cising the functions of an office, in any new mode, not hitherto found in the cases, the principle must be made to embrace the new case, or else by refusing it, we virtually deny the soundness of the rule itself. This figure of speech, by which we put a part for the whole, or the whole for a part, must have existed in all the countries from which we inherit our culture and our language, since the very term synecdoche, by which it is called, is substantially Greek, in form as well as import. And there is, perhaps, no figure of speech in more common use, and especially by law writers. They feel that it is not always safe to go much beyond the decided cases, and hence they adopt language merely embracing such cases as have already arisen, without very distinctly enunciating the general principle involved, but at the same time having no purpose of denying or restricting it; feeling that it will be time enough to embrace any new case when it arises.

This is one of the great excellencies of the unwritten law above a written code. The general principles of the former are allowed to embrace new cases as they arise, without regard to the enumerations already made under it; while the latter having been reduced to formal definitions, necessarily excludes all not anticipated at the time these definitions were made. We are conscious we have added very little to the clearness of the principle involved in the opinion, and are sure we need attempt no more. I. F. R.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

SUPREME COURT OF MARYLAND.[3]

COURT OF CHANCERY OF NEW JERSEY.[4]

SUPREME COURT OF WISCONSIN.[5]

ADMIRALTY.

Collision—Pilot in Charge under State Law.—The fact that a steamship is in charge and under the control of a pilot taken on board conformably to the laws of the state, is not a defence to a proceeding *in rem* against her for a tortious collision; the laws of the state providing only that if a ship coming into her waters, refuse to receive on board and pay a pilot, the master shall pay the refused pilot half-pilotage, and no penalty for the refusal being prescribed: *The China* (7 Wallace 58) affirmed: *The Merrimac*, 14 Wall.

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[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 14 of his Reports.

[2] From Hon. N. L. Freeman, Reporter; to appear in 57 Ills. Rep.

[3] From J. S. Stockett, Esq., Reporter; to appear in 36 Md. Rep.

[4] From C. E. Green, Esq., Reporter; to appear in vol. 8 of his Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 30 or 31 Wis. Rep.

Derelict Vessel—Salvor.—The master, officers and crew of a vessel, with every person on board, having gone off in extreme anxiety for their personal safety from the vessel on to another which they had brought to them by signals of distress, the mere expressed intention by the master to employ if possible a tug to go and rescue his vessel (she then lying at anchor in a violent gale), to which expression of intention, the person to whom it was made replied, that he "could not get a tug that would come and bring the boat in, as the weather was too rough," was held not sufficient to deprive the vessel of the character of a derelict, so far as timely effort to save her was contemplated: *The Laura*, 14 Wall.

A vessel undertaking in good faith to perform the office of salvor to a derelict vessel held not responsible for the latter having been wholly lost in the effort to save her: *Id.*

Collision—Lights at Night—Regulations as to Lights binding on Vessels on the High Seas—Suit by Foreign against American Vessel for Violation of United States Regulations as to Lights.—The statutes of the United States and the Orders in Council of Great Britain having each prescribed the sort of lights which, on the one hand, their steamers are to carry at night, and the different sort which, on the other, their sailing-vessels are to carry, and both nations adopting in this form the same distinction in the sorts of lights for the two sorts of vessels respectively, the court declares that where a British steamer and an American sailing-vessel are navigating at night in the known path of vessels navigating between the United States and Great Britain, so that there is a reasonable probability that vessels in that path would be either American or British, a steamer may, in the absence of knowledge, act upon the probability that a vessel whose light she sees while she cannot distinguish at all the vessel herself, is such a vessel as her light indicates, and apply the rule of navigation common to the two countries accordingly: *The Scotia*, 14 Wall.

Under the existing statutory regulations of the United States and Great Britain, both of which on the one hand require sailing-vessels to carry colored lights and not to carry a white one, and both of which on another require steamers to carry a white light at their mastheads,—when an American sailing-vessel carries in mid-ocean at night a white light hung at her bow, fastened low down, and carries no colored lights anywhere, a British steamer, not able to discover what she really is, may be excused for mistaking her for a steamer, and a steamer at a distance instead of near at hand: *Id.*

Semble that the navigation laws of the United States requiring different sorts of vessels to carry different sorts of lights, bind American vessels on the high seas as well as in American waters, and that the people of other nations navigating the high seas may properly sue our citizens in our courts for injuries occurring through the disregard of them: *Id.*

The rules of navigation established in the British Orders in Council, of January 9th 1863 (prescribing the sorts of lights to be used on British vessels), and in our Act of Congress of 1864, having, before the close of the year 1864, been accepted as obligatory by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, were, in April 1867, to be regarded, so far as relates to the vessels of these states, as laws of the sea. And of the historical fact that by common consent of

they have been acquiesced in as of general obligation, courts may take judicial notice: *Id.*

These rules having prescribed that sailing-vessels should not carry a white light, and that steamers should carry one at their masthead, a sailing-vessel which carried a white light low down, so that she looked like a steamer yet at a distance, was held to be without remedy where she had collided with a steamer which mistook her for another steamer and manœuvred accordingly: *Id.*

AGENT. See *Mortgage.*

BANKRUPTCY.

