ABSTRACTS OF RECENT DECISIONS.

ENGLISH COURTS OF LAW AND EQUITY.

SUPREME COURT OF MICHIGAN.[2]

COURT OF ERRORS AND APPEALS OF NEW JERSEY.[3]

SUPREME COURT OF OHIO.[4]

SUPREME COURT OF PENNSYLVANIA.[5]

ADMIRALTY.

Collision.—When a port-tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard-tacked vessel: *Wilson* v. *Canada Shipping Company*, Law Rep., 2 App. Cas.

A starboard-tacked vessel, when apprised of the helpless condition of a vessel which, by the ordinary rules of navigation, ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision in this case: *Id.*

Both vessels were held to blame for the collision: *Id.*

ADVANCEMENT.

When presumed.—Where real estate is conveyed by a father to a child, the legal presumption is that it was intended to be an advancement, which is greatly strengthened when the value of the land bears any considerable proportion to the father's whole estate; and to overcome this presumption there must be proof of distinct explanatory facts: *Storey's Appeal*, 2 Norris.

In 1843, C. conveyed to his niece certain land, the consideration for which was a sum due by C. to D., who was the niece's grandfather. The niece was a child and orphan, and became a member of C.'s family, where she was reared and educated. When the conveyance was made, D. told C. "it would help to support and educate her," and said, "he was to pay C. for her raising." C. maintained the niece from infancy to womanhood, and the estate conveyed to her remained untouched. Its value was about one-third of what she was entitled to from her grandfather's estate: *Held* (reversing the court below), that this was not a gift, but an advancement: *Id.*

Where a grandfather gave to his grandson, to enable him to engage in a permanent business, a sum of money equal to two-thirds of the grandson's share in the grandfather's estate, and nothing was said or done at the time the money was transferred or afterwards, to clearly indicate what was the intention of the donor, the purpose to which the money was to be devoted and its amount were enough to create an implication that the gift was intended as an advancement: *Id.*

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[1] Selected from the last numbers of the Law Reports.

[2] From Hoyt Post, Esq., Reporter; cases decided at January Term 1877; the volume of reports in which they will appear cannot yet be indicated.

[3] From G. D. W. Vroom, Esq., Reporter; to appear in 10 Vroom's Reports.

[4] From E. L. De Witt, Esq., Reporter; to appear in 29 Ohio State Reports.

[5] From A. Wilson Norris, Esq., Reporter; to appear in vol. 2 of his Reports.

BANKRUPTCY. See *Bills and Notes.*

BILLS AND NOTES.

Assignment of—Defence against Holder.—The debtor of a bank, of which A. was cashier, transferred a negotiable note, in payment of his indebtedness, to A. by special endorsement, and thereupon the bank, to enable A. to bring suit thereon, assigned its interest in the note to him. *Held*, that A. might maintain an action on the note in his own name, notwithstanding he may be accountable to the bank for the proceeds when collected: *White* v. *Stanley*, 29 Ohio St.

Such endorsement and transfer having been made before maturity of the note, the same in the hands of A. is not subject to any defence of which neither he nor the bank had notice at the date of the transfer: *Id.*

Fraud on Maker—Negligence.—In an action against the maker, by an endorsee of a negotiable promissory note, who purchased the same, for a valuable consideration, before maturity, and without notice of any fraud or infirmity as between the original parties, the defendant is not liable where it is shown:

1. That at the time of signing and delivering the note, he was induced, by fraudulent representations as to the character of the paper, to believe that he was signing and delivering an instrument other than a promissory note:

2. That his ignorance of the true character of the paper was not attributable, in whole or in part, to his own negligence in the premises: *De Camp* v. *Hamma*, 29 Ohio St.

Notice—Address of Drawer—Bankruptcy.—It is sufficient for the holder of a dishonored bill of exchange to give notice of dishonor to the drawer himself, even though before the dishonor he has been adjudicated a bankrupt, and a trustee of his property has been appointed: *Ex parte Baker. In re Bellman*, Law Rep., 4 Chanc. Div.

The holder of a bill of exchange which was dishonored after the appointment of a trustee in bankruptcy of the drawer, sent notice of the dishonor to the drawer by post to the address which he had left for some months. *Held*, that that address being the only one with which the holder was acquainted, the notice was sufficient: *Id.*

The holder was, therefore, allowed to prove in the bankruptcy in respect to the bill: *Id.*

COMMON CARRIER.

Negligence.—Where a box improperly directed was delivered to a railroad company for transportation and was safely carried to its destination, and there, after having been securely kept for two months, and due diligence exercised to ascertain the consignee, was delivered, by reason of the improper direction, to the wrong person, the company was not liable for the loss: *Lake Shore & Michigan Southern Railway* v. *Hodapp*, 2 Norris.

