No fraud was imputed to the owner of the premises, and he was not charged with any complicity with the tenant in violating the law. The owner objected that his property could not be forfeited for the acts of the tenant, committed without his knowledge or consent. But the court affirmed the decree of condemnation, and, in his opinion, CLIFFORD, J., says: "The legal conclusion must be that the unlawful acts of the distiller bind the owner of the property in respect to the management of the same as much as if they were committed by the owner himself. Power to that effect the law invests in him by virtue of his lease, and if he abuses his trust it is a matter to be settled between him and his lessor; but the acts of violation, as to the general consequences to the property, are to be considered just the same as if they were the acts of the owner."

Our conclusion is that the Act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but we cannot say that it violates any express or implied prohibition of the constitution.

The judgment must be affirmed with costs.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ERRORS OF CONNECTICUT.[2]
SUPREME COURT OF ILLINOIS.[3]
SUPREME COURT OF MISSOURI.[4]
SUPREME COURT OF NEW JERSEY.[5]
SUPREME COURT OF OHIO.[6]
SUPREME COURT OF WISCONSIN.[7]

ARREST. See *Escape.*

ASSIGNMENT.

*Claim against the United States.*—An assignment of a claim against the United States, made before the claim has been allowed, and before

[1] Prepared expressly for the American Law Register, from the original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.
[2] From John Hooker, Esq., Reporter; to appear in 45 Connecticut Reports.
[3] From Hon. N. L. Freeman, Reporter; to appear in 87 Illinois Reports.
[4] From T. K. Skinker, Esq., Reporter; to appear in 67 Missouri Reports.
[5] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 11 of his Reports.
[6] From E. L. DeWitt, Esq., Reporter; to appear in 34 Ohio St. Reports.
[7] From Hon. O. M. Conover, Reporter; to appear in 45 Wisconsin Reports.

a warrant has been issued for its payment, has no validity, either in law or in equity: *Spofford* v. *Kirk et al.*, S. C. U. S. Oct. Term 1878.

ASSUMPSIT.

*For value of excess of Land named in Deed.*—Where a tract of land was sold as containing 140 acres, at a given sum per acre, and a deed made conveying the same, and the purchaser gave his note secured by deed of trust for the unpaid price, it being verbally agreed, before the execution of the writings, that if the land on a survey should contain more than 140 acres, the purchaser should pay for such excess, and if it fell short, the seller should pay for the deficit at the same price per acre for which the land was sold, it was *held*, that a recovery could be had for any excess in the number of acres in the land, and that parol evidence of the contract was admissible: *Ludeke* v. *Sutherland*, 87 Ill.

ATTORNEY. See *Witness*.

BAILMENT.

*Symbolical Delivery.*—The delivery by a purchaser of grain to his vendor at the time of the shipment, of the railroad receipts as a security for the payment of the purchase-money, is a symbolical delivery of the grain as a pledge, and vests in the pledgee a special property entitling him to the proceeds of the grain to the amount of his debt: *Taylor* v. *Turner*, 87 Ills.

BANKRUPTCY.

*Power of District Courts—Summary Order of Sale.*—District courts, though constituted courts of bankruptcy, do not possess the power, under the twenty-fifth section of the Bankrupt Act, to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner: *Gifford et al.* v. *Helmes*, S. C. U. S., Oct. Term 1878.

Courts of bankruptcy may exercise many of the powers conferred by the first section of the Bankrupt Act in a summary way, as well in vacation as in term time, first giving notice to the party opposed in interest to the prayer of the petition, as in a rule to show cause in an action at law or in a suit in equity without service of process, the rule being that in such a proceeding neither party is entitled to a trial by jury, and that the only remedy for error is to seek a review under the first clause of the second section of the same act: *Id.*

Power to revise cases and questions which arise in the district courts in such proceedings is conferred upon the circuit courts by that clause of section 2, but it is settled law that the power so conferred does not extend to any case where special provision for the revision of the case is otherwise made: *Id.*

*Creditors cannot sue, but must bring suit in name of Assignee.*—Under the Bankrupt Act, creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: (1.) Because all such property, by the express words of the

Bankrupt Act, vests in the assignee by virtue of the adjudication in bankruptcy and of his appointment. (2.) Because they cannot sustain any suit against the bankrupt: *Glenny* v. *Langdon*, S. C. U. S., Oct. Term 1878.

