ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MICHIGAN.[1]

SUPREME COURT OF MISSOURI.[2]

SUPREME COURT OF NEW JERSEY.[3]

SUPREME COURT OF OHIO.[4]

SUPREME COURT OF WISCONSIN.[5]

ABATEMENT.

Divorce Suit—Death of one Party—When the Suit may survive.—When the party seeking a divorce appeals from a judgment simply denying it, and pending the appeal either party dies, the appeal and the action abate absolutely, and cannot be revived, there being no one living who can legally have any interest in the case: *Downer, Administrator,* v. *Howard,* 44 Wis.

Upon the death of either party pending an appeal from a judgment *granting* a divorce, or from a judgment determining either way an issue as to the *validity* of a marriage, this court would probably permit the appeal to be revived for the purpose of protecting persons (if any) whose property interests were affected by the judgment: *Id.*

In a suit between husband and wife, on the death of the wife, without issue, pending the husband's appeal from a judgment awarding her costs or suit money, there is a presumption that her administrator has an interest (in behalf of her creditors) in the judgment and the appeal, and has a right to have the appeal continued in his name: *Id.*

In an action by a wife for divorce, the husband's answer, besides denying the charges of the complaint, alleged facts to show that the parties were never lawfully married, and also alleged counter charges and demanded judgment of divorce against the wife. The court below dismissed the complaint and the husband's counter-claims, and adjudged that defendant pay the wife's attorneys a certain sum to enable her to pay expenses of her attorneys and counsel in carrying on the action. Pending the husband's appeal from so much of the judgment as denied his counter-claims, and awarded the wife suit money, the wife died and an administrator was appointed, and was substituted as respondent in the appeal. It did not appear, from the pleadings or otherwise, that the refusal to adjudge the marriage null would affect the property or other rights of any person. *Held,* that the appeal abated by the death of the wife, so far as it related to the dismissal of the husband's counter-claims; but might be continued in the name of the administrator so far as it related to the award of suit money: *Id.*

ACCORD AND SATISFACTION. See *Pleading.*

---

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

[2] From T. K. Skinker, Esq., Reporter; to appear in 66 Missouri Reports.

[3] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 11 of his Reports.

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

[5] From Hon. O. M. Conover, Reporter; to appear in 44 Wisconsin Reports.

ACTION. See *Public Schools.*

Debtor and Creditor—Composition Deed—Subsequent Promise to Pay —Voluntary Payment.—Where a debtor, after being discharged from the obligation of his debts by a deed of composition with his creditors, voluntarily gives a security for a debt from which he is discharged by such composition, and which is only due in conscience, such security may be enforced in a court of law: *Crossley* v. *Moore*, 11 Vroom.

But any agreement with one creditor for an advantage to him over other creditors, made to induce him to join in the composition, or required by him as a condition upon which he shall become a party to it, which is not provided for in the composition deed, and is not disclosed to the other creditors, is utterly void, and is incapable of being enforced or confirmed even as against the assenting debtor. A security given in pursuance of such a bargain or a subsequent promise of payment, is equally void with the antecedent agreement; and money paid by the debtor under such an agreement, in excess of the due proportion of such creditor's debt, may be recovered back, unless it be paid under such circumstances as to be regarded in law as a voluntary payment: *Id.*

Under what circumstances a payment of money in pursuance of such a bargain will be an involuntary payment, and the proper form of action by the debtor to recover back the money so paid, considered: *Id.*

AGENT.

Variance—Authority to draw Draft—Evidence of similar previous Action—Ratification.—Where a draft purported to be drawn in the name of the firm by D. *M.* Brock as their agent, and on the trial it appeared to have been drawn by D. *W.* Brock: *Held*, that the variance was immaterial: *McDonough et al.* v. *Heyman*, S. C. Mich., January Term 1878.

Where an agent's authority to bind defendants by a draft is in question, it is proper, in connection with proof of his having previously drawn a similar draft to the same order, which had been paid, to ask the payee what the agent said to him at the time the first draft was drawn as to his authority to draw in defendants' names. This is admissible to show that in drawing both drafts the agent acted in the same capacity: *Id.*

If parties in whose names a draft is drawn appropriate and enjoy the fruits of the same, with full knowledge of the transaction, they thereby adopt and ratify the act of the person drawing it though previously unauthorized: *Id.*

Knowledge not Notice to Principal.—It seems that if the agent of an express company receives goods consigned to him as such for delivery to the purchaser, and having in his hands for collection at the same time a bill for the price of such goods delivers them to the purchaser, the company becomes liable to the consignor, whether the agent in fact collects the bill or not: *Wells* v. *The American Express Co.*, 44 Wis.