Claim of Assignee against Transferee of Property.—Where an assignee in bankruptcy claims a fund as the property of his bankrupt, which some time before the bankruptcy a firm of which the bankrupt was a member transferred to a third party, and which the transferee now claims adversely to the assignee, the proceedings in the District Court should not be summary and under the first section of the Bankrupt Act, but formal and under the second clause of the third section: *Smith* v. *Mason, Assignee,* 14 Wall.

BUILDING ASSOCIATION.

Fines for the Non-payment of Dues.—Where a mortgage given to a Homestead or Building Association by one of its members, recognises the obligation of the fines which may be imposed upon him by the association, and stipulates for their payment, a court of equity, when called upon to foreclose the mortgage *ex parte* or otherwise, ought to allow in the ascertainment of the indebtedness of the mortgagor, such reasonable and legal fines as may have been incurred by him, by his own consent, when he has been in default: *Shannon* v. *Howard Mutual Building Assoc.*, 36 Md.

Such fines do not come within the principle which forbids a court of equity to lend its assistance to enforce the payment of fines, penalties or forfeitures: *Id.*

CHATTEL MORTGAGE. See *Mortgage.*

COLLISION. See *Admiralty.*

CONSTITUTIONAL LAW. See *Criminal Law; Supreme Court.*

Taking private Property for public use—Entry on Land by Railroad Company—Payment of Damages.—Private property cannot be entered upon and permanently occupied for public use, without the consent express or implied of the owner, until its value has been ascertained by some legal and proper proceeding, nor until such value has been paid to him, or an adequate and safe fund provided for his compensation: *Bohlman* v. *G. B. & Lake Pepin Railroad Co.*, 30 or 31 Wis.

Where such taking is by a private corporation (as a railroad company). the ascertained compensation must be tendered to the owner, and, in case he declines to receive it, must be deposited with some proper person to be kept for such owner until he shall apply for it: *Id.*

An attempt to enter upon the land in such a case, without the damage for its taking having been duly ascertained and tendered, will ordina-

rily be restrained by injunction on the application of the party whose rights are threatened: *Id.*

Ch. 175, Laws of 1861, 1 Tay. Stats. 1043–44, §§ 32, 33, declares that "any person owning or interested in any land upon which the track of any railroad shall have been constructed, or which shall have been appropriated by any railroad company without compensation having been made therefor, shall have the right to have commissioners appointed," &c., and that "no injunction shall be granted by any court to prevent the use or occupancy of such land by any railway company," until the amount of damages to which any owner, &c, is entitled, "shall have first been liquidated or final judgment rendered therefor." *Held*, 1. That this statute must be regarded as intended to apply only to cases where land has been actually occupied by the company with its track constructed, or with depots or other structures erected thereon and used by the company, and where this has been done with either the express or implied consent of the owner. 2. That if applied to a case like the present, where the company merely entered by force, against the owner's protest, and commenced preparing the land as a road-bed, the act would be invalid: *Id.*

The mere fact that a road has been *surveyed* and *located* over land, without any protest on the part of the owner, or any attempt by him to have commissioners appointed to assess his damages, does not give the company any right, under said act, to enter upon and permanently occupy the land: *Id.*

Contract. See *Usage.*

Motive—Consideration—Partnership.—In the matter of a contract, a distinction sometimes exists between a *motive* which may induce entering into it and the actual consideration of the contract. *Ex. gr.* A person, in virtue of some benefit passing to him, may be bound to give for it his promissory note for a certain sum and payable at a certain time, and yet refuse to give the note. Now, if upon an expectation of some particular results in another transaction, into which expectation he is led by his creditor in the original transaction, he gives the note, the original benefit to him, and not the expectation, must be regarded as the consideration of the note: *Philpot* v. *Gruninger*, 14 Wall.

A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C.: *Id.*

On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership. It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made: *Id.*

Corporation.

