## ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF IOWA.[2]
COURT OF APPEALS OF KENTUCKY.[3]
COURT OF APPEALS OF MARYLAND.[4]
COURT OF CHANCERY OF NEW JERSEY.[5]
SUPREME COURT OF OHIO.[6]

ASSAULT AND BATTERY. See *Damages.*

ASSUMPSIT.

*Money had and received, etc.*—In an action brought against a city by its mayor, to recover the costs taxed by him in his own favor in certain cases against persons charged with violating the ordinances of the city, in which cases such persons were fined, and in default of payment were sentenced to hard labor in the city prison, until such labor, at a stipulated rate, would amount to a sum equal to the fine and costs in such cases, and the persons were put to work in the city prison, and performed the required labor for the benefit of the city: *Held*, that this did not constitute a collection and appropriation by the city of the costs taxed in favor of the mayor in such cases, from which the law will imply a promise on the part of the city to pay the amount of such costs to the mayor: *Gibson* v. *City of Zanesville*, 31 Ohio St.

ATTORNEY. See *Judgment; Trust and Trustee.*

*Privileged Communications.*—Communications made to an attorney in the course of a professional consultation, which do not relate to the subject-matter of the consultation, are not privileged: *State* v. *Mewhorter*, 46 Iowa.

Where an attorney has received money which he is to hold until the question of its ownership shall be determined between the parties, he cannot in a proceeding of garnishment refuse to state where he has deposited the money, on the ground that his knowledge of the matter is privileged: *Williams Brothers* v. *Young*, 46 Iowa.

*Contract—Fees.*—Where an attorney, who had undertaken to prosecute a case under a contract fixing his fees therefor, after rendering cer-

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[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 John S. Runnells, Esq., Reporter; to appear in 46 Iowa Reports.

[3] Prepared expressly for the American Law Register, by John Q. Ward, Esq., Cynthiana, Ky., from opinions filed during the present term. The cases will be reported in 13 Bush.

[4] From J. Shaaf Stockett, Esq., Reporter; to appear in 47 Maryland Reports.

[5] From John H. Stewart, Esq., Reporter; to appear in 29 N. J. Eq. Reports.

[6] From E. L. DeWitt, Esq., Reporter; to appear in 31 Ohio St. Reports.

tain services transferred the management of the case to another attorney, whom he represented to his client that he had simply associated with himself in the case, *held*, that the attorney to whom the case was transferred was bound by the contract in the absence of knowledge and assent by the client to its termination: *Ennis* v. *Hultz*, 46 Iowa.

## Bailment.

*What constitutes—Redelivery of identical Article.*—The question of bailment or not is determined by the fact of whether the identical article delivered to a manufacturer is to be returned to the party making the advance: *Laflin and Rand Powder Co.* v. *Burkhardt*, S. C. U. S., Oct. Term 1877.

Thus where logs are delivered at a saw-mill to be manufactured into boards, or leather to a shoemaker to be made into shoes, etc., if the product of the identical articles delivered is to be returned to the original owner in a new form it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same lumber or leather or other material, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer: *Id.*

*Possession of Pledge—Equity.*—Possession is of the essence of a pledge, both at common and civil law, and without it no privilege can exist as against third persons: *Casey* v. *Cavaroc et al.*, S. C. U. S., Oct. Term 1877.

The pledgor may have the temporary possession of the pledge, as special bailee, without defeating the legal possession of the pledgee; but where the thing pledged has never been out of the pledgor's actual possession, but has always been subject to his disposal by way of collection, sale, or exchange, no pledge or privilege exists as to third persons: *Id.*

Though, in such case, the pledgee might, by the law of Louisiana, have a real action against the pledgor or his heirs to recover possession of the thing, he cannot sustain a privilege thereon as against creditors, or against a receiver or assignee who represents creditors: *Id.*

Equity will not regard a thing as done which is not done, when it would injure third parties who have sustained detriment and acquired rights by the things that have been done: *Id.*

## Bills and Notes.

*Title to Negotiable Paper, how acquired, how lost—Mala fides—Negligence—How they affect Title to Negotiable Paper—Evidence—Prayers and Instructions*—If a party take a negotiable bill or note before maturity for consideration and without *mala fides*, such party acquires a good title, notwithstanding there may have been negligence; and gross negligence while it may be *evidence* of *mala fides*, will not alone be sufficient to defeat the plaintiff's title. Nothing less than proof of *knowledge* of facts that show the want of authority on the part of the person transferring the note will be sufficient for that purpose: *Citizens' National Bank* v. *Hooper*, 47 Md.

