there be not money in the treasury, then the corporation should borrow, as provided in the charter or by existing law, or they should levy and collect such tax as to raise whatever sum is needed, and if they can neither borrow nor raise the money by taxation to meet their expenditures, then they should cease their expenditures until they can thus realize according to law.

But for no purpose had the corporate authorities the right to issue warrants on the treasury payable in city scrip, or to issue the city scrip. Their action was illegal and contrary to law and public policy. This city scrip is about the size, and upon the same kind of paper, and in every respect very much like national bank notes, and was doubtless designed to circulate as currency.

The court will strictly construe municipal charters, and require clear authority for the powers assumed to be exercised under them. While these defendants aver that they have acted in the utmost good faith, yet so much abuse of power, not to say corruption, has been found in some municipalities, and such onerous and ruinous burdens placed upon the taxpayers, that to use the language of a distinguished author, "it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard."

Let the decree be modified as indicated in this opinion, and the injunction be made perpetual.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
ENGLISH COURTS OF LAW AND EQUITY.[2]
SUPREME COURT COMMISSION OF OHIO.[3]
SUPREME COURT OF PENNSYLVANIA.[4]
SUPREME COURT OF RHODE ISLAND.[5]

ASSIGNMENT FOR CREDITORS. See *Trover.*

ASSUMPSIT.

Special Contract not carried out— Variance.—A plaintiff may recover as upon an implied *quantum meruit*, for the value of services rendered

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1877. The cases will probably be reported in 5 or 6 Otto.

[2] Selected from the late numbers of the Law Reports.

[3] From E. L. De Witt, Esq., Reporter; to appear in 30 Ohio State Reports.

[4] From A. Wilson Norris, Esq., Reporter; to appear in Vol. 3 of his Reports.

[5] From Arnold Green, Esq., Reporter; to appear in 11 Rhode Island Reports.

under a special contract, which has been wrongfully terminated by the defendant: *Ralston* v. *Administrator of Kohl*, 30 Ohio St.

Where an item of account on which suit is brought is not proved on the trial to the full extent claimed in the petition, but the variance between the allegations and the proof is not such as to mislead the defendant in regard to the nature and character of the claim in controversy, such variance will not prevent a recovery, if the facts proved show a good cause of action: *Id.*

AUCTION.

Personal Liability—Conditions of Sale.—In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues headed, "Great Western Railway Company. Catalogue of Unclaimed Property, &c., which will be sold by Messrs. H. & E. (the defendants) on Tuesday, November 7th and following day. By order of the directors of the above company, &c." The catalogue contained amongst others the following conditions: "The lots to be cleared away in three days after the sale at the purchaser's expense, &c. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be re-sold by public or private sale without further notice, and the deficiency made good by the defaulter." The plaintiff attended the sale, received a catalogue, bought one of the lots and paid a deposit. He did not fetch the goods away on Saturday (the last of the three days for clearing) but went for them the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendant's possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. The plaintiff having been nonsuited, *held*, first, that on the face of the catalogue and conditions, there was evidence that the defendants contracted personally with the plaintiff for the delivery of goods purchased by him. Secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery: *Woolfe* v. *Horne*, Law Rep. 2 Q. B. D.

BILL OF EXCEPTIONS.

Specific Exception—General Exception to several Propositions where only part sound.—Where exceptions are taken to a general charge of the court given to the jury, unless the party excepting points out specifically the part or proposition of the charge excepted to, or the grounds of the exception, a reviewing court is not required to take notice of such general exception: *P., Ft W. & C. Railway* v. *Probst*, 30 Ohio St.

An exception, in gross, to the refusal of a court to give in charge to the jury the whole of a series of propositions requested, will not be sustained when one or more of the propositions are unsound: *Id.*

To authorize this court to review the proceedings and judgment of a lower court overruling a motion for a new trial on the ground that the verdict is against the evidence, it must appear that the bill of exceptions contains all the testimony given to the jury on the trial: *Id.*

A bill of exceptions showing that it contains only the substance of a deposition offered in evidence on the trial before the jury does not comply with the rule so as to enable the reviewing court to review the case on the evidence: *Id.*

BILLS AND NOTES. See *Equity.*

Note given for Patent Right—Indictment.—The Act of May 4th 1869 (66 Ohio L. 93), making it a penal offence to take a "promissory note or other negotiable instrument," not containing the words "given for a patent right," knowing the consideration thereof to be a patented invention, does not include in such offence the taking of notes or instruments not negotiable: *State* v. *Brower*, 30 Ohio St.