CORPORATION.

Action by one Stockholder against Directors.—An individual stockholder cannot maintain a separate action at law against the directors of a corporation for damages sustained by reason of the negligence of the directors. The remedy of the stockholder must be in a form to protect

the interests of the corporation as the trustee of all the stockholders and the creditors: *Craig* v. *Gregg et al.*, 2 Norris.

Public Corporation—Ultra Vires—Liability.—A public corporation cannot be sued for the damages resulting from an act which is *ultra vires: Wheeler* v. *Essex Public Road Board*, 10 Vroom.

By force of the constitution of this state, a *public* corporation, exercising lawfully the state's right of eminent domain, is not required, unless the legislature has so ordered, to pay for the land taken, before taking possession of it; *contra*, when so taken by a private corporation: *Id.*

A road board, having the power, widened a public avenue, and in so doing, embraced the mill-dam of the plaintiff; took down such dam, and in lieu of it, built another dam outside of the area of the highway and on land owned by a third party. Such dam so constructed having given way, the plaintiff was deprived, for some time, of the use of the water in his pond: *Held*, that an action for such damage would not lie, as the building of the substituted dam was *ultra vires: Id.*

Criminal Law.

False Pretences—Sale of Goods—Commendation—Misstatement of Nature of Goods.—On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer from Leicester, and induced her to buy certain packages, which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly, falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted. *Held*, that the conviction was right: *The Queen* v. *Foster*, Law Rep., 2 Q. B. D., C. C. R.

Larceny—Receiving—Husband and Wife—Adultery.—A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods: *The Queen* v. *Kenny*, Law Rep., 2 Q. B. D., C. C. R.

Murder—Insanity—Burden of Proof.—In an indictment for murder, where the defence was insanity, it was error in the court to instruct the jury that they must be satisfied *beyond a reasonable doubt* that the prisoner was insane at the time the act was committed: *Meyers* v. *The Commonwealth*, 2 Norris.

This instruction was too stringent, and threw the prisoner upon a degree of proof beyond the legal measure of his defence, which measure is simply proof that is satisfactory; such as flows fairly from a preponderance of the evidence: *Id.*

Murder.—Where, in the trial of an indictment for murder, the evidence showed that the prisoner had had time to act deliberately, and had not acted under a sudden gust of passion, and it appeared that he had been on very bad terms with the deceased: *Held*, that all the ingredients of murder in the first degree were proved, and the case was properly submitted to the jury: *Green* v. *Commonwealth*, 2 Norris.

If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know beforehand (though the time be short) the use to be made of it, there is time to premeditate and deliberate: *Id.*

Damages.

Delay—Loss of Market.—Where, on account of defects in the ship, the voyage has been protracted, and in the meantime the market price of the goods shipped had fallen: *held*, reversing the judgment of the admiralty division, that the consignee could not recover damages for the loss of market: *The Parana*, Law Rep., 2 P. D. (C. A.).

Debtor and Creditor.

Assignment of Debt.—An assignment of a debt carries with it all the remedies and securities which the assignor had, but does not include a personal right of action founded on a tort which the assignor had against a third party, although arising from the same subject-matter: *Morris, for use of Rupp*, v. *McCulloch*, 2 Norris.

Error.

Documentary Evidence must be produced to Court—Presumption.—Plaintiff below declared upon a policy of insurance. The plea was the general issue, with notice of special matter of defence. The questions raised and sought to be reviewed all grew out of what was claimed to be a written application and the effect thereof, and certain written instruments introduced on the trial, and the terms of the policy sued upon, yet neither the policy, the application, nor any of the papers put in evidence appeared in or were in any way made a part of the printed bill of exceptions. *Held*, that it will not be presumed that plaintiff in error was injured by rulings upon instruments which are not shown to the court, and where no means are afforded of ascertaining their contents: *State Insurance Co. of Lansing* v. *Reynolds*, S. C. Mich. January Term 1877.

Evidence.

Refreshing Memory—Entries checked by Witness at the Time—Joint Stock Company—Evidence of its Existence.—The prisoner was a time-keeper, and T. C. was pay-clerk, in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days' work by the workmen to a clerk who entered the days and the wages due in respect of them in a time-book. At pay-time it was the duty of the prisoner to read out from the time-book the number of days' work by each workman to T. C., who paid the wages accordingly. And T. C. saw the entries in the time-book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences: *held*, that T. C. might refresh his memory by referring to the entries in the time-book in order to prove the sums paid by him to workmen. The prisoner being charged with obtaining by false pretenses the moneys of the company: *held*, that the existence of the company was sufficiently proved by evidence that it had carried on business as such: *The Queen* v. *Langton*, Law Rep., 2 Q. B. D. (C. C. R.)