Where goods are not delivered to an express company, but are sent by railway to their place of destination, consigned to the purchaser *in the care* of the express company's agent at that place, and never come into his possession, but are delivered by the railway company directly to the purchaser, without fault of the express company or its agent, and a bill

of such goods, sent also to such agent for collection, not being paid by the purchaser, is promptly returned by the agent, no liability of the express company to the consignor is created by these facts: *Id.*

C. having an order for goods, borrowed money of W. to enable him to fill the order, and, upon shipping the goods, both C. & W. requested the purchaser to send the purchase-money to W.; but he sent it by express in a package addressed to C. and W. jointly. *Held*, that although there was no such firm as C. & W., notice or delivery to either of them was notice or delivery to both: *Id.*

A common carrier is not bound by its agent's knowledge or notice of facts outside of his duties and employment as such agent: *Id.*

The mere fact, known to the express company's agent at the office of delivery of the above-mentioned package, that W. had shipped goods to the sender of the package, and had sent to the proper agent of such company a bill of the goods for collection from him, which had been returned unpaid, would not render the express company liable to W. for the value of the package, or of W.'s interest therein, after its delivery to C.: *Id.*

Arbitration and Award.

Assent to Award.—The parties to a promissory note differing as to the amount remaining due upon it, referred their difference to arbitrators, who fixed the amount and informed the parties. The holder thereupon surrendered the note to the maker, who accepted it; *Held*, that he thereby assented to the award, and became bound to pay the amount fixed by the arbitrators, although they may not have proceeded regularly in ascertaining it: *Phillips* v. *Couch*, 66 Mo.

Bankruptcy.

Discharge not impeachable in State Court.—A discharge in bankruptcy duly granted under the Act of March 2d 1867, when pleaded in bar to an action for prior indebtedness, cannot be impeached in a state court, notwithstanding the bankrupt purposely omitted the indebtedness sued upon from the schedules, and purposely omitted giving the creditor notice of the pendency of the proceedings: *Brown, Executor*, v. *Kroh, Executor*, 31 Ohio St.

Bills and Notes.

Unendorsed Note payable to order—Verbal Assignment.—A party cannot recover in his own name on an unendorsed note payable to order, by showing a verbal assignment from the payee to himself; *Robinson* v. *Wilkinson*, S. C. Mich., January Term 1878.

Note given for discontinuance of Criminal Prosecution.—A note is equally void, whether given as partial or exclusive consideration for the discontinuance by the prosecuting attorney of criminal proceedings: *Wisner* v. *Bordwell et al.*, S. C. Mich., January Term 1878.

Check—Delay in presenting.—Delay to present a bank check until the failure of the bank, ten days after its receipt, *held* negligence which would have discharged the drawers if they had left funds in the bank until that time to meet the check: *Kinyon* v. *Stanton*, 44 Wis.

But where the drawers drew out their entire account in the bank

before its failure, they are liable to protect the check; and this, though the bank would probably have paid it at any time before the day of the failure, and although its assignee (under the Federal Bankruptcy Act) recovered from the drawers the money drawn out by them on that day: *Id.*

BROKER.

Earning Commissions—Finding Purchaser.—Where a broker, employed to sell property at a price satisfactory to his principal, produces a party ready to make the purchase at a satisfactory price, or to make an exchange satisfactory to the principal, the latter cannot relieve himself from liability to the broker for a commission by a capricious refusal to consummate the sale: *Delaplaine* v. *Turnley*, 44 Wis.

CHECK. See *Bills and Notes; Gift.*

COMMON CARRIER. See *Agent.*

Railroad—Special Contract to carry Horses—Negligence.—A railroad company may, by express contract, limit its liability in the carriage of horses: *Morrison* v. *The Phillips Colby Construction Co.*, 44 Wis.