An indictment which does not show that the note or instrument on which it is founded was negotiable, does not show an offence under the act, and may be met by demurrer: *Id.*

CHARITY.

Statute of Elizabeth—Charitable Use—Perpetuity—Devise to Corporation.—The statute of 43d Elizabeth, chap. 4, was never in force in Maryland: *Ould et al.* v. *Washington Hospital for Foundlings*, S. C. U. S., Oct. Term 1877.

The validity of charitable endowments and the jurisdiction of courts of equity in such cases however in this country do not depend upon that statute: *Id.*

A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man: *Id.*

A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the term of gestation, in cases of posthumous birth: *Id.*

A devise to a corporation to be created by the legislature is good as an executory devise. A distinction is taken between a devise *in præsenti* to one incapable, and a devise *in futuro* to an artificial being, to be created and enabled to take: *Id.*

CHECK.

Payment without Endorsement by Payee—Custom of Banks.—The rightful possession of a check, made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine endorsement of the payee: *Dodge* v. *National Exchange Bank*, 30 Ohio St.

The duty of the drawee upon acceptance of such check, to pay the same only upon the genuine endorsement of the payee named therein, is not affected by a custom among bankers as to the mode of ascertaining the identity of the person endorsing the name of the payee and receiving payment. If the drawee relies upon false representations as to identity, for which neither the drawer nor payee are responsible, he makes payment to a wrong person at his peril: *Id.*

Where the drawee attempts to justify payment to a person not bearing the name of the payee, upon his unauthorized endorsement of the payee's name, on the ground that he was the person to whom the drawer intended payment to be made, though described by a false name; all the facts in

regard to such intention being unknown to the drawee at the time of payment, he can not be allowed to prove a portion of the facts occurring at the time of drawing the check, and to insist upon excluding other material facts occurring at the same time tending to disprove such intention: *Id.*

Constitutional Law.

Trial by Jury.—Art. 7 of the amendments to the Constitution of the United States relating to trials by jury, applies only to the courts of the United States: *Pearson et al.* v. *Yewdall et al.*, S. C. U. S., Oct. Term 1877.

Right of State to regulate Judicial Process—Corporation—Charter.—The regulation of the forms of administering justice by the courts is an incident of sovereignty. The surrender of this power is never to be presumed: *Cairo and Fulton Railroad Co.* v. *Hecht et al.*, S. C. U. S., Oct. Term 1877.

A statute, therefore, which prescribes a mode of service of judicial process upon a railroad company, different from that provided for in its charter, is valid and does not impair the obligation of a contract: *Id.*

When, however, it clearly appears to be the intention of the legislature to limit its power of bringing the corporation before its judicial tribunals to the particular mode mentioned in the charter, the subsequent legislation upon that subject is invalid: *Id.*

Contract.

Rescission.—Where a party to a contract by his acts or default renders the performance of the contract impossible, or if not wholly impossible yet imposes such conditions upon its execution as to render its performance practically impossible, the other party to the contract may treat the same as rescinded: *Seipel* v. *International Life Ins. and Trust Co.*, 3 Norris, Pa.

Contractor. See *Negligence.*

Corporation. See *Charity; Constitutional Law.*

Stockholder—Evidence of.—Where the name of an individual appears on the stock book of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption, and in an action against him as a stockholder the burden of proving that he is not a stockholder or of rebutting that presumption is cast upon the defendant: *Turnball* v. *Payson, Assignee, &c*, S C. U. S., Oct. Term 1877.

Transfer of Stock—Right of Refusal of Purchase by Company.—The charter of a corporation providing that "no stockholder in said corporation shall have the right to transfer his shares therein, without first giving ten days' notice in writing of such intention, and ten days' refusal thereof to said corporation, at the lowest price at which he will sell to any other person; and if in such case said corporation elect to purchase said shares at said lowest price, such stockholder shall, on the price being offered to him, convey said shares to said corporation." A stockholder offered to the corporation a certain number of shares at a gross price, and subsequently sold to a third party a smaller number of shares

at a given price per share. *Held*, that the offer to the corporation did not comply with the provisions of the charter, and that the corporation could not be compelled to allow the transfer of the stock sold upon its books: *Sweetland* v. *Quidnick Co.*, 11 R. I.

