

“After the argument of any criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony whether asked or not:” Pas. Dig., art. 3059.

The last instruction given by the learned district judge who presided at the trial is in the following words: “The allegation that the defendant married a negro is not sustained by evidence that he married a person of mixed blood unless it is shown that she comes within the class designated in the law as negroes.” This charge was calculated to mislead, and doubtless did mislead the jury. The jury might well conclude that, under the instructions of the court, they could find the defendant guilty if they were satisfied, from the evidence, that he married Lettice Howell, and that she was a person of mixed blood descended from negro ancestry.

For this error in the charge of the court, the judgment must be reversed and cause remanded.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF KANSAS.²

SUPREME COURT OF MICHIGAN.³

SUPREME COURT OF OHIO.⁴

BAILMENT.

Title to Property bailed to be manufactured—Replevin.—Where a railroad company having a quantity of old and worn out railroad iron, which it wished to utilize, entered into contract with a rolling mill company, by which the latter company was to re-roll into new bars or rails the old iron when delivered to it, and the rolling mill company was to add to the old iron a certain amount of new iron to form the head or top of the new rails, and thereafter, under said agreement, old iron was delivered to the rolling mill company by the railway company, and new rails were manufactured therefrom, with occasional additions furnished by the rolling mill company, and the railway company supplied the

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1877. The cases will probably be reported in 6 or 7 Otto.

² From Hon. W. C. Webb, Reporter; to appear in 19 Kansas Reports.

³ From opinions delivered at the January Term 1878. The cases will probably be reported in 37 or 38 Michigan Reports.

⁴ From E. L. De Witt, Esq., Reporter; to appear in 31 Ohio State Reports.

chief or principal part of the materials for the new rails, the right of property to the iron, while the work is going on, and to the rails, when completed, remains in the railway company, and the transaction between the two companies is of the nature of the bailment denominated by law writers of the class *locatio operis faciendi*: *Arnott & Archer v. Kansas Pacific Railway Co.*, 19 Kans.

In such a transaction, as above stated, the material inquiry is, which company furnishes the chief or principal portion of the material for the manufacture of the new rails, and where the old and new rails are levied upon in the possession of the rolling mill company, as the property of the latter company, and are afterwards replevied by the railway company as its property from the officers making such levy, and on the trial of said replevin action, the president of the rolling mill company, introduced by the railway company to prove the process of the manufacture of the new rails, testifies in full as to such process, and states he is familiar with the details of the manufacture of the rails, *held*, that it is material error for the district court to refuse to said officers the right to show by such witness the amount of new iron intermingled with the old iron, in the process of manufacturing the old rails of the railway company into new ones: *Id.*

BILLS AND NOTES. See *Corporation*.

CONFLICT OF LAWS. See *Set-off*.

CONSTITUTIONAL LAW.

Impairing the Obligation of a Contract—Charter of Turnpike Company.—The original charter of a company gave it the right, in consideration of building a turnpike authorized thereby, and of keeping it in repair, to erect certain toll-gates, and to exact certain tolls for the use of the turnpike, until the expiration of twenty-five years, from the date of the charter and as much longer as the state should fail to redeem the franchises so granted by paying the cost of the work: *Held*, that this was undoubtedly a contract; but it related only to the turnpike then authorized to be constructed, and that in resuming possession of the bridge and dyke by subjecting them to the control and management of the city of East St. Louis, the obligation of the contract was not impaired: *St. Clair County Turnpike Co. v. The People of Illinois*, S. C. U. S., Oct. Term 1877.

CORPORATION.

Certificate of Stock of, Non-negotiable.—The stock of a corporation may be held by a valid title without a certificate. The certificate is only one of the indicia of title. The right to the stock is in the nature of a non-negotiable chose in action: *Dewing et al. v. Perdicaries et al.*, S. C. U. S., Oct. Term 1877.