Possession by a shipper of a carrier's receipt for the property, containing special terms, is at least *prima facie* evidence of his assent to them, and in most cases may be conclusive: *Id.*

Defendant's custom was to carry horses at the owner's risk, and at reduced rates for that reason; and the letters "O. R.," signifying "Owner's Risk," were upon the receipt given plaintiff for his horses, and retained and put in evidence by him; and he testifies that he "did not see" those letters, but not that he did not *understand* their meaning. *Held*, that the restricted liability of the company clearly appears from plaintiff's evidence: *Id.*

The injury was caused by the breaking of a wheel under a freight car in the train, which threw the car containing plaintiff's horses from the track. The track was in good order, the wheel had been used for only a short time, and, upon inspection after the accident, showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company. *Held*, that there was no error in directing a verdict for the defendant: *Id.*

CONSTITUTIONAL LAW. See *Municipal Corporation.*

Taking Private Property for Public Use.—When the ratification of an assessment of damages of the landowner vests in the city a right, at its will, to enter upon the land and possess it as a street, such a right constitutes a taking, within the sense of the constitutional provision forbidding the taking of private property for public use without compensation: *Fink* v. *Mayor and Common Council of Newark*, 11 Vroom.

When land is so taken, provision must be made for the payment of such damages within a reasonable time: *Id.*

Interest will be allowed on the damages from the time the right of action accrues; but if during this interim the landowner has used beneficially the land condemned, the value of such use will be taken into the account: *Id.*

Putting twice in Jeopardy.—An award of punitive damages for a

tort which is also punishable as a crime, is not in violation of the constitutional provision that no person for the same offence shall be twice put in jeopardy of punishment; and the rule allowing such damages should not now be abrogated or modified in this state, except by legislation: *Brown* v. *Swineford*, 44 Wis.

Provocation of an assault, though not sufficient for justification, may go to exclude exemplary damages: *Id.*

CONTRACT. See *Bills and Notes.*

Assignment—Pleading—Averment of Breach.—A contract whereby certain parties agree to deliver all the lumber they have, or may buy during the season, to two persons, is assignable by one of the latter to his associate: *Hart* v. *Summers et al.*, S. C. Mich., January Term 1878.

An averment of a sale of any lumber to third parties is an averment of a breach, and as no payment could be demanded without delivery or readiness to deliver, there was no need to set forth the precise terms of payment by usage, an averment of readiness at all times to comply with the contract being sufficient: *Id.*

On such a contract a special count lies for selling lumber not so far set apart as to pass title to plaintiff, and also for such as had already been passed, while the common counts lie for the latter: *Id.*

For Personal Services—Assignment of.—An executory contract for personal services, to be paid for as performed, cannot be assigned by the employer, unless the employee assents to the substitution of the assignee as employer: *Chapin* v. *Longworth*, 31 Ohio St.

In an action by the employee against the employer and his assignee, the allegation that subsequent to the agreement of the employer to assign the employee rendered the same service for the assignee during part of the time embraced by the contract, and received compensation from him at the rate therein specified, does not show such substitution: *Id.*

CORPORATION.

Personal Liability of Stockholders—Foreign Statute.—The personal liability of the officers and stockholders of a corporation for a debt contracted by the corporation is inconsistent with the idea of a body corporate at common law, and can arise only out of some statutory provision: *Salt Lake City National Bank* v. *Hendrickson*, 11 Vroom.

In pleading a foreign statute, it must be set forth in substance, so that the court may see that the right or liability which depends on a statutory enactment arises by force of such statutory provision. The averment, "pursuant to the statute," without setting forth the substance of the statute, is insufficient: *Id.*

Suit against Foreign—Contract made within the State.—A foreign corporation is liable to be sued in this state, on a contract made in this state, when summoned in accordance with our laws: *National Condensed Milk Co.* v. *Brandenburgh*, 11 Vroom.

If the contract sued on was made in this state, the court will not, upon a motion to set aside the service of a summons, or to vacate a judgment by default, for want of jurisdiction, inquire whether, in truth, the contract was made by the corporation. Such an inquiry must be reserved for the trial of the cause: *Id.*

It may be proper ground for letting in a foreign corporation to plead, after judgment by default, because an honest defence was not interposed through the advice of foreign counsel, *bona fide* followed by the corporate officers: *Id.*

Created by two States.—A corporation created by concurrent legislation of two states, receiving from each the same charter in legal effect, has a legal domicile in each state, and may lawfully hold its meetings and transact its corporate business in either state: *Bridge Co.* v. *Mayer*, 31 Ohio St.