COURTS. See *Criminal Law.*

CRIMINAL LAW. See *Bills and Notes.*

Obscene Publication—Indictment—Omission to set out words charged as obscene.—In an indictment for the publication of an obscene book, the fact that the book is described by its title only, without setting out any of the words charged as obscene, is no ground for a motion to quash the indictment or arrest the judgment. *Semble*, that such omission of the words charged as obscene is not open to objection by demurrer or otherwise: *The Queen* v. *Bradlaugh*, Law Rep. 2 Q. B. D.

Rape—Consent—Submission.—The prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner: *Held*, that the prisoner was guilty of rape: *Reg.* v. *Barrow*, Law Rep. 1 C. C. 156, questioned: *The Queen* v. *Flattery*, Law Rep. 2 Q. B. D.

Continuance of Trial after expiration of Term—Testimony of Accomplice.—In a homicide case, where the jury has been sworn on the last day of the term, the court may adjourn from day to day, and proceed with the trial of the case after the expiration of the term; such continuance is within the sound discretion of the court: *Carroll et al.* v. *The Commonwealth*, 3 Norris, Pa.

To show motive for crime, it is competent for the Commonwealth to prove the existence of a secret criminal organization, and to show that one division of such organization furnished men to commit murder in compensation for a like crime by members of another division: *Id.*

It is not error to instruct the jury that the degree of credit to be given by them to the evidence of an accomplice is exclusively within their province, if such instruction is accompanied by the advice that they should not convict upon such testimony without corroboration: *Id.*

It is competent for the Commonwealth to corroborate the testimony of an accomplice, as to occurrences subsequent to the crime, where they explain the relations, conduct and motive of the prisoners, although they do not connect them directly with the commission of the crime: *Id.*

This court must look at the real competency of the evidence and not at the order of its reception, and when it is found that the evidence is all finally competent, will not reverse because of the time or order of its introduction: *Id.*

Juror—Previous Opinion about the Case.—A juror is competent who has formed an opinion from what he has read, but does not think the opinion is so fixed and determined that he would not be governed by

the evidence, and who feels sure it would not prejudice the prisoner or give undue weight to the evidence against him: *Curley* v. *The Commonwealth*, 3 Norris, Pa.

A juror testified on his *voir dire* that he had formed and expressed an opinion, and that it was fixed and determined from what he had read, but not such an opinion as would influence or control him in any degree as a juror; that it would not influence him to give an undue weight to evidence against the prisoner, and that he felt certain that he could divest his mind of all prejudice and be controlled by the evidence. *Held*, that he was competent, as it did not appear that his opinion was formed upon the evidence to be given, or that he had any fixed belief of the guilt of the prisoner: *Id.*

Murder—Detective not an Accessory.—A detective who joins a criminal organization for the purpose of exposing it, and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counselled parties who were about to commit crime, if in so doing he intended that they should be discovered and punished, and his testimony, therefore, is not to be treated as that of an infamous witness: *Campbell* v. *The Commonwealth*, 3 Norris, Pa.

Damages.

For taking Land for Right of Way—How value of Land to be computed—In a proceeding to condemn a right of way for a railroad through a tract of land, the jury should assess the compensation due the owner for the land to be appropriated irrespective of benefits, and also his damages by reason of the diminished value of the remainder of the tract, in consequence of such appropriation: *Cincinnati and Springfield Railway Co* v. *Executors of Longworth*, 30 Ohio St.

In ascertaining these amounts, the jury are to take into consideration the real value of the land taken, and the diminished value to the remainder, and may for that purpose take into account, not only the purposes to which the land is or has been applied, but any other beneficial purpose to which it may be applied, which would affect the amount of compensation or damages: *Id.*

In such proceedings before a jury to assess the compensation and damages to the owner by reason of the appropriation of a right of way for a railroad through a tract of land, the owner may show, that prior to the commencement of proceedings, and without any knowledge that the land would be sought for that purpose, he had laid the same off in lots, streets and alleys, for sale as town lots, and had caused a plat thereof to be made ready for record. He may also show that the land as thus subdivided for sale is more valuable than if sold by the acre or for other purposes, and in that connection, an unrecorded plat or diagram showing the manner in which the tract has been divided, and how such subdivision is affected by the appropriation, is admissible, not as a valid town plat, but as a scheme for sale affecting the value of the property: *Id.*

Whether the amount of the owner's recovery shall be ascertained by taking the value of the property as subdivided, or its value for other purposes, is for the jury to determine If the actual compensation and damages can be more nearly ascertained by taking the value of the property as subdivided, they are authorized to take such subdivision into

account, though no legal dedication of the same as a town plat has been made: *Id.*

