of Kentucky, in the case of *Brown, Appellant*, v. *The Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the act is sustained by the Supreme Court of Indiana and the Chief Justice of the Court of Appeals of Maryland, in able and well considered opinions: *Smith* v. *Moody et al.*; *In re A. H. Somers*.

We are happy to know, that if we have erred, the Supreme Court of the United States can revise our judgment and correct our error. The motion is overruled, and judgment will be entered upon the verdict.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MARYLAND.[1]

SUPREME COURT OF NEW HAMPSHIRE.[2]

SUPREME COURT OF NEW YORK.[3]

ACTION.

Amendment.—A declaration containing the usual money counts, and counts for goods sold and delivered, and for work and labor, and materials found, cannot be amended by introducing a special count upon a lease for unliquidated damages, for breach of the tenants' agreement to carry on the farm in a husbandlike manner, and the like: *O'Burt* v. *Kinne et al.*, Sup. Ct. N. H.

ARBITRATION AND AWARD.

Independent Awards—Non-Performance by One.—Where arbitrators award something to be done by each party, and the acts are distinct and independent, the one not being a condition precedent to the other, the failure of one party to perform his part of the award, furnishes no excuse for the other; and cannot be set up as a defence to a suit against him: *Girdler* v. *Carter*, Sup. Ct. N. H.

Where, in a submission between a landlord and tenant, it is awarded that the landlord shall, at a day named, have a certain cow and calf, it was held that the title to them passed by force of the award, without any further act by the tenant: *Id.*

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[1] From N. Brewer, Esq., Reporter; to appear in 23 Md. Rep.

[2] For these notes of very recent decisions we are indebted to the judges of the court. The volume in which they will be reported cannot yet be indicated.

[3] From Hon O. L. Barbour; to appear in Vol. 48 of his Reports.

BILLS AND NOTES. See *Husband and Wife.*

Signature by Mark.—A note signed by a mark, may be valid against the signer, though there be no subscribing witness: *Willoughby* v. *Moulton*, Sup. Ct. N. H.

Where a note purporting to be signed by the defendant by mark, without a subscribing witness, is specially declared on, if the signature is not denied under the 44th rule of court, it will be considered as admitted to be a genuine signature: *Id.*

What is a Note.—A promissory note or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely at some period, not depending on a contingency, nor payable out of a particular fund: *Skillen* v. *Richmond*, 48 Barb.

An instrument was drawn in the usual form of a promissory note, except the following clause, viz. "payable out of and from my separate property and estate, with interest payable quarterly: *Held*, that the instrument was not affected by any of the above rules; the words used not referring to a particular fund, but to the whole estate of the maker. Individual promises are always payable from the separate estate of the maker: *Id.*

Held also, that whether the instrument was subject to the rules of law governing mercantile paper or not, evidence to show an agreement, contemporaneous with the making or indorsement of the instrument, to extend the time of payment, was not admissible in an action by the holder against the maker and indorser: *Id.*

CONTRACT.

Fraud—Rescission.—If one party to a contract has been defrauded by the other, he may avoid and rescind the contract, or not, at his election: *Willoughby* v. *Moulton*, Sup. Ct. N. H.

But if he elects to rescind, he must do so in reasonable time after the fraud is discovered, and must restore or offer to restore whatever he has received under the contract: *Id.*

Construction of—Sales by Trustees in Chancery—Notice—Caveat Emptor—Mistake.—Purchasers from a trustee in chancery sought by petition an abatement of the purchase-money, on the ground of a deficiency of 53 acres in the quantity of land, and defects in certain machinery purchased, which had been advertised and described by the trustee as "that valuable cotton factory known as Phœnix Factory, with 187 acres of land, more or less, attached thereto," with further representation that "the machinery is in good running order, and now in use." The petition contained no allegation of fraud against the trustee, actual or constructive: *Held*,

1. That the terms used in describing the *quantity* of the land have acquired a legal meaning in this state, which is supposed to be known to all purchasers.

2. That by the terms "*more or less*" in the advertisement, the purchasers were notified that quantity did not enter into the essence of the contract, and they were warned to ascertain the quantity at their own risk (see 15 Md. Rep. 559; 2 Gill Rep. 128; 3 Md. Ch. Dec. 26; 9 Gill 451, cited by the court).