Self-defence in Criminal Prosecution.—In a criminal prosecution, where the defendant seeks to justify on the ground of self-defence, it is not competent to give in evidence the *opinion* of a witness as to the existence of danger to life, or of great bodily harm, or that such danger might have been reasonably apprehended by the defendant: *State of Ohio* v. *Rhoads*, 29 Ohio St.

Execution.

Team—Levy on single Horse—Other sufficient Team—Appraisal—Selection.—Plaintiff in error, as deputy sheriff, seized a horse belonging to Packer, on an attachment, and the latter replevied, claiming it as exempt. It was claimed by the officer that Packer had another horse and harness, and that the two horses and harness were worth more than the amount exempted by the statute; also that this was a trotting horse, and had been kept in training for that purpose. The court below charged that under the undisputed facts the plaintiff was entitled to recover. *Held*, that this ruling was correct; that the plaintiff was entitled to exemption for a team, and that if the officer claimed that what he had which would answer that designation was of greater value than the statute exemption, he should have levied on the whole and had it appraised, to give opportunity for the selection provided for by the statute: *Ostrander* v. *Packer*, S. C. Mich., January Term 1877.

Frauds, Statute of.

Parol Gift of Land.—To take a parol gift or sale of land between father and son out of the operation of the Statute of Frauds, the evidence thereof must be direct, express and unambiguous; its terms must be clearly defined, and all the acts necessary to its validity must have special reference to it and nothing else: *Shellhamer et al.* v. *Ashbaugh*, 2 Norris.

Where title to land is asserted under an alleged parol purchase, to take the contract out of the operation of the Statute of Frauds, it must be supported by adequate evidence of an existing consideration, an adjustment of the boundaries of the land, and of the change of possession which the law requires: *Id.*

Debt of Another—Original Promise—Several Liability—Charge to the Jury.—Marvin sued Welch for the value of meat furnished by him to be used in a boarding train upon the D. L. & L. M. Railroad. It appeared that one Cook, who was engaged in keeping such boarding car, had obtained his supply of meat from plaintiff, and in June 1875, was owing him therefor $117.78; that about June 14th, he refused to trust Cook any longer; that Welch, who had been supplying Cook with groceries, went with Cook to see Marvin, and the latter claimed Welch stated to him that the pay from the railroad company had been assigned to him, and that he would be responsible and pay for the meat thereafter furnished to run the train, and that for the existing indebtedness to Marvin it was arranged that Cook should give an order on Welch to be paid as fast as money came into Welch's hands; that such an order was obtained and accepted by Welch on condition that money enough came into his hands to pay his own account first; that different amounts were paid by Welch, in all $215; but it did not appear that any other orders were

given. It also appeared that in September, Marvin received an order from Cook on the railroad company for $100, which he endeavored to collect. Marvin continued to charge the meat to Cook on his books after the arrangement with Welch, precisely as he had done before. There was considerable conflict in the evidence. The court left it to the jury to determine what the agreement was between the parties. Defendant's counsel asked the following instruction: "If the jury find that Marvin sold Meat to Cook, and charged the same to Cook, and that Welch became responsible for it, in order to take the promise out of the Statute of Frauds, and make Welch legally liable, they must also find that Marvin thereupon absolutely discharged Cook from liability, and looked only to Welch for pay." Other similar charges were requested, and all were refused, the jury being merely instructed that the manner of keeping the accounts, and the efforts to collect from Cook, were facts capable of explanation, and might be considered by the jury: *Held*, that defendant was entitled to have the jury instructed as requested; that under no theory of this case could Cook and Welch both be responsible to plaintiff, severally at his option, since if Cook, after the arrangement with Welch, continued liable, then Welch's liability could not be an original one, and if Welch's promise was an original one, and the debt his debt, then Cook could not be held liable thereon; that while the parties might have made an agreement under which they would have been jointly liable, which is not claimed in this case, yet they could not, under the circumstances, be severally liable at plaintiff's option: *Marvin* v. *Welch et al.*, S. C. Mich., January Term 1877.

Guaranty.

Inability to collect—Condition precedent to recovery against Guarantor—Declaration—Effect of Pleading to Merits.—In an action against a guarantor, it is essential to prove a state of facts which establishes inability to collect of the principal debtors, one and all; and such inability may undoubtedly be proved by showing a prosecution seasonably begun, and diligently and in good faith carried on against all to final judgment and execution, without avail: *Aldrich* v. *Chubb*, S. C. Mich., June Term 1877.

A defendant is not at liberty, after having neglected to demur, and having pleaded to the merits, to turn his adversary out of court, on the trial, on account of formal defects in the declaration: *Id.*

Husband and Wife.