The plaintiff is not bound to make inquiry, and mere negligence, however gross, not amounting to wilful and fraudulent blindness, while it would be *evidence of mala fides*, is not the same thing: *Id.*

CHAMPERTY. See *Trust and Trustee.*

## CHARITY.

*Misnomer of Legatee—Uncertainty.*—A misnomer of a corporation legatee will not defeat a bequest if such legatee can be identified: *Goodell* v. *Union Association*, 29 N. J. Eq.

A gift to "Trinity Church Sunday School in Mount Holly, $1000, to be safely invested, the interest to be applied to making Christmas presence to the scholars of said school," is not a legal charity, and is void, also, for uncertainty in not designating the kind of gifts, and because such distribution is indiscriminate and devoid of all purpose: *Id.*

A gift of "the interest of $1000 yearly to help form a Young Men's Christian Association," etc., is good as a charity, and will be applied not only to assist in the formation of such association, but also in its maintenance: *Id.*

A gift to testator's brother (with a provision for a trustee or trustees in his stead in case of his refusal or death), "of $10,000, to the end that the interest be applied at discretion to alleviating the wants and sufferings of the deserving poor of Mount Holly," is a charity which this court will protect and effectuate: *Id.*

## COMMON CARRIER.

*Examination of Goods by Consignee.*—Where the consignor of goods shipped by an express company instructs the company not to permit the consignee to examine the goods before delivery and payment of charges, the agent of the company is authorized to refuse such examination and incurs no personal liability by returning the goods to the consignor: *Wiltse* v. *Barnes*, 46 Iowa.

If the express company has a rule forbidding inspection of goods by the consignee before delivery, it must appear that the rule was brought to the knowledge of the shipper to be binding upon the consignee: *Id.*

## CONSTITUTIONAL LAW.

*Intoxicating Liquors—License to sell—Local Police Laws*—The sale, by retail, of intoxicating liquors may be constitutionally regulated by law, and in localities where the legislature, or its constitutionally organized agencies are of the opinion that the peace and good order of society so require, license to carry on the retail traffic may be refused: *Anderson* v. *Commonwealth*, 13 Bush.

The question of license or no license is one properly of local police, and may be regulated by lawfully constituted local agencies representing and acting for the local public, such as county courts, or the municipal authorities of towns and cities, or by the sense of the qualified voters of a voting district taken under a law to provide therefor: *Id.*

*Vested Rights—Distribution of surplus of Intestate's Estate, where no surviving Relatives within the Fifth Degree—Power of Legislature to disturb Vested Rights by subsequent legislation—Statutory construction.*—A bill was filed by Rock Hill College to compel the administrators of James Stratton to pay over to the college the surplus remaining in their hands after the final settlement of the estate, the said Stratton having died intestate, unmarried and leaving no relations within the fifth degree,

who were by law entitled to claim such surplus. The college claimed the surplus under sect. 136 of art. 93 of the code, by which the state becomes entitled under such circumstances to the surplus for the use of the college. The defendants demurred to the bill, relying upon the Acts of 1876, ch. 295, and ch. 337, by which such surplus was directed to be paid to the school commissioners. The demurrer was sustained in the lower court, but on appeal it was *held*: 1st. That the state has no original prerogative right to appropriate such funds to its own use, in the absence of statutory rules of distribution. In England, even in the ancient period of her jurisprudence, when power was arbitrary and the rights of the subject but ill defined, such prerogative was not claimed; 2d. Rights that pass and become vested under the existing law of the land are beyond the control of the state through its legislature. The mere change of the law does not divest or impair the rights of property acquired before the change, even though the legislature may intend the new law so to operate; 3d. The state, as to this fund, is a mere trustee, with a full and explicit declaration of trust, made by authority of the trustee itself. Such, however, would not be the effect of a gratuitous appropriation by the state *of its own revenue*; 5th. The matter of distribution of an intestate's personal estate is regulated by positive law, and any person within the rules prescribed acquires a right of which he cannot be divested by a retroactive law: *Rock Hill College* v. *Jones*, 27 Md.

CONTRACT. See *Specific Performance.*

CORPORATION. See *Charity; Equity.*

*Receiver.*—The court will authorize a receiver of a railroad company to make all necessary repairs, and, if necessary, will charge the expense as a first lien on the property prior to existing mortgages thereon: *Hoover* v. *Montclair, &c., Railway Co.*, 29 N J. Eq.

