to the defendant's credibility and not to his competency. We regard the rule thus laid down on that point as the proper construction of the law since defendants have been permitted to testify on their own behalf in criminal cases, and we still adhere to it. In a criminal cause the intent is a fact known to, and peculiarly within the knowledge of, the defendant, and we see no well-founded reason why he may not testify concerning it as he might as to any other fact of which he has knowledge. Because the intent is a fact which cannot in the nature of things be positively known to others, and is hence a matter about which other witnesses cannot directly testify, does not, in our opinion, affect the rule above laid down as to the competency of the defendant in that respect.

We are clearly of the opinion, therefore, that the court below erred in excluding the proposed testimony of the appellant as to the intention existing in his mind when he came into the possession of the meat which he is charged with having stolen. There are other errors assigned on the record of this cause, and other causes for a new trial were assigned in the court below, but the view we have already taken as to the action of that court in excluding the proposed testimony of the appellant renders it unnecessary for us to consider any of the other alleged errors at present.

The judgment below is reversed and the cause remanded for a new trial.

ABSTRACTS OF RECENT DECISIONS.

COURT OF CHANCERY OF DELAWARE.[1]
COURT OF ERRORS AND APPEALS OF MARYLAND.[2]
SUPREME COURT OF VERMONT.[3]
SUPREME COURT OF WISCONSIN.[4]

CONTRACT. See *Vendor*

Rescission—Specific Performance.—The complainant and the defendant, A., entered into a parol contract for an exchange of lands—the complainant agreeing to convey a tract of woodland and pay $300 in cash—the defendant A., agreeing to convey, together with his wife, a tract of marsh, the title to which was held by the wife. Possession was mutually delivered. It was agreed that the parties should meet at the house of

[1] From Hon. D. M. Bates, Reporter; to appear in 2 Delaware Chan. Reports.
[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 45 Maryland Reports.
[3] From Hon. J. W. Rowell, Reporter; to appear in 49 Vermont Reports.
[4] From Hon. O. M. Conover, Reporter; to appear in 42 Wisconsin Reports.

G. F. to execute conveyances; but such meeting was delayed and never took place. The defendant, A., cut off the timber from the woodland delivered into his possession under the contract. Afterward the defendant, A., without any tender of performance on his part, or demand upon the complainant for the execution of the contract, sold and conveyed the marsh to the defendant, I. On bill filed by the complainant for a specific performance, *held*, that the defendant, A., was not entitled to abandon the contract and to re-sell the marsh, without first tendering to the complainant a deed for the marsh and demanding performance on his part; that, under the circumstances, the complainant was not in laches: *Burton* v. *Adkins*, 2 Del. Ch.

Held further, that the defendant, A., was not entitled to abandon the contract, after having cut the timber off the woodland and thereby substantially destroyed its value, so that the complainant could not be placed *in statu quo*: *Id.*

DAMAGES. See *Waters and Watercourse.*

Sale—Warranty.—In case for fraudulent warranty of a yoke of oxen, the declaration alleged that defendant falsely and fraudulently warranted the oxen well broken, orderly, peaceable, and suited for a special purpose known to defendant, for which plaintiff wanted them, whereas they were unbroken, disorderly, wild, and unsuited for said purpose, as defendant well knew. Defendant was allowed, against plaintiff's objection, to show their market value at the time of sale; but the court charged that the difference between the value of the oxen as they actually were, and their value as it would have been if they had been as warranted, was the measure of damages. *Held*, that the evidence was inadmissible, and that the error of its admission was not cured by the charge: *Wing* v. *Chapman*, 49 Verm.

DEBTOR AND CREDITOR.