Prima facie the bankrupt is divested of the whole estate, nor have the creditors any right to sue; but if it be represented that the assignee will not sue, the court having original jurisdiction of the matter may direct the recusant assignee to proceed, or may give the bankrupt or a creditor the right to institute the suit in the name of the assignee, first indemnifying the assignee against costs: *Id.*

## Bills and Notes.

*Demand of Payment—Diligence—Holder not prejudiced by Mistake of Postmaster.*—The holder of a note, payable in a distant city, sent it by mail, for collection, to a bank in that city, in ample time to reach its destination, by ordinary course of mail, before maturity. When the letter containing the note reached the city, the bank had made an assignment, and the address of the holder being printed on the envelope, the postmaster at once returned it, with the endorsement "bank failed." The holder, on the day of its reception, again mailed it to another agent in said city, who caused it to be presented and protested for non-payment on the day it was received, but several days after maturity: *Held*, that the holder had used due diligence in making demand of payment; that he was not required to make provision for a possible but unanticipated suspension of the bank before arrival of the letter, nor for the unauthorized interference with the same by the public officer in charge of the mails: *Pier* v. *Heinrichshoffen*, 67 Mo.

A notary's certificate of protest, which states that he put into the proper post-office the notice of presentment, demand, refusal and protest, is sufficient without the further statement by him that he prepaid the postage on such notice. So, the word "mailed," as applied to a letter, implies that the letter was properly prepared for transmission, and was put in the custody of the officer charged with the duty of forwarding the mail: *Id.*

*Transfer by Endorsement—Subsequent Title.*—Where a negotiable promissory note is transferred by endorsement, after maturity, the legal title is thereby vested in the endorsee; and, after such endorsement, the amount due on the note can not be garnisheed in the hands of the maker, whether he has notice of the transfer or not, as a debt due to the original holder: *Knisely* v. *Evans*, 34 Ohio St.

*Endorsement—Intent.*—The defendant, a holder of a negotiable note payable in five years from date with interest, endorsed by the payee in blank, delivered it before maturity to the plaintiff, with his name endorsed on it under that of the payee, but with the following words in his own writing above his name: "Rec'd one year's interest on the within. May 10, 1871." *Held*, that the whole entry taken together imported merely the acknowledgment of the payment of interest on the note, and that if the plaintiff would show that the defendant had made himself an endorser of the note by his signature, he must show by evidence *aliunde* that the signature had no connection with the words written above it: *Clark* v. *Whiting*, 45 Conn.

CHATTEL MORTGAGE. See *Debtor and Creditor.*

COLLATERAL SECURITY. See *Bailment.*

COMMON CARRIER.

*Delay—Damages.*—If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered, and the time it was in fact delivered, such depreciation will, ordinarily, constitute the measure of damages: *Devereux* v. *Buckley*, 34 Ohio St.

CONFEDERATE STATES.