Check to Husband—Presumption of Gift.—M. G., to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in London, for the amount, less the duty, and she endorsed the draft and handed it over to her husband, and his bankers received the amount, and placed it, by his direction, to his deposit account. The husband died suddenly a few days after. There was evidence pointing to the fact that the wife did not intend to give the check to her husband. In an action against his executors: *Held*, that the widow was entitled to be paid the sum claimed: *Green* v. *Carlill*, Law Rep., 4 Chan. Div.

Divorce—Consanguinity—First-Cousins—Marriage illegal by the Law

of Domicile.—The petitioner and respondent, Portuguese subjects and first-cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London. In 1873 they returned to Portugal, and continued to reside there. By the law of Portugal a marriage of Portuguese subjects, being first-cousins, without dispensation, wheresoever contracted, is invalid: *Held*, that the court of the place of contract of marriage is not bound to recognise the incapacities affixed by the law of the domicile on the parties to a contract of marriage, if such incapacities do not exist according to the *lex loci contractus*, and pronounce a marriage, otherwise valid, to be null and void by reason of such incapacity: *Sottomayor, otherwise De Barros* v. *De Barros*, Law Rep., 2 P. D.

INSURANCE.

Marine.—A policy of insurance was effected on ship from 22d of January 1872, to the 23d of January 1873, both inclusive. These words were written in, on a printed form, which also contained, in print, the words, "at and from," and "for this present voyage," and other similar words which were commonly found in the forms of a voyage policy, and which had not been erased or struck through: *Held*, that the policy was really a time police, and its character was not affected by the printed words thus negligently left in the form: *Dudgeon* v. *Pembroke*, Law Rep., 2 App. Cas.

In a time policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy: *Gibson* v. *Small*, 4 H. L. C. 353, supplemented by *Thompson* v. *Hopper*, 6 El. & Bl. 172, and *Faucus* v. *Sarsfield*, Id. 192, declared to have set at rest all controversies on this subject: *Id.*

If a ship-owner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover: *Id.*

Breach of Conditions.—A condition of a policy of insurance upon the merchandise of a store stipulated that no petroleum should be kept or had on the premises. The insured kept a barrel of petroleum at a time for sale, and the company claimed this avoided the policy. The court below instructed the jury that "merchandise" included whatever it was customary to keep in such a store, and if a supply of petroleum such as was kept on the premises was a part of the usual stock of the store the plaintiff could recover. *Held* to be error: *Birmingham Fire Ins. Co.* v. *Kroegher*, 2 Norris.

Held further, that the effect of the condition of the policy was not changed by the fact that the agent of the company knew that petroleum was kept on the premises at the time the insurance was effected: *Id.*

Waiver of Defence.—In an action against an insurance company to recover the amount of a fire policy, a defence on the ground that the insured failed to make and furnish the insurer with the preliminary proofs of loss in the manner and within the time required by the policy, is not waived by setting up and relying upon other defences not inconsistent therewith: *Farmers' Ins. Co.* v. *Frick*, 29 Ohio St.

Policy—Waiver of Conditions or Representations—Trial—Examination of Witnesses.—Although a proposal and application for a policy of

life insurance, contains an agreement on the part of the insured, that the answer to the questions annexed to them, and the accompanying statements made to the examining physician, shall be the basis and form part of the contract and policy between the insured and the company, yet if the policy does not, directly or indirectly, so declare, it will be assumed that all previous negotiations have been superseded, and that the policy alone expresses the contract between the parties: *American Popular Life Ins. Co.* v. *Day, Executor*, 10 Vroom.

The fact that the policy declares that the insurance is in consideration of the representations made to the company in the application for the policy, cannot have the effect of changing the character of the representations in the application, and elevating them to the importance of warranties or conditions of insurance: *Id.*

LIMITATIONS, STATUTE OF.

Acknowledgment of Debt—Implied Promise to pay.—The defendant, whose debt to the plaintiff was barred by the Statute of Limitations, wrote to the plaintiff within six years before action the following letter: "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined and check sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim." *Held*, that the debt was revived, as the request to be furnished with an account with vouchers at a particular time and place did not negative the implied promise to pay arising from the admission of a balance due: *Skeet* v. *Lindsay*, Law Rep., 2 Ex. D.

Pleading—Demurrer—Payments endorsed on back of Note—Since the adoption of the code, as before it, the bar of the Statute of Limitations must be pleaded, otherwise it is waived. But since the code, the bar may be insisted on by demurrer when it appears upon the face of the pleading demurred to, that the time of the statute has run against the cause of action therein stated: *Vose* v. *Woodford*, 29 Ohio St.

