the jury of any words of essential enlightment on the question of what was habitual intoxication.

Appellant's fifth refused instruction was to the effect that the defendant was not responsible for consequences which he or any reasonable or prudent man could not reasonably have foreseen, as the natural consequence of selling liquors to the plaintiff's husband.

The provision of the statute is that one who shall be injured in person or property, or means of support, in consequence of the intoxication, habitual or otherwise, of any person, shall have the right of action.

Appellant's twelfth refused instruction was calculated to mislead the jury, who would be likely to conclude from it that they could not in their verdict go beyond the actual damages sustained, and give exemplary damages.

The remarks already made in reference to appellee's third instruction are applicable to this twelfth refused instruction.

It is lastly complained that the damages are excessive. From an examination of the evidence we see no sufficient ground for any interference with the verdict of the jury on this score.

Finding no error in the record sufficient for the reversal of the judgment, it must be affirmed.

BREESE, J., dissented.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
COURT OF CHANCERY OF NEW JERSEY.[2]
SUPREME COURT COMMISSION OF OHIO.[3]
SUPREME COURT OF PENNSYLVANIA.[4]
SUPREME COURT OF VERMONT.[5]

ACCOUNT.

Statute of Limitations—Interest.—In matters of account, one party may credit the other items that represent a legal indebtedness that should go into the account, and thereby avoid the bar of the Statute of Limita-

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1876. The cases will probably be reported in 3 or 4 Otto.

[2] From C. E. Green, Esq., Reporter; to appear in vol. 12 of his Reports.

[3] From E. L. De Witt, Esq., Reporter; to appear in 27 Ohio State Reports.

[4] From P. F. Smith, Esq., Reporter; to appear in 80 Penna. St. Reports.

[5] From Hon. J. W. Rowell, Reporter; to appear in 48 Vermont Reports.

tions, although the other party has not charged the items, and insists that they are not to be allowed him: *Davis* v. *Smith*, 48 Verm.

In mutual accounts, interest is to be cast on the annual balances: *Id.*

ADMIRALTY.

Collision—Liability of Owners.—Owners of ships and vessels are not liable for any loss, damage or injury by collision, if occasioned without their privity or knowledge, beyond the amount of their interest in such ship or vessel and her freight pending at the time the collision occurred: *Steamboat Atlas, &c*, v. *Phœnix Ins. Co.*, S. C. U. S., Oct. Term 1876.

The reception of the amount of the loss from the insurers is no bar to an action subsequently commenced against the wrongdoer to recover compensation for the injury occasioned by the collision: *Id.*

The owners of a ship or vessel injured by collision may proceed to recover compensation either against the owners or against the master personally, or against the ship herself, at their election: *Id.*

The cargo which is on board the colliding vessel at the time the collision occurs is not liable for the damage done by the ship in which it is carried: *Id.*

Where both vessels are in fault, the positive rule of the Court of Admiralty requires the damage done to both ships to be added together and the combined amount to be equally divided between the owners of the two: *Id.*

AGENT. See *Corporation.*

Unlawful Acts not presumed to be Authorized.—Defendant's constable was employed to summon defendant's witnesses and to assist in the defence. Plaintiffs offered to show that the constable offered inducements to one of plaintiffs' witnesses to keep away from the trial, and not to appear as a witness for the plaintiffs; but they did not offer to show that any other officer or agent of the town was cognisant of, authorized or approved the act. *Held*, inadmissible, and that it could not be presumed that the constable was the agent of the town for any such unlawful purpose: *Green and Wife* v. *Town of Woodbury*, 48 Verm.

In order to make evidence of such acts admissible against a party, it must appear that they were the acts of the party, either directly or by authorization: *Id.*

ASSIGNMENT FOR CREDITORS. See *Deed.*

ASSUMPSIT.

It is well settled in this state, that where there is an agreement to give time for payment upon the debtor's giving a note with surety, if such note is not given, the creditor may sue at once on book or in general assumpsit. Thus, where the agreement was that defendant should pay by giving plaintiffs a note *to be approved by them*, payable in one year, and such note was not given on request, it was *held* that the agreement called for a note with surety, and that plaintiffs might sue at once in general assumpsit, for the recovery of their demand: *Hale & Fish* v. *Jones*, 48 Verm.