*Status of Residents in, during the Civil War—Invalidity of Legislation of the Confederate Congress—Liability of Person executing Military Orders of the Confederate Army.*—On the 6th of March 1862, the Confederate Congress passed an act declaring it to be the duty of all military commanders in the service of the Confederate States to destroy all cotton, tobacco, and other property that might be useful to the forces of the United States, whenever, in their judgment, the same should be about to fall into their hands. Afterwards, on the 2d of May 1862, General Beauregard, commanding the Confederate forces, in obedience to that act, made and issued a general order, directed to officers under his command in the state of Mississippi, to burn all cotton along the Mississippi river likely to fall into the hands of the forces of the United States. In pursuance of this order S. was commanded by the provost-marshal to burn certain cotton, including the cotton of F., which was near the bank of the Mississippi and likely to fall into the hands of the Federal forces. In an action for damages brought by F. against S.: *Held*, that the destruction of the cotton, under the orders of the rebel military authorities, for the purpose of preventing it from falling into the hands of the Federal army, was an act of war upon the part of the military forces of the rebellion, for which the person executing such military orders was relieved from civil responsibility at the suit of the owner voluntarily residing, at the time, within the lines of the insurrection: *Ford* v. *Surget*, S. C. U. S., Oct. Term 1878.

The district of country declared by the constituted authorities during the late civil war, to be in insurrection against the government of the United States was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated as enemies, without reference to their personal sentiments and dispositions: *Id.*

There was no legislation of the Confederate Congress which this court can recognise as having any validity against the United States, or against any of its citizens, who, pending the war, resided outside of the defined limits of the insurrectionary districts: *Id.*

The Confederate government can be regarded by the courts in no other light than as simply the military representative of the insurrection against the authority of the United States: *Id.*

To the Confederate army was, however, conceded, in the interest of humanity and to prevent the cruelties of reprisals and retaliation, such

belligerent rights as belonged, under the laws of nations, to the armies of independent governments engaged in war against each other, that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, on the footing of those engaged in lawful war, and exempting them from liability for acts of legitimate warfare: *Id.*

CONFLICT OF LAWS. See *Receiver.*

CONSTITUTIONAL LAW. See *Criminal Law.*

*Construction should follow Intent.*—Courts are not justified in giving a strained construction or astute interpretation to a constitutional provision to avoid the intention of the framers of the instrument, or of a statute passed under it to carry out its mandate, in order to relieve against individual or local hardships. Their duty is to enforce them according to their plain and obvious meaning: *Law* v. *The People*, 87 Ill.

COURTS.

*Jurisdiction.*—Where a declaration in assumpsit set up in different counts separate demands, each of which was below the jurisdiction of the court, it was held that the court had no jurisdiction, although the different demands in the aggregate were of sufficient amount, and although the damages claimed were within the jurisdiction: *Camp* v. *Stevens*, 45 Conn.

After judgment had been rendered for the plaintiff in the case, the defendant at the same term of the court moved that the case be stricken from the docket for want of jurisdiction. *Held*, that the motion was not too late, and that the case might properly be stricken from the docket: *Id.*

CRIMINAL LAW. See *Witness.*

*Cumulative Sentences.*—Where a prisoner is convicted, on the same day, under two distinct indictments, and is separately sentenced under each to a term of imprisonment in the penitentiary, the terms are not concurrent, but one commences when the other ends, and the prisoner is not entitled to be discharged until both have expired: *Williamson's Case*, 67 Mo.

*Evidence—Variance—Name.*—Upon the trial of a person jointly indicted with another, the prosecution will not be permitted to show that the latter is in the penitentiary of another state: *The State* v. *English*, 67 Mo.

When the prosecution has given evidence tending to prove that the defendant went to the place where the crime was committed for the purpose of committing it, the defendant will be allowed to show that he went thither on legitimate business: *Id.*

Evidence that the defendant stole property of Peter Sinish will not sustain an indictment for stealing property of John Peter Sinish: *Id.*

*Accessory.*—Mere concealment of a murder, committed within his knowledge, does not make a man an accessory, at common law, but is a misprision of felony: *State* v. *Hann*, 11 Vroom.

*Prosecution without a Finding by Grand Jury.*—A statute authoriz-

ing the prosecution of the offence of keeping a disorderly house by a city court, without an indictment found by a grand jury, is repugnant to a constitutional provision that "no person shall be held to answer for a criminal offence unless on the presentment of a grand jury," &c.: *State* v. *Anderson*, 11 Vroom.