Where a petition, which contains a good cause of action, except that it appears to be barred by the statute, is demurred to, and the defendant afterward, pending the demurrer, answers to the merits, and an issue of fact is joined thereon and trial had, the demurrer must be taken to have been waived: *Id.*

A petition against several makers of a joint and several note more than fifteen years past due, whereon payments have been made within the time of the statute, but by whom paid not appearing, does not show a statutory bar in favor of any of the defendants: *Id.*

Where the holder of a note past due receives from the principal debtor, without the knowledge of the surety, a sum of money greater than the amount of interest then due, and the amount so received is endorsed on the note as received on account of interest, it not appearing that such endorsement was made by the holder or that he had knowledge that the same was so made, it is not error to refuse to charge the jury that, in law such receipts and endorsement constituted an agreement to extend the time of payment of the note for such period of time as such sum would pay interest: *Id.*

MANDAMUS.

Nonsuit—Previous Nonsuit—Order setting same aside on payment of

Costs—Noticing for Trial—Waiver—Costs.—A writ of mandamus was asked to require the respondent to set aside a nonsuit. A previous nonsuit had been granted, which, on motion, was ordered set aside on the payment of costs. The defendant, without taxing costs or demanding payment, noticed the case for trial, and had it placed on the docket. When it was reached, a nonsuit was again granted. The plaintiff moved to set it aside, on the ground that the case was not in condition to be noticed for trial, showing that he was ready and willing to pay the costs when taxed: *Held*, 1. That when the defendant noticed the cause for trial, this was in law a waiver of the previous nonsuit, and plaintiff was entitled to proceed to a trial on such notice. 2. That if plaintiff was in doubt regarding the waiver, it was his duty, knowing the case had been placed on the trial docket, to move to strike it off, if he intended to dispute its right to be there; and that he, having failed to do this, the Circuit judge was justified in considering the case as standing regularly for trial: *The People ex rel. Wineman* v. *The Judge of the Wayne Circuit*, S. C. Mich., January Term 1877.

Master and Servant.

Who is Fellow-servant.—A master is not liable to a servant for the negligence of a fellow-servant, while the two are engaged in the same common employment, unless for negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency: *McAndrews* v. *Burns, Administratrix*, 10 Vroom.

A fellow-servant is any one who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants it may probably expose them to injury: *Id.*

A. not liable for the Negligence of his Servant while employed under the control of B.—The defendants, having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all the labor, the defendants to provide and place at the disposal of W. the necessary engine power, ropes and hoppets, with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W., while working at the bottom of the shaft, was injured by the negligence of the engineer: *Held* (affirming the judgment of the Common Pleas Division), that though the engineer remained the general servant of defendants, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of defendants, who were therefore not liable for his negligence: *Bourke* v. *White Moss Colliery Company*, Law Rep., 2 C. P. D., C. A.

Mine.

Lease of Coal—Damage to Lessor's Estate by working a Mine.—A lease which gives the right to take out all the coal beneath a certain surface, confers also the right to make all necessary openings to reach the coal: *Trout* v. *McDonald*, 2 Norris.

T. made a voluntary conveyance of a farm to his wife, in 1867, but

remained in possession of the property till his death, in June 1873. In April 1873, he granted to McD. the right to mine coal on a part of this farm. McD. worked a mine, under the lease, during T.'s lifetime and after his death, with the widow's knowledge. McD. never knew of the existence of this deed till July 1874. It was not recorded till August 1874. After the husband's death, his widow received payments of royalty under the lease, but afterwards filed a bill to restrain McD. from entering upon the property to mine coal: *Held* (affirming the court below), that she had ratified and confirmed the lease, and was bound by it: *Id.*

Whether she might have avoided the lease after her husband's death was not decided: *Id.*

The fact that a mere "wet-weather" spring might be injured by working the mine is not important. Even if it was a valuable spring, it seems that its destruction, if a necessary incident to mining under the lease, would be *damnum absque injuria: Id.*

National Bank.

Mortgage—When Ultra Vires.—A mortgage given to a National bank to secure a future loan is *ultra vires* and therefore void: *Woods* v. *Peoples' Nat. Bank*, 2 Norris.

A mortgage given to a National bank to secure a pre-existing debt is valid: *Id.*

Where a mortgage was given to a National bank partly to secure certain pre-existing notes, upon which W. was an accommodation endorser, and partly to secure a future loan, *Held*, that the mortgage was void as to the future loan, and that W. had a right to have the proceeds of a sale of the mortgaged premises under the mortgage applied to the payment of the notes of which he was endorser: *Id.*

Negligence. See *Nuisance; Railroad.*

Master and Servant—Coal Grate in Highway.—The carman of the defendant, a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries: *Held*, in an action against the defendant for negligence, that he was responsible: *Whiteley and Wife* v. *Pepper*, Law Rep., 2 Q. B. D.

Nuisance.