*Receiver—Officer of Corporation.*—An officer of a corporation, under whose management it has become insolvent, is not a proper person to be appointed its receiver: *McCullough* v. *Merchants' Loan and Trust Co.*, 29 N. J. Eq.

The power which creates a receiver may, at any time, put an end to his functions, but it ought not to do so except for cause: *Id.*

Where an officer of a corporation has been appointed its receiver, and it appears proper that his conduct, as such officer, should be investigated, to ascertain whether he has not obtained an advantage which he ought not to retain, sufficient cause for removal exists: *Id.*

*Sale by Assignee.—Fraud of Stockholder.*—A sale by the assignee of an insolvent corporation, made by him in good faith, is not invalidated or affected by the fraud of a stockholder committed without the knowledge or privity of the assignee: *Trevitt* v. *Converse*, 31 Ohio St.

*Subscriptions procured by Fraud.*—Contracts of subscription to the stock of a corporation, if procured by fraud, will be set aside. The rule is universal, whatever fraud creates justice will destroy: *Vreeland* v. *New Jersey Stone Co*, 29 N. J. Eq.

An oral contract of subscription will not be enforced under a charter requiring that such contracts shall be made in writing: *Id.*

Where a fraud is committed in the name of a corporation, by persons

having the right to speak for it, for their personal benefit, they will be made to answer personally for the injury inflicted by their fraud: *Id.*

CRIMINAL LAW. See *Extradition.*

*Intoxication.*—Where a charge of perjury is based upon testimony given in reference to a past transaction, evidence that the accused was "greatly intoxicated" at the time such transaction occurred, is a circumstance proper to be submitted to the consideration of the jury in determining whether the accused knowingly testified falsely: *Lytle* v. *State,* 31 Ohio St.

*Insanity.*—In the trial of a capital case, where homicide is admitted, and the defence of insanity is set up, the burden of establishing the defence by a preponderance of testimony rests upon defendant: *Bergen* v. *State,* 31 Ohio St.

*Uncontrollable Propensity.*—The uncontrollable propensity which will relieve a person from the consequences of a crime, must have its origin alone in a diseased or insane mind: *State* v. *Mewhorter,* 46 Iowa.

To entitle one who has committed a criminal act to an acquittal on the ground of insanity, his mental disease must have been such as to destroy the power to comprehend rationally the nature and consequences of his act, and overpower his will: *Id.*

One who commits a crime under the influence of an insane delusion, is punishable if he knew that he was acting contrary to law: *Id.*

In a case of partial delusion, where the subject is not insane in other respects, the law considers him as to his responsibility, in the same condition as if the facts in regard to which his delusion exists were real: *Id.*

*Pleading—Statutory Offences.*—It is a well settled rule of criminal pleading that an indictment for an offence created by statute must describe the offence in the words of the statute or in words of similar import, and if the statute creating the offence contains in its enacting clause exceptions, it is necessary to negative such exceptions in the indictment so as to show that the defendant does not come within any of them: *Connor* v. *Commonwealth,* 13 Bush.

DAMAGES.

*Liability of Railroad Companies—Compensatory and Punitive Damages—Duty of Conductors on Railway Trains in ejecting Passengers*—That the jury may be allowed to give exemplary or punitive damages against a railroad company, in an action by a passenger for illegal and violent expulsion from their train, is no longer an open question in this state: *Philadelphia, W. & B. Railroad Co.* v. *Larkin,* 47 Md.

The jury may not only award to the plaintiff such sum as damages as will *compensate* him for the injury to his person, feelings and character, arising from the unlawful act of the defendant, but if they believe the unlawful act was deliberately and forcibly done, then they may give such *exemplary damages* as they may consider a proper *punishment* for the defendant: *Id.*

In ascertaining the extent of the injury, the jury may consider all the facts which relate to the wrongful act of the defendant and its consequences to the plaintiff; but they are not at liberty to go further, unless

it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them: *Id.*

In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require; the tort is aggravated by the evil motive, and on this rests the rule of exemplary damages: *Id.*

Though the plaintiff may, in the first instance, render himself liable to be ejected from the cars on account of his disorderly conduct, still in accomplishing his removal it is the plain duty of the company to use no more force than absolutely necessary; and if unnecessary force and violence be used to the injury of the plaintiff, the company is liable to an action for damages: *Id.*

An excessive battery is a complete answer to a plea of *son assault demesne*, and if wantonly and maliciously inflicted, subjects the party making it to the same liability to exemplary damages as if he had been the original wrongdoer: *Id.*

DEED.