Not so a statute authorizing a prosecution for the sale of ardent spirits without a license: *Id.*

DAMAGES. See *Common Carrier.*

DEBTOR AND CREDITOR. See *Partnership.*

*Chattel Mortgage—Mortgagor remaining in Possession—Fraud.*—While it is the settled law of this state, that an agreement in, or contemporaneous with, a chattel mortgage, that the mortgagor may remain in possession, sell the goods, and apply a part of the proceeds to his own use, renders the instrument void as against creditors, (*Blakeslee* v. *Rossman*, 43 Wis. 116); yet the mere fact of leaving a stock of goods in the mortgagor's possession, with instructions to go on and sell as usual, and make remittances to the mortgagee, though proper evidence to go the jury, in connection with other facts, upon the question of fraudulent intent, does not of itself amount to fraud: *Fisk* v. *Harshaw*, 45 Wis.

DECEDENTS. See *Probate Courts.*

EQUITY. See *Fraud; Judgment.*

*Account—Partnership—Reform of written Instrument.*—Except in an action of account, which is almost obsolete, it is a general rule that, between partners, whether they are so in general or for a particular transaction only, no account can be taken at law: *Ivinson* v. *Hutton*, S. C. U. S., Oct. Term 1878.

Owing to the ability of courts of equity, not only to investigate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to restrain breaches of duty for the future, it is to them, rather than courts of law, that partners usually have recourse for the settlement of controversies among themselves: *Id.*

Courts of equity possess the power to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain, and which are the subjects of special agreement; but the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory: *Id.*

Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfil the manifest intention of the parties, equity, if the proof is clear, will correct the mistake so as to produce a conformity of the written instrument to the antecedent agreement of the parties: *Id.*

*Facts to be determined by the Court—Office of Jury only advisory.*—In all equitable actions, even where questions of facts are submitted to a jury by the judge (on his own motion or by request of a party), the court must find that all the facts necessary to sustain the judgment have

been established by the evidence, and order the judgment: *Stahl* v. *Gotzenberger*, 45 Wis.

Issues of fact submitted to a jury in an equitable action should be *particular* issues, fixed and agreed upon before the jury is called. And if the court is not satisfied with the findings of the jury, it may submit the same issues to another jury, or may itself determine them: *Id.*

### Escape.

*Arrest—Escape and Retaking—Option of Creditor—Election by Conduct.*—It is not necessary that there should be a manual touching of the body, or actual force used to constitute an arrest in a civil action; it is sufficient if the party be within the power of the officer and submits to the arrest: *Richardson, Executor of Esther T. Browning*, v. *Rittenhouse*, 11 Vroom.

It is an escape, if the sheriff, after arrest on execution, permits the defendant to remain at home, on the promise to go the same day, with his surety, to the sheriff's office to give bail for his appearance: *Id.*

If the defendant, after escape, surrenders himself to the sheriff, the plaintiff has his election, either to bring his action against the sheriff for the escape, or to affirm the defendant in custody under his writ: *Id.*

Where the defendant, being in actual custody of the sheriff, gives a bond and inventory under section two of the insolvent laws, and applies to the court for the benefit of said laws, if the plaintiff, *having knowledge of the escape*, appears in court as a creditor and opposes the debtor's discharge, and he is thereupon remanded and surrenders himself into the custody of the sheriff, the election is made, and the action for escape is waived: *Id.*

### Evidence. See *Criminal Law; Verdict.*

*Rule as to amount of in Civil Suits for Criminal Acts.*—In an action for damages resulting from the sales of intoxicating liquor, under the seventh section of the statute on that subject (67 Ohio L. 102), it is not necessary that the illegal sales should be proved beyond a reasonable doubt: *Lyon* v. *Fleahmann*, 34 Ohio St.