If there has been no such binding dedication, that fact is material as affecting the value of the property when considered as lots, but it does not limit the owner to proofs of the value for other purposes: *Id.*

DEBTOR AND CREDITOR. See *Husband and Wife.*

DEED. See *Husband and Wife.*

Trust.—The *premises* of a deed recited the payment of the consideration by W., trustee for W. & Co., a firm consisting of said W., S. and N., and gave, granted, bargained, sold, aliened, enfeoffed and conveyed "unto him, the said W., trustee as aforesaid, his heirs and assigns for ever," the realty in question. The *habendum* of the deed limited the realty "to him, the said W., trustee as aforesaid, his heirs and assigns for ever, to his and their only proper use, benefit and behoof for ever." *Held*, that the legal estate to the realty vested in W. in trust, and not in W., S. & N., as tenants in common: *Mowry* v. *Bradley*, 11 R. I.

DONATIO MORTIS CAUSA.

Check.—A check drawn by a testator payable to his wife or her order, given to her shortly before his death, endorsed by her and paid into a foreign bank against the amount of which she drew: *Held*, a good *donatio mortis causa*, although the check was not presented for payment at the bank on which it was drawn till after the death of the testator. *Rolls* v. *Pearce*, Law Rep. V.-C. M., 5 Chan. Div.

Query, if the check had been payable to bearer: *Id.*

DOWER. See *Legacy.*

EMINENT DOMAIN. See *Damages.*

EQUITY.

Defence at Law—Necessity of Affirmative Relief.—In an action at law on a promissory note, facts which constitute mere matter of defence and are available as such in the pending action, will not, in general, entitle the defendant to equitable relief. Such affirmative relief will be granted only when necessary to prevent wrong or injustice: *Quebec Bank of Toronto* v. *Weyand & Jung*, 30 Ohio St.

It is error to decree a cancellation of such note, for the mere purpose of preventing an anticipated erroneous judgment by a court of concurrent jurisdiction, in which the plaintiff's action at law on the note is properly pending: *Id.*

ERROR AND APPEAL.

Jurisdiction of Supreme Court of United States—Power to re-examine Final Judgmgnt only.—The court can only re-examine the final judgment in the suit, and for that purpose must look alone to the record of that judgment as it is sent to them. If parts of the record below are omitted in the transcript the court may, by certiorari, have the omissions supplied, but they cannot correct errors which actually exist in the record as it stands in the state court. For that purpose application must be made there, and, if necessary, upon sufficient showing the court may

remand the case in order that the court below may proceed: *Goodenough Horseshoe Manufacturing Co.* v. *Rhode Island Horseshoe Co.*, S. C. U. S., Oct. Term 1877.

EXECUTOR.

Liability to pay Interest—Commissions.—Where an executor did not deposit the money of the estate in bank, but used it as he wanted it, in his own business: *Held*, that he was chargeable with interest on balances in his hands: *Clauser's Estate. Huy's Appeal*, 3 Norris, Pa.

Held, however, that he was not chargeable with interest on a sum improperly paid by him as counsel fees, for which he was refused credit in his account: *Id.*

Compensation is allowed to trustees as a reward for the faithful execution of the trust: *Id.*

Where an executor misappropriated funds of the estate by paying a large sum to his private counsel, in litigation which was for the benefit of his son, the residuary legatee, and not of the estate, and by paying another large sum on a bond upon which he was principal and his testator was surety, pretending that it was a debt of the testator's, and both credits were struck out of his account: *Held*, that he had forfeited his right to commissions; and that he should pay three-fourths of the costs of anditing his account: *Id.*

FOREIGN JUDGMENT. See *United States Courts.*

Records of Sister State—Judgment confessed.—In an action in this state on the record of a judgment of a sister state, which is duly authenticated as required by Act of Congress of May 26th 1780, as the judgment of a court of record of such state, such judgment is entitled to full faith and credit, if it appears that such court had jurisdiction over the subject-matter and the person, and that it is valid and conclusive in the courts of that state: *Sipes* v. *Whitney and Bowen*, 30 Ohio St.