3. Trustees will not be permitted to make representations which are untrue, knowing them to be so, or which they have no reason to believe to be true; but if acting in good faith, they commit mistakes, such mistakes will not prejudice sales made by them more than those made by other vendors.

4. There is no relation of confidence and trust between the trustee and a purchaser; on the contrary, the doctrine "*caveat emptor*" applies to all sales by trustees, acting under decrees of Courts of Equity (see 7 Md. Rep. 342, cited by the court): *Slothower* v. *Gordon*, 23 Md.

Corporations.

Action by Receivers.—An action may be maintained by the receivers of an insolvent corporation, against individuals, some of whom are stockholders and some of whom are creditors of the company, to recover from the stockholders a dividend declared on its capital stock and received by them; where it is averred in the complaint that such dividend impaired the capital; that some of the defendants as creditors are suing the stockholders to recover from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation: *Osgood et al.* v. *Layton et al.*, 48 Barb.

Criminal Law.

Stealing from a Warehouse.—A building 21 feet by 15, placed on a market garden and used for storing the tools and agricultural implements, and the manures used there, and such seeds as were sown in the garden, is not a warehouse nor a granary within the meaning of the statute, which punishes as a distinct offence stealing in a warehouse or granary after entering in the night-time, or breaking and entering in the day-time: *State* v. *Wilson*, Sup. Ct. N. H.

Debtor and Creditor. See *Homestead.*

Partnership Debtor—Retiring Partner—Notice to Creditor.—Where evidence has been received, and upon doubts of its competency being expressed by the court, the party offering it says he will withdraw it, and no objection is made by the judge, it will be taken to be withdrawn with his assent, and the verdict will not, ordinarily, be disturbed: *Zollar* v. *Janvrin*, Sup. Ct. N. H.

A person accustomed to deal with a trading firm will hold a retiring partner for a debt contracted after such retirement, unless such person had actual notice of it, or was put upon inquiry: *Id.*

Notice in the gazette is not notice to a person accustomed to deal with the firm, unless brought to his knowledge, and even if he be in the habit of taking the same gazette, it is not notice as matter of law: *Id.*

Nor will the registry of a mortgage by the remaining member of the firm to the retiring partner, even of goods like those of the firm, or even if brought to the knowledge of the creditor, put him, as matter of law, upon inquiry: *Id.*

The fact that the creditor had the means of knowledge, and with reasonable diligence might have ascertained the dissolution, will not charge him, unless the circumstances were such as to put him upon inquiry: *Id*

EQUITY.

Bill by Sheriff.—Where goods are attached and sold on mesne process, and the purchaser pays the price to the creditor, who recovers a judgment for an amount sufficient to absorb the whole; and the sheriff has no other claim upon the purchaser than as trustee for such creditor, a bill in equity will lie to compel an application of the amount so paid to the claim of the sheriff: *Barker* v. *Barker*, Sup. Ct. N. H.

HOMESTEAD.

Sale by Execution-Creditor.—A creditor cannot lawfully seize and sell on execution his debtor's right of redeeming the family homestead, or an interest therein, where its value does not exceed $500: *Tucker* v. *Kenniston*, Sup. Ct. N. H.

If it exceeds that sum, the officer, upon due application must set out the homestead, before he can make sale of any interest therein, and then can proceed only against the surplus: *Id.*

If, after such application, the officer, without setting out the homestead, undertakes to dispose of it, a court of equity will interfere by injunction, upon the ground that it will create a cloud upon the debtor's title: *Id.*

HUSBAND AND WIFE.

Divorce—Imprisonment as a Cause.—In the statute which enumerates the causes of divorce, the term "the state prison," is limited in meaning to the prison established and maintained by this state at Concord, and does not include a prison in another state, though called there "the state prison:" *Martin* v. *Martin*, Sup. Ct. N. H.