Subscription to Stock—Liability of Stockholder—Estoppel.—Where a stockholder in a manufacturing company, incorporated under Article 26 of the Code of Public General Laws, knowing that the whole capital stock has not been subscribed, participates in the organization of the company, attends its meetings, is one of the directors, and privy to the contracting of a debt by the company, he will not be heard in an

action against him to enforce his individual liability for the debt, to the extent of the stock subscribed for by him, to deny the regularity of the organization of the company, or to set up as a defence a partial subscription of the capital stock: *Hager* v. *Cleveland*, 36 Md.

Covenant.

Warranty Deed—Outstanding Tax Certificate—Damages—Eviction.—A tax certificate outstanding at the date of a conveyance by warranty deed, is a breach of the covenant against encumbrances: *Eaton* v. *Lyman*, 30 or 31 Wis.

In an action upon the covenants of such deed, the grantee (or his assignee of the right of action) is entitled to recover the amount necessarily expended by him in removing the encumbrance, not exceeding the purchase-price of the land. If the grantee has not removed the encumbrance, he may still maintain the action and recover *nominal* damages: *Id.*

Whether after the recovery of nominal damages in such a case, the grantee or his assignee could maintain a subsequent action for actual damage afterwards suffered from the existence of such encumbrance, is not here decided: *Id.*

Proof that the grantee has been evicted does not show a breach of the covenant of warranty, without showing either under what title the plaintiff in the action against said grantee claimed, and that the same was in fact paramount to the title of his grantor, or that the said grantor was bound by the judgment in that action: *Id.*

Criminal Law.

"*Due Process of Law*"—*Informations*—*Grand Juries.*—The first clause of § 8 of art. 1 of the Constitution of this state, which declared that no person should be held to answer for a criminal offence "unless on the presentment or indictment of a grand jury" (except in certain specified cases), was amended in 1870 so as to declare that no person shall be so held to answer "without due process of law." *Held*, 1. That in view of the history of this section, and the known purpose of its amendment, the words "due process of law" therein cannot be held to require, in cases of *felony*, a presentment or indictment by a grand jury. 2. That so much of ch. 137, Laws of 1871, as provides that the courts of this state shall possess the same power and jurisdiction to try prosecutions *upon informations* for *all* crimes, as they possess in cases of like prosecution upon indictment, is not in violation of said section as amended: *Rowan* v. *State*, 30 or 31 Wis.

The 14th amendment to the Constitution of the United States, which declares that no state shall "deprive any person of life, liberty or property *without due process of law*," was not designed, and does not have the effect, to prevent the states from punishing felonies by criminal informations without presentment or indictment by a grand jury; but, as respects the punishment of crimes, the amendment merely requires that this shall be effected through courts of justice, by regular judicial proceedings therein, previously prescribed by law: *Id.*

The provision of § 12 of said ch. 137, that "in any indictment or information for murder it shall be sufficient to charge that the accused did wilfully, feloniously and of his malice aforethought, kill and murder

the deceased; and in any indictment or information for manslaughter, it shall be sufficient to charge that the accused did feloniously kill and slay the deceased," is valid, and is not in violation of § 7, art. 1 of the state Constitution, which secures to the accused the right "to demand the nature and cause of the accusation against him:" *Id.*

DEBTOR AND CREDITOR. See *Mortgage.*

EASEMENT.

Right of Way—Notice of.—Where a party purchased a right of way, and received a written instrument to evidence the fact, and both sides of the way were fenced, and it was in constant use by him, for the purposes of a way, although the writing was not recorded, these facts constitute such notice to a subsequent purchaser as to prevent him from holding the right of way: *McCann et al.* v. *Day*, 57 Ill.

In such case equity has jurisdiction, as the injured party has no adequate remedy at law, and will perpetually enjoin such purchaser from obstructing the right of way: *Id.*

EQUITY. See *Building Association; Easement.*

ERROR.

Wrong Interpretation of Statute—Change of Statute before Judgment of Court of Error.—Though error may have been committed by a court below on the then state of statutory law, yet where a statute has been passed since that court gave their judgment, changing the then existing law, so that if the judgment were reversed and the case sent back, the court would now, and in virtue of the new statute, have to rightly give the same judgment that they gave before erroneously, this court will affirm: *Pugh* v. *McCormick*, 14 Wall.

ESTOPPEL. See *Corporation.*

When a Party is not estopped from showing the Truth.—A party is not estopped by his acts or declarations from showing the truth, unless such acts or declarations were intended to influence the conduct of another, or he had reason to believe that they would influence the conduct of another: *Kuhl* v. *The Mayor of Jersey City*, 8 C. E. Green.