*Calls—Metes and Bounds—Courses and Distances.*—When a deed conveying land does not accurately describe the land intended to be conveyed, it is the duty of the grantee to tender to the grantor, for execution, a corrected or confirmatory deed: *Heck* v. *Remka*, 47 Md.

It is well settled law that, in locating lands, the *calls* always prevail over the *courses and distances*: *Id.*

EQUITY. See *Bailment; Injunction.*

*Corporation—Waste of Funds by Officers.*—The waste or misapplication of the funds of a corporation by its officers or agents, authorizes the company to resort to equity in order to compel such officers to account for such waste or breach of trust, even though it were conceded that an adequate remedy at law exists. The existence of such remedy at law would not oust this court of its jurisdiction: *Citizens' Loan Association* v. *Lyon et al.*, 29 N. J. Eq.

EVIDENCE.

*Civil and Criminal Cases—Degree of Proof.*—In a civil action to recover damages for a criminal act, the same degree of proof is required to establish the commission of the act as would be necessary to convict the defendant upon an indictment for the crime: *Barton* v. *Thompson*, 46 Iowa.

EXPRESS COMPANY. See *Common Carrier.*

EXTRADITION.

*Trial for Offences not included in the Extradition Treaty.*—Hawes was indicted in the Criminal Court of Kentucky for embezzlement and on four separate and distinct charges of forgery. He made his escape to Canada and on demand of the president was extradited under the 10th article of the treaty concluded August 9th 1842, to answer three charges of forgery. Two of the indictments for forgery were dismissed, and on the other two Hawes was tried and acquitted. He was yet held in custody and put on trial for embezzlement. Affidavits were filed by Hawes showing these facts, and a motion entered for

his discharge from custody, for a continuance of the cases against him and that he be allowed to return to his domicile and asylum in Canada. This motion was sustained, and Hawes released from custody until the further order of court. *Held:* That a treaty made by the United States and a foreign power is not merely a compact or bargain, but a living law, and as binding on the judicial tribunals, state and federal, as any other law of Congress. In the extradition treaty referred to only seven classes of crimes were enumerated for which persons charged might be demanded for extradition. Embezzlement was not one of them, and the naming of certain offences excluded the idea that the demand might, as matter of right, be made for any offence, not named in the treaty. Hence an extradited prisoner should not be required to defend himself against any offence, except that for which he is extradited; much less for one for which his extradition could not be demanded. The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends *solely* upon treaty stipulations between them, and the right is measured and restricted by the provisions of the treaty. The prisoner did not secure personal immunity by flight, and if he ever voluntarily returns within the jurisdiction of the laws of this country he may be put on trial for all offences with which he is charged; yet as he sought asylum in Canada and secured it, it would be a manifest disregard of the conditions of the extradition to put him on trial for offences for which he was not extradited and for which no legal demand could have been made for his extradition: *Hawes* v. *Commonwealth*, 13 Bush.

FRAUD. See *Corporation; Sale.*

*Mortgage to defraud Creditors—Bona Fide Purchaser—Equity Rule as to Fraud.*—An assignee of a mortgage takes it subject to all defences existing against the mortgagee in favor of the mortgagor, but free from latent equities existing in favor of third persons: *De Witt* v. *Van Sickle et al.*, 29 N. J. Eq.

A mortgage executed as a step in a scheme to defraud creditors, will be upheld, even against creditors, in the hands of a *bonâ fide* assignee for value; but, in order to be considered an assignee for value, he must pay money, surrender a valuable right, or assume an irrevocable obligation; the surrender of a pre-existing debt is not a sufficient consideration: *Id.*

Property conveyed in fraud of creditors will be reclaimed for the benefit of creditors, no matter who may happen to hold it, if reclamation can be effected without injustice to innocent third persons: *Id.*

He who buys any part of the avails of a scheme to defraud creditors, in order to keep what he gets, must not only pay for it, but he must be innocent of any purpose to further the fraud: *Id.*

A person who wilfully closes his eyes to avoid seeing what he believes he would see if he kept them open, must be considered to have seen what any man with his eyes open would have seen: *Id.*

FRAUDS, STATUTE OF.

