But the general rule does not apply where the order of commitment is made by a tribunal or officer having no jurisdiction to make it; and the proviso of the fourteenth section of the Judiciary Act has been greatly modified. The benefit of the writ may now be had by prisoners in jail, not only when in custody under authority of the United States, but in 1833, when the nullification proceedings were adopted in South Carolina, it was extended to those in custody for an act done in pursuance of a law of the United States, or of a judgment of any of its courts; in 1842, when the complications growing out of the McLeod case and the Canada rebellion occurred, it was extended to foreigners acting under the authority and sanction of their own government; and in more recent times it has been extended to all persons in custody in violation of the Constitution or a law or treaty of the United States. The present case belongs to the last category, and is relieved from the impediment to the use of a *habeas corpus*, which formerly existed where the prisoner was committed under state authority; whilst the want of jurisdiction in the state court removes any impediment arising from the general rule, which discountenances its use where the prisoner has been regularly convicted and sentenced.

The order of discharge must be affirmed.

NOTE.—The prisoner was thereupon discharged, but was immediately arrested upon a bench warrant from the United States court in Savannah.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]
SUPREME COURT OF INDIANA.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF OHIO.[4]
SUPREME COURT OF PENNSYLVANIA.[5]

ARBITRATION.

Of Public Interest by Officer.—Where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate to others, and therefore such officer cannot submit such matters to arbitration: *Mann* v. *Richardson*, 66 Ill.

ASSUMPSIT.

Parent and Child—Care and Support of Parent—Implied Promise — Where a parent resides in the family of a child, there is no implied contract on the part of the parent to pay for services rendered, or for

[1] From Hon. N. L. Freeman, Reporter; to appear in 66 Illinois Reports.

[2] From J. B. Black, Esq., Reporter; to appear in 48 Indiana Reports.

[3] From Hoyt Post, Esq., Reporter; cases decided at February and April Terms 1875.

[4] From E. L. De Witt, Esq., Reporter; to appear in 25 Ohio State Reports.

[5] From P. F. Smith, Esq., Reporter; to appear in 76 Pennsylvania Reports.

board, lodging or clothing supplied; but a liability may arise from an express contract, or a contract to pay may be inferred from circumstances. The relationship rebuts the presumption which exists in other cases that compensation was intended, and the circumstances must be such as to overcome the presumption which arises from the relationship of the parties: *Smith et al.* v. *Denman*, 48 Ind.

Work and Labor.—Where one has entered into a special contract to perform work for another, and has done the work, but not in the time or manner stipulated by the contract, if the work done is accepted and used by the other party, the latter is answerable to the amount he is benefited upon an implied promise to pay for the value he has received: *Adams* v. *Cosby*, 48 Ind.

By the terms of a special building contract payment for work and materials was to be made only on the presentation of the architect's certificate of the quality and value of the work done and materials furnished in accordance with the contract; suit was brought by the contractor, not on the special contract, but on a *quantum meruit*. *Held*, that, to maintain such suit, it was not necessary to procure a certificate from the architect: *Id.*

Waiver of Tort—Pleading.—Melick employed Satterlee to saw logs into lumber; Satterlee delivered to Melick less lumber than the logs produced; there was no evidence of conversion by Satterlee. *Held*, that Melick could not recover in assumpsit on the common counts for the deficiency: *Satterlee* v. *Melick*, 76 Pa.

The court charged: that as bailee, Satterlee was bound to exercise such care of the property as a prudent man takes of his own property, and if for want of it the lumber was lost, he would be liable; that the deficiency made a *primâ facie* case and put Satterlee on proof of care. *Held* to be error, the action not being in case and there being no count on a contract to keep as bailee: *Id.*

Generally where there is evidence of conversion by a wrongdoer, the plaintiff may waive the tort and sue in assumpsit: *Id.*

To recover in such case on a count for goods sold, &c., there must be fraud or unfair dealing, or other circumstances from which an implication may arise under such a count: *Id.*

Bailment.