A receipt for taxes on real properties given by a tax collector on receiving a check, does not estop him from showing that the check was unpaid, although a purchaser was induced by such receipt to pay the whole consideration. The collector did not give the receipt, knowing that it would be used for such purpose, nor does the mere giving of a receipt, which is only a voucher of payment between the parties and always liable to be disproved, raise the presumption that it will be used to defraud a purchaser: *Id.*

EVIDENCE. See *Contract; Husband and Wife.*

EXECUTORS.

Suits in Equity by and against Parties.—Where executors are directed by the will to pay money into the estate, and personally bound so to do, and are directed out of such fund to pay a legacy to a co-executor, but fail to pay the money into the estate, such co-executor may bring suit

in a court of equity, in his individual right, against the executors individually to compel the payment of the legacy: *Evans* v. *Evans*, 8 C. E. Green.

In any suit which necessarily should be brought by a complainant as executor against the defendants as such, if the allegations in the bill are sufficient to bring them before the court in that character, it is not necessary that they should be styled such, either in the process or in the commencement of the bill, or in the prayer for process: *Id.*

Ordinarily it is not necessary to make debtors of the decedent parties to a bill against the executors by creditors or legatees. But where there is collusion alleged or suspected between the executor and the debtors, or he refuses to collect the debts, they are proper parties, and in case of a charge upon real estate, the heirs or devisees are proper parties with the personal representatives: *Id.*

Forcible Entry and Detainer.

Possession of Plaintiff—Joint Tenants.—In this form of action, two questions must arise, first, as to the exclusive possession of the plaintiff, and second, the invasion of his possession by the defendant: *Jamison* v. *Graham*, 57 Ills.

Where there was evidence tending to show both plaintiff and defendant used the premises jointly, as a pasture, it was error in the court to instruct the jury, that the plaintiff might recover, if he was in possession, without reference to defendant being also in possession. The instructions should have informed the jury that plaintiff, to recover, should have had exclusive possession: *Id.*

To maintain an action of forcible entry and detainer, it is not necessary that the plaintiff should have a *pedis possessio;* it is sufficient, if the premises are used and occupied for some useful purpose; but if such possession is joint, as to different persons, neither one would be entitled to the exclusive possession: *Id.*

Even if one joint tenant could maintain this action against another, who has taken exclusive possession, still that could not apply to a case where the parties occupy the premises jointly, and one party seeks to recover the entire premises, to the exclusion of the other. One joint tenant cannot recover the exclusive possession of the premises against his co-tenant: *Id.*

Highway.

Townships—Liability to a Private Action for Neglect of Duty in keeping Highways in Repair.—Organized townships, established by law as civil divisions of counties merely, are not liable, in their corporate capacity, to a private action for damages occasioned by their neglect to keep their public highways in repair: *Bussell, Adm'r.*, v. *Town of Steuben*, 57 Ills.

Homestead. See *Building Association.*

Husband and Wife.

Marriage between Slaves—Evidence as to Pedigree—Act of 1868, *ch.* 116, *relating to the Competency of Witnesses.*—David Jones, a slave, intermarried with a free woman; subsequently, in 1819, he became free by deed of manumission; the parties lived together as man and wife,

and acknowledged and treated each other as such, and were so recognised by all who knew them, long after his emancipation, and up to the time of his wife's death. They had children. A brother of David who became free by manumission in 1815, died in August 1870 intestate, possessed of a large personal estate, leaving a widow but no child, and no relatives other than the children of his brother David, who had died some years previously. On a petition filed by the children of David Jones, claiming a distributive share of the intestate's estate, it was *held*, that the marriage of David Jones was valid, and his children were entitled to one-half of their uncle's estate, his wife being entitled to the other half: *Jones* v. *Jones and others*, 36 Md.

A marriage between slaves is made valid by the ratification of the parties after they become free: *Id.*

Declarations of deceased members of a family as to pedigree, are always admissible in evidence: *Id.*

On a petition by the nephews and nieces of an intestate, claiming to be his next of kin and heirs at law, and asking to share in the distribution of his estate, the whole of which was claimed by his wife to whom letters of administration had been granted, the petitioners are not incompetent as witnesses under the Act of 1868, ch. 116: *Id.*

Insurance.

By Partnership for Individual Benefit of one Partner—Concealment.—Insurance may be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners; especially when the property insured (grain) is held by the parties insured on commission only, and in the policy is described "as held by them in trust or on commission, or sold and not delivered:" *Phœnix Insurance Company* v. *Hamilton*, 14 Wall.

In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm; there is no misrepresentation on that subject which avoids the policy: *Id.*

And where the firm has no actual care or custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance; the omission to inform the insurance company of an agreement of dissolution previously made cannot be considered a concealment which will avoid the policy: *Id.*

Interest. See *Mortgage*.