The assignee takes it subject to all the equities which existed against it in the hands of the assignor: *Id.*

Even a negotiable note which is void *ab initio*, because made so by statute or by public policy, on account of the consideration, or is so by reason of the incapacity of the maker, can no more be enforced against the maker by a *bona fide* holder than by the payee: *Id.*

CRIMINAL LAW.

Larceny—Animus furendi.—The wrongful taking and carrying away

of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny : *Berry v. The State*, 31 Ohio St.

Drunkenness no Excuse for Crime, but can negative Intent.—Though drunkenness cannot excuse crime, yet by negating the fact of intent, where intent is a necessary element, *e. g.*, the felonious intent in larceny, it may show that the crime could not have been committed : *People v. Walker*, S. C. Mich., Jan. Term 1878.

Prosecution—Counsel privately employed—Informations—Particularity of Allegations.—Where objection is made to certain counsel aiding in the prosecution, on the ground that he is employed by the complaining witness and other private persons, it is error for the court to refuse to permit such employment to be shown, even though the prosecuting attorney states that the counsel acts in the cause at his request : *Sneed v. The People*, S. C. Mich., Jan. Term 1878.

The statute simplifying the forms of informations does not dispense with the necessity of setting forth, in cases of statutory offences, allegations conforming to the statutes that define them : *Id.*

But where the offence is an ordinary common-law one (*e. g.*, where the prosecution's evidence tended to show that defendant went with a loaded gun into a piece of woods on or across the road where deceased was about to cross, and there waited till he came along, and shot and killed him), an information in the language of the statute is sufficient. Under our system, entitling the accused to a previous examination, he can always ascertain fully the facts to be brought against him : *Id.*

DEBTOR AND CREDITOR. See *Guaranty; Surety*.

Lands taken by Creditor in trust to sell and pay himself—Party to execute Trust after Creditor's Death.—Where a debtor conveys lands to his creditor in trust to sell and from the proceeds to satisfy the debt and pay the balance to the debtor; and the debtor dies without having paid the debt, and without having elected to take the land instead of its proceeds, his personal representative is the proper party to compel the execution of the trust by a sale of the lands : *Craig et al. v. Jennings et al.*, 31 Ohio St.

After such trust has been executed by a sale under a decree at the suit of the administrator, it is too late for the heir to elect to take the land : *Id.*

If such sale be tainted by the fraud of the purchaser, it is for the administrator, and not the heir, to impeach it on that account : *Id.*

DEED.

Delivery after Grantor's Death—Wife's Influence.—Delivery of deeds after the grantor's death, by a third party to whom they were delivered by the grantor under instructions to give them to the grantees immediately after his death, is effectual to render them operative : *Latham v. Udell*, S. C. Mich., Jan. Term 1878.

The law has no concern with the reasons which have induced a grantor or testator, not unduly influenced, and in full possession of his faculties, to discriminate against one of his children : *Id.*

It is not unlawful for a wife to exert an influence over her husband
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for her own benefit or for that of others, as to the disposition of his property, unless she acts fraudulently, or extorts benefits when her husband is not in a condition to exercise his faculties as a free agent: *Id.*

ERRORS AND APPEALS.

Judgment by Default, reviewable by Writ of Error.—Upon a writ of error to reverse a judgment by default, such defects in a declaration or complaint as could have been taken advantage of before judgment by general demurrer may be brought under review. If the judgment would have been arrested on motion, if made, because the declaration did not state facts sufficient to constitute a cause of action, it may be reversed for the same reason upon error: *McAllister v. Kuhn*, S. C. U. S., Oct. Term 1877.

EXECUTOR. See *Debtor and Creditor*.

EVIDENCE.

Subscribing Witness.—Where a contract is attested by a witness, such witness must be called or his absence accounted for, before the testimony of other witnesses can be received to prove that the maker's signature is genuine or was admitted by him to be genuine: *Warner v. Baltimore and Ohio Railroad Co.*, 31 Ohio St.

FIXTURES. See *Mortgage*.

FRAUD. See *Surety*.