### Execution.

*Promise to indemnify Officer—Statute of Frauds.*—A verbal promise, by a judgment creditor, to indemnify an officer holding an execution against loss or damage from the seizure and sale of property claimed by the debtor to be exempt from execution, is not void as being against public policy; nor is such promise within the Statute of Frauds: *Mays* v. *Joseph*, 34 Ohio St.

### Executor and Administrator. See *Probate Courts.*

### Former Adjudication.

*Order for Examination of Debtor in aid of Execution—Extent of Adjudication.*—Where a judgment creditor has obtained an order for the examination of the defendant in the judgment, on supplementary proceedings, and the order has been fully executed, and the proceeding heard upon its merits and dismissed, the case is *res judicata*; the parties are precluded as to all matters existing previous to that time, and which were embraced in the consideration and judgment of the court; *Clarke* v. *Londrigan*, 11 Vroom.

A new examination can only be asked for on the ground that after the judgment of the court in the previous proceedings, the debtor had become possessed of property. in respect to which the creditor was entitled to examine him under the statute: *Id.*

FRAUD. See *Debtor and Creditor; Judgment.*

*Conveyance procured by—Equity.*—Where a husband by fraud, collusion and artifice on his part, and others assisting him, procured a conveyance of his wife's property to one of his confederates, and the execution of an agreement in relation thereto and for other purposes, with the intention of discarding her and possessing himself of her property, it was held that a court of equity would not assist him in enforcing the agreement, or obviating a defect in his title caused by the mutilation of the deed he had thus obtained: *Fargo* v. *Goodspeed*, 87 Ills.

FRAUDS, STATUTE OF. See *Execution.*

HUSBAND AND WIFE. See *Fraud.*

*Ante-Nuptial Contract — Whether Dower is barred.*—Whether a widow can take the provisions made for her in the will of her husband, and also under an ante-nuptial contract, whereby her right of dower is barred, depends on the intention of the testator: *Bowen* v. *Bowen*, 34 Ohio St.

Where, by ante-nuptial settlement, a sum of money is secured to the wife, to be paid after the husband's death, and, by a subsequent will, the husband directs all his just debts of every kind to be first paid, and makes provision for the support of his wife during widowhood, with a declaration that the intent and meaning of the testator was to give to his wife the provision made for her in his will, she may claim the provision in the will, and also that made for her in the settlement: *Id.*

JUDGMENT.

*Relief in Equity against—Excessive Damages.*—The mere fact that a judgment by default in an action of trespass is for a sum much greater than it ought to have been, is not of itself evidence of fraud on the part of the plaintiff, and the plaintiff in such judgment is not responsible for errors in the assessment of damages, so as to justify a court of equity in setting aside the judgment: *Walker* v. *Shreve*, 87 Ills.

MECHANIC'S LIEN.

*Contract—Waiver of Lien.*—Where, by a building contract, the material men agree to take in payment second mortgages upon some of the houses, and it does not appear that demand has been made for such mortgages, or that there is inability to give them, no action can be brought under the statute for a mechanic's lien. Such contract is a waiver of the statutory lien: *Weaver* v. *Demuth*, 11 Vroom.

MISTAKE.

*Whether of Law or Fact.*—When a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect, this is a *mistake of law*, and not of fact; *Birkhauser* v. *Schmitt*, 45 Wis.

In an action to recover moneys alleged to have been paid under a mutual mistake of fact, for a defendant's supposed interest in land, it appears from the complaint and plaintiff's evidence (for which see the opinion), that plaintiff had full knowledge of all the facts which affected, or were supposed to affect, the title to the land, before he purchased and paid therefor, and that the attorney-at-law of both parties, upon consideration of those facts, fully communicated by him to them, came to the legal conclusion and advised them that defendant had a certain interest in the land; and the parties acted upon such advice in the sale and purchase. *Held*, that the mistake thus shown was of law only, and the court erred in directing a verdict for the plaintiff: *Id.*

### Mortgage.

*Sale under Deed of Trust—Enforcement of Equities—Innocent Purchaser—Notice.*—An agreement between the owner of land sold under a deed of trust, and the purchaser at the sale, for a reconveyance as soon as a debt due from the former to the latter shall have been paid out of the rents, cannot be enforced against a grantee of the purchaser who has bought without notice of the agreement, paid a substantial part of the purchase-money in cash, and given his negotiable promissory notes for the remainder. But it might be otherwise if, at the time of the trial, the notes remained in the hands of the first purchaser: *Digby* v. *Jones*, 67 Mo.