Malicious Prosecution.

Probable Cause—When Malice may be inferred—Inadmissible Evidence to show Absence of Malice.—Where a party against whom a charge of larceny is preferred, is acquitted and discharged after a full investigation by the magistrate who issued the warrant for her arrest, such acquittal and discharge are *primâ facie* evidence of the want of probable cause for the prosecution, sufficient to throw upon the prosecutor, in an action against him for malicious prosecution by the party against whom he made the charge, the burden of proving there was probable cause: *Straus* v. *Young*, 36 Md.

Malice may be inferred from the want of probable cause for a prosecution: *Id.*

In an action for malicious prosecution, malice on the part of the defendant may be inferred from his zeal and activity in conducting the prosecution against the plaintiff: *Id.*

In an action for malicious prosecution, proof that the defendant acted under the advice of a magistrate, or other person not learned in the law, is not admissible for the purpose of showing the absence of malice: *Id.*

MORTGAGE.

Deed of Trust—Sale under, by Agent—Prior Lien—Equity.—Notwithstanding an agent appointed by a trustee, with a power to sell the trust property, cannot legally sell it in the absence of the trustee, still, a person holding simply the legal title, without having any equitable interest whatever in the trust property, cannot in equity question such a sale: *Beach* v. *Shaw*, 57 Ills.

Where a prior mortgage falls due, and the property is sold by a trustee under a power in the deed, and a junior mortgagee becomes the purchaser at such sale, pays the money and enters into possession of the property and continues the possession: *Held*, such a person will not be disturbed by a person clothed merely with a naked legal title, but having no equitable rights; nor can such person redeem from the sale under the mortgage: *Id.*

Where the assignee bid in the trust property in the name of his clerk, and paid the sheriff the amount of the judgment out of the trust funds in his hands, that operated simply as a satisfaction of the judgment, and let in the junior encumbrance next in rank to the first mortgage on the property, and if the purchaser from the first mortgagor, were to be allowed to redeem, he would be required to pay not only the bid by the second mortgagee under the sale on the first mortgage, but the amount of the second mortgage to him: *Id.*

As a general rule, the holder of the legal estate under the mortgagor is a proper person to redeem, whether he holds as trustee for others or in his own right by a voluntary conveyance from the mortgagor, but when such grantee asks something more than the mere right to redeem, as to set aside a sale previously made under the mortgage, on the ground of irregularity in conducting it, but which was fair, and at which a third party became a purchaser in good faith, and the sum paid with his own encumbrance exceeded the value of the property, such holder of the legal title must show that he has equities before he can redeem: *Id.*

Deed absolute on its face, but held for Security only—Burden of Proof.—An answer, though responsive on the point in controversy, sworn to before an officer in another state, not authorized by the statutes of this state or the rules of this court to take an oath to an answer, has no weight as evidence; it must be treated as a pleading only: *Freytag* v. *Holland*, 8 C. E. Green.

When the controversy is as to the fact whether a deed was intended as security only, the burden of the proof is on the grantor, and his oath against that of the grantee would not be sufficient to change a deed absolute on its face into a mortgage: *Id.*

But where the mortgagee admits that he required an absolute deed as security for a debt, without any recital to show what the debt was, and the mortgagor testifies that the consideration expressed in the

was the debt it was intended to secure, the burden of proof is on the mortgagee to show that it was given as security for a greater amount: *Id.*

The grantee in such case must reconvey on payment of his debt, and if the net rents and profits exceed the amount the deed was given to secure and interest, he must repay such excess: *Id.*

Security—Tax Certificates—Trust.—Where one holds the legal title to land for another and as security for money advanced, if he buys in the tax certificates, he holds those also in trust, and is entitled, as against the *cestui que trust*, to interest upon the amount paid therefor, *only at seven per cent.*, and not at twenty-five per cent., the rate which such certificates bear, by statute, where no such trust relation exists: *Fisk* v. *Brunette*, 30 or 31 Wis.

Judgment that plaintiff be permitted to redeem land upon payment of a certain sum found due from him to defendant on an accounting, should provide also for interest on such sum from the rendition of the judgment to the time of payment: *Id.*

Where the action was to enforce an absolute right to the land, and it appeared that defendant had a right to redeem, but had not tendered the amount due, judgment affirming the right of redemption should be without costs to either party: *Id.*

Of Chattels—Delivery—Recording.—A chattel mortgage is required to be filed or recorded only when the mortgagor retains possession of the property: *Morrow* v. *Reed et al.*, 30 or 31 Wis.