Duty and Liability of Owners of Adjoining Premises.—The plaintiff and the defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return-drain which passed through the defendant's premises being decayed, the sewage escaped and flowing into the plaintiff's cellar did damage. The defendant was unaware of the existence of this return-

drain, and consequently of its want of repair: *Held*, that the defendant was liable for the damage done to the plaintiff, for the defendant's duty was to keep the sewage, which he himself was bound to receive, from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that this duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain: *Humphries* v. *Cousins*, Law Rep. 2 C. P. D.

PARTNERSHIP.

Liability of new Partner for old Debts.—The members of a firm doing a banking business under the name of "The Citizens' Bank," are not dormant partners, and are all individually liable for the debts of the firm; and a member of such a partnership, upon withdrawing from it, must give notice of his withdrawal as in the case of ordinary partnerships; otherwise he remains liable for the subsequent debts of the firm: *Shamburg* v. *Ruggles*, 2 Norris.

A new partner entering a firm is not liable for the antecedent debts of the firm, unless he has agreed to assume them: *Id.*

Where S. joined an association doing a banking business as "The Citizens' Bank" some months after it was formed, and became a director in it, and when he withdrew, in December 1872, no notice was given of his withdrawal, but, on the contrary, his connection with the bank as a director continued to be advertised, though against his wishes, till June 1873: *Held*, that he was liable for a deposit made in January 1873, although the depositor had never known that he had been a member of the firm: *Held*, in the absence of any evidence that he assumed the debt, that he was not liable for a deposit made before he became a partner, and that the payment of interest on such deposit while S. was a partner, even with his knowledge, was not, of itself, enough to show that he had assumed the antecedent debts of the firm: *Id.*

Execution.—B., an individual judgment-creditor of M., issued a fi. fa. against him, to which writ the sheriff returned "that he had levied on all the interest of M. in the business and property of M. & Sons, and subsequently sold said property as that of M. & Sons, under executions against the firm." The fund arising from the sale under the execution against the partnership was referred to an auditor for distribution, before whom B. claimed the amount of his judgment out of the proceeds, and offered evidence to show that no partnership existed, but that the property belonged to M. alone: *Held* (reversing the court below), that the auditor could not inquire into the existence of the partnership, and that B. was concluded by the return to his writ, and estopped from making any claim to the fund: *Bogue's Appeal*, 2 Norris.

Change of Partners under same Style of Firm.—Prior to April 1872, a firm of bankers, consisting of two partners A. and B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April 1872, X. and Y. were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, and the business was carried on under

the same firm by B., X. and Y. In 1874 B. died, and the business was carried on by X. and Y., still under the same firm, until 1875, when the bank stopped payment, and went into liquidation. The depositors all knew of A.'s death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from X. and Y. Others had increased and others had diminished the amount of their deposit after A's death, receiving in each case fresh deposit notes; and they had all proved in the bankruptcy of X. and Y. for the amount due on their notes as money "advanced and lent" to the bankrupts. *Held*, that in each case there had been a complete novation, and that none of the depositors were entitled to prove against the estate of A.: *Bilborough* v. *Holmes*, Law Rep. (V. C. H.), 5 Ch. D.

Practice.

Rule to Plead—Clerical Error—Notice Served—Statute of Amendment.—M. sued H. *et al.*, by declaration. The rule to plead, by an error of the clerk, was worded to require the defendant to plead in ten days instead of twenty days after service. The notice endorsed on the declaration served, however, was one of twenty days. Default was not entered until after twenty days after service, and on the basis of this default judgment was afterwards in due course entered. H. *et al.* claimed the judgment to be erroneous on account of the defect in the rule to plead: *Held*, that the notice served being regular, and the proceedings being in accordance therewith, the clerical mistake in the entered rule was immaterial, and worked no prejudice to plaintiffs in error, and that the defect was cured by the Statute of Amendments: *Howe et al.* v. *Maltz*, S. C. Mich., January Term 1877.

Public Schools.

Control over Pupils.—Boards of education are authorized by law to adopt and enforce necessary rules and regulations for the government of the schools under their management and control: *Sewell* v. *Board of Education*, 29 Ohio St.

Where instruction in rhetoric was given in any grade or department of such schools, and one of the rules adopted by the board for the government of the pupils therein provided that if any pupil should fail to be prepared with a rhetorical exercise, at the time appointed therefor, he or she should, unless excused on account of sickness or other reasonable cause, be immediately suspended from such department: *Held*, that such rule was reasonable: *Id.*

Where the teacher of such department, with the consent of the board, for a failure to comply with the rule, or to offer any excuse therefor, suspended a pupil, until he should comply with the rule, or offer a reasonable excuse for his non-compliance, neither the board of education nor the teacher is liable in damages therefor: *Id.*

Railroad.

Negligence—Liability to Stranger.—A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where,

at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road: *Pittsburgh, F. W. & C. Railway Co.* v. *Bingham,* 29 Ohio St.