*When in renewal of old one does not lose its priority.*—Where a party takes a new mortgage to secure the payment of the same debt secured by a prior one, and this fact is stated in the later mortgage, no new note being taken, and gives a release of the old mortgage, which is recorded on the same day with the new mortgage, and there is no substantial difference in the two mortgages, this will not give priority to a mortgage given to another and recorded after the first and before the last of said mortgages: *Shaner* v. *Williams*, 87 Ills.

### Municipal Corporation. See *Street.*

### Name.

*Legacy to Corporation—Parol Evidence of Intention.*—A testator gave a legacy to "The American and Foreign Bible Society." It appeared that there was an incorporated society of that name for the distribution of the Bible, established and mainly supported by the Baptist denomination; and another, incorporated earlier for the same general purpose, named "The American Bible Society," which was mainly supported by the Congregational and Presbyterian denominations. The latter society was sometimes called "The American and Foreign Bible Society," but there was no evidence that it was as well known by that name as the other society, and none that the testator had ever called it or heard it called by that name. Both societies were in the habit of soliciting contributions for their work from the neighborhood where the testator lived. The testator's denominational associations and preferences were wholly with the Congregationalists, and he had no special sympathy with the Baptist denomination. *Held*, that evidence was not

admissible, upon a claim of the American Bible Society to the legacy; that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible society sustained by the Congregationalists and Presbyterians; that he was not sure as to its corporate name, but believed it to be "The American and Foreign Bible Society:" *Dunham* v. *Averill*, 45 Conn.

NEGLIGENCE. See *Railroad.*

*Contributory—When Matter of Law—Allowing Cattle to Run in Vicinity of Railroad.*—Plaintiff's premises, in a city, were so nearly surrounded by railroads running within a few feet of them, that his cow, if suffered to be at large, would be likely to get upon some one of said roads. She was accustomed to go for water to a canal on one side of his premises, and might go to a river on the other side, but to reach either must cross a railroad. Late in the fall, when grass was scarce, and there was none growing in the immediate vicinity of plaintiff's barn, his cow, after being housed until late in the day, was turned into the street without any one to look after her; and not long after, being near but not upon the track of defendant's road, a few rods from plaintiff's premises, and near the river, feeding on grass growing on defendant's embankment, she started on the approach of a train, and, after running a short distance, was struck upon the track and fatally injured. In an action for the damages, the above facts appearing from plaintiff's evidence: *Held, as a matter of law,* that plaintiff was guilty of gross contributory negligence, and could not recover, in the absence of malice or wilfulness on defendant's part: *McCandless* v. *C. & N. W. Railway Co.*, 45 Wis.

The facts that the track was unfenced, and that the train was running somewhat faster than usual at that place, and was not slacked, nor any alarm given, would not have sustained a verdict that defendant was guilty of any wilful or malicious act; and a compulsory nonsuit was properly granted: *Id.*

There was no error in rejecting evidence offered by plaintiff, that other cattle were in the habit of running at large in the vicinity of the place of accident, and that some of them had been killed on the track, as those facts would not aid his case: *Id.*

NUISANCE.

*When Equity will enjoin.*—A court of equity may interfere by injunction, to abate a nuisance, before the fact of the business being a nuisance is established at law, where there is danger of irreparable loss, or material injury being done, before a trial at law can be had; as, where a slaughter-house is erected near the dwelling-house of another, and the business creates an offensive and unwholesome stench, and is likely to produce sickness or disease: *Minke* v. *Hopeman*, 87 Ill.