The case of *Sebastian* v. *The Covington and Cincinnati Bridge Co.*, 21 Ohio St. 451, is reviewed, and the principles therein established approved: *Id.*

Keeping its Records in the State—Forfeiture of Charter at suit of State.—Independently of statutes, it is the duty of a private corporation to keep its principal place of business, its records and the residence of its officers so located as to render it accessible to the process and to the exercise of the visitorial power of the state by which it is created; and a forfeiture may be adjudged for violation of this common-law obligation: *State ex rel. Attorney-General* v. *Milwaukee, Lake Shore and Western Railway Co.*, 44 Wis.

An information showing that the principal office of the defendant company is in the city of New York; that its books and records have always been kept in that city; that none of its principal officers reside in this state; and that by reason of these facts it has been impossible to enforce an attachment against the shares of stockholders in said company in actions brought in courts of this state, in accordance with the laws thereof, *Held*, on demurrer, to show sufficient ground for adjudging a forfeiture of the company's charter: *Id.*

DAMAGES. See *Constitutional Law; Libel.*

DEBTOR AND CREDITOR. See *Action; Partnership.*

Contract—Appropriation of Fund—Process of Garnishment.—Process of garnishment cannot be made to operate so as to annul the contracts of parties, or to subject a party to recovery by the creditor of his creditor, when the latter could not himself recover: *McPherson et al.* v. *Atlantic and Pacific Railroad Co., Garnishee*, 66 Mo.

Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it: *Held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes: *Id.*

DIVORCE. See *Abatement.*

EMINENT DOMAIN. See *Way.*

ESTOPPEL. See *Former Adjudication; Pleading.*

EVIDENCE. See *Partnership.*

FOREIGN STATUTE. See *Corporation*

FORMER ADJUDICATION.

Estoppel by Judgment.—Where an action was prosecuted to set aside a contract on the ground of fraud, and to cancel an unmatured note given in pursuance of the contract, which resulted in a judgment affirming the validity of the contract and note: *Held*, that in a subsequent action on the note, the defendant is estopped, by the judgment in the former action, from setting up that the contract and note were executed by the parties under a mutual mistake: *Bell* v. *McCullough's Ex.*, 31 Ohio St.

FRANCHISE. See *Riparian Rights.*

FRAUDS, STATUTE OF.

Verbal Contract for the Purchase of Land—When Money or Property paid thereon cannot be recovered.—No action can be maintained to recover back money or property, which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part: *Galway et al.* v. *Shields*, 66 Mo.

In an action for the value of goods sold and delivered, no recovery can be had, if it appears that such goods were delivered pursuant to a verbal agreement that the price therefor was to be paid in specific land to be conveyed by the buyer to the seller, and the buyer has offered and is ready and willing to comply with his part of the agreement: *Id.*

GIFT.

Check—Death of Drawer before Payment.—The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn. *Held*, that until the check was either paid or accepted, the gift was incomplete; and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check: *Simmons* v. *Cincinnati Savings Society*, 31 Ohio St.

HIGHWAY.

Occupation by Railroad.—Power given by a charter of a railroad company to construct its road across a public highway upon condition that the same be restored to its former state, "or in a sufficient manner not to impair its usefulness," does not authorize the company permanently to appropriate any portion of the public highway by obstructions which materially interfere with the public travel: *Little Miami Railroad* v. *Commissioners of Greene Co.*, 31 Ohio St.

The obligation, in such case, to restore the public highway to such condition as not to impair its usefulness, is a condition inseparable from the company's right to construct its road across such highway, and the Statute of Limitations is not an available defence to an action brought to secure the performance of such condition: *Id.*

INSURANCE.

