might happen that we should afford a remedy here which is denied to persons in that jurisdiction, and which would not be allowed to persons seeking to enforce a similar right under our own laws. It is hardly necessary to add, that if the defendants are not a corporation, but are a partnership, the plaintiff has a plain and adequate remedy at law.

The defendants' counsel has argued at great length, and with signal ability, that the liability created by the statutes of Ohio, being entirely unknown to the common law, no action either at law or in equity can be maintained in this state on account of or to enforce that liability. But in the view we have taken of this case we have not found it necessary to consider that question except incidentally. Several other questions raised by the demurrer we have also had no occasion to consider.

CUSHING, C. J., and LADD, J., concurred.

Demurrer sustained.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF KANSAS.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF NEW HAMPSHIRE.[4]
SUPREME COURT OF PENNSYLVANIA.[5]

AMENDMENT.

Bill to enforce Implied Trust—Averment of express promise to perform Trust not a new Cause of Action—Trust resulting from payment of Purchase-money.—A bill in chancery was brought for the purpose of enforcing a trust in regard to certain land, and alleged an express trust. It was proposed to amend the bill by inserting allegations of facts from which a trust resulted. It was objected that the resulting trust was displaced by the express trust, and that the amendment would introduce a new cause of action. *Held*, that it was no objection to the implied trust that it was alleged that the defendant had expressly promised to perform it, and that the object of the bill as amended being to

[1] Prepared expressly for the American Law Register, from the original opinions. The cases will probably appear in 1 or 2 Otto.

[2] From W. C. Webb, Esq., Reporter; to appear in 16 Kansas Reports.

[3] From Hoyt Post, Esq., Reporter, and Henry A. Chaney, Esq. Cases decided at April Term 1876. The volume in which they will appear cannot yet be indicated.

[4] From J. M. Shirley, Esq., Reporter; to appear in 56 New Hampshire Reports.

[5] From P. F. Smith, Esq., Reporter; to appear in 79 Penna. St. Reports.

enforce substantially the same trust, the amendment did not introduce a new cause of action: *Hall* v. *Congdon*, 56 N. H.

It being alleged that the money with which the land was purchased was the plaintiff's money, *Held*, that it was no objection to the implied trust that the defendant furnished the money by way of loan, and that the plaintiff had agreed that he should hold the land by way of security until the money had been repaid: *Id.*

Assignment.

Dividend on whole Claim—Not on Balance—Assignee is Trustee for all Creditors whether secured or not.—Smeid assigned for the benefit of creditors his real estate, being subject to three judgments to Graeff, who sold it under the judgments; the proceeds were brought into court and decreed to be paid to Graeff; two judgments were paid in full and the third in part. In the distribution of the personal estate in the hands of the assignees, the court below decreed a dividend on the whole of the *unpaid* judgment only. *Held* to be error: the dividend should be on the whole amount of all the judgments until he should be paid in full, if a *pro ratâ* dividend would reach that: *Graeff's Appeal; Meily's Appeal*, 79 Penna.

Upon an assignment for the benefit of creditors, the property of the assignor is in trust for the benefit of all his creditors, without regard to the nature of the securities they hold; the creditors are the equitable owners: *Id.*

Graeff's interest was the extent of his *whole* claim; the payment in full of one judgment, nor the fact that real estate was first resorted to, did not change his position: *Id.*

Bailment.

For what neglect Bailee is responsible—Evidence on question of Negligence—How far Bank responsible for Act of Cashier.—Collateral facts incapable of affording reasonable presumption as to the principal matter in dispute, are inadmissible as evidence, as tending to draw the minds of the jury from the issue and to prejudice and mislead them: *First National Bank of Carlisle* v. *Graham*, 79 Penna.

Where a bailment is for the sole benefit of the bailor the bailee is answerable only for gross neglect; when solely for the benefit of the bailee, he is responsible for slight neglect; when reciprocally beneficial to both, the bailee is responsible for ordinary neglect: *Id.*

A bailee keeping the property of the bailor with the ordinary care with which he keeps his own, does not fulfil his duty, if the contract requires strict diligence and extraordinary care: *Id.*

Where the benefits are reciprocal, the bailee is liable for neglect of ordinary care, although he has been careless and reckless in the management of his own goods as well as those of the bailor: *Id.*

That the bailee has dealt with his own goods and the bailor's in the same way, is evidence in adjusting the standard of duty and deciding the question of performance, and as a test of the bailee's good faith. It would raise a presumption of adequate diligence: *Id.*

The measure of the bailee's responsibility is to be determined in each

case by a comparison with the conduct of *classes* of men, not of individuals: *Id.*

The mere voluntary act of the cashier of a bank in receiving securities for safe-keeping, will not render the bank liable for their loss; but if the deposit be known to the directors and acquiesced in, the bank will be liable: *Id.*

BILLS AND NOTES. See *Partnership.*

Acceptance of Bill of Exchange by Parol—Lex loci contractus.—Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought: *Scudder* v. *Union National Bank*, S. C. U. S., Oct. Term 1875.