OFFICER. See *Surety.*

PARTNERSHIP. See *Equity.*

*Renewal Notes—Payment—Surety.*—The acceptance by a creditor of the note of an individual member of a firm after dissolution of the firm, in lieu of a matured note of the firm, is not an extinguishment of the firm debt, unless it is expressly agreed that it shall so operate: *Leabo* v. *Goode*, 67 Mo.

A surety on a note given after the dissolution of a firm, by one of the members of the firm, in renewal of a note of the firm, on which also he was surety, may recover of the other member of the firm money which he has paid in discharge of the renewal note: *Id.*

*Liability of Firm for tort of one Partner.*—If a member of a firm in the due course of business of the partnership, commits a tort or wrongful act by seizing and taking the property of another, and the same is appropriated to the use and benefit of the firm, thereby increasing its assets, the other partners will be liable for the same. *Durant* v. *Rogers*, 87 Ill.

*Account stated.*—The statement of an account between partners will be conclusive upon their rights, unless it is shown there has been some mistake, or omission, or accident, or fraud, or undue advantage, by which the same is vitiated, and the balance incorrectly fixed. In such case a court of equity will allow it to be opened and re-examined: *Guge* v. *Parmelee*, 87 Ill.

### Pleading.

*Plea as to part of complaint only.*—A plea which professes to answer and does answer only part of a count, is good, provided that part is material and severable from the rest of the count as a basis of recovery: *Flemming* v. *Mayor of Hoboken*, 11 Vroom.

### Probate Courts.

*Administration of Estate of Person supposed to be dead, but really alive.*—The only jurisdiction which the county court has in respect to the administration of estates, is over the estates of *dead* persons: *Melia* v. *Simmons*, 45 Wis.

Proceedings in administering, settling and assigning the estate of a person who, though represented to have deceased, was and still is alive, are absolutely void for all purposes; and an entry and continuous occupation for ten years under claim of title exclusive of any other right, founded upon the judgment of the county court in such a case, would not bar an action to recover the land: *Id.*

### Railroad.

*Negligence.*—Where a railroad company is authorized to propel its trains and operate its road by the use of steam locomotives, no inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from such locomotives: *Ruffner* v. *Cincinnati H. & D. Railroad Co.*, 34 Ohio St.

### Receiver.

*Title in another State—Conflict of Laws.*—Where property has once vested in an assignee or receiver by the law of the state where the property is situated, the law of another state will not divest him of his right to it, if he should take it into such state in the performance of his duty: *Pond* v. *Cooke*, 45 Conn.

A receiver of an insolvent manufacturing corporation appointed by a court in New Jersey where it was located, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in this state, purchased iron with the funds of the estate, and sent

it to this state. *Held*, that the iron was not open to attachment in this state by a creditor residing here: *Id.*

And held that a party giving a receipt for the property to the officer who attached it, and taking it into his possession, was not liable to nominal damages in a suit brought upon the receipt after a demand and refusal: *Id.*

A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency: *Id.*

### Sale.

*Question of Gift or Sale—Intention of Parties.*—The plaintiff, being interested as a large bondholder in the early completion of a railroad, procured a quantity of timber for its bridges, specially prepared for that purpose, to have it ready when wanted. The timber was his own private property and he was under no obligation to furnish it for the road. A firm who subsequently contracted with the railroad company to complete the road and supply all the materials required, applied to him for the timber to use in the construction of the bridges, and he told them that they might have it. No terms were agreed upon and there was no express agreement that it should be used in constructing the bridges, but it was so understood on both sides. The plaintiff delivered the timber to the firm, who were transporting it to the place where it was to be used when it was attached by creditors of the railroad company. *Held*, that the transaction amounted to a sale to the firm, and that the plaintiff could not maintain replevin for the recovery of possession of it from the parties attaching it: *Colegrove* v. *Snow*, 45 Conn.