A different rule is said to prevail where the debtor is only required to give his own note: *Id.*

BILLS AND NOTES.

Bonâ fide Holder.—A holder of negotiable paper, who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title: *Johnson* v. *Way*, 27 Ohio St.

To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part: *Id.*

Circumstances tending to show bad faith or fraud in taking such paper, are admissible in evidence, and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defences existing between antecedent parties: *Id.*

Evidence—Sureties.—Plaintiff held a note whereon N. was principal, and defendants and others were sureties. Plaintiff and N. procured defendant W. to sign another note, agreeing at the time that it should not be used except to take up the former note, nor unless all the signers of the former note signed it. W. was induced by this agreement to sign said last-mentioned note, which plaintiff well knew, and also knew that the note was to be presented to defendant S., by N., the principal thereon, with W.'s name upon it as an inducement for him to sign, and that S. was thereby induced to sign; and plaintiff took the note, knowing S. had been so induced, and advanced money thereon to N. instead of taking it in payment of the former note as agreed. *Held*, that defendants' relations as sureties, and said agreement, might be shown by parol, and constituted a defence to the note: *Harrington* v. *Wright*, 48 Verm.

COLLISION. See *Admiralty; Negligence.*

CONFLICT OF LAWS. See *Judgment.*

CONSTITUTIONAL LAW. See *Limitations, Statute of.*

CONTRACT. See *Vendor.*

Time as of Essence.—If one agree to pay and another to take a certain sum within a certain time in settlement of a disputed claim, and payment be not made within the time, suit may be brought upon the original demand: *Piper* v. *Kingsbury*, 48 Verm.

CORPORATION. See *Subrogation.*

Dealings of an Officer with his Company—Notice to Agent.—The rule, that notice of facts to an agent is constructive notice thereof to the principal himself, has no application to a case of a sale to a corporation, by its president, of property purchased by him in his private capacity; in such a transaction, the officer, in making the sale and conveyance, stands as a stranger to the company: *Barnes* v. *Trenton Gas-light Co.*, 12 C. E. Green.

When an officer of a corporation is dealing with them in his own interest opposed to theirs, he must be held not to represent them in the transaction so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys: *Id.*

Individual Liability of Trustees or Directors—Equity.—The Act of Congress (16 U. S. S. 98) under which certain corporations are organized in the District of Columbia, contains a provision that "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." *Held*, 1. That an action at law cannot be sustained by one creditor among many for the liability thus created, or for any part of it, but that the remedy is in equity. 2. That this excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of their debts: *Hornor* v. *Henning et al.*, S. C. U. S., Oct. Term 1876.

Criminal Law.

Imprisonment in another State.—Congress has power to provide that persons convicted of crimes against the United States in one state may be imprisoned in another. Congress can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there, or it may arrange with a single state for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them: *Ex Parte Karstendieck*, S. C. U. S., Oct. Term 1876.

The Revised Statutes of the United States (sects. 5541, 5542 and 5546), provide that if the court in which the prisoner is convicted finds that the state penitentiary is unsuitable, the attorney-general of the United States may designate another in another state for use on that account: *Id.*

It was not the intention of Congress to confine imprisonment in penitentiaries exclusively to cases in which hard labor is in express terms made by statute a part of the punishment: *Id.*

When the attorney-general has designated a state penitentiary, the court may sentence the person convicted to imprisonment at the place designated: *Id.*

Custom. See *Easement.*

Damages.

Breach of Promise of Marriage.—In assessing damages in an action for the breach of a promise of marriage, it would not be a legitimate subject for the jury to consider the consequences to plaintiff had she married defendant and thereby formed an unhappy alliance, rendered such by the want of that love and affection that a husband should bear his wife: *Piper* v. *Kinsbury*, 48 Verm.

Debtor and Creditor. See *Corporation; Deed; Vendor.*

Decedent's Estate.