Therefore, whether a contract shall be in writing or may be made by parol, is a formality to be determined by the law of the place where it is made: *Id.*

Unless forbidden by statute, it is a rule of law generally that a promise to accept an existing bill of exchange is an acceptance thereof whether the promise be in writing or by parol: *Id.*

CONTRACT. See *Bills.*

Government Contract—Power of Secretary of the Navy—Settlement.—Where the secretary of the navy possesses the power under the legislation of Congress, and the orders of the president, to enter into contracts for work connected with the construction, armament or equipment of vessels of war, he can suspend the work contracted for, when from any cause the public interest may require its suspension; and where such suspension is ordered he is authorized to settle with the contractor upon the compensation to be paid for the partial performance of the contracts: *The United States* v. *The Corliss Steam-engine Company*, S. C. U. S., Oct. Term 1875.

When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it is equally binding upon the government as upon the contractor: *Id.*

CORPORATION.

Union Pacific Railroad—Relations with United States.—The Union Pacific Railroad Company conceding the right of the government to retain *one-half* of the compensation due it for the transportation of the mails, military and Indian supplies, and to apply the same to reimburse the government for interest paid by it on bonds issued to the corporation to aid in the construction of its railroad and telegraph lines, brought suit to establish its right to the other moiety. The United States, on the other hand, having paid interest on these bonds in excess of the sums credited to the company for services rendered by it, insisted upon its right to withhold payment altogether. *Held*, that the Act of Congress of 1862, incorporating the Union Pacific Railroad Company, and the purposes contemplated by it, show that Congress never intended to impose on the corporation the obligation to pay current interest; and that therefore the deduction for interest paid on the bonds could not be

lawfully made: *The United States* v. *The Union Pacific Railroad Co.*, S. C. U. S., Oct. Term 1875.

Contracts made by Promoters before Charter—Corporation liable, if benefits accepted and enjoyed—Minority of Promoters cannot bind the others.—Where a number of persons not incorporated but associated for a common object, intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he should be compensated; if such acts were necessary to the organization and its objects and are accepted by the corporation and the benefits enjoyed, they must be taken *cum onere* and be compensated for: *Bell's Gap Railroad Co.* v. *Christy*, 79 Penna.

In such case the promoters of the enterprise must be a majority of them. A minority could not bind the association or corporation: *Id.*

COURT.

Disagreement of Judges as to Reasons for Judgment.—Where a majority of the court agree in the judgment that ought to be rendered but disagree as to the reason for such judgment, such judgment must be entered; but it is useless to give the opinion of the several judges, for thereby no point of law is settled or decided (*Foltz* v. *Merrill*, 11 Kans. 479): *Railroad Co.* v. *Hubbard*, 16 Kans.

DELIVERY. See *Sale.*

DIVIDEND. See *Assignment.*

DIVORCE.

Extreme Cruelty—Competency of Children as Witnesses.—Upon the trial of a libel for divorce on the ground of extreme cruelty, only two assaults upon the libellant by the libellee were proved, and those of not a very aggravated nature. It was in proof that the libellee used very violent language towards the libellant, cursing her, and applying indecent epithets, and conducting himself so as to terrify his wife and children, and make living with him intolerable. *Held*, that these facts furnished evidence from which the judge who heard the cause was authorized to find that the charge was supported: *Day* v. *Day*, 56 N. H.

Upon such trial, a boy ten years old was offered as a witness. He appeared to have no knowledge of the nature of an oath. Having been first instructed by the court upon that point, he was permitted to testify. *Held*, that he was properly admitted: *Id.*

If a child under the age of nine years is found, after examination by the court, to possess a sufficient sense of the wickedness and danger of false swearing, he may be sworn, and admitted to testify: *Id.*

EVIDENCE. See *Divorce; Libel; Negligence.*

Opinions of Non-professional Witnesses—Insanity—Practice—Right to Open and Close.—Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testator's appearance and conduct: *Boardman* v. *Woodman*, 47 N. H. 120; *State* v. *Pike*, 49 N. H. 399, and *State* v. *Archer*, 54 N. H. 468, upon this point, overruled: *Hardy* v. *Merrill*, 56 N. H.

The party who affirms that a will was duly and legally executed, has the burden of proof, and the accompanying duty of opening, and the

right to close, no matter in what form the issues for trial may be drawn: *Id.*

INTEREST.