### Sheriff's Deed.

*Irregularity in the Sale.*—If a sheriff's sale be made on a day different from that on which it is advertised to be made, the defendant in the execution, or his creditor, if damaged thereby, may by a timely application have the sale set aside; but where the sheriff has made a deed, good upon its face, to the purchaser, who was a stranger to the execution, and there is no evidence in any way connecting him with the mistake made, or tending to show it to have been fraudulent, the deed cannot be collaterally assailed, after the lapse of half a century, for such irregularity: *Houk* v. *Cross*, 67 Mo.

### Street.

*Use of by Municipality.*—The fee of the soil in the streets in the original town of Chicago, is either in the state or in the city, for the use of the public generally, and it was competent for the city, under legislative authority of the state, to construct a tunnel in one of the streets, and the city is not liable to an adjacent lot-owner for damages claimed on account of the construction of such a tunnel in the street, when the work is properly planned and executed, and no physical injury is done to the claimant's property, and there is enough of the street left for passage and ordinary travel: *City of Chicago* v. *Rumsey*, 87 Ill.

*Eminent Domain—Right to condemn Property for a Street Railway.*—The right of a corporation to condemn property and appropriate the same for the construction, operation and maintenance of a horse or dummy

railway in the streets of a city, is derived solely from the state law, and the consent of the city authorities to the construction and operation of such railway is not a condition precedent to proceedings to condemn. Such consent can be obtained after condemnation as well as before, and if given, is a mere license revocable at any time before it is acted on. *Metropolitan City Railway Co.* v. *Chicago W. D. Railway Co.*, 87 Ill.

SURETY. See *Partnership.*

*For Public Office—Liability for Special Duties imposed on Officer.*—The general rule is, that where an officer is required to perform a duty special in its nature, and to give a special bond for its faithful performance, no liability therefor attaches to his general bondsmen, in the absence of any declaration that they shall also be liable: *Supervisors of Milwaukee* v. *Ehlers*, 45 Wis.

UNITED STATES. See *Assignment.*

UNITED STATES COURTS. See *Bankruptcy.*

VENDOR AND PURCHASER.

*Payment by Check as Cash—Withdrawal of Funds.*—Where a vendor of land receives the vendee's bank check for the amount of a cash payment, a withdrawal by the vendee of his funds from the bank before presentation of the check, leaving nothing to pay it, is a fraud upon the vendor; and he will retain his equitable lien upon the land for the amount of such check. So held where the vendee's funds were withdrawn about two weeks, and the check presented nearly four weeks, after its date: *Madden* v. *Barnes*, 45 Wis.

VERDICT.

*Finding in substance what is in issue—Rule as to quantum of Evidence.*—Where issue is joined, in an action to recover damages for an assault and battery, as to the guilt of the defendant, and whether or not the injury to the plaintiff was occasioned by his own fault in first assaulting the defendant, and the jury by their verdict "do find and say that the plaintiff is entitled to nine hundred and ninety dollars, damages in the above case," such verdict is substantially a finding of the issue in favor of the plaintiff: *Shaul* v. *Norman*, 34 Ohio St.

In such action it is not necessary for the plaintiff to prove the assault and battery beyond a reasonable doubt: *Id.*

WITNESS.

*Privileged Communications—Client and Attorney.*—Where the accused in a criminal trial becomes a witness in his own behalf, he cannot be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney; nor can such disclosures be required of the attorney without the consent of the accused. It is the privilege of the accused to have such communications protected from compulsory disclosure, and the privilege is not waived by his becoming a witness: *Duttenhofer* v. *The State*, 34 Ohio St.

WAIVER. See *Escape*; *Mechanic's Lien.*

*Question of Fact.*—A waiver is an intentional relinquishment of a known right. The existence of such an intent is a matter of fact: *First National Bank* v. *Hartford Life and Annuity Ins. Co.*, 45 Conn.