Degree of Care.—A bailee taking a carriage to repair for pay, is only held to the exercise of ordinary care, as the contract in such case is one of mutual benefit, and when such carriage is destroyed by a fire which no ordinary prudence could guard against or prevent, the bailee will not be responsible for the loss, even though he was detaining the same for indebtedness of the owner to him; *Russell* v. *Koehler*, 66 Ill.

Barratry. See *Insurance.*

Bills and Notes. See *Partnership.*

Note for Patent Right.—The Act of May 4th 1869, regulating the execution and transfer of notes "given for patent rights," relates only to the instruments named in the act, when given for an interest in the invention, secured to a patentee by letters patent, and does not include

in its provisions negotiable paper given for machines built under letters patent, nor negotiable paper given to secure the agency to sell machines so built, in certain specified territory: *State of Ohio* v. *Peck*, 25 Ohio.

Payable in Bank—Innocent Holder—Fraudulent Representations.—In an action by an innocent endorsee on a note payable in a bank in this state, it is no defence that the execution of the note was procured by fraudulent representations: *Strough et al.* v. *Gear et al.*, 48 Ind.

Where a note payable in a bank in this state, and an agreement by which the note was payable on conditions, were executed at the same time, and the agreement was not attached to or so referred to in the note as to be a part of it, and the payee endorsed the note to a party who had no knowledge or notice of the agreement, and subsequently the payee fraudulently substituted for said agreement another without conditions: *Held*, that the subsequent fraud of the payee did not destroy or impair the immunity which attached to commercial paper in the hands of the *bonâ fide* holder: *Id.*

Where a note provided for the payment of "attorney's fees of ——— per cent. if suit be instituted on the note:" *Held*, that the note was payable with reasonable attorney's fees, and that "of ——— per cent.," was surplusage: *Id.*

Fraud in Procuring Signature.—Carelessness of Maker.—Rights of Innocent Endorsee.—Where the maker of a promissory note, negotiable and payable at a bank in this state, was induced by the fraud and circumvention of the payee to sign his name to such note when he honestly supposed and believed that he was executing a paper of an entirely different character, and had no intention to sign a note: *Held*, that the maker was liable to a *bonâ fide* endorsee for value, if he was guilty of negligence in failing to use reasonable care to inform himself of the contents of the paper so signed by him: *Nebeker et al.* v. *Cutsinger et al.*, 48 Ind.

When a man, who can without difficulty read, executes a negotiable note without reading it, trusting to the party to whom it is executed for a statement of its contents, or trusting to the reading of it by the latter, there being no substantial reasons shown for not reading it himself, he is guilty of negligence: *Id.*

Material Alteration.—Suit on a promissory note, payable in a bank in this state six months after date, or before if made out of the sales of certain machines named, and having a condition annexed thereto that the same was not to be paid if sales of said machines were not made equal to the amount of the note within the time limited for the payment thereof: *Held*, that if, after signing and delivery, without the knowledge or consent of the maker, the condition was taken from the note, this was a material alteration: *Cochran et al.* v. *Nebeker et al.*, 48 Ind.

The fact that such promissory note was payable at a bank in this state did not make the maker liable upon it, as thus altered, in an action thereon by an endorsee: *Id.*

When an instrument is altered after its execution, it will be presumed, until the contrary is shown, that the alteration was made by the party claiming under it, or by one under whom he claims; and it is not necessary, in an answer setting up that an instrument sued on has been

altered, to allege that it was altered by the party claiming under it, or by one under whom he claims: *Id.*

When the signing and delivery of an instrument sued on are admitted, but it is claimed in answer that it has been altered in a material part, the burden is on the defendant to prove its material alteration: *Id.*

CHURCH. See *Equity.*

COMMON CARRIER.

Reshipment of Freight.—A common carrier who undertook to transport freight by steamer to a designated point, but terminated his voyage at an intermediate port, and reshipped such freight on the steamer of another carrier, was liable to the owner for the loss, where the second carrier could not find the consignee at the place where the freight was to be delivered, and, because there was no safe place of storage there, returned it to the port where the reshipment was made, and there stored it in a proper warehouse, which with the freight, was soon after accidentally destroyed by fire: *The Green, &c., Co.* v. *Marshall*, 48 Ind.