Change of Title to Property Insured—Mortgage.—It was stipulated, in a policy of fire insurance, that if the property insured should be sold or transferred, or any change made in its title, without the assent of the

company insuring, the policy should be void. The assured sold and conveyed the property for an agreed sum, to be paid in the future, the company assenting to the sale, but without knowledge of its terms. To secure the payment of the purchase price, the purchaser, at the time of the sale, and as a part of its terms, executed a mortgage of the property to the vendor, of which the company had no knowledge until after the property was destroyed by fire. *Held*, that the assent given by the company to said sale and transfer of title was an assent to the terms upon which the same was made, and hence that the execution of said mortgage did not avoid the policy: *Farmers' Ins. Co.* v. *Ashton*, 31 Ohio St.

JUDGMENT.

Cancellation by Fraud and Mistake.—Where judgments assigned are cancelled by fraud and mistake, caused by defendants' misrepresentations to the plaintiff's attorney, the cancellation will be vacated: *Keogh* v. *Delany*, 11 Vroom.

Merger—Attachment.—A note is not merged in a judgment rendered thereon in an action commenced by attachment where, though property was levied on, defendant was not personally served, and did not appear, and where no part of the judgment has been satisfied: *Smith* v. *Curtiss*, S. C. Mich., January Term 1878.

LANDLORD AND TENANT. See *Debtor and Creditor.*

Liability of Tenant for Rent after Assignment of the Term.—A lessor may maintain an action for rent against his lessee, on an express covenant to pay rent during the term, contained in a lease for ninety-nine years and renewable for ever, though the rent accrued after the lessee had assigned all his interest in the leasehold estate and after the lessor had accepted rent from the assignee of the term: *Taylor* v. *DeBus*, 31 Ohio St.

The case of *Worthington* v. *Hewes & McCann*, 19 Ohio St. 66, explained and limited: *Id.*

LIBEL.

Offers of incompetent Testimony—Privileged Publications—Negligence of Newspaper Proprietor—Exemplary Damages—Haste in issuing Paper.—In an action for libel, it is error to allow the plaintiff to offer successively in evidence, articles published in defendant's newspaper subsequent to the time of publication of the article complained of, when articles of the same character, and offered for the same purpose, have been ruled out: *Scripps* v. *Reilly*, S. C. Mich., January Term 1878.

The character of offers made in the presence of the jury may be such, even although the offers were rejected below, as to require, on error, a reversal of the judgment, where the party making such rejected offers obtains a verdict: *Id.*

All incompetent testimony should be excluded from the knowledge of the jury: *Id.*

Semble, that the publication of charges contained in a bill of complaint is not privileged. At any rate, if a fair statement of the charges were privileged, the privilege would be gone on the publication of a sensational article with notes and comments, based in part upon the

charge made in the bill, and plaintiff would be entitled to recover the same damages as though no bill had ever been filed: *Id.*

The burden of proving carelessness or negligence on the part of a newspaper proprietor in the selection or retention of his employees, is upon the plaintiff: *Id.*

Where the act done is one which, from its very nature, must be expected to result in mischief, or where there is malice, or wilful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, damages are allowed for injury to the feelings of the plaintiff: *Id.*

Where the tort consists of some voluntary act, but no element of malice, carelessness or gross neglect is shown to have existed, but that the wrong was done in spite of proper precaution, the damage to be awarded on account of injured feelings will be reduced to such sum as must inevitably have resulted from the wrong itself: *Id.*

So far as exemplary damages are concerned, the fact that an indictment may or may not be pending or threatened for the same wrong is wholly immaterial, as they are allowed by way of remuneration for the injury sustained: *Id.*

Want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employees after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages to wounded feelings; but express malice in the employees would not be admissible for such purpose, where the act was done without the knowledge or consent of the defendant, where proper care had been exercised in their employment and retention: *Id.*

The hurry incident in the issuing of a newspaper, and the time in connection therewith at which the article in question was received, are admissible in evidence, and should be considered by the jury, not as an excuse or justification, but as circumstances characterizing the act, and to aid in fixing the amount of damages to be recovered: *Id.*

When it becomes important to consider what degree of care and prudence has been exercised by the proprietor of a newspaper in the publication thereof, the character which the paper has earned may be shown, irrespective of the truth or falsity of the articles, by the introduction of the papers containing them, to aid the jury in determining the question: *Id.*

Publication—Remote Damages.—In a complaint for libel, for words not in themselves actionable, contained in a letter from defendant to one C., where the special damages alleged appear to have resulted not from the reading of the letter by C., but from the reading of it by others to whom it shown by him, there being no averment that defendant authorized C. to show the letter to such other persons: *Held*, that no cause of action is stated, such special damages not being the natural and immediate consequence of the publication charged upon defendant: *Gough v. Goldsmith*, 44 Wis.