Composition with Creditors.—In assumpsit for money paid, &c., defendants, who were insolvent, and who had been trying to compound with their creditors, and whose property had been under attachment at the suit of B., introduced in evidence in bar of plaintiff's claim, a written instrument signed by plaintiff, and other but not all of defendants' creditors, by B., and by defendants themselves, whereby it was agreed that "the creditors of" the defendants should "accept their *pro rata* parts of the sum of $1200 in full satisfaction of their respective claims," that their several dividends should be ascertained by ascertaining defendants' entire unsecured indebtedness, and dividing said sum *pro rata* upon such indebtedness—paying to each creditor such a part of such sum as his debt was of such entire indebtedness, and that defendants and B. should pay to each creditor his part of said sum, upon demand, after execution of said instrument, and after proof of, or agreement upon, the sum due. *Held*, that as the instrument was not executed by all the parties thereto, it was not, under its provisions, binding upon the plaintiff: *Chase* v. *Bailey & Co.*, 49 Verm.

EQUITY.

Relief for the Loss or Destruction of Bonds and Negotiable Securities.—Where the loss or destruction of bonds and negotiable securities

has happened without the negligence or fault of the party applying, equity will grant relief, provided such relief can be given without derogating from any positive agreement, or violating any equal or superior equity in other parties: *Chesapeake & Ohio Canal Co.* v. *Blair*, 45 Md.

The relief will be granted, however, upon the condition that full and secure indemnity shall be given the defendant against all risk: *Id.*

EVIDENCE.

Parol to affect a Written Instrument.—Extrinsic evidence is not admissible to contradict, add to, or vary a written instrument. Thus, in ejectment, where plaintiff, in support of his title, introduced in evidence a deed from R. to *Rufus* V., and a deed from *Russell* V. to F., under whom he claimed, and offered evidence that Rufus V. and Russell V. were the same person, that the name *Russell* V. was the true one, and that the insertion of the name *Rufus* as that of the grantee in the first-named deed, was a clerical error, it was *held*, that the evidence, the purpose of which was, in legal effect, to reform the deed, was inadmissible: *Pitts* v. *Brown*, 49 Verm.

FENCE. See *Railroad.*

HIGHWAY. See *Negligence; Town.*

HUSBAND AND WIFE.

Chose in Action.—A married woman is not restricted in the disposition of her *choses in action* to a joint conveyance with her husband: *Trader* v. *Lowe*, 45 Md.

Ante-nuptial Contract—Debtor of Wife has no Interest in.—An ante-nuptial contract, not recorded, raises no equity, at the suit of a debtor to the wife *dum sola*, to restrain the collection of the debt at law by process in the name of the husband and wife. Such a debtor has no interest in the contract, entitling him to set it up in equity: *Hill* v. *Garman and Wife*, 2 Del. Ch.

Nor is the debtor at any risk in paying the debt. Such payment would protect him against any future claim by the trustee under the contract, who had not interfered to prevent the collection of the debt by the husband: *Id.*

INFANT.

Appearance and Defence by Natural Guardian.—An infant is not legally capable of appearing and defending, nor of appointing an attorney to appear and defend for him; but appearance and defence by his father and natural guardian are sufficient, and need not appear of record, but may be shown by parol. Thus, where, in a suit against an infant, his father became bail, was present during the entire trial, testified on material points at the suggestion of his son's counsel, assisted in impanelling the jury, and would have appealed if he had not known of his son's minority, judgment against the son upon *audita querela* to set it aside was held valid and binding: *Fuller* v. *Smith*, 49 Verm.

INSURANCE.

Resolution of Insurers subsequent to Policy.—A resolution of the board of directors, prohibiting certain acts on the part of the insured, passed subsequent to the issuance of the policy to the plaintiff, not

communicated to him, and of which he had no notice or knowledge, cannot affect his rights under the policy: *Martin* v. *Mutual Fire Ins. Co*, 45 Md.

JUDGMENT.

Power of Court to revise after the Term.—Judgment for plaintiff by agreement, and bond filed for its payment. Plaintiff's attorney, by mistake, neglected to make a motion for a certified execution. At a subsequent term, plaintiff filed a motion to have the case brought forward, the judgment vacated, and for a certified execution, and the motion was granted: *Held*, that the county court had no power to grant the motion: *Amazon Ins. Co.* v. *Partridge*, 49 Verm.