Contract for Sale of Land—Widow not entitled to Notice.—By contract for sale of land the estate of the decedent is converted into personalty, over which his personal representatives have absolute control: *West Hickory Mining Association* v. *Reed*, 80 Penn. St.

A widow and heirs are not entitled to specific notice of an application for an order of sale for the payment of debts: *Id.*

Where the application for specific execution of a contract for sale of land is by the administrators, &c., of a decedent, notice to the widow and heirs is not necessary: *Id.*

When land is brought into a partnership as stock, it is, as between the partners, their creditors and one who has knowingly dealt with them for it, personalty belonging to the firm: *Id.*

Deed.

Cancellation by Parties does not re-vest the Estate.—The cancellation or destruction of a deed by consent of parties, will not divest the grantee or an estate thereby granted to him and vested in him by virtue thereof, and re-vest it in the grantor; and this is equally true as to a deed made under the "act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," as to any other: *Alpaugh* v. *Roberson and Others*. 12 C. E. Green.

By a conveyance made under that act, the real and personal estate of the assignor passes to the assignee and continues in him, notwithstanding the destruction of the deed: *Id.*

The execution of such a conveyance is the creation of a trust which exists, notwithstanding the destruction of the instrument, and which the Court of Chancery will establish and execute: *Id.*

Upon a renunciation by the assignee of his trust, under such a conveyance, application should be made to the Court of Chancery to appoint a trustee in his stead: *Id.*

Where, after the destruction of a conveyance made under the act "to secure to creditors an equal and just division," &c., the grantor made an assignment to other assignees, such assignees were enjoined: *Id.*

In such a case, declared, that if consent be given, the trust under the original assignment will be established by decree of the court, and a new trustee or trustees appointed under it; otherwise, a receiver will be apppointed: *Id.*

Escrow—Delivery.—Evidence was admissible for defendant that the agent of the company who procured his subscription agreed to hold it until he should authorize its delivery to the company, and that a person not a director obtained the paper to look at, and without consent of the agent or defendant delivered it to the company: *Cass* v. *Pittsburg, Virginia and Charleston Railway Co.*, 80 Penna. St.

As a general rule, delivery of the deed as an escrow cannot be made to the grantee: *Id.*

When an absolute deed is delivered to the grantee his acceptance is presumed; subsequent acceptance relates to the first delivery: *Id.*

If by a condition a contractor imposes a burden upon the other party, the latter must expressly or impliedly accept before it is binding on both: *Id.*

Easement.

Surface and mining Rights—Usage—Of natural right the surface land is entitled to support from the strata below: *Coleman et al.* v. *Chadwick; Chadwick* v. *Coleman et al*, 80 Penna. St.

When the owner of the whole fee grants the minerals, reserving the

surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface: *Id.*

A custom contrary to such right would not be reasonable and therefore would be invalid: *Id.*

A grant of minerals and all privileges necessary for the convenient working, &c., of coal, and the rights "incident or usually appurtenant to working and using coal mines," does not affect the grantor's right to a surface support: *Id.*

The loss of springs to the owner of the surface by reason of the ordinary working of the mines, does not render the owner of the minerals liable for damages: *Id.*

EQUITY. See *Corporation; Injunction; Judgment; Subrogation.*

Discovery for Purposes of Suit at Law.—The Court of Chancery exercises concurrent jurisdiction with courts of law in cases where, though the rights are of a purely legal nature, other and more efficient aid is required than a court of law can afford, to meet the difficulties of the case and insure full redress: *Hoppock's Ex'rs* v. *United New Jersey Railroad and Canal Co., &c.*, 12 C. E. Green

The Court of Chancery will take jurisdiction of a suit whose subject-matter is properly cognisable at law, and though adequate relief may be given there, in order to a discovery; and in this case, under the circumstances, it was held that a suit in equity might be maintained for discovery of the party who should be sued at law, and as to the liability of the parties against whom the bill was filed: *Id.*

Interference with Judgment at law.—Equity will relieve a party against a judgment at law when its justice can be impeached by facts, or on grounds, of which the party seeking its aid could not have availed himself at law, or of which he was prevented from availing himself by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part: *Cairo & Fulton Railroad Co.* v. *Titus and Scudder*, 12 C. E. Green.