*Parol Contract not to be performed within the Year.*—To make a parol contract void within the Statute of Frauds it must appear affirmatively that it was not to be performed within a year. If performance by de-

fendant could have been required by plaintiff within a year the contract is valid: *Walker* v. *Johnson*, S. C. U. S., Oct. Term 1877.

When a contract for the delivery of stone exists only in parol, a subsequent verbal agreement varying the manner of delivery is binding: *Id.*

*Sheriff's Sale within.*—A sheriff levied an execution on real estate, it was duly advertised and bought by one T. at $11,050. T. refused to execute a sale bond, or pay for the land. The land was re-advertised and resold for $9000. In the sheriff's return no reference was made to the uncompleted sale to T., but the second sale was regularly returned. In an action against T. by the defendant in the execution for the difference in value, it was *held*, that the sale was within the Statute of Frauds and a demurrer to the petition was properly sustained: *Linn Boyd Tobacco Warehouse Co.* v. *Turrill*, 13 Bush.

Where a contract for land is executory on both sides, it is necessary that the sale and the price both be evidenced by a memorandum signed by the parties to be charged: *Id.*

The sheriff in such a case as this is the legal agent of the plaintiff and defendant in the execution, and of the purchaser, and might by his official return on the execution have taken the case out of the statute, but his private memorandum of the sale could not have this effect: *Id.*

## GUARANTY.

*Parol Evidence to affect Written.*—A guarantor, in writing, of the payment of a debt when due, will not be permitted to show by parol, that at the time the guaranty was delivered, it was understood between him and the guarantee, that he should be liable only as a guarantor of the collection of the debt: *Neill* v. *Board of Trustees of Ohio Agricultural College*, 31 Ohio St.

B. subscribed $100, 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, at the same time and place, and upon the same consideration, 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, upon the consideration aforesaid, as one instrument: *Held*, that the subscriber and guarantor may be jointly sued on said instrument: *Id.*

## HUSBAND AND WIFE.

*Legacy in lieu of Dower.—Revocation of election to take.*—A widow's election to take her dower instead of a legacy in lieu thereof, made under a mistake as to her rights, may be revoked, *nunc pro tunc*, and she placed *in statu quo*, unless the situation has so changed since her election that it cannot be done without prejudice to the subsequently-acquired rights of others: *Macknet* v. *Macknet*, 29 N. J. Eq.

## INJUNCTION.

*Against Public Improvement—Laches.*—A suitor who seeks to have a public improvement enjoined must apply promptly, show an invasion of a clear right, and that he has no other adequate remedy: *Traphagen et al.* v. *Mayor and Alderman of Jersey City*, 29 N. J. Eq.

A suitor who by laches has made it impossible for the court to enjoin

his adversary without inflicting great injury upon him, will be refused the aid he asks and left to pursue his ordinary legal remedy: *Id.*

An injunction will be refused to a complainant who has intentionally delayed his application until he has obtained an inequitable advantage of the defendant: *Id.*

The use of a public street for the construction of a sewer, is lawful: *Id.*

INSANITY. See *Criminal Law; Lunatic.*

INTOXICATING LIQUORS. See *Constitutional Law.*

INTOXICATION. See *Criminal Law.*

JUDGMENT. See *Limitations, Statute of.*

*Vacation of—Negligence of Attorney.*—The negligence of attorneys in failing to interpose a defence where a valid one existed, does not constitute a sufficient ground for disturbing a judgment: *Jones* v. *Leech*, 46 Iowa.

*Cannot be Alternative.*—In an action in the Circuit Court the court found the garnishee to be liable for one of two amounts to be determined by a future contingency: *Held*, that such finding did not constitute a judgment, and that upon the transfer of the case to the District Court, the garnishee had the right to make a further answer: *Battell & Collins* v. *Lowery et al.*, 46 Iowa.

JUDICIAL SALE.

*Representations of Guardian.*—The purchaser of real estate at guardian's sale has no right to infer from the guardian's assurance that he will give a good title, that he is acquiring a title in fee simple, and such assurance being given in good faith and without fraudulent intent, the purchaser is not entitled to equitable relief even though he may have been misled thereby: *Findley* v. *Richardson*, 46 Iowa.

The purchaser having acquired all the interest of the ward in the land, cannot refuse to pay a promissory note given for the purchase-money on the ground of a failure of consideration: *Id.*

*Title under.*—The rule of *caveat emptor* applies to all sales of real estate made under judgments, after confirmation. Before the sale is confirmed by the chancellor he may grant relief and quash the bonds, if it is discovered that the vendee acquires no title or some equitable reason is presented for cancelling the bid and bonds of the purchaser. But after confirmation as there is no warranty of title there can be no relief for defects of title: *Farmers' Bank of Kentucky* v. *Peter, &c.*, 13 Bush.