Where there is some irregularity in the filing or recording of the mortgage, or it fails to duly describe the property, or covers property to be subsequently acquired, such defects are all cured by a subsequent delivery of the property to the mortgagees, as against parties who have not acquired paramount rights *before* such delivery: *Id.*

The delivery in such a case must be such an actual transfer of the possession and control of the property that if it were destroyed the loss would be that of the mortgagee: *Id.*

Where the property is bulky and incapable of manual delivery, as in the case of logs, it is sufficient that the mortgagor goes with the mortgagee to the place where it lies, and points it out to the latter as the property included in the mortgage, and which he thereby transfers to the mortgagee's possession: *Id.*

Where the agreement for the *sale* of logs is, that the vendee shall take title to them as soon as they are gotten out and deposited in a certain place, the title will pass when the logs are deposited at the place designated (if that was the intention of the parties in making the contract), even though the vendor is still required to *scale* them: *Id.*

Municipal Corporation.

Streets—Grade—Repairs.—A city has full control over the grade of its streets, and may adopt such angle as the authorities may choose, and may lower or elevate it at will, and the owners of lots adjacent to the street cannot call it to account for errors of judgment in fixing the grade, or recover damages for inconvenience or expenses produced in adjusting the level of their premises with the street. But a city has no more power over its streets than a private person has over his own land, and the city, under the plea of public convenience, cannot be allowed to

exercise that dominion, to the injury of the property of another, in a mode that would render an individual liable to damages, without itself becoming responsible. The rule of law which protects the right of property of one individual against another individual, must protect it from similar aggressions on the part of municipal corporations: *City of Aurora* v. *Reed*, 57 Ill.

If a city, in fixing the grade of a street, turns a stream of water and mud on the grounds or cellar of a citizen, or creates in his neighborhood a stagnant pond that generates disease, it becomes liable to respond in damages: *Id.*

Where the city, through its proper officer, fixes the grade of a street, and property-owners improve the street under the direction of the officer, and the improvement of the street is so made that water from rains and melting snow runs to and discharges itself over a lot owned by an individual, the city is liable for damages. The city has no right to turn surface-water on private property, nor does it change the principle that the street was improved before the lot was. Nor does it change the liability of the city, by showing that other property-owners on the street filled up a portion thereof in front of their lots, so as to turn the water on plaintiff's house. If the officials of a city permit persons to place obstructions in the streets, the city will be liable for injury resulting therefrom: *Id.*

It is no defence to show that plaintiff might have dug ditches that would have protected his property; he was under no legal obligation to do so, and the city was. It was the duty of the city to provide proper sewerage to carry off such water. It is armed with ample power to provide proper means therefor; if necessary, it could condemn ground for the construction of sewers, or use the streets therefor as far as practicable: *Id.*

Navigable Waters.

Rights of Riparian Owner under Laws of United States—Bridges, Dams, &c.—Control of State over—Ordinance of 1787.—Under the laws of the United States, the title of the purchaser of lands bordering on a navigable stream stops at the edge of the stream, and does not extend to the centre; but he has the same right to construct suitable landings and wharves as riparian proprietors on navigable waters affected by the tide: *Wisconsin Imp. Co.* v. *Lyons*, 30 or 31 Wis.

In holding that the title of the purchaser extends to the centre of the stream, this court also held (*Jones* v. *Pettibone*, 2 Wis. 319), that he took subject to the public right of navigation; and this includes the right of the public to do anything within the banks of the stream which may be considered necessary for the benefit of commerce and navigation: *Id.*

The legislature has power to prohibit the erection of any dam, bridge or other structure within or over any navigable stream, which may obstruct or impede the free navigation thereof: *Id.*

By the ordinance of 1787, the constitution of this state, the articles of compact between it and the United States, and sec. 1, ch. 41, R. S., the Mississippi river and the *navigable waters leading into it* and the St. Lawrence, are declared to be common highways, and for ever free, &c.; and this description includes the Wisconsin river: *Id.*

By sec. 2, ch. 41, R. S., "all rivers and streams of water in this state, in all places where the same have been meandered, and returned as navigable by the surveyors employed by the United States government," are "declared navigable to such an extent that no dam, bridge or other obstruction may be made in or over the same, without the permission of the legislature." Defendant, without legislative permission, built a dam in the Wisconsin river at a place where it is navigable in fact. *Held*, that the erection and maintenance of such dam is unlawful, whether it does or does not interfere with the navigation of the river: *Id.*

The plaintiff company having sustained damage from the erection and maintenance of said dam, in the loss of tolls to the amount of $600. may maintain an action for relief against the further construction and maintenance thereof: *Id.*

PARTNERSHIP. See *Bankruptcy; Contract; Insurance.*

PRACTICE.