New testimony cannot be relied on as a ground for equitable interference with the judgment, if such testimony could, with proper care and diligence, have been procured in time to have been available at law. Nor will equity interfere when the facts, though discovered since the trial, might have been established at the trial upon cross-examination: *Id.*

It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must show a clear case of diligence to entitle him to an injunction: *Id.*

Joinder of Causes of Action—Multiplicity.—No general rule defining what causes of action may be properly joined in a bill and what cannot, can be laid down. The question is always one of convenience in conducting a suit, and not of principle, and is addressed to the sound discretion of the court: *Ferry* v. *Laible*, 12 C. E. Green.

Where it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined

together, but must be heard piecemeal, first one and then the other, a clear case of misjoinder is presented: *Id.*

But where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other, or growing out of the same subject-matter, where all the defendants have some interest in every question raised on the record, and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained: *Id.*

Married Woman—Decree against—Trustee as Party.—It is error for which a decree in chancery will be reversed, to make such decree against a woman whom the bill shows to be both a minor and *feme covert*, with no appearance by her or for her, without appointing a guardian *ad litem*: *O'Hara and wife* v. *MacConnel and Kennedy, Assignees in Bankruptcy of Michael O'Hara*, S. C. U. S., Oct. Term 1876.

Where the object of the suit is to divest a *feme covert* or minor of an interest in real estate, the title of which is in a trustee for her use, the trust being an active one, it is error to decree against her without making the trustee a party to the suit: *Id.*

The making of the conveyance as ordered by the decree does not deprive defendant of the right of appeal: *Id.*

Neither a subsequent petition in the nature of a bill of review, nor anything set up in the answer to such petition on which no action was had by the court, can prevent a party from appealing from the original decree: *Id.*

Errors and Appeals.

Order striking out Answer when followed by Judgment is appealable.—The striking out of an answer because not sufficiently specific, followed by a refusal of time to file a further answer and the entry of judgment on the same day, is not a mere matter of discretion, but is reviewable by a court of error, and if erroneous on the merits, the order will be reversed. *Fuller & McKibben* v. *Claflin et al*, S. C. U. S., Oct. Term 1876.

Foreign Judgment. See *Judgment.*

Former Adjudication.

Defence to be made at Proper Time or Barred.—In a judicial proceeding in a court of record, where a party is called upon to make good his cause of action or establish his defence, he must do so by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the correctness of the determination, nor to re-litigate the same matters between the same parties: *The Covington and Cincinnati Bridge Co.* v. *Sargent*, 27 Ohio St.

This holding is not to affect any right a party may have in matters of set-off, counterclaim or cross action provided for by law: *Id.*

Husband and Wife. See *Equity.*

Ante-nuptial Contract upon Consideration of Marriage.—An ante-nuptial contract, in parol, whereby R. M. K., then a *feme sole*, and being the owner in fee of certain lands, agreed with J. H., in consideration that he would marry her, and would enter upon and make valuable im-

provements upon said lands, she would convey to him by deed duly executed in fee simple the sam , is "an agreement upon consideration of marriage" and is void under the 5th sect. of th Statute of Frauds and Perjuries, not being in writing and signed by the parties sought to be charged: *Henry* v. *Henry et al.*, 27 Ohio St.

Such contract is an entire one, and the additional consideration named therein, of entering upon and making improvements upon the land, in no manner changes the character of the agreement so as to take it out of the statute: *Id.*

The marriage under such contract of the parties is not such a part performance as takes the case out of the statute: *Id.*

Nor is the marriage and subsequent entry on the lands, and making valuable improvements thereon, such part performance as takes the case out of the statute, such acts being as well referable to his character as husband as that of vendee: *Id.*

A deed defectively executed by the wife, in the attempted performance of such contract, will not be perfected in the absence of a clear case for a specific performance of a parol contract: *Id.*

Injunction.

Mandatory—Interlocutory.—An injunction to restrain a defendant from raising the water from his mill-pond above a certain height, is not mandatory; but if it were strictly mandatory, that would not constitute a valid objection to it: *Longwood Valley Railroad Co.* v. *Baker*, 12 C. E. Green.