When a delivery cannot be made at the point of destination, such prudent care of the goods and their diligent and safe delivery, with notice to the consignee or owner, as best comports with the interests of the owner, according to the circumstances, will excuse the carrier; but it devolves on the carrier to allege and prove such matter of excuse: *Id.*

Exception to Liability of.—The strict rule of the carrier's responsibility as an insurer is subject to the important qualification, that if the owner of the goods is guilty of any fraud or imposition in respect to the carrier as by concealing their nature or value, or where he deceives the carrier by his own carelessness in treating the parcel as a thing of no value, he cannot hold the carrier liable for the loss of the goods: *C. & A. Railroad Co.* v. *Shea*, 66 Ills.

CONTRACT.

Against Public Policy.—A contract by one physician with another, whereby the latter takes the office of the former for a given term, and is to practise medicine in the name of the former, to personate him when applied to by patients requiring medical treatment, and to prescribe for them in his name, is contrary to public policy and will not be enforced: *Jerome* v. *Bigelow*, 66 Ills.

COVENANT. See *Easement; Vendor.*

CRIMINAL LAW. See *Evidence.*

Murder—Evidence.—When two persons are murdered at the same time and place, under circumstances evidencing that both murders were committed by the same person, and were part of the same transaction, &c., evidence as to the circumstances of the murder of one is admissible on the trial for the murder of the other: *Brown* v. *Commonwealth*, 76 Pa.

On a trial for murder, there was evidence that the defendant had in his possession coin at a time when specie payments were suspended; that the murdered man was living in a place where there was no safe deposit for money; under these circumstances evidence was admissible

that the murdered man had received a quantity of coin, although several years before: *Id.*

In order to establish identity, evidence that the witness gave testimony in a prosecution against prisoner for another murder, and that he recognised him as the person from whom he purchased coin the morning after the murder, was properly admitted without producing the record of the prosecution: *Id.*

A prisoner confined in the jail with the defendant, testified that he held a conversation with the defendant through the soil-pipes, in which defendant confessed his guilt, and that the witness knew it was the defendant from his voice. *Held*, that the testimony was admissible; its weight was for the jury: *Id.*

The court charged the jury, that they might acquit the prisoner or find him guilty of murder in the first or second degree, and state the degree in their verdict. *Held*, that it was not error to omit instructing the jury on the subject of manslaughter, no instruction having been asked as to that: *Id.*

It is not error in the court to omit instructing a jury on the abstract principle, that on an indictment for murder, there may be a conviction for manslaughter: *Id.*

Custom.

Coextensive with State.—No particular custom, unless it is coextensive with the state, should be allowed to affect a general law: *Spears et al.* v. *Ward et al.*, 48 Ind.

Debtor and Creditor.

Assignment for Benefit of Creditors.—Middleton, the owner of ironworks, being hopelessly insolvent, by deed reciting that by an assignment for his creditors, or by proceedings in bankruptcy, his creditors, except mortgage-creditors, could not hope to receive anything from his estate, but believing that if his creditors would take his ironworks, &c., and work them, his debts might be paid, &c., transferred all his estate to Light and his successors who might be elected by his creditors, in trust to carry on the ironworks, and manufacture and sell the iron so long as the creditors might determine it to be their interest to do so, and until the debts should be paid, and when the creditors should determine, to convert the estate into money and distribute it amongst them, &c. The trustee took the estate under the deed, advanced money and made a large quantity of iron at the furnaces of the assignor. *Held*, that this being the product of the capital and labor of the trustee, a judgment-creditor of the assignor, who did not assent to the arrangement, could not seize the iron so made on an execution on his judgment: *Peters* v. *Light et al.*, 76 Pa.

The property assigned enured to the benefit of all the creditors, in proportion to their claims, which would not be invalidated by any attempted preference: *Id.*

The stipulation that the trustees should manufacture iron so long as the creditors should determine it was their interest to do so, was void as against non-assenting creditors: *Id.*

Such stipulation did not hinder or delay creditors; they could sell the assigned property as if the assignment had not been made: *Id.*

Easement.