LIMITATIONS, STATUTE OF.

*When begins to run against Judgment binding Land.*—The Statute of Limitations for the action to recover possession of land is not applicable to the lien of a judgment creditor on the land, though the judgment debtor may sell and convey the land with possession to the party setting up the statute: *Pratt* v. *Pratt*, S. C. U. S. Oct. Term 1877.

The statute does not begin to run in such case until the land has been sold under the judgment and the purchaser becomes entitled to a deed, because until then there is no right of entry or right of action against the defendant in any one: *Id.*

But as soon as the judgment creditor places himself, by a sale and purchase of the land, in a condition that he can bring suit for the possession, the statute begins to run against him. These propositions are applicable to the Illinois Act of 1835, limiting actions for the recovery of land to seven years: *Id.*

LOCAL OPTION. See *Constitutional Law.*

LUNATIC.

*Judgment against.*—A judgment rendered against an insane person, without the intervention of a trustee or guardian, and in favor of one having knowledge of the insanity, is not void: *Johnson, Guardian,* v. *Pomeroy,* 31 Ohio St.

In a proceeding in aid of execution, such judgment cannot be impeached by the guardian of the judgment debtor without showing some fraud or unfairness on the part of the creditor in obtaining the judgment: *Id.*

Where a proceeding in aid of execution has been commenced, and the judgment debtor is afterward adjudged to be insane, the guardian of such debtor cannot resist a decree preferring such creditor by showing that his ward was insane before the commencement of the proceeding and that his estate is insolvent: *Id.*

MANDAMUS.

*Right of a Private Citizen to sue out the Writ of Mandamus to compel Performance of Duty by a Public Corporation—Power of Legislature over Municipal Corporations—Duties of Municipal Corporations as to Highways.*—The Act of 1876, ch. 220, authorized and required the mayor and city council of Baltimore to take charge of and maintain as a public highway, a certain bridge over Gwynn's Falls, in the city of Baltimore, known as "Harman's bridge." On the refusal of the said mayor and city council of Baltimore to do so, P. filed his petition in the Superior Court of said city for a mandamus, to compel the mayor and city council to assume the charge of the said bridge, and maintain it as a public highway, as required by the said Act of 1876. The said mayor and city council demurred to the petition, and by consent of parties a *pro forma* judgment was rendered sustaining the demurrer. On appeal it was *held:* 1st. That the legislature had the power to impose this duty upon the appellee: 2d. That the appellant had the right to sue out the writ of mandamus to compel the performance of this duty: *Pumphrey* v. *Mayor and City Council of Baltimore,* 47 Md.

Where the law leaves it to the discretion of a municipal corporation to assume control over a public highway or not, it would seem that at any time before the property was actually acquired and while the proceedings were *in fieri,* the corporation would have the right to change its purpose, though it had taken steps to assume control over it: *Id.*

But the rights and obligations of the appellee depend upon the Act of 1876, which is *mandatory* in its terms, and by which the discretion of the city over the subject has been taken away, and it is "*directed and required*" to take charge and possession of the bridge: *Id.*

Though the city of Baltimore is a public corporation, it is not exempt from the control of the legislature. A public corporation is created for

political purposes, with political power to be exercised for purposes connected with the public good; an instrument of the government subject to the control of the legislature: *Id.*

It is one of the ordinary duties of a municipal corporation to make and keep in repair the bridges on the highways belonging to it: *Id.*

Where the petitioner for the writ of mandamus to compel the performance of a duty by a public corporation has a personal interest in the matter different in kind from that of the general public, he is entitled to the writ: *Id.*

There is a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer: *Id.*

The petition for a mandamus is always addressed to the discretion of the court: *Id.*

## Master and Servant.

*Evidence—Competency of Servant.*—Where the incompetency and carelessness of an engineer employed by the defendant, a mining company, were alleged to have been the cause of an injury, proof that he was afterward discharged by defendant and by a subsequent employer was not competent evidence to support such allegation: *Couch* v. *Watson Coal Co.*, 46 Iowa.