Negligence, when a Question for Jury—Duty of Company to maintain Order on its Trains—Proximate and Remote Cause.—The plaintiff was a passenger by the defendants' railway; and at one station, though all the seats in the carriage in which the plaintiff was were filled, three more persons got in and stood up. There was no evidence that the defendants' servants were aware of this; but the plaintiff remonstrated with the persons who had so got in. At the next station the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in, and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train: *Held* (on appeal), by COCKBURN, C. J., and AMPHLETT, J. A. (KELLY, C. B., and BRAMWELL, J. A., dissenting), that there was evidence from which the jury might infer negligence on the part of the defendants so as to entitle the plaintiff to recover damages: *Jackson* v. *Metropolitan Railway Co.,* Law Rep., 2 C. P. D. (C. A.)

Negligence—Combustible Matter near its Tracks—Duty of Adjacent Owners.—A railroad company is bound to keep its track free from combustible matter, whereby fire may be communicated from its locomotives to adjoining property. Negligence in suffering combustible matter to accumulate on its right of way, so as to make it dangerous to adjoining property to run its locomotives through it, will make the company liable for injuries from fires originating in such combustible matter from coals dropped or thrown from its locomotives, and carried thereby to adjoining property, though there be no allegation that the engine from which the coals were dropped or thrown was improperly constructed or driven: *Delaware, Lackawanna & Western Railroad Co.* v. *Salmon,* 10 Vroom.

The owner of lands adjacent to a railroad is not obliged to keep his lands contiguous to the track free from leaves or other combustible matter coming or being thereon. He may cultivate, build upon, and use his lands, or leave them in a state of nature, as he may see proper, and will take upon himself no other risks than such as are incident to the operation of the road with proper care by the company, and will, nevertheless, be entitled to damages for injuries by fire, arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain: *Id.*

Nor will such owner be barred of recovery of damages for injury by fires caused by the negligence of the company, by the fact that the company acquired the right of way through his land by grant or condemnation. A conveyance of land for railroad purposes, or an assessment of the value of lands taken, and damages under proceedings to condemn, only bars the recovery of such damages as naturally and necessarily arise from the use of the premises for the authorized purpose, and will not bar the recovery of damages for injuries arising from

an unskilful or improper construction, or negligence in operating the road. For such damages the remedy by action remains, notwithstanding the conveyance or condemnation: *Id.*

By a provision in the charter of a railroad company, its road was declared to be a public highway for the use of steam-engines and cars propelled by steam-engines only: *Held*, that the company was liable for injuries from fire thrown by the locomotive of another company which the defendants suffered and permitted to be run on the road without any spark-arrester on it, its defective condition being known to the defendants' train-despatcher, who exercised no supervision over it: *Id.*

Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed from his negligent act to involve him in legal liability: *Ryan* v. *N. Y. Central Railroad Co.*, 35 N. Y. 210, and *Penna. Railroad Co.* v. *Kerr*, 62 Penna. 353, disapproved: *Id.*

In actions for injuries resulting from fire originating through the defendant's negligence, and communicated to the plaintiff's property, where distance, intervening objects, or the manner in which the fire was communicated, present the question whether the plaintiff's loss is attributable to the defendant's negligent act, and there be no intervening agency apparent which may stand in law as the immediate cause of the injury, the question is one for the jury whether, under all the conditions under which the loss happened, the destruction of the plaintiff's property was a result that might reasonably have been expected—though not, in fact, anticipated—from the defendant's negligent act: *Id.*

Sale.

Damages for Non-delivery—Counter-claim.—Where damages for the failure to deliver goods sold are sought to be set up by way of counter-claim by the purchaser, the answer, which shows that delivery of the goods and payment therefor were concurrent conditions, without averring an offer or readiness to pay on his part, does not state facts sufficient to constitute a counter-claim: *Chambers* v. *Frazier*, 29 Ohio St.

Where nominal damages only can be assessed on a counter-claim, without proof of actual damages, the omission to assess any damages, there being no proof of actual loss, is not ground for a reversal when such omission does not affect the costs: *Id.*

Shipping.

Charter Party—Cesser of Liability—Demurrage—Lien.—Defendants chartered plaintiff's ship to carry a cargo of rice to a good and safe port, calling at another port for orders which were to be forwarded within forty-eight hours after notice of her arrival or laydays to count. Twelve working laying-days to be allowed the freighters for loading the ship at port of loading and waiting for orders at port of call, fifteen days on demurrage allowed over and above the laying-days, at 4*d.* per ton per day. It was further agreed "that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge. but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which

they should be bound to exercise." The ship arrived at the port of call with a cargo worth the freight, and notice was given to the defend ants. In an action against the charterers (who had sold the cargo before arrival at the port of call), two breaches of contract were assigned: 1. That the defendants did not give orders as to the ship's port of discharge; 2. That they gave orders for the ship to discharge at a port which was not a good and safe port; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight: *Held*, affirming the judgment of the Common Pleas Division, that the exoneration clause discharged the defendants from liability for the breaches: *French* v. *Gerber*, Law Rep., 2 C. P. D. (C. A.) 247.

