—Words falsely and maliciously spoken, which impute to a clerk the want of any qualifications which, as such, he ought to possess, or any misconduct which would unfit him to discharge faithfully and correctly all the duties pertaining to his position, are actionable, if in consequence thereof he is dismissed from his employment: *Wilson* v. *Cottman*, 65 Md.

When some specific damage is caused by words falsely and maliciously spoken, they may become actionable, when otherwise the law would give no redress against the person speaking them: *Id.*

The defendant falsely and maliciously spoke of the plaintiff the following words, by reason of which he lost his position as clerk and assistant weigh-master: "He has caused the downfall and ruin of my clerk." "Will (meaning the plaintiff), has been the ruination of my clerk; I do not want him (meaning the plaintiff), to have anything to do with my business;" meaning that plaintiff should not weigh any goods consigned to the defendant. *Held*, that the words thus spoken were actionable: *Id.*

SPONTANEOUS COMBUSTION. See *Insurance.*

STOCKHOLDERS. See *Insurance.*

STOCKS.

Stock Gambling—Sales on Margins—Lex Loci Contractus—Evidence.—The plaintiffs sued the defendant in assumpsit to recover an alleged

balance due them for services, advances, and interest on purchases and sales of stocks, bonds and grain, alleged to have been made by them for defendant at his request. Both plaintiffs and defendant resided in York, Pennsylvania, where the former conducted the business of bankers and brokers. The plaintiffs bought and sold on orders of the defendant, who deposited from time to time, a margin, or left certain profits as they accrued, with the plaintiffs to cover and protect them in the fluctuations of prices. The plaintiffs made their negotiations in the markets of New York, Baltimore, Chicago and Philadelphia. The defendant failing to keep up his margins, the plaintiffs sold some stocks credited to him, and sued for the balance still required for their reimbursement. The defendant pleaded specially that by the law of Pennsylvania, where the contracts were made and to be performed, they were all gambling transactions and void, as the real intent of the parties was to wager on, and speculate in the rise or fall of the prices of the articles dealt in, which were not to be actually delivered, but the one party was to pay and the other party to accept the differences between the contract prices and the market prices of the same at the dates fixed for executing said contracts, or when said contracts should be closed. *Held*, 1st. That it was competent for the defendant to show, that although in form the transaction was perfectly legal, it was in fact a mere guise under which a gambling transaction might be conducted. 2d. That although the plaintiffs may have acted merely as defendant's broker in negotiating the contracts, and were suing not on the contracts, themselves, but for services performed and money advanced for the defendant, they stood in the same position as if seeking to enforce the original agreement, and could not recover for services rendered or losses incurred by themselves in forwarding the transaction. 3d. That as to the *locus* of the transaction, the jury should have been given the law of Pennsylvania, as comprised in the decisions of that state, bearing on wagering contracts within its limits. 4th. That the action being for services rendered by the plaintiffs to the defendant, it was their relations with him on which the suit was based; and the parties with whom they dealt in making the purchases and sales were in nowise connected with the suit. 5th. That the validity of the transaction was to be tested by the Pennsylvania cases, according to which, if there was such an understanding between the plaintiffs and the defendant, as the latter claimed there was, the transactions were merely wagers, and no recovery could be had by the plaintiffs: *Stewart* v. *Schall*, 65 Md.

Streets.

Rights of Abutting Lot Owners to Mine under.—A party owning city lots has not the right to make a subterranean passage from one to another through the underlying soil of a public street, the fee of which is not in him, in order to mine and remove minerals, etc., even though no injury may result thereby to the street as such: *Zinc Co.* v. *City of La Salle*, 117 Ill.

Surety. See *Mortgage.*

Tenants in Common.

Improvements upon the Common Property.—One tenant in common may rightfully insist that the other shall contribute his proportionate

share for the preservation of the joint property, but he cannot insist that he shall enter upon new investments, to be paid for from the joint property, or out of other funds belonging to him, against his judgment and inclination: *Field* v. *Leiter*, 117 Ill.

Redemption from Tax Sale.—Where one tenant in common of land exercises the right given him by law to redeem the entire premises from a sale for taxes, such redemption will inure to the benefit, also, of his co-tenant, upon the condition that he, or those claiming under him, will pay the one redeeming one-half of the cost of the redemption: *Lomax* v. *Gindele*, 117 Ill.

Where one of two tenants in common of a tract of land which had been sold for taxes, instead of redeeming directly from the sale, made an agreement with the holder of the certificate of purchase that the latter should take out a tax deed thereon and then convey the premises to the former, which was done, it was *held*, that the transaction amounted to but a redemption for the benefit of both tenants in common, and that a court of equity would compel the one taking a conveyance of the tax title, to convey to the other one individual half of the tax title, upon payment of half the cost thereof: *Id.*

Partition — Decree, Conclusiveness of.—A decree of partition not appealed from in a court of probate, is conclusive upon the parties and their privies as to the title at the time of its rendition; and they are estopped to claim a greater interest in the land than the share decreed to them: *Davis* v. *Durgin*, 64 or 65 N. H.

Trespass.

Quære Clausum Fregit.—Damages.—In trespass *quære clausum* for felling the defendant's trees across the line of fence, and covering the plaintiff's land with brush, the measure of damages is not confined to the expense of removing the brush, nor is it limited to the value of the land encumbered: *Hutchinson* v. *Parker*, 64 or 65 N. H.