Agent of United States, Fraudulent Act of—Rights of injured party—Equity—Trust.—Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party: *United States v. State National Bank of Boston*, S. C. U. S., Oct. Term 1877.

The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced: *Id.*

Purchase of Goods by Insolvent.—A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay: *Talcott v. Henderson, Assignee, &c.*, 31 Ohio St.

But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact: *Id.*

GUARANTY.

Joint and several Obligation.—The guaranty of the payment of the debt of another, made at the time the debt is contracted, does not constitute the guarantor and the principal debtor joint promisors. And such guaranty, made without the knowledge of the principal debtor, does not so alter his contract as to discharge him from liability: *Deming v. Board of Trustees of Ohio Agricultural and Mechanical College*, 31 Ohio St.

D. subscribed \$500, and promised to pay the same to the Ohio Agricultural and Mechanical College, in consideration that said college should be located at a specified place. N., in writing, before the acceptance of the subscription, guaranteed the payment of the sum so subscribed. Said subscription, with the guaranty thereto annexed, was delivered to, and accepted by, the trustees of the college as one instrument: *Held*, that the liability incurred by D. and N., respectively, by said instrument, is several, and not joint: *Id.*

A release of such guarantor from his liability, by the creditor, does not affect the liability of the principal debtor: *Id.*

HUSBAND AND WIFE. See *Deed*.

Divorce—Alimony.—Upon granting a divorce to the husband by reason of the fault or aggression of the wife, the court has power to decree the sum allowed as alimony to the wife a lien upon the real estate of the husband, and *held*, that under such a decree the premises occupied by such husband and wife as a homestead at the date of the decree of divorce may be sold in satisfaction of said lien: *Blankenship v. Blankenship*, 19 Kans.

Under the provision of the statute that the court in granting a divorce may give to the wife such share of her husband's real or personal estate as shall be just and reasonable: *Held*, not an abuse of discretion for the court to allow to the wife a specific sum in money and to provide as a penalty in the decree that if the same is not paid at once, it shall draw interest at the rate of twelve per cent. per annum until paid: *Id.*

INJUNCTION.

Irreparable Injury—Motives of lawful Purchasèr—Damages.—The writ of injunction does not issue of right for every injury threatened or done, but its granting is discretionary, its purpose being to prevent irreparable mischief, to stay evils the consequences of which could not adequately be compensated in damages, if suffered to go on: *Edwards v. The Allouez Mining Co.*, S. C. Mich., Jan. Term 1878.

Generally, courts have no concern with a party's motives in making a lawful purchase, or in doing any other lawful act; but where one invokes the aid of equity, averring that, under the peculiar circumstances of his case, the rules of the common law do not afford him adequate redress, it may be inquired how he came to be placed in such circumstances: *Id.*

Where a party bought lands on the banks of a stream, with the sole purpose of forcing their repurchase at a great advance by the proprietor of a costly quartz mill above, in necessary consequence of the operations of which mill large quantities of sand were continually deposited by the stream on the lands below: *Held*, that complainant's motives in purchasing might be inquired into, and that instead of granting an injunction which would sacrifice valuable property, the court would leave complainant to his remedy in damages: *Id.*

JOINT OBLIGORS. See *Guaranty*.

JUDGMENT. See *Errors and Appeals; United States Courts*.

MANDAMUS.

Discretion of Officers.—Where county commissioners were authorized

by special act of the legislature to build a bridge, and to raise the necessary funds for the purpose by successive yearly levies of taxes upon the people of the county, and the commissioners, after levying and collecting a part of the taxes necessary, for reasons in their judgment sufficient, abandoned the purpose of building the bridge, and declined to make further levies: *Held*, that they will not be compelled by mandamus, at the suit of taxpayers, to build the bridge, or to make further levies to raise the necessary funds therefor: *The State, on relation of Geering, v. Board of Commissioners of Henry County*, 31 Ohio St.

MORTGAGE. See *Debtor and Creditor*.