SURETY.

Co-sureties—Discharge of one.—W., to procure a line of discount for the firm of which he and his brother were the members, executed to a bank a mortgage of his individual real estate. The security of this mortgage being deemed insufficient, the mother of W. executed a mortgage of her real estate to provide further protection to the bank. The condition of each mortgage was to secure the payment of the notes to be discounted for the firm to an amount not to exceed $25,000. Notes to the amount of $20,000 being held by the bank, on the payment of $10,000 by W. his mortgage was satisfied without the knowledge of his mother, and the firm having subsequently failed suit was then brought by the bank on her mortgage to recover the amount of the residue of the notes unpaid. *Held*, that the relation of defendant to the parties and the transaction was that of surety of W. alone, and she had the right to require that the value of the property covered by the lien of the mortgage of W. should be exhausted before recourse could be had to her mortgage: *Wharton* v. *Duncan*, 2 Norris.

Held, further, that the relation of co-sureties did not subsist between W. and the defendant and the liability of each to the plaintiff was therefore not equal: *Id.*

TITLE.

State Lands—Certificate of Purchase—Forfeiture—Redemption—Assignment—Forgery.—In 1865, Benjamin F. Bush became the purchaser of 120 acres of land, paying to the state land office one-fourth of the purchase-money, and receiving the usual certificate. He died in 1866. In October 1869, the land was offered for sale as land which had become forfeited, and complainant, in October 28th 1869, bid it off, and paid to the state treasurer $120, by means whereof he became, as he avers, entitled in one year thereafter to a certificate of purchase if the land was not redeemed. On November 13th 1869, the land was redeemed by James A. Smith. Complainant was at once notified of the fact, and that his payment would be refunded on surrender of his bid. December 31st 1870, he was again notified to surrender his bid and take his money, as it was necessary to close up that kind of business on the books. A similar notice was sent him in November 1873. May 18th 1871, defendant, claiming to hold the Bush title through several mesne assignments, paid up the amount remaining due on the purchase-money, and on the next day received his patent. This suit was brought in August 1874, to compel an assigment to complainant of the patented

lands, on the ground that the titles set up under Bush were derived under a forged assignment, and were therefore void, and gave no right to redeem the lands from complainant's purchase. James A. Smith, when he redeemed, was guardian of the heirs of Bush. *Held*, that Smith was entitled to redeem in one capacity or the other, and that Bush's heirs, who were not parties to this controversy, could not now be precluded from any rights they had; that if the Bush transfer was forged the heirs were entitled to the land, and if not forged, then the redemption enured to the holders of the Bush title, and in either case it was sufficient to cut off complainant's right to the land: *Johnson* v. *Knapp*, S. C. Mich., January Term 1877.

TRIAL.

Practice—Reading Opinions to Jury.—It is error in the judge, at the trial, to permit counsel, in his summing up, to read to the jury the remarks of the court in the opinion read at bar, on a motion for a new trial in the same case, touching the weight of evidence or the credibility of the witnesses: *Allaire's Heirs* v. *Allaire*, 10 Vroom.

But an objection, at the trial, to the reading of such opinion, is too broad, as such opinion, with respect to the law stated in it, could be lawfully read to the jury. It must appear, to render the exception available in the bill of exceptions, that the attention of the judge was drawn to the point by the objection being confined to that portion of the reading which was deemed illegal: *Id.*

Evidence—Discretion of Judge.—Reasonable discretion must be accorded to a judge at nisi prius, in allowing or overruling questions to witnesses on direct examination, which inquire as to matter not in itself pertinent, and which can only become so by the introduction of other evidence which is clearly pertinent: *Am. Popular Ins. Co.* v. *Day*, 10 Vroom.

WILL.

Revocation of former Will by conditional Will which does not operate.—The deceased made a will, by which he left all his property to his wife and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The deceased died in the lifetime of his wife: *Held*, that the joint will was dependent upon a contingency which did not happen, and was, therefore, inoperative even to revoke a previous will: *In the Goods of Hugo*, Law Rep., 2 P. D.

No residuary or revocatory Clauses—Earlier Will disposing of the whole of the Property.—The deceased executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced, "This is the last will and testament," &c. It varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses: *Held*, that from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it, therefore, was revoked: *Dempsey* v. *Lawson*, Law Rep., 2 P. D.