Limitations, Statute of.

Credit on Account.—A credit upon an account after the cause of action on the same is barred by the Statute of Limitations, will not be

treated as part payment thereof, unless shown to have been so intended by the parties: *Kaufman, Adm'r*, v. *Broughton*, 31 Ohio St.

MASTER AND SERVANT. See *Contract.*

Injury by Negligence of Superior Servant.—The master is liable for an injury to a servant resulting from the negligence of a superior servant, while the latter is discharging the duties of one under his control to the same extent as if the act causing the injury had been committed by an inferior servant under his directions: *Berea Stone Co.* v. *Kraft*, 31 Ohio St.

MORTGAGE.

Sale under trust Deed, not affected by voluntary Absence of Trustor in Confederate States—Notice of Foreclosure.—A sale under a deed of trust given by a debtor to secure the payment of his debt, is not invalidated by the fact that at the time it was made he was residing within the military lines of the confederate states, if he was a citizen of Missouri when the deed was executed, and his removal within the confederate lines took place after the debt matured and was voluntary: *Martin* v. *Paxson*, 66 Mo.

A stipulation in a deed of trust given to secure the payment of a debt, that in the event of default in payment the trustee may sell the trust property, lying in Morgan county, at public sale, at the court house door in Boonville, Cooper county, first giving at least thirty days' notice of the time, terms and place of sale, and of the property to be sold, by advertisement in Morgan or adjoining county, is not void for uncertainty or as being against public policy. Such matters are proper subjects of contract between the parties, and their contract is binding: *Id.*

MUNICIPAL CORPORATION. See *Constitutional Law.*

Constitutional Power of Legislature over— Courts to determine what is General Legislation.—On application for a *mandamus* against the common council, they may call in question the constitutionality of an act which legislates them out of office: *The State, ex rel. Pell*, v. *Mayor and Common Council of Newark*, 11 Vroom.

The words, "the legislature shall pass no special act conferring corporate powers," in the constitution, applies only to private corporations, and not to municipal corporations: *Id.*

The legislature may, by special laws, establish townships, cities and counties, and change or alter their exterior lines at will: *Id.*

The internal affairs of cities, towns and counties must be regulated by general laws, where it is practicable to do so: *Id.*

The court, and not the legislature, is the tribunal which must determine whether an object can be accomplished by general legislation: *Id.*

The manner in which ward lines are run, being a matter which concerns only those within the city, affecting exclusively internal affairs, a general law must be framed to change such ward lines, special legislation being prohibited in such cases: *Id.*

Paving Contract—Unused Material—Conversion—Liability of City.—Where the contractors, in a forfeited paving contract, have left loose sand lying within the limits of the unfinished work, it is their duty to remove it, and the city or new contractors perform no tortious act in

removing it from the street: *City of Detroit* v. *Michigan Paving Co.*, S. C. Mich., January Term 1878.

Nothing but a distinct sale could amount to a conversion of the sand by the city, and use by new contractors under any other footing than as grantees by the city is an independent act of their own, for which the city is not responsible: *Id.*

NEGLIGENCE. See *Common Carrier.*

PARDON.

When executed, not revocable—Constructive Delivery.—A pardon or commutation of sentence takes effect, and the recipient of executive clemency cannot be deprived of its benefits and immunities by a subsequent revocation, when it has been signed by the executive, properly attested, authenticated by the seal of the state, and delivered either to the recipient, or to some one acting for him, or on his behalf: *Ex parte Reno*, 66 Mo.

Delivery of a pardon by the governor to one suing for the release of a prisoner confined in the state penitentiary, is constructive delivery to the prisoner: *Id.*

Under the constitution of 1865, the governor had power to grant a conditional pardon, but the conditions, to be operative, should appear on the face of the paper: *Id.*

PARTNERSHIP.