By a statute of the state of Pennsylvania, the prothonotary or clerk of a court of record is authorized and required, on application, to enter up judgments in vacation, on warrants of attorney on notes, bonds, and other instruments of writing, for the amount which from the face of the instrument appears to be due, without the agency of an attorney or declaration filed, which judgment must be entered on the docket, with the date and tenor of the instrument. The statute also provides that such judgment shall have the same force and effect as if a declaration had been filed and judgment confessed by an attorney, or as if obtained in open court, and in term time. In an action on a judgment entered under the provisions of this statute, where the record of the proceedings is entitled and made up as the record of the court at a term of such court next after such entry, the complete record of which is duly authenticated and certified as a true copy of the judicial proceedings of such court in the case: *Held*, that such judgment is entitled to full faith and credit in a sister state, though the transcript shows that it was rendered upon a confession before the prothonotary in the vacation prior to said term of court: *Id.*

Under this statute it is not necessary, in order to authorize the prothonotary to enter up a judgment on such warrant of attorney, that

there be a formal appearance of an attorney to confess the same, or that a declaration by the plaintiff be filed: *Id.*

If, however, an attorney authorized by the warrant of attorney executed by the defendant does appear and confess judgment against him, and at the same time as plaintiff's attorney files a declaration on which such judgment is confessed, the remedy of the defendant for such irregularity, if it be one under said statute, must be sought in the court where the judgment was rendered: *Id.*

Frauds, Statute of.

Memorandum in Writing—Naming Vendor.—A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the Statute of Frauds: *Marsden* v. *Kent*, Law Rep. 5 Chan. Div. (C. A.).

Husband and Wife.

Deed by—Defective Form of.—A statute being in force providing that "where the husband and wife, being of lawful age, are seised of any lands, tenements, or other real estate in the right of the wife, they shall be authorized to convey the same by deed or other instrument in writing, signed, sealed and delivered by them, respectively," a deed was given, drawn as the individual deed of a married woman, throughout the premises, granting and covenanting parts down to the attestation clause, which read, "In testimony whereof, we have hereunto set our hands and seals, this 11th day of April A. D. 1867." The deed was signed, sealed and acknowledged, by both husband and wife, the wife's acknowledgment being separately taken. *Held*, that the deed was a nullity: *Warner* v. *Peck*, 11 R. I.

Joint Obligation of Married Woman and another.—One who signs a note or bond with a married woman, whether as principal or surety, is the only party bound, and his being a surety makes no difference in the liability: *Unangst* v. *Fitler*, 84 Penn. St.

Voluntary Settlement—Fraud on Creditors.—A voluntary conveyance of land made by a husband to his wife, through the intervention of a trustee, will not be held void as to future creditors, on the mere ground that the husband subsequently became insolvent: *Evans* v. *Lewis*, 30 Ohio St.

Such conveyance will be set aside at the suit of a subsequent creditor, only on proof that it was made with intent on the part of the grantor thereby to defraud such subsequent creditor or creditors; *Id.*

One having a valid cause of action, sounding in tort, against such grantor, at the time of such conveyance, upon which an action was subsequently brought and judgment recovered, is to be regarded as a *subsequent creditor: Id.*

On the trial of an action brought by such subsequent creditor, against the grantor to set aside the voluntary conveyance, on the ground that it was made with intent to defraud the plaintiff, which intent was denied by the answer, the plaintiff having offered testimony tending to prove such intent, it was error in the court to exclude the evidence of competent witnesses, offered by the defendant, tending to prove that a year before the making of such conveyance, and before the cause of action

for which plaintiff's judgment was recovered, had accrued, the grantor had promised his wife that he would convey the land in question to her: *Id.*

INSURANCE.

Policy of—Stipulation in.—Policies of fire insurance are contracts whereby the insurers undertake for a stipulated sum to indemnify the insured against loss or damage by fire, in respect to the property covered by the policy, during the prescribed period of time, to an amount not exceeding the sum specified in the written contract: *Lycoming Fire Ins. Co.* v. *Haven et al*, S. C. U S., Oct. Term 1877.

A policy of insurance provided as follows: "If the interest of the insured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the insured, or if the buildings insured stand on leased ground, it must be so represented to the company and be so expressed in the written part of the policy, otherwise the policy shall be void." It was admitted at the trial that the insured were the owners in fee of the land where the buildings stood at the time of the fire. *Held*, that a failure to disclose a lease of the property did not avoid the policy: *Id.*