LACHES. See *Vendor*.

LANDLORD AND TENANT.

Construction of Lease—Right of Lessor to rent after Eviction.—In assumpsit for rent, it appeared that the demised premises were described in the lease as "the premises on the corner of College street and Centre street recently occupied by E. Laporte as a French hotel. (The joiners' shops are not included, but when vacated, Kennedy is to have right to either or both at same rent they now draw, payable quarterly in advance $75 and $112 respectively.") Notice of special matter under the general issue alleged eviction through plaintiff's neglect properly to drain a cellar under the premises, not included in the lease, whereby the premises were rendered unfit for occupation. In support of the notice, defendant sought to show by parol that the cellar was not occupied by Laporte, and the evidence so offered was admitted, with evidence in rebuttal tending to show that it was occupied by him. *Held*, that the words, "recently occupied by E. Laporte as a French hotel," were restrictive of the grant; that the exception of the joiners' shops did not indicate an intention to pass all else on that corner owned by plaintiff; that the evidence was properly admitted; and that the question of whether or not Laporte occupied the cellar was properly submitted to the jury: *Alger* v. *Kennedy*, 49 Verm.

The lease provided that defendant should put and keep the place in repair. The court, in charging the jury, after putting several questions to illustrate the meaning of the phrase, "in repair," said that if the cellar was included in the lease, the fault was the defendant's if the cellar was not taken care of, provided they found that to drain it was a necessary repair. *Held*, that the question of whether or not the cellar was in repair was thus submitted to the jury, and that to submit it to them was erroneous: *Id.*

Any default, as well as any overt act of the lessor, that renders the tenement dangerous to the life or health of the tenant, may be treated by the lessee as an eviction. Thus, it was *held*, that evidence of the lessor's neglect to drain the cellar was admissible: *Id.*

If the lessor unlawfully evict the lessee his right to rent thereupon ceases: *Id.*

MORTGAGE.

Of Chattels—Taking Possession.—A clause in a chattel mortgage, providing that if the mortgagee shall at any time deem himself insecure, he may take possession of and sell the property, vests in him an abso-

lute discretion; and his right does not depend upon his having *reasonable ground* for deeming himself insecure: *Huebner* v. *Koebke*, 42 Wis.

MUNICIPAL CORPORATION. See *Negligence.*

NEGLIGENCE. See *Railroad.*

Bodily Injury — Defective Highway — Damages. — In an action for injuries to plaintiff's person caused by her stepping through a hole in a sidewalk of the defendant city, where there was evidence that the walk was on one of the principal thoroughfares of the city, and that the hole had existed there for several months, this was sufficient to warrant the jury in finding the city chargeable with notice of the defect: *Hall* v. *City of Fond du Lac*, 42 Wis.

A verdict in plaintiff's favor for $3258 *held* not excessive in this case, it appearing satisfactorily that her injury was of a very serious if not of a permanent character, and would probably render her unable to do any continuous hard work for years, or perhaps for life: *Id.*

Railroad Company—Explosion of a Locomotive Engine—Sufficiency of Evidence.—H., employed as an engineer on a railroad, was killed by the explosion of the locomotive engine of which he had charge. An action was brought against the railroad company for the use of the widow and minor child of the deceased, to recover damages sustained by them by reason of his death. There was no evidence of negligence on the part of the defendant in the selection of faithful and competent employees. The ground of the action and the liability of the defendant rested upon the alleged facts that the engine was unsound and unsafe when it was purchased and put upon the road, and so continued till the time of the accident, and that the agent of the defendant, by whom it was purchased, did not exercise ordinary care in purchasing and procuring a sound and safe engine. Evidence was offered by the plaintiff as to the purchase of the engine, the explosion of which caused the death of H. The defendant proved that the engine was repaired about a month before its explosion, and alleged that there was no evidence of the original and continued unsoundness of the engine and of the alleged negligence of the defendant in procuring it: *Held*, that there was evidence on these questions legally sufficient to go to the jury, and they were properly submitted to their decision: *Cumberland and Pennsylvania Railroad Co.* v. *The State, use of Hogan*, 45 Md.