In an action against a coal company for injuries caused by the alleged negligence of its engineer, the superintendent of the company was properly allowed to state whether in his opinion the engineer was competent, without previously showing himself to be an expert: *Id.*

The plaintiff had the right to introduce proof of the character of defendant's machinery; whether or not he had knowledge of its alleged defects before the accident was a question to be considered by the jury under the instructions of the court: *Id.*

Evidence of specific acts of negligence on the part of the engineer would be admissible as tending to establish the negligence of the defendant in continuing to employ him, but such evidence should not be admitted unless it be shown that the negligent acts occurred before the injury complained of: *Id.*

## Misnomer. See *Charity.*

## Mortgage. See *Fraud.*

*Conveyance to secure Payment of Money is mortgage—Power of sale must be followed strictly.*—A conveyance of land to secure the payment of a sum of money with power of sale, whether made to the creditor or a third person, is in equity a mortgage, if there is left a right to redeem on payment of the debt thereby secured: *Shillaber* v. *Robinson*, S. C. U. S. Oct. Term 1877.

A sale under the power in such an instrument must be made in strict conformity to the directions therein prescribed, or to such as may be prescribed by statute, or the sale will be absolutely void: *Id.*

A sale made on six weeks' notice, though followed by conveyance, when the mortgage and the statute of the state require twelve, is void, and does not divest the equity of the party who had the right of redemption: *Id.*

A person holding the strict legal title, with no other right than a lien for a given sum, who sells the land to innocent purchasers, must account to the holder of the equity for all he receives beyond his lien: *Id.*

MUNICIPAL CORPORATION. See *Mandamus.*

NEGLIGENCE.

*Liability of Railroad Companies—Contributory Negligence—Evidence —When the Court will instruct the Jury that there is no Evidence.*—In order to maintain an action against a railroad company for injuries received, &c., it must be proved that the injury was caused by the negligence of the defendant or its agents; and it must not appear from the evidence that want of ordinary care and prudence on the part of the person injured directly contributed to the injury: *State, use of Foy*, v. *Philadelphia, Wilmington and Baltimore Railroad Co.*, 47 Md.

Railroad companies, while prosecuting their lawful business, are bound to use ordinary and reasonable care to avoid inflicting injuries upon others: *Id.*

Railroad trains are liable to be detained by various causes, without any fault of the company, and negligence cannot be imputed to the company from the fact that a train may be behind the usual time: *Id.*

The fact of negligence is for the jury to decide where there is evidence legally sufficient to prove it, but in the absence of such evidence, it is the duty of the court to withhold the case from the jury: *Id.*

The *onus probandi* as to negligence on the part of the company is on the plaintiff, as it is the ground of his action: *Id.*

OFFICER. See *Statute.*

RAILROAD. See *Damages; Negligence.*

*Insolvent—Power of Chancery over.*—Two railroads were in the hands of receivers, appointed by this court under insolvency proceedings. *Held*, that the court had power, on the application of either receiver, to modify a contract made before their insolvency, so as to equitably re-adjust the rates agreed upon by them for terminal facilities, and, also, for the use of part of one road by the other company: *Petition of the receivers of the New Jersey and New York Railway Company for relief*, 29 F. N. Eq.

RECEIVER. See *Corporation; Railroad.*

SALE.

*Fraud and Fraudulent Contracts—When Right of Action accrues.*—Where goods are obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract, so as to revest the property in himself and to recover its value in an action of tort against the vendee: *Dellone* v. *Hull*, 47 Md.

But if the plaintiff make the contract his cause of action he must be bound by its terms, and cannot maintain his suit until the money becomes due: *Id.*

The vendor cannot sue for the *price* of goods before the period of credit has expired; by so doing he affirms the contract; but he can disaffirm the contract and sue in tort for the *value* of the goods: *Id.*

The Act of 1864, ch. 366, does not alter this rule as to cases arising under that statute: *Id.*

SHERIFF'S SALE. See *Frauds, Statute of.*

SLANDER.

*Privileged Communication.*—B. sued M. for charging him with the crime of perjury in an action pending before a justice, to which action M. was a party, giving at length the words used. M. confessed the speaking of the words and pleaded in avoidance, that he managed his own case before the justice and that all he said was addressed to the court in attempting to sustain his case, and for no other purpose, and was not in excess of his lawful right to indulge in fair criticism. *Held*, that in such a case it was error to instruct the jury that if the words charged were spoken and were false, then the law implies malice. The instruction ought to have been qualified, and the jury instructed to find for the defendant if the words spoken by him were pertinent and material to the question in controversy in the action before the justice: *Morgan* v. *Booth*, 13 Bush.