Trial by the Court instead of the Jury—Effect when the Court, consisting of two Judges, fail to agree.—Where a party, in virtue of article 30, section 91, of the Code, elects to be tried by the court instead of the jury, and the trial takes place, the court is substituted for the jury, and has the same duties and functions to perform in passing upon the guilt or innocence of the accused; and unless the party charged is determined to be guilty or not guilty, there can be no judgment either of conviction or acquittal: *League* v. *State*, 36 Md.

Where a party, indicted for murder, instead of being tried by the jury, is tried by the court, consisting of two judges, and they fail to agree, he is left in the same position as if no trial had taken place. It is in law a mis-trial, and a re-trial must of necessity be had: *Id.*

RAILROAD.

Passenger—Removal from Railroad Train—Damages.—Where a passenger went upon a train of cars, and offered a worthless piece of paper, claiming it to be a pass, and on being informed that it was not a pass, and the passenger refused to pay fare or leave the train, the servants of the company had a right to remove such passenger from the train at a regular station, and they may use the necessary force for the purpose: *Chicago, Rock Island and Pacific Railway Co.* v. *Herring*, 57 Ills.

In such a case it is error to instruct the jury, in estimating damages, that they may consider whether the plaintiff in good faith believed she had a pass, and offered it in good faith, although the paper was not a pass. It was the duty of the passenger, on being informed that it was not a pass, to either pay the fare or leave the train at the first station: *Id.*

If, in such a case, the employees of a railroad use more force than is necessary, then the company would be liable to damages, and the question of the good faith of the passenger, believing she had a valid pass, is wholly immaterial in assessing damages: *Id.*

It is not error in such a case to instruct the jury, that if the servants wilfully and negligently injured plaintiff, they would be authorized to give exemplary damages; as they were engaged in the furtherance and execution of the business of the company, the company were liable for the misconduct and negligence of their servants when thus engaged: *Id*

REPLEVIN.

Evidence—Pleadings.—The averment in a plea in a replevin suit, of property in the defendant, being but inducement to a traverse of the averment in the declaration of property in the plaintiff, and such plea having put plaintiff to the proof of property in himself, any evidence which tends to show the plaintiff is not the owner is legitimate, and it is error to reject it on the trial of the issue: *Constantine* v. *Foster*, 57 Ills.

The 14th section of the Practice Act, R. S. 1845, does not change the rules of pleading in the action of replevin, so as to require a plea of property in a stranger, before such proof can be made, where the ownership of the plaintiff is traversed: *Id*

When the averment in the declaration of ownership by the plaintiff is traversed, he is put on proof of title against the world, and he must prove title to recover; in a plea of property in the defendant, or a stranger traversing plaintiff's ownership, the only issuable fact in the plea is the plaintiff's ownership, and he must recover on his title. and the burden of the proof is on him: *Id.*

Under such an issue it is error to prevent the defendant from proving property in a third person. It is pertinent to the issue, and tends to prove the plaintiff was not the owner, and even under the plea of *non detinet*, it is competent for the defendant to prove that the plaintiff is not entitled to possession of the property: *Id.*

RIPARIAN OWNER. See *Navigable Waters.*

SHIPPING. See *Admiralty.*

Bill of Lading—Ship's Bill.—The contract between a ship and the shipper is that which is contained in the bills of lading delivered to the shipper. The bill retained by the ship, or "ship's bill," as it is sometimes called, is designed only for its own information and convenience; not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract: *The Thames*, 14 Wall.

By issuing bills of lading for merchandise, stipulating for a delivery to order, the ship becomes bound to deliver it to no one who has not the order of the shipper. It is no excuse for a delivery to the wrong persons that the endorsee of the bills of lading was unknown, and that notice of the arrival of the merchandise could not be given to him. Diligent inquiry for the consignee, at least, is a duty. And if, after inquiry, the consignee or the endorsee of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He has no right, under any circumstances, to deliver them to a stranger: *Id.*

The endorsee of a bill of lading may libel the vessel on which the goods are shipped, for failure to deliver them, though he may be but an agent or trustee of the goods for others; as, *ex. gr.*, the cashier of a bank: *Id.*

SLAVE. See *Husband and Wife.*

STAMP.

Stamping by Collector after Execution of Paper—Endorsement of Note.—The 5th section of the Act of July 14th 1870, 16 Stat. at Large 257, by which the power of collectors of internal revenue to post-stamp certain instruments of writing and remit penalties for the non-stamping of them when issued, is extended in point of time, applies to notes issued before the passage of the act as well as to notes issued subsequently: *Pugh* v. *McCormick*, 14 Wall.