Mutual Company—Failure to pay Assessments.—L. took out a policy of insurance on his life in a mutual insurance company; the policy provided that a failure to pay any assessment within forty days after notice of the death of a member, should work a forfeiture of the policy; a rule of the company provided that members whose policies had lapsed might be reinstated upon presenting a certificate of good health and paying all unpaid dues. Notices of the death of four members, and the consequent assessments, were sent successively, at intervals, to L., but he never paid the assessments Afterwards, notice of the death of a fifth member of the company was sent to him; he was then on his death-bed. His brother-in-law, not knowing that the other assessments were unpaid, sent this assessment to the company in L.'s name, but without his authority. The secretary did not enter the money on the books, but held it, and wrote to L. for information in regard to his unpaid assessments. L. died two days before this letter was written. Hearing that he was dead, the company tendered back the money to his representatives, who refused to receive it. In an action on the policy, brought by L.'s widow, in whose favor it was written, *Held*, that there was no evidence to go to the jury to find a waiver of the forfeiture of the policy caused by the failure of L to pay the assessments levied upon him: *The Mutual Protection Life Ins. Co.* v. *Laury*, 3 Norris, Pa.

JUROR. See *Criminal Law.*

LANDLORD AND TENANT.

Surrender.—Plaintiffs let a house to defendant for seven years from Lady Day 1868. Defendant entered and occupied till Michaelmas, when he left England for America. He left the keys with an agent to dispose of the house if he could, if not, to make the best bargain he could with plaintiffs for the surrender of the term. The agent was unable to find a tenant, and gave the keys in December 1868 to plaintiffs. They employed a house agent to let the house, and he put up bills on the house and advertised it to let, but the house was not let till Lady Day, 1872, when a new tenant went in. In 1870, for a short time, some workmen of plaintiffs occupied two rooms in the house for the

purpose of plaintiffs' saddlery business. Plaintiffs having sued defendant for rent from Michaelmas 1868, to Lady Day 1872, *held*, that there had been no possession of the house by plaintiffs so inconsistent with the continuance of the defendant's term as to estop plaintiffs from alleging the continuance of it, so as to effect a surrender of the term by operation of law: *Oastler* v. *Henderson*, Law Rep. (C. A.) 2 Q. B. D.

Legacy.

Pecuniary Bequest in lieu of Dower—Abatement for Deficiency.—A general pecuniary bequest in lieu of dower, is not subject to abatement *pro rata* with the other pecuniary bequests in case of insufficient assets: *Potter* v. *Brown*; 11 R. I.

Semble, that in case of an insufficient personalty the realty may be charged by implication with the payment of debts and legacies, but in case of such charge the executor is not obliged to enforce it in favor of the legatees: *Id.*

Libel.

By Answer in Judicial Proceedings.—An action will not lie for statements contained in an answer alleged to be libellous, if such statements were honestly made, without malice, and if they were relevant, believed by defendant to be true, and were made upon probable cause, and under advice of counsel: *Lanning* v. *Christy*, 30 Ohio St.

Municipal Corporation.

Street—Change of Grade—Damages to Lot-owners—Evidence.—Where a city, contemplating an improvement in the grade of its streets, causes its civil engineer to make and file in his office a plan and profile of the contemplated improvement, and also causes a notice to be published, notifying lot-owners to file claims for damages with the city clerk, within a limited time, M., owning lots abutting on the streets to be graded, seeing such notice, went to the office of the engineer to examine the plan and profile, and to learn therefrom what was to be done in front of his lots, but being unable to obtain the desired information therefrom, requested the engineer to give him the desired information, so as to prepare a claim for damages, who then told M. the cut in front of his premises would not be more than two feet deep, and by reason of such information M. filed no claim for damages: *Held*, that the statements of the engineer, in explanation of such plan and profile, made to the lot-owner, under such circumstances, were competent to be given in evidence in an action for damages by the lot-owner against the city for alleged injury occasioned by the improvement: *City of Youngstown* v. *Moore*, 30 Ohio St.

Where a public highway has been adopted by a municipal corporation as a street, and used as such without change of grade for more than thirty years, and lot-owners upon such street have used reasonable care, discretion and judgment in making their improvements, with a view to future proper and reasonable change of such grade, and the municipal authorities cause a change of grade in such street to be made, which occasions injury to the lot-owner, and the change of grade causing the injury could not, by ordinary care, discretion and judgment have been anticipated, such municipal corporation will be liable for the injury: *Id.*

NATIONAL BANK. See *Taxation.*

NEGLIGENCE.

Contractor and Sub-contractor—Evidence—Question for Jury.—The defendants were builders and contractors who after the outside of a house was finished had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house and the tool in falling injured the plaintiff who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. *Held,* that the defendants were entitled to a judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of the defendants to provide against it, and that if it were the duty of any one to supply protection against the consequences of the falling tool, it was the duty of the sub contractor and not of the defendants. *Bridges* v. *North London Railway Co.* (Law Rep 7 H. L. 213), discussed: *Pearson* v. *Cox,* Law Rep. (C. A.) 2 C. P. D.