Water Privilege.—If a miller purchase a water privilege, or portion of water-power, without any portion of the bed of the stream, he will gain an incorporeal hereditament or easement. And the capacity of covenants in a deed to run with incorporeal hereditaments is the same as it is with those which are corporeal: *Sterling Hydraulic Co.* v. *Williams*, 66 Ills.

Equity.

Injunction to restrain the Pastor of a Church from officiating.—Upon a bill filed by the trustees of an independent church to restrain their pastor from longer officiating as such, it appeared that one of the customs of the church was to elect a pastor every year, and the defendant had several time been so elected, and at the last election by the church and society voting together. After this election the church session and the trustees decided not to retain him; they claiming that they had the sole power to employ a pastor, but the latter refused to leave. *Held*, that the facts and circumstances were not such as to justify the interference of a court of equity, it appearing that the pastor remained in obedience to the vote of the majority of the society, whose wishes, according to the usages of the church, should control: *Trustees of Independent Pres. Church* v. *Proctor*, 66 Ills.

Estoppel.

By Pleadings.—Where a defendant of full age, by the pleadings expressly or by implication assents to the execution of a contract as set out in the bill, the court may give effect to such consent by its decree, and such defendant will not be permitted to retract the assent upon error, or insist the contract was not as set out: *Cronk* v. *Trumlie*, 66 Ills.

Evidence.

Photograph.—On the trial of an indictment for the murder of "Goss *alias* Wilson," a photograph of Goss, testified to be like a mutilated body found, was evidence to be submitted to the jury, that the body was that of Goss: *Udderzook* v. *The Commonwealth*, 76 Pa.

Photography is to be judicially recognised as a proper means of producing correct likenesses: *Id.*

A mutilated body, whose face was discolored and swollen, was found, having been buried apparently for some days; the witness who found it had never seen the person before. He might testify that the face resembled a photograph of a person alleged to be the one found; the question whether the witness could identify it, was for the jury: *Id.*

Goss having been a man in the habit of becoming intoxicated, proof that a man called "Wilson" had the same habits was evidence for the jury on the question as to Wilson and Goss being the same person: *Id.*

Frauds, Statute of. See *Husband and Wife; Partnership.*

Sale of Good-will—Agreement not to carry on same Business.—An agreement by the lessor to let the lessee have the good-will of a business, and that the lessor will abstain from carrying on a like business in the

same locality for a period of five years, is within the Statute of Frauds, and voidable if not in writing: *Gottschalk* v. *Witter*, 25 Ohio.

Where a lessee brought his action on such an agreement, seeking to enjoin the lessor from its violation, and to recover damages for its breach, and upon demurrer to a plea by the lessor that the agreement was not in writing, and therefore void, the court, on hearing, overruled the demurrer, and dismissed the petition: *Held*, that this action and proceeding were no bar to a future action by the lessee to rescind the contract, and recover back the consideration given for the agreement: *Id.*

Husband and Wife.

Wife's Separate Deed void.—A wife made a deed for real estate which she owned, her husband not joining in it; his consent, not given in the manner and form required by the statute, was of no effect, and after her death he could recover the land as tenant by the curtesy: *Houck et al.* v. *Ritter*, 76 Pa.

Evidence that the grantee of the wife held a note against the husband, which was given to her as the consideration for the land, was inadmissible in ejectment for the land by the husband after the wife's death: *Id.*

Statute of Frauds.—Contract in consideration of Marriage.—A wife obtained a divorce from her husband and also a judgment for alimony. Afterward the parties remarried, the judgment being unpaid. They were again divorced, and alimony was granted the wife a second time. The husband, after the second divorce, filed his complaint to enjoin the collection of the first judgment, on the grounds, first, that the judgment plaintiff agreed, in consideration that he would remarry her, she would release said judgment; second, that the judgment was satisfied by the second judgment for alimony, the court having then made a thorough investigation of his ability to pay. *Held*, that the promise to release the first judgment in consideration of the remarriage was void by the Statute of Frauds, because not in writing. *Held*, also, that there was nothing in the second ground inconsistent with the idea that the defendant was liable upon the first judgment: *Brenner* v. *Brenner et al.*, 48 Ind.

Insurance.