Conviction and imprisonment in another jurisdiction is not a cause of divorce in this state: *Id.*

Promissory Note of Wife.—A married woman is liable upon her promissory note given for the price of neat stock purchased by her during marriage for the use of a farm of which she was seised to her sole and separate use: *Batchelder* v. *Sargent*, Sup. Ct. N. H.

Conveyance by Husband to Wife.—The deed of the husband in consideration of love and affection, in which he covenanted to stand seised of a farm to his own use during his life, then to the use of his wife during her life, and then to the use of the son, the defendant, for ever, is good to vest the estate in the wife on the death of the husband: *Leavitt* v. *Leavitt*, Sup. Ct. N. H.

Upon the death of the husband, his administrator is not entitled to the possession of the farm as against the wife, unless the estate be actually insolvent; and a decree of insolvency alone is not sufficient: *Id.*

Such a settlement is good if the covenantor was not embarrassed, but retained ample means to pay all his existing debts, and it was made in good faith; and, therefore, the administrator will not be entitled to dispossess the wife, by showing a decree of insolvency; that some debts due when the deed was made, had been presented against the estate; and that the personal estate is not sufficient to pay all the debts: *Id.*

A verbal agreement between the wife, after the husband's death, and her son, that they shall live together on the farm during her life, and

that he shall carry it on, and that they shall pay the debts of the estate; and an entry and possession by him under such agreement, creates a tenancy at will, from year to year: *Id.*

Therefore a notice to quit of less than three months is not sufficient to terminate such tenancy: *Id*

The notices prescribed by the act, known as the Landlord and Tenant Act, are intended to take the place of those required at common law, and apply in actions at common law equally as in proceedings under that statute: *Id.*

A notice not naming the day when the tenant is required to yield up the possession, seems not to be in accordance with the statute: *Id.*

Writ of Entry by.—Husband and wife should join in a writ of entry to recover possession of land which was conveyed to them both during their natural lives: *Wentworth and Wife* v. *Remick*, Sup. Ct. N. H.

Insurance (Marine).

Time Policies—Deviation.—In time policies, the rules as to deviation do not apply to the same extent as in voyage policies. Under time policies, the mere intention to deviate is not sufficient to avoid the policy, although during the period of the violation of the warranty, the vessel is not covered by the policy: *Bearns* v. *The Columbian Insurance Company*, 48 Barb.

Jury.

Costs—Verdict—Surplusage.—A jury have no power to award costs in their verdict. But if they attempt to do so, that portion of their verdict will be treated as void, and rejected as surplusage, and will not affect the residue of the verdict: *Tucker and Stiles* v. *Cochran*, Sup. Ct. N. H.

So also, if the jury in returning a special verdict find a fact which is entirely immaterial, that portion of the verdict may be rejected as surplusage: *Id.*

When a verdict either general or special, does not find the issue raised by the pleadings, as it should do, yet if it is such a verdict as the court can clearly understand, and such that a verdict can be concluded out of it to the point in issue, the court will mould and work it into form according to the justice of the case: *Id.*

Landlord and Tenant. See *Husband and Wife.*

Summary Proceedings to remove Tenant.—The affidavit by which summary proceedings for the removal of a tenant are initiated, need not state the date or duration of the lease. The facts stated in such affidavit, and not denied by the affidavit of the tenant, are admitted: *The People ex rel. Teed* v. *Teed*, 48 Barb.

Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord, and the payment of rent to him by the tenant, establishes both of these issues against the tenant: *Id.*

If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defence: *Id.*

PARTITION.

By Parol.—A partition of land by parol is invalid, notwithstanding the division line was marked and monuments set up, and a several occupation in accordance with it for several years: *Ballou* v. *Hall*, Sup. Ct. N. H.

So such several occupation for a period less than twenty years, will not be proof of the assent of one tenant in common, to a conveyance by the other of one of the parcels so marked out, and which was assigned to him for his share: *Id.*

Such a conveyance, although it can have no effect upon the rights of the other tenant in respect to partition, will entitle the grantee to stand in the place of the grantor in respect to the possession and profits of that parcel of the common land: *Id.*

Trover cannot be maintained by one tenant in common against the other, for taking all the crops and merely withholding the whole from him: *Id.*

RAILROAD.