Crossing Railroad Track—Duty to Stop, Look and Listen.—F. approached a railroad crossing with which he was perfectly familiar, and with a manageable team. He drove by an open space, through which he had an extended view of the railroad, and stopped directly in front of a watch-house of the railroad, which intercepted his view in the same direction. In this position he stood still for an instant, turning his head around as if looking for the train, and then whipped up his team to cross the track, and colliding with a passing train was killed. He was partially deaf, but did not leave the wagon to look past the watch-house. *Held,* that he was guilty of contributory negligence, and the court should have instructed the jury that no damages could be recovered for his death: *The Central Railroad Co. of New Jersey* v. *Feller et al.,* 3 Norris, Pa.

The erection of the watch-house in this position was not negligence *per se,* and the question whether it was negligence to be so located should go to the jury to determine upon the circumstances: *Id.*

Liability of Owner who lends his Property—Negligence of Borrower.—The owner of a horse, lent without hire, is responsible for the negligence of the borrower, and if the negligence of the latter contributed to an accident whereby the horse was killed, the owner cannot recover: *Forks Township* v. *King,* 3 Norris, Pa.

K. brought an action against a township to recover damages for the death of his horse, which he had loaned to H. to use in the latter's team, and which he alleged was killed by the unsafe condition of defendant's road. To show that the negligence of H. contributed to the accident, the defendant offered to prove that H. was informed of the dangerous condition of the road, and that he was acquainted with another and safer road leading to the same point, which offer the court rejected. *Held,* that this evidence should have been received: *Id.*

PARTNERSHIP.

Construction of Agreement.—Agreement between A. and B. by which A. agreed to build five houses for B. at actual cost, to be completed, &c.,

and the houses and the lots whereon they were built to be sold, and the proceeds of the sale, after deducting the cost of the houses and the value of the land rated at five cents a foot and other expenses, to be divided between A. and B. *Held*, that if this agreement could be construed as a partnership at all, it was one for disposing of the houses and land, not for building them: *Bisbee* v. *Taft*, 11 R. I.

Execution against.—The interest of all the partners in the partnership property may be sold under an execution upon a judgment confessed by a single partner, in the firm name and for a firm debt: *Ross* v. *Howell*, 3 Norris, Pa.

Power.

Extent of.—A testatrix bequeathed a fund to her daughter for life, and after her death to and amongst the other children of the testatrix, or their issue, in such parts, shares and proportions, manner and form, as her said daughter should by deed or will appoint. *Held*, that the daughter's power was exclusive and not distributive merely: *In re Veal's Trusts*, Law Rep. (C. A.) 5 Chan. Div.

Riparian Rights.

Navigable River—Mooring Vessel to Wharf—Injunction.—A navigable river is a public highway, navigable by the public in a reasonable manner and for a reasonable purpose. Accordingly a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time; and the court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighboring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock by other vessels: *Original Hartlepool Collieries Co.* v. *Gibb*, Law Rep. M. R., 5 Chan. Div.

Shipping.

Liability of Shipowners and Stipulators.—Shipowners are in no case liable for any loss, damage or injury occasioned by collision beyond the amount of their interest in the colliding ship and her freight pending, except for costs and interest by the way of damages in case of default of payment and suit to recover the amount: *Sparrow et al.* v. *Avery et al.*, S. C. U. S., Oct. Term 1877.

Nor are the stipulators, either for cost or value, ever liable for any default of their principal beyond the amount specified in the stipulation which they gave, except for costs and interest by the way of damages in case of their own default to make payment pursuant to the terms of the stipulation: *Id.*

Taxation.

Shares of Stock in National Bank—Act of Congress.—The rate of taxation upon the shares of a National Bank should be the same or not greater than upon the moneyed capital of the individual citizen which is liable to taxation. That is, no greater in proportion or percentage of tax in the valuation of shares should be levied than upon other moneyed taxable capital in the hands of the citizens: *Adams & Co. et al.* v. *The Mayor, &c., of Nashville*, S. C. U. S., Oct. Term 1877.

The discretionary power of the legislature of the states over all these subjects remains as it was before the Act of Congress of June 1864. The plain intention of that statute was, to protect the corporations formed under its authority from an unfriendly discrimination against them of the power of state taxation. That particular persons or particular articles are relieved from taxation is not a matter to which either class can object: *Id.*

TRIAL.