Settlement on Dissolution—Notes given to Creditors by settling Partner.—Upon the dissolution of a firm, plaintiff received notes of one of the former partners for a firm debt due him. There being conflicting testimony upon the question whether these were taken in *payment* of such debt, or merely as collaterals, the jury were at liberty to determine the question from *circumstantial* as well as from direct and positive evidence of the fact; and it was error to instruct them that such an agreement could not be "found in the affirmative *by inference*, but must be established by affirmative proof:" *Gates* v. *Hughes*, 44 Wis.

The amount of the firm property turned over to the maker of said notes upon the dissolution, and his ability to pay plaintiff's demand, were proper facts to be considered by the jury, in connection with others, in determining whether such agreement was made: *Id.*

Where, after dissolution of the firm of A. and B., A. assumes, as between himself and B., payment of a firm debt, and the creditor, with knowledge of that arrangement, accepts notes of A. postponing the time of payment without the assent of B.: *Quære*, whether B. is not to be regarded as having been a mere surety for the debt, and as released by the taking of the notes: *Id.*

PARTITION.

Effect of Decree—Ejectment by Parties not bound.—Parties holding lands in severalty by virtue of purchases under allotments in partition proceedings, cannot have the decree under which they claim—and which contained no defect so far as the parties to the petition suit were concerned—opened or avoided to prevent persons not parties to that suit, and who have done nothing to bar their rights, from asserting their interests by ejectment: *Walsh et al.* v. *Varney*, S. C. Mich., January Term 1878.

PLEADING. See *Contract; Corporation.*

Departure—Argumentative Pleas—Demurrer.—The replication must support and fortify the declaration. The plaintiff, where an evasive plea is filed, may re-state his cause with more particularity and certainty in his replication, but he must not depart from any material allegation in the declaration: *Salt Lake City National Bank* v. *Hendrickson*, 11 Vroom.

A departure in pleading is a fault in substance, and may be taken advantage of by general demurrer: *Id.*

An argumentative plea is good on general demurrer. An objection of that kind could formerly be taken advantage of only by special demurrer, and is now available only by a motion to strike out: *Id.*

The rule that judgment on demurrer will be given against the party whose pleading is first defective, applies only when the defect in the prior pleading is in a matter of substance, such as would be available on general demurrer: *Id.*

Accord and Satisfaction—Estoppel.—Upon application of a landowner whose dam had been taken down by the Essex Public Road Board in constructing a highway, an alternative *mandamus* was allowed directed to said board, commanding them to apply as directed by their charter for the appointment of appraisers to assess the damages for said taking, or show cause, &c. As a return to this writ, the board filed three pleas. On motion to strike out, it is *held*—

1. That the first plea, that the said dam was taken down by the board by leave and license of the relator, is bad.

2. That the second plea, that as compensation for the taking of said dam, a new dam was erected by the board for the relator, and accepted by him in full satisfaction of all claims, &c., is good as a plea of accord and satisfaction.

3. That a plea setting up a former assessment for taking the same property, and also an acceptance of the award so found as compensation, &c., is bad for duplicity. As a plea in estoppel, it should have stated all jurisdictional facts directly and not legal conclusions. As a plea of accord and satisfaction, it is argumentative: *State ex rel. Wheeler* v. *Essex Public Road Board*, 11 Vroom.

POSSESSION.

Writ of—Duty of Officer—Character of Possession he must deliver.—Under a writ of possession, the officer must invest the plaintiff with the full, actual and complete possession of the premises. He is bound to remove all persons in possession. The test is, that the plaintiff must be so established in his possession by the officer, that any person entering upon him, *se invito*, will be indictable for a forcible entry: *Inhabitants of Union, to use of Elliott*, v. *Bayliss*, 11 Vroom.

The officer is not bound to remove the tenant's goods, but he may give the tenant an opportunity to do so, or he may remove them himself, as the agent of the plaintiff: *Id.*

PUBLIC SCHOOLS.

Power of School Directors to make Rules—Liability for enforcing them.—The school law (Wag. Stat., p. 1264, § 8) provides that the board of directors "shall have power to make and enforce all needful

rules and regulations for the government, management and control of such schools and property as they shall think proper * * * not inconsistent with the laws of the land." A board of directors having made a rule that no pupil should, during the school term, attend a social party, the plaintiff, a pupil of the school, by the permission of his parents, violated the rule, and was expelled from the school for so doing. In an action against the directors to recover damages for the expulsion; *Held*, 1. That under the law, they had the power to make needful rules for government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; that in prescribing the foregoing rule they had gone beyond their power, and had invaded the rights of the parents, but 2. As there was no malice, oppression or wilfulness on the part of the directors, they were not liable in damages: *Dritt* v. *Snodgrass*, 66 Mo.