Fire by Collision—Barratry.—A policy of insurance on a steamboat against loss by fire only, covers a loss by fire caused by collision where collision is not excepted, by the terms of the policy, from the risk named: *Germania Ins. Co.* v. *Sherlock*, 25 Ohio.

Where the conduct of a pilot results in injury to the owner of the vessel, but is free from fraud, gross negligence, and wilful violation of a known positive law, he is not guilty of barratry within the rule of maritime or insurance law: *Id.*

Total Loss—Negligence.—Where a steamboat, injured at or near its home port by a peril insured against, remains in specie, the assured cannot, without abandoning the vessel to the underwriter, claim indemnity as for a total loss, although the cost of repairing the vessel may exceed its value when repaired: *Globe Ins. Co.* v. *Sherlock*, 25 Ohio.

The rule that an insurer who has paid the loss resulting from a peril

insured against, may be subrogated to all the claims which the insured may have against any person by whose negligence the injury was caused, does not apply in a case where the injury was caused by the negligence of the insured himself. But if the loss was caused by the wilful or fraudulent act of the insured, the same may be set up as a defence to an action on the policy, whether the subject of the insurance has been abandoned to the insurer or not: *Id.*

JUDGMENT.

Jurisdiction—Civil War.—The existence of the late civil war and the President's proclamation issued in pursuance of an Act of Congress, prohibiting all commercial intercourse between the citizens of the rebellious and those of the loyal states, did not suspend the operation of our statutes authorizing the prosecution of suits against non-resident defendants domiciled in the rebellious states, in respect to their property situate in this state, by publication of notice, so as to deprive the courts in such cases of all jurisdiction: *Seymour* v. *Bailey*, 66 Ills.

LANDLORD AND TENANT.

Lease on Shares.—In the case of a leasing for a share of the crops raised, to be divided after the same is gathered, the title to the whole of the crop raised will be that of the tenant until divided and possession given; and after the levy of an execution against the tenant, an agreement between him and the landlord that the latter shall receive his share in the field, will not be allowed to defeat the levy, nor give the landlord the right to maintain replevin: *Sargent* v. *Courrier*, 66 Ills.

LIMITATIONS, STATUTE OF.

Suspension by War.—The fact of inaccessibility or inability to sue seems to be the true reason why statutes of limitation are suspended during a time of war. The disability to sue which attaches to the character of alien enemy, continues only while the party is abiding in his own country. Therefore, if a party residing in a seceding state at the commencement of the late hostilities, should voluntarily leave his state and go into a foreign state or come to this state, it would seem that his disability to sue would cease: *Seymour* v. *Bailey*, 66 Ills.

NEGLIGENCE. See *Railroad.*

Physician.—Neglect of Orders by Patient.—A surgeon assumes to exercise the ordinary care and skill of his profession, and is liable for injuries resulting from his failure to do so; yet if his patient neglects to obey the reasonable instructions of the surgeon, and thereby contributes to the injury complained of, he cannot recover for such injury: *Geiselman* v. *Scott*, 25 Ohio.

The information given by a surgeon to his patient concerning the nature of his malady, is a circumstance that should be considered in determining whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not: *Id.*

Failure to keep Stream clear.—Backing Water on Neighbor.—Plaintiff owned land above defendants' dam, which ordinarily did not back the water on plaintiff's land; in latter years a peculiar grass commenced growing in this dam about February of each year, which obstructed the

water, and in consequence it flowed back on plaintiff's land; about June the grass broke off and ceased to impede the current. The court below charged that if accumulations of dirt, &c., in the dam caused the growth of the grass, the defendants would be liable as if the obstruction had been caused by dirt, &c., alone; but if the grass would have grown to the same extent and caused the same injury, &c., in the channel if there had been no dam or accumulation of dirt, &c., he would not be liable. *Held*, to be correct: *Knoll* v. *Light et al.*, 76 Penn.