There is no general rule against granting relief by mandatory injunction, interlocutorily, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and injury to other rights: *Id.*

Equity will not interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief; and each case must depend on its own circumstances: *Id.*

Insurance.

Foreign Company—State regulation of—Statute.—A foreign insurance company can transact business in Pennsylvania only under the system established by Act of April 11th 1868: *Thorne et al* v. *Travellers' Insurance Co.*, 80 Penn. St.

Thorne was appointed agent of a foreign insurance company; the conditions required by the Act of 1868 not having been complied with, he gave bond with sureties to the company, conditioned for paying over moneys received by him, &c.; in suit by the company against him and his sureties for his not paying over, *Held*, that the plaintiffs could not sustain the suit: *Id.*

The legislature may prescribe the conditions under which foreign corporations may do business in the state, and the mode of appointing and qualifying agents: *Id.*

An action on a transaction prohibited by a statute cannot be maintained, although a penalty be imposed and the transaction be not declared void: *Id.*

Courts will not aid a party in an action grounded on an immoral or illegal act: *Id.*

INTEREST. See *Account.*

JUDGMENT.

Equitable Jurisdiction over—Foreign Divorce.—It is competent for a court of equity, upon an allegation that a judgment is founded in fraud, to inquire whether the cause of action spread upon the record is wholly fictitious and groundless; and also, whether the plaintiff fraudulently withheld from the court pronouncing it, any fact which, if disclosed, would have shown he had no cause of action: *Doughty* v. *Doughty*, 12 C. E. Green.

In order to relief from a judgment on the ground of fraud, the proof in demonstration of the fraud must be so clear and strong as to render it certain the plaintiff knew, at the time he brought his suit, he had no right of action, and was without expectation of obtaining judgment unless he was successful in depriving the defendant of an opportunity of making defence: *Id.*

A judgment of divorce obtained in Illinois, declared void, on the ground that the cause of action on which it purports to be founded was fabricated: *Id.*

A judgment by a court of one of the states, divorcing a husband and wife domiciled in different states, is not entitled to extra-territorial recognition in case the party procuring it could have given the defendant actual notice of the suit, but refused or neglected to do so: *Id.*

The right of every person accused to have an opportunity to make defence, is secured by a rule of general law; a judgment pronounced in violation of it is not entitled to general recognition: *Id.*

LIMITATIONS, STATUTE OF. See *Account.*

Pleading—Demurrer.—The Statute of Limitations cannot, by the English practice, be set up by demurrer in actions at law, though it may be in certain cases in suits in equity. And this rule obtains wherever the English practice prevails: *The President, &c., of the Chemung Canal Bank* v. *Lowery et al.*, S. C. U. S., Oct. Term 1876.

Under the revised statutes of Wisconsin, however, when on the face of the complaint itself it appears that the statutory time has run before the commencement of the action, the defence may be taken by demurrer: *Id.*

A statute of Wisconsin providing that when the defendant is out of the state the Statute of Limitations shall not run against the plaintiff if the latter resides in the state, but shall if he resides out of the state, is not repugnant to that clause of the Constitution of the United States (article 4, sect. 2) which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states:" *Id.*

MASTER AND SERVANT.

Contractor—Person not interfering not liable.—Persons not personally interfering with the progress of a work or directing its progress, but contracting with third persons to do it, are not responsible for a wrongful act or for negligence in the performance of the contract, if the act agreed to be done be lawful. *Wray* v. *Evans*, 80 Penna. St.

The immediate employer of the agent or servant who causes the

injury is alone responsible for it; to him only the rule *respondeat superior* applies: *Id.*

There cannot be two superiors severally responsible for the same wrongful act: *Id*

Wray contracted with a gas company to dig trenches in streets, lay gas-pipes, &c., to the satisfaction of the company's engineer, who was to have the right to suspend the work; Wray to bear all losses, &c., which should happen to any person. Wray sub-let to Davis to perform all the work for which Wray had contracted, to the satisfaction of the company's engineer, to be suspended as the engineer might direct; Davis to bear all losses by reason of carrying out the work through negligence, &c.; if he neglected to perform the work to the satisfaction of the engineer, Wray on two days' notice might declare the contract void. A trench was made under the contracts by Davis, who employed the hands and supervised them; defendant had no control over them. Plaintiff fell into the trench and was injured. *Held*, that Wray was not liable to the plaintiff for the injury: *Id.*

MORTGAGE.