In a case where malice is the gravamen of the action, the petition will be held bad on demurrer, if the facts as detailed in it show that there was no malice, notwithstanding it contains a general charge that defendant's acts were wilful, malicious and oppressive: *Id.*

RAILROAD. See *Common Carrier.*

RIPARIAN RIGHTS.

Franchise of Boom in Navigable River—Trespass.—The grant of a franchise (as to maintain a boom in a river, within certain limits) cannot license a trespass by the grantee on lands of other persons: *Stevens' Point Boom Co.* v. *Reilly*, 44 Wis.

The purchaser of a trespasser's possession takes no right which the trespasser had not: *Id.*

The franchise to maintain a boom in a navigable river within certain limits does not pass by a mortgage, by the grantee of the franchise, of land within those limits of which he had no title: *Id.*

Riparian owners on the banks of streams in this state which are navigable for the purpose of floating logs to market, may lawfully, until prohibited by statute, construct in front of their land proper booms to aid in floating logs, so as not to violate any public law or obstruct the navigation of the river by any method in which it may be used, or infringe upon the rights of other riparian owners: *Id.*

Riparian owners lawfully in possession of piers and booms upon a navigable stream, may enjoin any obstruction of the river below which will interfere with the beneficial use of their property; but cannot absolutely restrain lower riparian owners from maintaining booms in front of their own land: *Id.*

SALE.

Requisites of Contract—Price may be fixed subsequently—Waiver.—It is not necessary to the validity of a contract of sale, that it should determine the price in the first instance; but it may appoint a way by which it shall be thereafter determined, and in that case the contract will be perfected when the price has been so determined: *Cunningham* v. *Brown*, 44 Wis.

Where, therefore, a contract for the sale of a village lot provided that the price should be the same as the price of sale of the first lot

which should be sold in the vicinity, and lots adjoining the one in question were sold before the action was commenced: *Held*, that the contract was thus rendered certain: *Id.*

Where, by the contract of sale, land was to be paid for in part by labor and services, and upon the vendee's demand for an adjustment of the amounts paid and unpaid, and a conveyance, the vendor repudiated the contract and ordered him to quit the possession, this was a *waiver* of any further tender or demand, before suit by the vendee for specific performance: *Id.*

SCHOOLS. See *Public Schools.*

STATUTE.

Retroactive.—The words *shall have been or shall be*, in the Act passed April 9th 1875, to heal defects in public notices, are prospective, and not retrospective. The intent to make statutes retroactive must clearly appear by express words or by necessary implication: *State, Alden, pros.*, v. *Newark*, 11 Vroom.

SURETY. See *Partnership.*

TRESPASS. See *Riparian Rights.*

TRUST AND TRUSTEE. See *Mortgage.*

Mortgagor—Power after making Deed.—One who gives a deed of trust upon land cannot afterwards make any agreement concerning the same to the prejudice of the title conveyed by the deed. A subsequent contract with a stranger permitting him to enclose and use part of the land, is void as against a purchaser at a sale under the deed of trust: *Sims* v. *Field*, 66 Mo.

USURY.

When it may be shown.—If a new security includes sums for unpaid usurious items, it is to that extent without consideration and liable to abatement: *Gardner* v. *Matteson*, S. C. Mich., January Term 1878.

In replevin against the mortgagee of chattels who has seized them for non-payment, the mortgagor may show that the notes secured by the mortgage are in part made up of usurious items: *Id.*

VENDOR AND PURCHASER. See *Frauds, Statute of; Sale.*

VOLUNTARY PAYMENT. See *Action.*

WAIVER. See *Sale.*

WAY.

Appropriation of Land for Private Road—Must be Necessary.—Only a clear, practical necessity, not mere convenience, warrants the taking of private property for a private road. It is only justifiable where no other way of access to the applicant's land can be found: *People ex rel. Ayres et al.* v. *Richards*, S. C. Mich., January Term 1878.