Adverse Claimant to Mortgagor and Mortgagee.—In a foreclosure proceeding the complainant cannot make a person who claims adversely to both mortgagor and mortgagee a party and litigate and settle his rights in that case: *Dial v. Reynolds*, S. C. U. S., Oct. Term 1877.

Fixtures—Lessee purchasing Reversion.—Fixtures put in by lessees of a mortgaged building, who afterwards purchase the reversion, become subject to the mortgage if its terms are broad enough to cover them: *Jones v. Detroit Chair Co.*, S. C. Mich., Jan. Term 1878.

Note secured by—Interest—Default in Payment.—Where a note is given payable in four years, with interest at ten per cent., and at the same time a mortgage is given to secure the payment of the note, in which mortgage it is stipulated that the interest is payable annually and the interest to become principal, if not paid when due, and if default be made in said payment, or any part thereof, as provided, then this conveyance shall become absolute: *Held*, that the interest is to be construed as payable each year, and that on default of the payment of interest, the mortgage may be foreclosed for the amount due: *Meyer v. Graber*, 19 Kans.

MUNICIPAL CORPORATION.

Street Improvements—Liability to Contractor for.—Where a municipal corporation agrees with a contractor to pay a specified sum for a street improvement, in assessments upon the abutting property, and the assessments levied and assigned to the contractor exceed twenty-five per centum of the value of the property after the improvement is completed, the city is liable to the contractor for the deficiency: *City of Cincinnati v. Diekmeier*, 31 Ohio St.

Where the contractor, in an action against the abutting owner, to collect such assessment, prosecuted without laches and in good faith, fails to recover the full amount of the assessment because it exceeds twenty-five per centum of the full value of the assessed property, after the improvement is made, the city is bound by such judgment, although it had no notice of the actual pendency of the action: *Id.*

NATIONAL BANK.

Set-off—Usury—Jurisdiction of State Courts.—A set-off may be pleaded in an action brought by a receiver of an insolvent national bank: *Hade, Receiver, v. McVay et al.*, 31 Ohio St.

Where usurious interest is reserved or charged on a note or bill discounted by a national bank, the entire interest, reserved or charged, will, in an action on the note or bill, be adjudged forfeited: *Id.*

The action authorized by sect. 30 of the National Banking Act of 1864, to recover from the bank twice the amount of usurious interest paid, was within the jurisdiction of the state courts: *Id.*

NEGLIGENCE.

Damages for Injury by—Amount of Verdict.—In an action to recover damages for personal injuries by a brakeman in the employ of a railway company while in the discharge of his duties, and the testimony introduced on the trial under the pleadings tends to prove that the plaintiff was injured through the negligence of the engineer of the company in charge of the locomotive of the train; that said engineer was an incompetent and unfit person to be a locomotive engineer; that the company was guilty of negligence in employing said engineer and in retaining him in its employ, after his unfitness had become known, or when, by the exercise of ordinary care, it would have been known, and thereon the jury find a verdict for the plaintiff against the railway company, and the trial court approves the same, and sufficient evidence is offered to sustain the verdict, *held*, that this court will not disturb the judgment on the claim of the railway company, that the preponderance of the evidence proves the injury to the plaintiff was due solely to his own fault or misfortune, growing out of his own errors of judgment: *Union Pacific Railway Co. v. Young*, 19 Kans.

In an action which has been pending in the courts for nearly nine years before the verdict, where the plaintiff seeks to recover for personal injuries resulting in the loss of a right hand at the wrist, and such plaintiff at the time of the injury was only twenty-five years of age, and engaged in an employment which has a regular system of promotions, and two juries have returned substantially the same amount of damages, and the verdict has been approved by the trial court: *Held*, that a verdict of \$10,000, under all the circumstances of the case, is not so flagrant as to strike the mind at first blush as being the result of bias or prejudice, and this court will not disturb the same solely on the ground of its being excessive: *Id.*

Damages for Death by.—In an action under sect. 422 of the Code of Civil Procedure (Gen. Stat. 709), to recover damages for the death of a party, and outside of the question of exemplary damages, the recovery is to be of a pecuniary compensation for a pecuniary loss: *K. P. Railroad Co. v. Cutter*, 19 Kans.