If the growth of the grass was not occasioned by any act or negligence of the defendants, and was the result of natural causes over which he had no control, he would not be liable for injury therefrom to the plaintiff, although the obstruction was on the defendants' own land: *Id.*

There is no liability for an injury arising from natural causes or an act of Providence, if there be no concurring negligence: *Id.*

The plaintiff, if injured by the grass, had the right to enter upon defendants' land and remove it: *Id.*

NUISANCE. See *Negligence.*

Remedy in Equity—Separate Plaintiffs—Acquiescence—Similar Nuisances in Vicinity.—The complainants, being nineteen separate owners and occupants of valuable residences in a small specified district in Detroit, substantially used for dwellings, united in a complaint against defendant in which they maintained that he uses certain premises he occupies near by, on Woodbridge street, in such manner as to be a nuisance, and specially and greatly injurious to them in property, comfort and health. His business was that of forging, and the nuisance complained of was the smoke and soot from bituminous coal and the noise and jar caused by the use of a heavy steam-hammer. Complainants prayed for an injunction, which was decreed by the court below. It was objected that the case is not rightly constituted, since the complainants are separate owners with distinct property interests, but it should be brought by the attorney-general. *Held*, That this objection is not maintainable; that the rights asserted are alike, and the grievance complained of has one source and operates in the same general manner against the rights of all the complainants, and to sustain this objection would be to sacrifice substance to useless form: *Robinson et al.* v. *Baugh*, S. C. Mich.

It was objected that the bill should have been verified by oath. *Held*, That as the bill was framed only as a mere pleading, and not for use in obtaining a preliminary injunction, the only relief contemplated being such as would be granted on final hearing, no verification of it was required: *Id.*

It was insisted that a trial at law was a necessary prerequisite before a suit in equity could be brought. *Held*, That this position is not correct; that the statutes (Comp. L. § 6377) giving jurisdiction in equity in matters concerning nuisances, confer it in all cases where there is not a plain, adequate and complete remedy at law, and that no adequate remedy at law exists for such a grievance as this: *Id.*

Defendant also urged that some of the complainants had establishments near by which were liable to objections similar to those made against his, and that he, therefore, ought not to be enjoined at their instance. *Held*, That, assuming the fact to be as supposed, it affords no valid

excuse for him; it neither lessens his wrong nor disables the complainants from making legal complaint of it.

It was urged that complainants had so far acquiesced in defendant's operations as to preclude them from enjoining him. *Held*, That as his operations which were objected to were only commenced two years before the suit, and the large hammer was not purchased until a year later, and complaint was made to the common council and to defendant personally before suit, this point was not sustainable: *Id.*

It was also specified, as a ground of defence, that there were several other establishments in the vicinity, which were specified, that were claimed to be as detrimental as that of defendant. *Held*, That this is no excuse for defendant; that where nuisances are maintained by separate owners they must be proceeded against separately, and that it is of no legal consequence that prosecution is carried on against only one at a time: *Id.*

OFFICER. See *Arbitration.*

PARENT AND CHILD. See *Assumpsit.*

PARTNERSHIP.

Contract.—Statute of Frauds.—A parol agreement, made by one who has purchased the interest of a partner in the partnership property, to pay, as a part of the consideration for the property purchased, one-half of the debts of the old partnership, may be enforced against such purchaser by the holder of a note made by the members of the old firm. Such agreement is not within the Statute of Frauds: *Haggerty* v. *Johnston*, 48 Ind.

Death of one.—The death of a partner is *ipso facto*, from the time of the death a dissolution of the partnership, however numerous the association may be. But a community of interest still exists between the survivors and the representatives of the deceased partner, and the latter have a right to insist on the application of the joint property to the payment of the joint debts, and a due distribution of the surplus. So long as these objects remain to be accomplished, the partnership may be considered as having a limited continuance: *Nelson* v. *Hayner*, 66 Ills.

In equity the surviving partners are treated as trustees, with the fiduciary relation existing between them and the representatives of the deceased partner, of trustees to *cestuis que trust*. If the surviving partner does not account in a reasonable time, a court of chancery will grant an injunction to restrain him from acting, and appoint a receiver and direct the account to be taken: *Id.*

Grounds for dissolving.—It is not for every act of misconduct on the part of one partner that a court of equity, at the instance of the other, will dissolve the partnership and close up the affairs of the company: *Cash* v. *Earnshaw*, 66 Ills.