What Property may be considered Part of.—For purposes of taxation, wood, timber, logs, and lumber, owned by a railroad corporation, and distributed along its line for present use in operating and repairing such road, are to be deemed a part of the railroad, and subject to be taxed in that form by the justices of the Supreme Judicial Court: *Fitchburg Railroad* v. *Prescott et al.*, Sup. Ct. N. H.

And therefore, such articles cannot be lawfully taxed in the towns where they may happen to be, although exceeding in value the sum of $50: *Id.*

STAMPS.

On Process issued by Justices.—The Act of Congress passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon all writs and other process issued by a justice of the peace, when the amount claimed is $100 or over. It therefore embraces a summons: *Cole* v. *Bell et al.*, 48 Barb.

Objection for want of, how waived.—Where the notice of appeal from a judgment of a justice of the peace, though specifying several grounds of error, did not specify the want of a stamp upon the summons as one of them: *Held*, that as the objection involved a question of jurisdiction, it was not waived by the notice of appeal, but could be raised at any time during the progress of the action: *Id.*

On Notice of Appeal.—No objection can be urged on the argument of an appeal to the notice of appeal, because no revenue stamp was put upon it Such objection can only arise on a motion to dismiss the appeal: *Id.*

TRUSTEE.

Attachment of Funds in his hands.—A sale of certain real estate was made by a trustee under decree of court. The proceeds of sale, to which in part the appellee was entitled, were duly reported for distribution, but before his share was ascertained by the statement and ratification

of the final account, the appellants, being his creditors, sued out attachments for the amount of their respective claims, and caused them to be laid in the hands of the trustee. Counsel, professing to act for the appellee, and for the protection of his interest in the fund derived from the sale, entered their appearance for the garnishee, and finally consented to judgments of condemnation. The appellee claimed that his share of the proceeds of the sale as per the final account, should be paid him regardless of the claims of the appellants on their judgments of condemnation. *Held*, that the general rule, that funds in the hands of a trustee in equity are not liable to attachment and condemnation before the statement and ratification of a final account, appears to rest altogether on jurisdictional considerations sufficient for the defence of a trustee as garnishee, as well as for the protection of the funds in his hands from condemnation; but it is manifest that these are purely matters of defence of which the trustee should avail himself by motion, pleadings, or proof at some stage of the attachment proceeding before final judgment: *Groome, Adm'r. of Keck et al.*, v. *Lewis*, 23 Md.

It is not necessary, however, that a trustee should plead such matters specially, but they should be so disclosed that the court having jurisdiction of the attachment may take notice of them before the cause is concluded by a judgment: *Id.*

Where, in proceedings in attachment, there was nothing to show that the garnishee made any defence whatever, but assented to the judgments of condemnation, those judgments, like others pronounced by courts of competent jurisdiction, must be respected as final and conclusive on the rights ascertained and established by them: *Id.*

The fact that the garnishee had a good defence, or that he was clothed with a privilege sufficient to protect him from liability to the attaching creditors, cannot be inquired into here for the purpose of setting aside the judgments or releasing him from their proper legal effect: *Id.*

The general rule above cited, is not a device for the benefit of debtors, nor can it be said to contemplate in any way the protection of their interests in trust funds from the appropriate remedies of their creditors, nor can they derive any incidental advantage from the rule, except in cases where the existing facts or circumstances are such as to justify its application; the rule cannot be applied after there has been a final account and an order to the trustee to pay accordingly: *Id.*

It cannot be doubted that an attachment, laid in the hands of a trustee before a final account, would be good, if at any time before trial or judgment the share of the fund in hand, belonging to the debtor, is ascertained by a final account: *Id.*

WAY.

Conditions of Grant.—Where a farm was conveyed with the free and uninterrupted use and privilege of passing and repassing over other land of the grantor, in the usual passage way, and proof was offered that such way had been used with gates and bars for forty years, and up to the time of the grant; and that such gates and bars were necessary to the convenient use of the grantor's remaining land: It was *held* that this must be taken to be a grant of the way as there existing, subject to gates and bars, and a right to use it without other or further impediment: *Garland* v. *Turber et al.*, Sup. Ct. N. H.,