NEW TRIAL.

Notice to opposite Party.—An application for a new trial is a motion, which, with the papers on which it is founded, must be served upon the opposite party, who is also entitled to an opportunity of presenting affidavits or other evidence against the motion: *McWilliams* v. *Bannister*, 42 Wis.

A judgment for defendant in a mortgage foreclosure having been reversed by this court with direction that if defendant should satisfy the trial court, by affidavit or other proper proof, that on another trial she would probably be able to produce sufficient additional evidence to change the result, and plaintiff having taken an order on defendant in the trial court to show cause why judgment of foreclosure should not be entered, the court at the hearing of this motion granted a new trial on plaintiff's application then made, and an affidavit in her behalf then

read, without any notice of such motion or copy of such affidavit having been served. *Held*, error: *Id.*

A new trial should be granted to defendant only upon reasonable terms, including payment of costs of the former appeal; and it should be limited to the question suggested by this court: *Id.*

NOTICE. See *Waters.*

Writing—Signature.—A notice which the statute requires to be *in writing*, is insufficient where it is *not signed* by the appellant, nor by any one for him, and the record fails to show that it was served by him in person: *Eaton* v. *Manitowoc County*, 42 Wis.

RAILROAD. See *Negligence.*

Fence—Negligence.—Whether or not contributory negligence would be a defence to an action for an injury arising from the failure of a railroad company to construct a fence as required by the statute, such negligence may defeat an action for an injury arising from failure of the company to maintain in repair such a fence, once built: *Lawrence* v. *M., L. S. & W. Railway Co.*, 42 Wis.

Sect. 1, ch. 268 of 1860, and sect. 30, ch. 119 of 1872, make railroad companies responsible for damages *occasioned* by failure to fence their tracks, as there required; and, in an action under those statutes, the injury complained of must be affirmatively shown to have been caused by the want of a proper railroad fence, the evidence connecting the injury with the want of a fence at some point on the road (whether near to or distant from the plaintiff's premises), and showing that the one was the consequence of the other: *Id.*

RELEASE. See *Tort.*

SALE. See *Damages.*

TAXATION.

Tax Title—United States Patent:—In ejectment, where plaintiff claims under a tax deed, and defendant under a patent from the United States, and it appears that the tax on which plaintiff's deed was based must have been levied before the date of the patent, and there is no proof of the date of *entry* of the land, it must be presumed that the title to the land was in the United States when the tax was levied; and this presumption rebuts the primâ facie evidence of the liability of the land to taxation furnished by the tax deed: *Treat* v. *Lawrence*, 42 Wis.

TENANT IN COMMON.

Ouster of One by Another.—In 1834, orator purchased a lot of land with the joint funds of himself and his two brothers, taking and holding the title of two undivided thirds thereof in trust for his brothers equally. In 1842 and 1843, the brothers respectively conveyed one undivided third of said land to C., by deed of warranty. Upon C.'s death, the thirds so conveyed to him were set to his daughter P. Afterwards the guardian of P. conveyed them to J. R., and finally, through J. R., in 1870, they came to defendant. *Held*, on a bill for partition and an accounting, that orator and defendant were tenants in common of the whole lot: *Chandler* v. *Ricker*, 49 Verm.