To justify such an extraordinary interposition a strong and clear case must be made out of positive and meditated abuse. For minor misconduct or grievances involving no permanent mischief, a Court of Equity will ordinarily go no further than to act upon the faulty partner by way of injunction. The fact of loss occurring to the firm through mere error of judgment of the partner is not sufficient cause for a dissolution of the partnership: *Id.*

Negotiable Paper in Firm Name—Presumption of Partner's Authority—Burden of Proof.—Cameron sued plaintiffs in error on two promissory notes signed John Carrier & Co. The declaration counted specially on each note, and also contained the general counts with copies of the notes. Each special count averred that the defendants were copartners doing business under the firm name of John Carrier & Co. The plea was the general issue, and an affidavit of John Carrier was filed and served to preclude its being taken as admitted that the notes were firm transactions or obligatory upon any one but the signer himself. The first question presented is whether the plaintiff was required, in order to make out a *primâ facie* case to show in the outset that Carrier had express authority to make notes generally or to make the notes in suit in the firm name, or that the copartnership was of the class in respect to which such authority is presumed, or that its course of business had been such as to imply authority, or that the signing by Carrier had been approved or ratified. *Held*, that when a member of a firm gives a note in the firm name the presumption is that it is given for a partnership purpose, and the burden of proof is on the copartnership to show the contrary; that a plaintiff is not required in the first instance, in order to maintain his part of the issue on a count setting up an express contract, to give express evidence of matters neither alleged nor required to be alleged in the count, and that in a count by an endorsee against copartnership makers it is not necessary to specially allege the capacity of the firm to make notes, or to set forth specifically a state of facts which would seem to imply it: *Carrier et al.* v. *Cameron*, S. C. Mich.

After the plaintiff had proved the existence of the firm, that Carrier belonged to it and had signed the notes and delivered them to one Corbit, who had endorsed them to plaintiff, and that plaintiff was owner of them, and had shown how much was due on them, the defendants offered to prove that Carrier gave the notes for money borrowed for himself, for his own private use, and that Corbit loaned him the money and knew the facts, and that the other members of his firm knew nothing about their being given or ever sanctioned or approved it, and that Carrier signed the firm name without authority, but the court below, after asking if it was proposed to show that Cameron had notice of these facts, and reply being made in the negative, and that they did not know whether Cameron had knowledge or not, ruled out the offered evidence. *Held*, that this was error; that it was certainly competent for the defendants to show that the notes were fraudulent in their inception, as against the copartnership, and that the payee not only knew this, but was actually a partner to the fraud, and the offer went to that extent; that if the offered evidence had been given, the inference from it would have been that Cameron gave no value and was not a *bonâ fide* holder, and it would then have been incumbent upon the plaintiff to establish his right to recover, to show that he had in fact given value for the notes and was in the position of a *bonâ fide* holder: *Id.*

PATENT. See *Bills and Notes.*

PHOTOGRAPHY. See *Evidence.*

PHYSICIAN. See *Contract; Negligence.*

Railroad.

Passenger.—Ejection of.—Where all the seats in one of two passenger cars are already filled with passengers, another passenger has no right to demand a seat in that particular car, and to refuse to pay his fare or deliver his ticket unless furnished a seat in such car; and if he refuses, under such circumstances, to deliver his ticket or pay his fare, the persons in charge of the train may rightfully eject him therefrom: *Pittsburgh, &c., Railroad Co.* v. *Van Houten*, 48 Ind.

When a passenger, because not furnished a seat in a railroad car already filled with passengers, abused the conductor in a violent manner and with profane language, and struck said conductor in a violent and angry manner, without any excuse whatever, and on account of such misconduct, and his refusal to pay his fare or deliver his ticket, the passenger was ejected from the train: *Held*, that such ejection was justifiable: *Id.*

Contributory Negligence—Cattle killed in City—Fence.—It is negligence in the owner of cattle to allow them to run at large in a city, where a railroad is not required to be fenced; and by reason of such contributory negligence, he cannot recover for cattle killed by trains of a railroad company at such place, when the company is guilty of negligence only; otherwise, where the cattle are wilfully killed: *J., M. & I. Railroad Co.* v. *Underhill*, 48 Ind.