Usury—Powers of the National Government.—The National Bank Act of Congress of the 3d of June 1864, *inter alia*, makes the following provisions: (1.) The rate of interest chargeable by each bank is to be that allowed by the law of the state or territory where the bank is situated. (2.) When by the laws of the state or territory a different rate is limited for banks of issue organized under the local laws, tho rate so limited is allowed for the national banks. (3.) Where no rate of interest is fixed by the laws of the state or territory the national banks may charge at a rate not exceeding seven per cent. per annum. (4.) Knowingly reserving, receiving or charging "a rate of interest *greater than aforesaid* shall be held and adjudged a forfeiture of the interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." *Held*, that the phrase "a rate of interest greater than aforesaid" has reference not merely to the preceding sentence, which relates to banks where no rate of interest is fixed by law, but to all the foregoing clauses; and that therefore the consequences of usury where such rate is fixed, is not to be governed wholly by the local law upon the subject: *National Bank* v. *Dearing*, S. C. U. S., Oct. Term 1875.

The states can exercise no control over the national banks nor in any wise affect their operation except in so far as Congress may see proper to permit: *Id.*

In the United States the powers of government may be divided into four classes: those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised concurrently and independently by both; and those which may be exercised by the states, but only with the consent, express or implied, of Congress: *Id.*

JUDGMENT. See *Court.*

LIBEL.

Action for Libel—Pleading—Evidence.—On the trial of an action for libel, it appeared that the original writing, the publication of which was the foundation of the suit, was among the records of the navy department at Washington. *Held*, that secondary evidence of its existence and contents was properly admitted: *Carpenter* v. *Bailey*, 56 N. H.

The alleged libel contained charges against the plaintiff as paymaster in the naval service of the United States stationed at Portsmouth, and requested his removal. *Held*, that a letter from Vice-admiral Porter, while in charge of the department, to the plaintiff, making the removal, and stating the reasons for it, was admissible, as an act of the department: *Id.*

The plaintiff was permitted to testify that he sold his furniture at a loss, upon his transfer from the naval station at Portsmouth. *Held*, no cause for setting aside the verdict in his favor: *Id.*

The allegations of a special plea of justification in such case must be

proved substantially as laid. Hence, where such plea set up specific facts, going to show that the charges were true, and other facts showing that the occasion was lawful and the end justifiable, and alleged that such was the fact, *Held*, that the court properly refused to charge the jury that if the alleged charges are true the plaintiff cannot recover; also, that the jury were properly instructed, among other things, that, if the occasion was lawful and the alleged libel true, the verdict should be for the defendant: *Id.*

Whether an alleged libel is a privileged communication, is a question for the jury under proper instructions from the court: *Id.*

NATIONAL BANKS. See *Bailment; Interest.*

Taxation of by States.—The provision of the Act of Congress of February 10th 1868, that taxation on national bank stock shall not be at a greater rate than is assessed upon other moneyed capital in the states, relates only to the rate, and does not prohibit the states from exempting any *subjects* from taxation. Per Graham, P. J.; adopted by the Supreme Court: *Gorgas's Appeal*, 79 Penna.

Stock of National Banks liable to School-tax in addition to State-tax.—A school tax was assessed on national bank stock in 1870, which was unpaid. On the 19th of January 1871, the bank paid the state tax of one per cent., being the tax of 1871, under Act of April 12th 1867, sect. 5. *Held*, that the holder of stock was not exempt from the school tax of 1870: *Carlisle School District* v. *Hepburn*, 79 Penna.

The state assessor assessed the stock at $150, the par value being $100, the return was duly made and there was no appeal. *Held*, that a tax imposed by the school directors on that valuation was not void; if the assessment was wrong the remedy was by appeal to the auditor-general under the Act of April 2d 1868: *Id.*

NEGLIGENCE. See *Bailment.*

Escape of Fire from Locomotive—Circumstantial Evidence—Remote Injury—Questions of fact for Jury.—Negligence on the part of a railroad company in permitting fire to escape from its engines may be shown wholly by circumstantial evidence, and it is not necessary in such a case that any direct proof of any particular act of negligence should be introduced: *Railroad Co.* v. *Bales*, 16 Kans.