An endorsement of a promissory note need not be stamped under any existing statutes of the United States: *Id.*

Nor a waiver in writing, by an endorser, of demand of payment and notice of dishonor: *Id.*

STATUTE. See *Error.*

STREET. See *Municipal Corporation.*

SUPREME COURT OF UNITED STATES.

Error to State Courts—Faith and Credit to Proceedings in other States.—To bring a case here under the 25th section of the Judiciary Act, on the ground that the provision of the Constitution which ordains that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," has been violated by a refusal of the highest state court to give proper effect to a judicial record of another state, it is necessary that it appear that the record have been authenticated in the mode prescribed by the Act of May 26th 1790, "to prescribe the mode in which the public acts, records and judicial proceedings in each state shall be authenticated, so as to take effect in every other state:" *Caperton* v. *Ballard*, 14 Wall.

TAX TITLE. See *Mortgage.*

TOWNSHIP. See *Highway.*

TRUST.

Commissions—Use of Money by Trustee in his own Business—Will not be removed for every violation of Duty.—A *cestui que trust* is entitled to have the interest on the fund held in trust for her, paid to her yearly, without any deductions for commissions, until commissions are allowed and settled by the proper court: *Lathrop* v. *Smalley*, 8 C. E. Green.

A trustee who uses the trust fund in his own business, like any other debtor, must seek the *cestui que trust* to pay the interest. *Id.*

A trustee who, contrary to the directions of the will, fails to invest the fund, but in flagrant violation of the trust, uses the money in his own business, is not entitled to commission: *Id.*

The trustee using the trust fund, having retained the interest, must pay interest upon it from the day it became due: *Id.*

A trustee will not be removed for every violation of duty. For acts done in bad faith, or that have diminished or endangered the trust fund without bad faith, it is the duty of the court to remove him: *Id.*

But when it appears that the trustee is a responsible man, of large property, and engaged in no hazardous business, and that the fund has not been in any danger, and that he supposed the money was as safe in his hands as in any investment he could make, and that retaining it

would save expenses to the fund, his good faith is not impeached and he will not be removed: *Id.*

Whether a co-trustee, who has paid no attention to the fund, but left its administration entirely in the hands of the acting trustee, will be removed, depends upon the conduct of the acting trustee. Under the circumstances of this case he will not be removed: *Id.*

Vexatious and troublesome conduct on the part of a trustee may be good grounds for removing him from the trust, but held insufficient for that purpose in this case: *Id.*

The fund must be invested on bond and mortgage at the highest rate of interest allowed by law, if such investment can be procured, and so as not to be subject to taxes if the trustee resides in a part of the state where such exemption exists: *Id.*

USAGE.

Express Contracts—Presumptions from Usage—Usury.—In actions upon express contracts, proof of *usage* is admitted on the ground that it serves to explain and ascertain the intent of the parties upon some point as to which their contract is silent: *Lamb* v. *Klaus*, 30 or 31 Wis.

The usage shown should be so long-continued and well known and settled, and uniformly acted upon, as to raise a presumption that it was known to both contracting parties, and that their contract was made with reference to it: *Id.*

It is not necessary, however, to show *how long* a usage has continued, if it is otherwise shown to have been known to the parties and their contract made with reference to it: *Id.*

Where there is a written contract to manufacture and deliver goods, and money is advanced thereon, a usage to pay interest on such advances at ten per cent. is not contrary to the terms of the written contract, although nothing is said of interest therein: *Id.*

Where the party who made the advances claimed by his pleading that there was a *mistake* in the written contract, and that the obligation to pay interest at ten per cent. should have been *expressed* therein, and asked to have the instrument reformed, and this equitable issue was first tried and determined against him, the court adjudging that the written contract "expressed fully the intentions of the parties, and was the real contract between them:" *Held*, that this must be construed to mean merely that the written contract expresses all that the parties *meant to express therein;* and it does not estop either party from proving a usage which entered into the agreement: *Id.*

A usage to pay *ten* per cent. interest on advances is like any other *unwritten* promise to pay that rate, and is good to enforce payment of interest at seven per cent., the rate allowed by law where there is an obligation to pay interest and no written agreement for a higher rate: *Id*

USURY. See *Usage.*

VENDOR AND PURCHASER. See *Mortgage.*

Delivery—Intention to part with Title.—Under a contract that A. shall get out logs and deposit them at a certain spot, and that as fast as they are so deposited the title shall vest in B., the actual deposit of the logs by A. at the place named passes the title to B.; and it makes no