Mortgagee in possession—Action for Account.—A mortgagee in possession of the mortgaged premises, after condition broken, with the assent of the mortgagor, is presumed, until the contrary is shown, to occupy in his character of mortgagee; and as such is liable to account for rents and profits: *Anderson* v. *Lanterman*, 27 Ohio St.

Where a tenant in possession for a fixed term purchases outstanding past due mortgages on the premises, and after the expiration of his term continues in possession and in receipt of the rents and profits, such continued occupancy, until the contrary is shown, is presumed to be under the mortgages, and not of a tenant holding over: *Id.*

An agreement between the mortgagor and the mortgagee, when the mortgage debt bears interest, that the latter shall use and occupy the mortgaged premises without being accountable for rents and profits, unless supported by a consideration, other than the forbearance to foreclose the mortgage, is not such a valid contract as will bar the right to an account for rents and profits: *Id.*

A judgment creditor of the mortgagor, in a proper case for equitable relief, has the same right to such an account as the mortgagor: *Id.*

MUNICIPAL CORPORATION.

Ordinance—Nuisance—Wooden Building in City limits.—The owner of a wooden building, situated in a city which has, by ordinance, prohibited the erection or placing a wooden structure over ten feet high within certain prescribed boundaries, which building was erected within said limits prior to the passage of the ordinance, may lawfully move such building from one lot to another within the prescribed boundaries: *City of Cleveland* v. *Lenze*, 27 Ohio St.

The owner of such building having, by the consent of the city, moved it along and upon a street to a point adjoining his lot, located within the fire boundaries, may lawfully place it upon such lot, and the city could not lawfully interfere to prevent his doing so: *Id.*

Under circumstances that place the city in the wrong, an interference on her part so that the owner is prevented from placing the building on his lot, and in consequence, by obstructing the street, the building

becomes a nuisance and is torn down, the city is liable to the owner for damages: *Id.*

Where the building was lawfully in the street and the owner was in the act of removing it from the street upon his own premises, and by the wrongful interference of the city with the rights of the owner, the building becomes a nuisance, an order from the police court, requiring it to be removed or torn down, will not exempt the city from liability for damages: *Id.*

An agreement between the owner of such building and the city authority, made on the consideration that the city will permit him to tear down his own building, or that the city may tear it down without incurring a responsibility in damages, is wanting in mutuality, without consideration, and void: *Id.*

The owner of such building having offered to make it conform in all respects to the requirements of the fire ordinance of May 10th 1854, had the right to do so, and was entitled to a reasonable time in which to perform: *Id.*

Ne Exeat.

Practice.—A *ne exeat* obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to depart the state, will not be discharged upon a counter affidavit by the defendant denying the intention: *Houseworth's Administrator* v. *Hendrickson*, 12 C. E. Green.

When, to a bill filed by an administrator against his intestate's co-partner for an account, and for a writ of *ne exeat*, the answer, denying the right to an account, substantially admits the correctness of the allegations of the bill as to defendant's statement of the assets of the firm, and the amount of its indebtedness, but denies that the estimates were correct, and that defendant owes anything to the estate of the intestate—such denial cannot avail to discharge the writ: *Id*

Negligence.

Collision on River—Evidence.—In an action against the owners of a steamer for injury to barges from collision, the plaintiff having shown the collision and injury, may, in chief, give evidence that defendant's pilot was incompetent: *Bigley et al.* v. *Williams*, 80 Penna. St.