Where circumstantial evidence, tending to show negligence on the part of a railroad company in permitting fire to escape from its engines, is introduced by the plaintiff, and the defendant company afterwards introduces direct and positive evidence tending to show the contrary; *Held*, that it is a question for the jury to determine which evidence is entitled to the greatest credit; *Id.*

Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the lands of several different persons before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff, at a great distance from where the fire was first kindled, sets it on

fire and consumes it: *Held*, that the negligence of a railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company: *Id.*

The proper questions to be considered in such a case are as follows: (1.) Was the railroad company negligent in permitting the fire to escape? (2.) Would the plaintiff's property have been destroyed by fire as it was destroyed, except for the fire permitted to escape from the company's engine? (3.) Could the railroad company, by exercise of reasonable diligence, at or before the time of permitting said fire to escape, have anticipated the burning of the plaintiff's property as likely to occur and as the natural and probable consequence of permitting said fire to escape? And these are all questions of fact entirely for the jury to consider and determine under proper instructions from the court: *Id.*

Speed of Steam-cars in City—May be regulated by Ordinance—Contributory Negligence by Child—And Parents.—A child about nine years old was sent by his mother, who resided in Harrisburg, near defendants' railroad, on an errand across the road; whilst on the track he was killed by an engine going westward; there were iron-works and houses for the hands on the opposite side of the road at that point, which was in the outskirts of the city; and the hands of the works and other persons were frequently crossing the track about the place. East of where the boy was struck was a curve, which prevented the engineer from seeing him till within too short a distance to stop the train after he was seen. There was no ordinance of the city limiting the rate of running trains at that point. There was evidence that the train was running at a high rate of speed. *Held*, that whether the train was running at a rate of speed which was safe and prudent under the circumstances, was for the jury: *Pennsylvania Railroad Company* v. *Lewis et ux.*, 79 Penna.

It is not common prudence or ordinary care for trains to enter the outskirts of a city at a dangerous rate of speed, although the people have no right to go on the railroad track: *Id.*

Although persons on a railroad track are trespassers, regard must be had to the habits, character, condition and circumstances of a people living in a city and immediately on the line of a railroad: *Id.*

The Commonwealth by its police power may regulate positive rights when for the safety, protection and welfare of the people; and the speed of trains through towns and cities may be regulated by ordinance: *Id.*

When it is determined by the jury on the facts submitted to them that the rate of speed of a train is incompatible with public safety under the circumstances of the place, the rights of a company even on its own track are qualified by the law of the public good: *Id.*

The court charged: "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," &c. *Held* not to be error: *Id.*

There was evidence in this case of contributory negligence by the parents as to exposing their son to danger, and submitted with proper instructions: *Id.*

PARTNERSHIP.

Right of liquidating Partner to give Firm-notes.—A firm dissolved in May, giving notice by publication and authorizing one as the liquidating partner to use the firm name for that purpose; in August, without the knowledge of his fellows, he drew notes payable to the firm, endorsed them with the firm name, had them discounted by bankers with whom the firm had never had dealings; the proceeds of the notes passed to the individual credit of the partner making them; there was evidence that the proceeds were applied to the firm debts. *Held*, that if the notes were *bonâ fide* for liquidation and the proceeds applied to payment of firm debts, the other partners would be liable: *Lloyd et al.* v. *Thomas et al.*, 79 Penna.

RAILROAD. See *Negligence.*

SALE.

When Contract Complete—Delivery most Significant Fact, but not Conclusive.—The plaintiff sold defendant certain logs lying in Bad River, and received $50 on account of the price. He (plaintiff) was subsequently to run the logs down stream as far as the limits of the Bad River Booming Company, where they were to be measured. The price was to be $8 per M. The logs were delivered to the Booming Company, but defendant never received them: *Held*, That where under a contract for sale of personalty something remains to be done, as to identify the property, or to fix the price to be paid, &c., the presumption is that title is not to pass until such act has been accomplished, but such presumption is not conclusive. The question is one of mutual assent, whether the minds of the parties have met, and by their understanding the purchaser has now become owner: *Wilkinson* v. *Holiday*, S. C. Mich., April Term 1876.

Delivery is the most significant fact to prove transfer of title, but it is not conclusive; parties may agree that title shall not pass until the measurement be made to determine the amount of the price to be paid: *Id.*

As to the delivery in this case, the real question was, for *whom* was the Booming company bailee after they received the logs? And while the fact that the defendant was to pay the company's charges raised the presumption that the logs were held for him, on the other hand, the fact that the logs were to be scaled, to determine how much was to be paid, and no credit having been agreed on, raised the inference that payment was to be made before the purchaser was to be at liberty to remove the logs: *Id.*

The question of delivery was one of fact to be submitted to the jury, and not to be decided for them by the court: *Id.*

TRUST. See *Amendment.*

WAY.

Way of Necessity—Implied Reservation.—A party having conveyed a portion of his land over which was the only means of access to the remaining land—*Held*, that a right of way by necessity to the remaining land was reserved: *Pingree* v. *McDuffie*, 56 N. H.

WILL. See *Evidence.*