SPECIFIC PERFORMANCE.

*Contract—Mutuality.*—A contract to be specifically enforced must be such that it might, at the time it was entered into, have been enforced by either of the parties against the other, and if the one party be incapable of performance he cannot enforce it upon the other: *Luse* v. *Deitz*, 46 Iowa.

L. entered into a contract with D. to convey to him a brewery which at the time of the execution of the contract was the property of his wife; subsequently he tendered to D. a deed to the property, executed by himself and wife, which D. refused to accept: *Held*, that the contract could not be specifically enforced: *Id.*

*Equitable Title to Land—Contracts to purchase—Purchasers without notice—Certainty of averment and sufficiency of proof—Discovery—Answers in Chancery—Parties.*—Where application for the specific performance of a contract for the purchase of land is made by the purchaser, or some one in privity with him, having knowledge of the terms of the contract, courts of equity require that the terms of the contract shall be fully and particularly stated, so that it may appear to the court to possess all the elements of fairness, mutuality and certainty in all its parts: *Light Street Bridge Co.* v. *Bannon, Administrator of Lawrence*, 47 Md.

But such strictness is not required as to the averments in the bill where the complainants are strangers to the contract, and have not full and particular knowledge of its terms; and especially where the defects in the averments may be supplied by proof: *Id.*

Where a bill is filed for the sale of an equitable interest in land, and it appears that since the date of the contract creating such equitable title, the land has been sold, the purchaser thereof should be made a party to the suit in order that his rights may be protected: *Id.*

STATUTE.

*Construction of.*—Statutes directing the mode of procedure of public officers where there are no negative words restricting the action and nothing showing a different intent are directory: *Parish* v. *Elwell et al.*, 46 Iowa.

### Surety.

*Arrest of Principal.*—It is no defence for the surety on a bail-bond or forfeited recognisance, that his principal has been arrested and is being detained by the United States on a charge against him: *Commonwealth* v. *House*, 13 Bush.

### Trust and Trustee.

*Hostile feelings between Trustee and Cestui que trust—When cause for removal—Attorney—Champerty.*—While in a case where the trustee has a discretionary power over the rights of the *cestui que trust*, and has duties to discharge which necessarily bring him into personal intercourse with the latter, a state of mutual illwill or hostile feeling may justify a court in removing the trustee, it is not sufficient cause where no such intercourse is required and the duties are merely formal and ministerial, and no neglect of duty or misconduct is established against the trustee: *McPherson* v. *Cox*, S. C. U. S., Oct. Term 1877.

A contract to pay a specific sum of money to a lawyer for his services in a suit concerning real estate out of the proceeds of said land when sold by the client, if recovered, is not champertous, because he neither pays costs nor accepts the land or any part of it as his compensation: *Id.*

Nor is it void under the Statute of Frauds because not in writing, for it may be performed within the year: *Id.*

The land being recovered in the action in which the attorney was employed, and sold by the owner for $38,000, for which a bond was taken and left with the attorney, he has a lien on the bond for his fee both by express contract and by reason of the lien which the law gives an attorney on the papers of his client left in his hands for any balance due him for services: *Id.*

Where, under the circumstances mentioned, the client brings a bill in chancery to remove the attorney from his position as trustee in a deed to secure the purchase-money and for a delivery of the bond, it is the duty of the court to decide on the existence and amount of the lien set up by the attorney in his answer, and to decree the delivery of the bond on payment of amount of the lien, if one be found to exist: *Id.*

Though the defendant by neglecting to file a cross-bill can have no decree for affirmative relief, it is proper that the court should establish the conditions on which the delivery of the bond to complainant, according to the prayer of the bill, should be made, and require it to be done on that condition being complied with: *Id.*

### Title. See *Vendor and Purchaser.*

### Vendor and Purchaser.

*Flaw in Title—Bona fide Purchaser—Possession.*—In a suit in this court to quiet title and restrain an action of ejectment, a deposition of a witness in that action who has since died is competent, the action at law having been substantially between the same parties and for the same land: *Wanner et al.* v. *Sisson*, 29 N. J. Eq.

A person who, having discovered a flaw in a title to land, purchases the title for speculation, with a view to ousting the possessors, who claim to be the real owners, is not a bona fide purchaser: *Id.*

Possession by a man or his tenant is notice of the title, equitable as well as legal, under which he claims the property: *Id.*