Anything evidencing negligence in those navigating the steamer or incompetency in the discharge of their duties which would tend, though remotely, to produce the accident, would be relevant: *Id.*

The barges were floating down the river, guided by oars only; the steamer was ascending and under the control of the pilot; the steamer was bound to keep clear of the barges: *Id.*

The plaintiff would have made a *primâ facie* case, by showing the collision, injury, and—the accident occuring at night—the exhibition of such lights as were necessary to warn the steamer: *Id.*

The plaintiff was not bound to rest his case upon the presumption of carelessness arising from the circumstances, but might prove in chief positive negligence: *Id.*

The plaintiff was bound, under the Act of Congress and common prudence, to show a light when it would avail the steamer to avoid a collision; that this was neglected during the remainder of the night when the steamer was not in sight, was of no importance: *Id.*

Evidence that the pilot, "after the accident, admitted the collision was caused by his neglect, and within twenty-four hours afterwards committed suicide by poison," was inadmissible: *Id.*

Declarations of the pilot, unless made before or at the time of the collision and so connected with it as to make them part of the *res gestæ*, were inadmissible. The narrative of an agent of a past occurrence, is not evidence against his principal, nor does the nearness to the accident of the subsequent declarations qualify them as evidence, unless they are so immediately connected as to form parts of its history: *Id.*

Contributory.—Plaintiff and defendant were farmers. Plaintiff went to defendant's late in the evening, to buy six bushels of oats. Defendant had no oats to sell, but yielding to plaintiff's importunity, he consented to sell him the oats, to accommodate him. Defendant always kept his granary locked, but he obtained the key by sending some distance for it, and went with plaintiff to the upper floor of the granary where the oats were, and while defendant stepped back to get a measure, plaintiff walked about the floor in the dark, and fell through an aperture therein, and was injured. *Held*, defendant not liable for the injury: *Pierce* v. *Whitcomb*, 48 Verm.

Railroad—Platform.—Plaintiff was rightfully at defendant's depot in the evening, for the purpose of taking defendant's cars. There was a platform extending from the east side of the depot to the railroad track, over which passengers passed to and from the cars. Stairs led through the centre of the depot to the street on the opposite side, which was several feet lower than the track; and there were also stairs at either end of the depot, leading from the platform to the street. The stairs at the north end of the depot were open at the top, as if they might be used. These stairs, and a platform at the bottom of them about four feet from the ground, were constructed by an express company for its sole use, but they were on defendant's premises, of which defendant had control. Plaintiff, in attempting to pass down these stairs in the dark, from the upper platform to the street, without fault on her part, fell from the lower platform to the ground, striking beyond the limit of defendant's premises, and was injured. *Held*, that defendant was liable: *Beard* v. *Connecticut & Passumpsic Rivers Railroad Co.*, 48 Verm.

NUISANCE. See *Municipal Corporation.*

PATENTS.

Measure of Damages for Infringement of.—Juries in an action at law for the infringement of a patent, are required to find the actual damages sustained by the plaintiff in consequence of the unlawful acts of the defendant. Power is given to the court, in such a case, to enter judgment for any sum above the amount of the verdict, not exceeding three times the amount of the same, together with costs, but the jury are strictly limited in their finding to the actual damages which the plaintiff has sustained by the infringement: *Birdsall et al* v. *Coolidge*, S. C. U. S, Oct Term 1876.

Evidence of an established royalty will undoubtedly furnish the true measure of damages in an action at law, where the unlawful acts consist in making and selling the patented improvement or in the extensive

and protracted use of the same, without palliation or excuse, but where the use is a limited one and for a brief period, it is error to apply that rule arbitrarily or without any qualification: *Id.*

Actual damage is the statute rule, and whenever the royalty plainly exceeds the rule prescribed by the Patent Act, the finding should be reduced to the statute rule: *Id.*

Removal of Causes.

From a State to a Circuit Court.—The Act of Congress of March 2d 1867, provided, in substance, that where a suit was pending in a state court between a citizen of the state in which the suit was brought and a citizen of another state, and the matter in dispute exceeded the sum of $500, *such citizen of another state*, whether plaintiff or defendant, if he made and filed in such state court an affidavit stating "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," might have the cause removed to the Circuit Court of the United States. A suit was brought in a court of the state of Tennessee by a citizen of that state, against a citizen of the state of Georgia. *Held*, that under the statute the party who was a citizen of Tennessee could not have the cause removed to the Circuit Court, because he was a citizen of the state in which the suit was brought and not of "another state," but the citizen of Georgia could: *Hurst* v. *The Western & Atlantic Railroad Co.*, S. C. U. S, Oct. Term 1876.