A tenant in common, to show an ouster of his co-tenant, must show acts of possession inconsistent with, and exclusive of, the rights of such co-tenant, and such as would amount to an ouster between landlord and

tenant, and knowledge on the part of his co-tenant of his claim of exclusive ownership. Proof of notice to one who had been the agent of the co-tenant for watching trespassers and paying taxes, but whose agency had terminated before the giving of notice, is insufficient proof of the knowledge required to be shown, both because of the narrowness of the agency and of its previous termination. Evidence that the land is a wild, mountain lot, nearly covered with forest, and that the occupation was under a deed conveying an undivided part thereof, and by an occasional cutting of a few trees for shingles or timber, and by peeling and carrying away a few loads of bark, at a merely nominal profit, is, in itself, of little weight as evidence of the acts required to be shown: *Id.*

TORT.

Effect of a Release under Seal of one of three joint Tort-feasors, as to the right to recover against the Others.—An action was brought against three persons as joint tort-feasors. Pending the suit the plaintiffs executed to L., one of the defendants, a release under seal in which it was declared that it was not to prejudice or impair the plaintiffs' claim against the other two defendants. The release was executed in consideration of $500, and in terms released and discharged L. from all claims of every description for damages accruing or accrued by reason of the wrongs complained of; the plaintiffs thereby acknowledging themselves "to be fully paid and satisfied for all and singular the trespasses complained of" by them in the suit then pending against the three defendants jointly. *Held*: 1. That the release enured to the benefit of all the defendants, and was a bar to the action. 2. That the proviso in the release, by which the right to recover for the same injury against the other defendants was attempted to be reserved to the plaintiffs, was simply void, being repugnant to the legal effect and operation of the release itself: *Gunther* v. *Lee*, 45 Md.

TOWN.

Sufficiency of Notice of Injury upon Highway.—The notice of injury upon a highway was, that plaintiff claimed damage of the town for injuries to himself and his team, on October 13th 1873, "at a certain bridge" on the highway in question, "located between William Mitchell's and Hugh Mitchell's." The houses of the Mitchells were about one hundred rods apart, and there were two bridges between them, about twenty rods apart. The bridge on which the injury was received was a log-and-pole bridge, and the other, and larger, a plank bridge. Plaintiff had been accustomed to pass over the road frequently—knew it well, and knew the facts above stated in regard to the two bridges. *Held*, that the notice sufficiently designated the *place where* the injury was received: *Ranney* v. *Town of Sheffield*, 49 Verm.

TRUST AND TRUSTEE.

Following Trust Fund.—A trust fund, so long as it can be traced, may be followed for the purpose of enforcing the trust: *Barwick* v. *White*, 2 Del. Ch.

A promissory note, taken by an administrator for proceeds of land of his decedent sold under an order of the Orphans' Court for the payment of debts, and showing on its face the purpose for which it was given, is a trust fund: *Id.*

Upon the death of the administrator, the assignment of the note by

his administratrix to pay his debts is a breach of trust and a legal fraud, for which the administratrix and her assignee are liable in equity: *Id.*

Lapse of Time.—Lapse of time does not bar a *direct* trust as between the trustee and *cestui que trust;* otherwise, as to *constructive* trusts: *Cartmell* v. *Perkins,* 2 Del. Ch.

A legacy charged upon land, and payable by the devisee of the land, is a trust falling within the exclusive jurisdiction of courts of equity, and as such is not subject to the equitable defence of lapse of time, by analogy to the Statute of Limitations; otherwise, of a legacy payable by the executor or administrator of the personal estate, and which is recoverable both at law and in equity: *Id.*

Chancery—Appointment of New Trustees—Interference with discretion in Exercise of a Power.—Principles upon which a court of equity controls the exercise of a power to appoint new trustees: *Bailey* v. *Bailey,* 2 Del. Ch.

The court will not prevent the exercise of a discretion given for the appointment of trustees, but will see that it has been duly exercised, so as to subserve the purposes contemplated in the creation of the power: *Id.*

The *cestui que trust,* under a devise of a fund in trust, being authorized, upon the death or refusal of the trustee to act, to appoint "a suitable person" to act in his place—*Held,* that the son of the *cestui que trust*—a young man and without property—was not such "suitable person," nor was he entitled to a decree for the delivery of the trust funds, without security first given to the satisfaction of the court: *Id.*

Vendor and Purchaser.