In determining the amount of such compensation much must be left to the good sense and sound judgment of the jury, upon all the facts and circumstances of the case. No uniform and precise rule can be laid down for estimating the value to the survivors of the life of the deceased, for the elements which go to make up such value are personal to each case: *Id.*

A charge to a jury in such an action that they are not to take into consideration the pain suffered by the deceased, or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same, is held, under the circumstances of the case, to present no error: *Id.*

Where the jury find the pecuniary loss to be a certain sum, in this case \$1320, and in answer to a specific question say that the loss consisted of notes and mining stocks, and there is testimony that the deceased had notes and mining stocks which were lost on account of his death, and the amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld, although the amount named by the jury cannot be deduced from the testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the Statute of Limitations or otherwise, the death of the deceased brought about the loss of the notes and stocks: *Id.*

NOTICE.

What constitutes—Record of Deed—Open Possession.—Record evidence of a conveyance operates as notice, and so may open possession, the rule being that actual, visible and open possession is equivalent to registry: *Noyes v. Hall*, S. C. U. S., Oct. Term 1877.

PARTNERSHIP.

Legal Title of Property of Firm, by whom held—Duties of surviving Partner and Administrator.—The legal title to the realty or personalty of a firm is held by the heirs of a deceased partner, as trustees, for the equitable purposes of the firm: *Merritt et al. v. Dickey*, S. C. Mich., Jan. Term 1878.

The surviving partner of a firm is entitled to the possession of the partnership assets, both realty and personalty, and cannot be dispossessed except for misconduct: *Id.*

The business of closing out a partnership concern belongs to the surviving partner, though the administrator of the deceased partner is bound to inquire into the survivor's conduct and protect the estate from mismanagement: *Id.*

What constitutes—Sharing in Profits.—To constitute one a partner, it is not at all necessary that he should agree to share in the losses of the business. If he shares in the profits, he thereby deprives creditors of part of the means of payment, and this is sufficient: *Lager v. Tupper et al.*, S. C. Mich., Jan. Term 1878.

RAILROAD.

Track in Street of City—Damages to Property-owners.—A city may permit a city railway track to be laid in its streets, without consulting or compensating the abutting proprietors who may own the soil of the street. Such a railway is in furtherance of the purpose for which the street was originally established, relieving the pressure of local business and travel, instead of constituting an embarrassment: *Grand Rapids, &c., Railroad Co. v. Heisel*, S. C. Mich., Jan. Term 1878.

But the owner of land taken for street or highway cannot be supposed to have assented to its appropriation, at the direction of the public authorities, either wholly or in part, for the purposes of a railroad connecting distant points, and to have been compensated for such appropriation. He is entitled to compensation for the new burden imposed on his estate, which affects him differently from the original easement: *Id.*

If the track is laid without first being legally appropriated and with-

out compensating him in whom is the fee of the highway, it unlawfully encumbers his freehold, and he may recover, not only for the inconvenience he is put to in making use of the public easement, but for any injury the encumbrance causes. The decrease in rental and market value of his lot are then proper items of damages, and so are the annoyances to business or family occupation caused by the operation of the railroad: *Id.*

But if the abutting owner does not own the soil of the street, his freehold is not appropriated and the mere laying of the track in the street is, in the absence of any statute giving him redress therefor, no legal injury: *Id.*

A railroad is not a public nuisance, and no right of action can arise against the company until by negligence or improper management they do, or suffer to be done, something injurious to the abutting property which the permission to occupy the street would not justify: *Id.*

REPLEVIN. See *Bailment.*

SALE. See *Fraud.*

SET-OFF. See *National Bank.*

By what Law governed.—The right of set-off in an action is governed by the law of the place where the action is brought: *Second National Bank v. Hemingray*, 31 Ohio St.