Set-off.

Assignment of Non-negotiable Demand.—The assignment of a non-negotiable demand arising on contract, before due, defeats a set-off by the debtor of an independent cross demand, on which no right of action had accrued at the time of the assignment: *Fuller* v. *Steiglitz, Assignee*, 27 Ohio St.

Statute. See *Insurance.*

A statute amending a prior statute by declaring that it shall read in a given manner, has no retrospective effect: *Kelsey* v. *Kendall*, 48 Verm.

Subrogation.

Payment by Surety.—Equity will, as a matter of course, and without any agreement to that effect, substitute, in the place of a creditor, a person who advances money to pay the debt for which he is bound as surety: *Coe* v. *New Jersey Midland Railway Co.*, 12 C. E. Green.

A director of an insolvent railroad company is entitled to reimbursement out of the funds in the hands of a receiver, for advances made by him to save the property against an unquestionable lien. To the amount of such advances, his claim is paramount to that of mortgagees whose encumbrances are subordinate to the lien: *Id.*

A person who pays a debt of a railroad company, incurred under contracts of purchase for rolling-stock, which, if not paid, would entail serious loss and embarrassment to the company, under agreement with the company for security for re-payment by subrogation to the rights of the vendors under the contract, is entitled to be subrogated to the rights of the vendors to the amount of his advances: *Id.*

That the whole debt has not been paid, under the contract, is no ob-

jection to the subrogation of the party making such payment. Such subrogation is subject to the rights of the vendors under the contract, but is superior to any claim of the receivers upon the property, in respect to payments made by them under the same contract: *Id.*

SURETY. See *Subrogation.*

VENDOR AND PURCHASER.

Divisible Contract—Failure of title as to part—Equity—Parol Evidence.—A contract was for the sale of a piece of land, "also a tract of coal property;" for the land the vendee "agrees to pay $2500, $2000 to be paid on delivery of the deeds and possession of the property; * * the coal is to be paid for at the rate of half a cent per bushel, payment to be made for the coal at the end of each year, vendee agrees to use at least $1000 worth of coal at half a cent a bushel each year." *Held* on its face to be a divisible contract: *Graver* v. *Scott*, 80 Penna. St.

The vendor being unable on demand to deliver a deed and possession of the property the vendee did not take possession of the coal tract nor mine coal; at the end of the year the vendor sued for the $1000. *Held*, the suit being in affirmance of the contract, that parol evidence was admissible that the land was necessary for the vendee's enjoyment of the coal and that it was the understanding at its execution that the contract was entire: *Id.*

In absence of explanatory proof, on a sale in separate lots, if title to a portion fails, equity will compel the vendee to take the lots to which title can be made: *Id.*

If the part of a contract of sale that has failed be so essential to the residue that it cannot be reasonably supposed the purchase would have been made without it, the contract is dissolved *in toto*: *Id.*

A verbal promise at the making of a written contract, if made to obtain its execution, may be given in evidence: *Id.*

An action by the vendor for the purchase-money under a contract is in affirmance of it, and is subject to the rules applicable to a bill for specific performance: *Id.*

Vendor's Lien—Conditional Sale.—Where the vendor of personal property reserves a lien upon it at the time of sale, and the property is subsequently exchanged for other property by the vendor's consent, with an agreement between him and the vendee that his original lien shall attach to the property exchanged for, such lien can be enforced: *Kelsey* v. *Kendall*, 48 Verm.

Vendor's Lien—Proceeding by Creditor on Note and Collateral Mortgage at the same time.—In many of the states the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase-money does not pass by an assignment of the debt; but where the lien is expressly reserved in the deed, an equitable mortgage is created which passes by an assignment of the debt it secures: *Ober* v. *Gallagher*, S. C. U. S, Oct. Term 1876.

An election to sue at law upon a note secured by mortgage, does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage. He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained: *Id.*