Sale of Land—Relief of Vendee in case of Fraud—Rescission.—A purchaser, under a contract for the sale of land, who has accepted a deed and entered into possession, will, nevertheless, be relieved in equity against a defect of title afterwards discovered by him, *if fraud in the sale was practised upon him by the vendor.* Otherwise, *it seems,* if the deed were accepted *in the absence of fraud: Houston* v. *Hurley,* 2 Del. Ch.

The right to rescind a contract for fraud must be exercised promptly after the discovery of it: *Id.*

A purchaser under a contract for the sale of land accepted a deed and entered into possession in December 1854, soon after which he discovered that the land had been sold, before the conveyance to him, for unpaid taxes; but he continued in possession until 1858, when, without eviction, he abandoned it. *Held,* that after so long delay he was not entitled to wholly rescind the contract; but *held also,* that a portion of the purchase-money remaining unpaid, a court of equity will restrain the collection of it until a good title be made: *Id.*

Warranty. See *Damages.*

Waters and Watercourses.

Negligence—Obstructing a Mill-race—Duty of Person Injured to avoid consequences as far as he reasonably can—Damages—Lost Profits.—In an action for obstructing the race leading to the plaintiff's distillery by throwing or placing therein, or by cutting and allowing to fall therein, trees, branches, logs, stumps, brush, chips, stakes, leaves, &c., whereby damage accrued to the plaintiff, the question is not whether the defendant has acted with due care, but whether his acts have occasioned the damage complained of. If the acts complained were done by the defend-

ant, or by his agents or servants in the course of their employment, they were unlawful invasions of the plaintiff's rights of property, and it matters not that they were done without negligence. Negligence is not the gravamen of the action: *Lawson* v. *Price*, 45 Md.

Where wrong is done by the obstruction of a mill-race, it is the duty of the party injured to avoid the consequences of such wrong, as far as he reasonably can. If, by labor, or a reasonable outlay of money, he can stay or avoid the consequences of the wrong, he should do so. All consequences resulting from his own wilful failure or gross neglect to use timely and reasonable precaution to prevent an extension or increase of the injury, should fall upon himself: *Id.*

The placing an obstruction in a mill-race is an infringement of the owner's absolute right of property, and the continuing such obstruction is equally an infringement of the right, and this the party placing the obstruction in the race is bound to know at his peril, and he has no claim to notice from the owner to remove the obstruction before action brought: *Id.*

In an action on the case for obstructing the race leading to the plaintiff's distillery, the declaration averred that by reason of the wrong complained of, the plaintiff had "lost the whole benefit, profit and advantage of his said distillery, and had been greatly prejudiced and damnified in his possession thereof, and in his said trade, business and employment;" and there was very definite proof before the jury as to the extent of profit that was lost in consequence of the obstruction of the race. *Held*, that the plaintiff was entitled to recover for all the consequences legitimately resulting from the wrongful acts of the defendant, including the loss of profits on the product of the distillery during the time the injury was suffered: *Id.*

WAY.

Private Right over Land of Grantor—Erection of Gates.—Nothing passes as incident to the grant of a private way over one's land, but that which is necessary for its reasonable and proper enjoyment: *Baker* v. *Frick*, 45 Md.

What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant, the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied: *Id.*

In an action by the grantee of a private right of way against the grantor, for the obstruction of the way by the erection of gates, it was *Held*, that the questions whether under all the circumstances of the case as disclosed by the testimony, the gates were necessary to the defendant for the useful and beneficial occupation of his land, looking to the situation of his property; and whether the particular gates complained of were usual and proper under the circumstances; and the further question whether their existence upon the road interfered with the reasonable use of the right of way by the plaintiff, considering the situation of his property, and the manner in which it was occupied, and the intent of the parties as to the mode in which the right of way was to be used, were all questions proper to be decided by the jury upon the evidence in the case: *Id.*

WRITING. See *Notice.*