Negligence—Injury by Fire.—In an action against a railroad company, where the complaint charges that the defendant, while running its locomotive and train of cars adjoining the plaintiff's premises, negligently set fire to said premises from sparks and coals of fire from said engine, and burned certain rails, &c., it is competent for the plaintiff to prove, as tending to show negligence, that the sides of the railroad track at the point of the fire had dry rubbish, logs and grass thereon: *T., W. & W. Railway Co.* v. *Wand*, 48 Ind.

Under such complaint it is not necessary for the plaintiff to show that his premises were first ignited; it is sufficient if combustible material on the railroad track was first ignited, the natural tendency of which was to conduct the fire to the adjoining premises of the plaintiff: *Id.*

A locomotive may be properly equipped with spark-arresters, and yet have other defects by which it may set fire to adjoining premises, or it may be operated with reasonable care and diligence in reference to the road itself, and yet run among combustible rubbish and thus communicate fire to the adjoining premises: *Id.*

Failure to ring the Bell.—In an action on the case against a railway company to recover for a personal injury, the court instructed the jury that if plaintiff was injured by one of defendant's engines at a street crossing, in the city of Peoria, and at the time there was no bell ringing or whistle sounding upon such engine, they should find for the plaintiff, unless he, by his own negligence, materially contributed to the injury: *Held*, that the instruction should have left it to the jury to find whether the plaintiff was injured by reason of such omission of duty, and without this it was fatally defective: *C. B. & Q. Railroad Co.* v. *Notzki*, 66 Ills.

STREAM. See *Easement; Negligence.*

STREET.

Agreement to dedicate.—Acceptance by Public.—Where the proprietors of adjacent lands agreed that each would appropriate from his land a strip to be used in common for a public street, and conveyances and improvements have been made on the faith that the street would be opened, the agreement may be enforced in equity, whether the public authorities accept the street as dedicated to public use or not: *Seegar* v. *Harrison*, 25 Ohio.

The grantee in a deed, which describes the premises conveyed as bounded on a street named, is bound to take notice of the existence of such street; and he is chargeable with such knowledge as to the location of the street as he could have obtained by reasonable inquiry: *Id.*

SUBROGATION. See *Insurance.*

TORT. See *Assumpsit.*

Election of Remedy.—Suit in Contract is Waiver of Tort.—Subsequent Suit for same Cause of Action.—This was an action of case for enticing away and harboring plaintiff's minor son nineteen years old. The evidence went to show that the parties having been near neighbors in Cooper, Kalamazoo county, defendant moved to Missouri, and without plaintiff's knowledge or consent and against his wishes persuaded and induced the young man to leave his father and go to defendant's place in Missouri and there work for the latter on his promise of wages. In defence it was shown that the plaintiff had before sued defendant in *assumpsit* before a justice to recover on the basis of contract for the minor's services; that the cause was brought to trial before a jury and a hearing had upon the merits: that the jury disagreed and the cause was discontinued and this suit brought, and this was claimed to be a decisive election by the plaintiff to treat the transaction as one of contract and not tort, which precluded him from afterward counting upon it as a tortious act. The court below charged the jury in effect that it was competent for the plaintiff to ignore the tort and to treat the transaction as one of contract between the parties to be enforced agreeably to its nature; and that if the plaintiff, with full knowledge of all the facts, had elected to place his right on that basis, and had prosecuted a suit on that theory and foundation down to the submission of the case to a jury, he could not afterwards turn round and repudiate such election and maintain a suit in tort. The jury found for defendant and plaintiff brings error. *Held*, That a man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge, or the means of knowledge, of such facts as would authorize a resort to either, will preclude him thereafter from going back and electing again: *Thompson* v. *Howard*, S. C. Mich.

Held, further, That as there was no evidence or claim that the parties ever actually agreed together at all in regard to the minor's services, it was not possible to refer the *assumpsit* to any real agreement of a date later than that of the alleged wrongful enticement, and not possible to infer that the *assumpsit* rested on a distinct arrangement