Of Facts by Judge without Jury—Practice.—Where a jury is waived and issues of fact submitted to the court, with a request to have the conclusions of fact found separately from the conclusions of law, a question as to the sufficiency of the evidence upon which findings of fact were made by the court, can only be raised by a bill of exceptions. Statements as to the grounds upon which conclusions of fact were based, can not, by being improperly incorporated into the findings of fact, be made part of the record: *Ralston* v. *Adm'r of Kohl*, 30 Ohio St.

By Judge without Jury—Not for mere Opinion on Law—Must be bona fide Controversy.—A case submitted to the court without action, under sect. 495 of the code of civil procedure, must present an agreed statement of facts which might be the subject of a civil action, and upon which a judgment may be rendered as if an action were pending thereon: *Newark, &c., Railroad Co.* v. *Commissioners of Perry Co.*, 30 Ohio St.

The section was not intended to provide for the submission of questions of law for the mere opinion or advice of the court, but to provide a short and convenient mode for such adjudication of actual cases as would be a bar to a future action for the same cause of action: *Id.*

Where a case is submitted under the section which merely propounds questions of law, without an agreed statement of facts on which a judgment can be rendered, the only thing the court can properly do, is to dismiss the case without judgment and without costs: *Id.*

TROVER.

Title of Assignee for benefit of Creditors.—A wagon belonging to E. and A. was placed by them in the hands of B. for sale. Subsequently E and A. made an assignment for the benefit of their creditors to H. Trover was after this brought for the wagon against B. by "E. and A., trustees for H." *Held*, that the assignment gave good title to H., and that the action was improperly brought in the name of E. & A., trustees: *Meyers* v. *Briggs*, 11 R. I.

TRUST. See *Deed.*

UNITED STATES COURTS.

When amendment allowed by Supreme Court.—Section 1005 of the Revised Statutes authorizes the court in its discretion, and upon such terms as it may deem just, to allow an amendment of a writ of error when the statement of the parties thereto is defective. The right of a party to amend is not absolute, but it is to be granted by the court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances: *Pearson et al.* v. *Yewdall et al.*, S. C. U. S., Oct. Term 1877.

Record—Authentication of.—It is not absolutely necessary that the record of a judgment should be authenticated in the mode prescribed by the Act of Congress to render the same admissible in the courts of the United States: the District Court of the United States, even out of the state composing the district, is to be regarded as a domestic and not a foreign court, and the records of such a court may be proved by the certificate of the clerk under the seal of the court, without the certificate of the judge, that the attestation is in due form: *Turnbull* v. *Payson*, S. C. U. S., Oct. Term 1877.

Supreme Court—Jurisdiction of—Federal Question.—To give the court jurisdiction, it is not sufficient to show that a federal question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise and was applied by the state court to the case: *Hager et al.* v. *The People of the State of California*, S. C. U. S., Oct. Term 1877.

VARIANCE. See *Assumpsit.*

VENDOR AND PURCHASER.

Rent—Use and Occupation—Admission by Demurrer.—Claim, that by an agreement for the purchase by the plaintiffs of property belonging to the defendants, the purchase was to be completed on the 29th of December 1869, from which time the plaintiffs were to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. That the purchase was not completed until the 13th of March 1876, and that the plaintiffs had duly paid the interest. That the defendants had remained in possession, but had paid no rent. That the plaintiffs claimed rent for use and occupation at the rate of 150*l.* per annum as a fair value. The defendants demurred: *Held*, that under the agreement a fair rent must be paid by the defendants for the time they remained in possession, and by demurring they had admitted 150*l.* a year to be fair rent: *Metropolitan Railway Co.* v. *Defries*, Law Rep. 2 Q. B. D. (C. A.).

WILL.

Provision for after-born Child.—A statute in force providing that "whenever any child shall be born after the execution of his father's or mother's will, without having any provision made for him in such will, he shall have a right and interest in the estate of his father or mother in like manner as if the father or mother had died intestate." A testator, by his will, gave a bequest of $2000 in trust, the income to be used for his daughter until twenty, or until married, then the trust fund to said daughter. In case, however, of her death under twenty or unmarried, the sum so held in trust, together with the accumulated interest thereon, was bequeathed in equal shares to her brothers and sisters then living. More than a year after the execution of the will a son was born to the testator, for whom no provision was made in the will except the above described contingency. *Held*, that the provision was not such as was contemplated by the statute, and that the son was entitled to share in his father's estate as in case of an intestacy: *Potter* v. *Brown*, 11 R. I.