In an action brought in Ohio, by the endorsee, against the maker of a promissory note payable to order, executed in Kentucky, and endorsed before due, the maker cannot set off a debt due to him from the payee, notwithstanding the Kentucky statute which declares such notes "assignable so as to vest the right of action in the assignee," but provides that such assignment shall not "impair the right to any * * * offset the defendant has or might have used" against the payee: *Id.*

STOCK. See *Corporation.*

SURETY.

Bona fide Purchaser of Fraudulent Title—Equity.—A *bona fide* purchaser of a debtor's land from a fraudulent vendee, without notice of the fraud, or of the rights of the creditor, acquires an equity superior to that of a creditor who obtained a judgment against the debtor, and levied his execution on the land, after the date of the fraudulent sale and prior to that of the *bona fide* purchase: *Farmers' Nat. Bank v. Teeters*, 31 Ohio St.

A surety of the debtor, who takes a mortgage for his indemnity as such surety, is to be regarded in equity as a *bona fide* purchaser, within this rule, and will be protected to the extent of his liability as surety: *Id.*

Such mortgage executed to one or more of several sureties on the official bond of an officer, inures to the benefit of all the sureties, as well to those who subsequently became such under an order of court requiring "additional sureties," in pursuance of law, as to those who were sureties at the date of the mortgage: *Id.*

TRUST. See *Fraud.*

UNITED STATES. See *Fraud.*

UNITED STATES COURTS.

Lien of Judgment.—A judgment rendered in the Circuit Court of the United States has the same lien on the lands of the debtor within the district, that is given to a judgment of the state court within the limit of its territorial jurisdiction: *Laurence v. Belger*, 31 Ohio St.

The words "lands and tenements of the debtor," as used in sect. 421 of the Code, include a vested remainder held by the debtor under a legal title: *Id.*

Where a judgment creditor, within the life of his judgment lien, commences an action to enforce his judgment against the lands of the debtor and to marshal the liens thereon, and, after a decree finding his lien and directing the sale of the property, subject, however, to a further order adjusting priorities and for distribution, is properly made a defendant in another action in which a sale is made, such judgment creditor does not lose his right to share in the distribution of the proceeds, by reason of the fact that, at the commencement of the last action, five years had elapsed from the date of the last execution issued on the original judgment: *Id.*

Federal Question—Collision.—An action was brought under a New York statute, to recover damages for negligence causing the death of plaintiff's testator, by a collision between a steamer and a sail-boat in New York bay. The pleadings raised only a question of fact and the judge at the trial was not asked to rule any point of law. *Held*, that no federal question was raised, and the writ of error was dismissed, on motion, for want of jurisdiction: *Staten Island Railway Co. v. Lambert*, S. C. U. S., Oct. Term 1877.

VENDOR AND PURCHASER. See *Surety*.

VERDICT. See *Negligence*.

WATER AND WATERCOURSES.

Mill-owners—Injunction.—In controversies between mill-owners as to the flow of water, a decree which attempts to fix definitely the lower proprietor's rights, and to secure them to him, unlimited and unaffected by the corresponding and identical rights of the upper, is erroneous: *Hoxsie v. Hoxsie*, S. C. Mich., Jan. Term 1878.

It is error to compel the upper proprietor, while he is operating his machinery, to retain the flow of water past him within precisely indicated limits which are not required by a proper adjustment of his rights and those of the lower proprietor, thus precluding him from getting an additional flow to operate new machinery, from making repairs, &c.; or to forbid him to make such detention of water during the working hours of the day as would prevent the lower proprietor from having "at least the natural flow:" *Id.*

In such controversies the process of injunction, being troublesome and susceptible of abuse from the difficulty of laying down any precise rule to fit the varying circumstances, should seldom be resorted to. Except in very clear cases, the parties should be left to their legal remedy in the recovery of damages: *Id.*

WILL. See *Deed*.