Trover and Conversion.

Evidence of Conversion—Defendant's Breach of Contract.—To constitute a conversion of chattels there must be some exercise of dominion over the property, in repudiation of or inconsistent with the owner's rights: *Evans* v. *Mason*, 64 or 65 N. H.

In an action of trover for a horse hired by the defendant to go to and from a place named, without stopping, his mere delay in returning is not sufficient evidence of a conversion: *Id.*.

Turnpike.

Toll.—The Baltimore and Fredericktown Turnpike Road, under its charter (Act of 1804, ch. 51), is entitled to charge and collect toll for ten miles, from a person passing through the ninth gate on its road westward from Baltimore city—toll for the three miles east and the seven miles west of the gate—whether he actually starts from Frederick and stops at Middletown, which is only five miles west of the gate, or not; and a person going east must pay for the same ten miles, and not simply for the six miles between gates numbers nine and eight: *Turnpike Road* v. *Routzahn*, 65 Md.

USAGE. See *Insurance; Principal and Agent.*

WATERS.

Floatable Streams—Log Driving—Reasonable use—Damages.—Where one deliberately and without compulsion, selects a particular portion of a floatable stream, for the storage of logs, and thereby prevents another from entering such common highway with a drive of logs from a tributary stream, he is liable to such other person for the damages occasioned thereby: *McPheters* v. *Log Driving Co.*, 78 Me.

Wages and board of men while waiting for a reasonable time would be an element of damages; so, too, would the expense of moving one crew out and another in, as well as the increased cost, if any, of making the drive next season, and the interest on the contract price for making the drive during such time as the payment thereof was delayed, because of inability to complete the drive on account of such obstruction: *Id.*

The loss of supplies left in the woods, for use when completing the drive, and destroyed by wild beasts, would not constitute an element of damage, being too remote: *Id.*

Aqueduct—Easement—Prescription—Extinguishment of Easements.—An easement originating from water supplied by a spring not situated upon land belonging to the grantor of the plaintiff's premises, will not pass as an appurtenance to the estate conveyed, unless it has become attached to the same. *Douty* v. *Dunning*, 78 Me.

But where such easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, although it may not be necessary to the employment of the estate by the grantee: *Id.*

There may be such an adverse and exclusive use of water flowing through an aqueduct, and for such a period of time, as may well be considered presumptive evidence of a grant: *Id.*

Such right may be thereby acquired by prescription: *Id.*

The right to draw water from a spring and to have pipes laid in the soil of another, and for that purpose to enter thereon, repair and renew the same, constitutes an interest in the realty, assignable, descendible and divisible: *Id.*

Easements growing out of it may be acquired by grant or prescription, and thus become the objects of title in others: *Id.*

An easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right: *Id.*

But in order that the unity of title shall operate to extinguish an existing easement, the ownership of the two estates must be co-extensive, equal in validity, quality, and all other circumstances of right. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of the easement: *Id.*

WILL.

Right of Disposition of Property—Disposing Capacity.—A party having the capacity to make a will, may dispose of his property as he

sees fit, and if he makes an unequal disposition among his heirs, it is wholly immaterial whether he has any reasons therefor or not. In a case where the evidence as to a person's capacity to make a will was conflicting, the court instructed the jury, that if they should believe, from the evidence, that at the time of the execution of the instrument (the validity of which was in question), by the testator, he was so diseased mentally, as not to be of sound mind, then their verdict should be for the complainants, the contestants: *Held*, that the instruction was erroneous, as it stated the rule too broadly: *Freman* v. *Easly*, 117 Ill.

A person may be so diseased, mentally, as not to be of sound mind, and yet possess a disposing mind, which is the mental capacity to know and understand what disposition he may wish to make of his property, and upon whom he will bestow his bounty: *Id.*

A person who is capable of transacting ordinary business is also capable of making a valid will. The derangement or imbecility, to incapacitate a person from making a will, must be of that character which renders him incapable of understanding the effects and consequences of his acts. If a party is capable of acting rationally in the ordinary affairs of life, so that he may comprehend what disposition he may wish to make of his property, and be able to select the objects of his bounty, that is all that is required to make a will: *Id.*

Bequest—Vested Interest—Life Interest—Remainder.—A bequest of a sum of money to one after the decease of the legatee, to whom the income of the money is given during life, vests at once on the testator's death: *Crosby* v. *Crosby*, 64 or 65 N. H.

Election to Take under Will.—Where a testator devises property to his sons, and also property belonging to them to another, they must either relinquish their claim to their own property so devised, or to the provision made in their favor. A party cannot take under a will and contrary to it. In such case he must make his election: *Ditch* v. *Sennot*, 117 Ill.

The doctrine of election does not apply where the testator has but a part interest in an estate which he devises; but even in such a case, if it is apparent from the terms of the will that the testator intended to devise the whole estate, including the interest of a third person, then the doctrine will apply as to such third person, if a devisee: *Id.*

Witness.

Competency of Grand Juror to Testify to Evidence given before Grand Jury.—On the trial of a party for larceny, after laying the proper foundation, a grand juror was called to contradict one of the defendant's witnesses, by testifying to his statements on oath before the grand jury. which he had denied. It was objected that a grand juror could not be called as a witness to disclose what occurred before the grand jury, but the court held the evidence proper; *Bressler* v. *The State*, 117 Ill.