that the defendant had a perfect right to construct the dam on his own ground, and therefore he committed no wrongful act in the county of Stark for which a suit would lie against him. If every person is free to use his own property as he may desire, he cannot do so in such a way as to encroach upon the rights of his neighbor. Hence the appellee in constructing this dam upon his own land knowing at the same time that in the ordinary course of things, it must cause the injurious flooding of appellant's premises, was doing an act which he had no right to perform. For in that case he was making use of his land in such a manner as to interfere with the rights of adjoining proprietors. Being unable to discover any sufficient reason why he should not be made to answer for that wrongful use in the county where the act was committed, the judgment of the circuit court will be reversed and the cause remanded.

PILLSBURY, J., dissented. Judgment reversed.

ABSTRACTS OF RECENT DECISIONS.

ENGLISH COURTS OF LAW AND EQUITY.[1]
SUPREME COURT OF KANSAS.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF PENNSYLVANIA.[4]
SUPREME COURT OF WISCONSIN.[5]

ACTION.

Implied Contract—Tort—Set off.—A cause of action founded upon an *implied* contract may be the subject of set-off: *Fanson* v. *Linsley*, 20 Kans.

Whenever one person commits a wrong or tort against the estate of another with the intention of benefiting his own estate, the law will, at the election of the party injured, *imply* or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer: *Id.*

But where one person commits a wrong or tort against another, without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay for the resulting damages: *Id.*

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

[2] From Hon. W. C. Webb, Reporter; to appear in 20 Kansas Reports.

[3] Prepared expressly for the American Law Register, from opinions delivered at the April Term 1878. The cases will probably be reported in 38 or 39 Michigan Reports.

[4] From A. Wilson Norris, Esq., Reporter; to appear in 85 Penna. St. Reports.

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

On Contract made by another for Plaintiff's benefit.—As a general rule an action on a contract must be brought in the name of the party having the legal interest therein: *Kountz* v. *Holthouse*, 85 Penna. St.

A third party may maintain an action in his own name upon a contract made expressly for his benefit where his release would be a sufficient discharge to the promisor, but not where it would leave the promisor liable to an action by the other contracting party: *Id.*

On Payment to another Person to use of Plaintiff.—The rule that if one party pay money to another for the use of a third person, or having money belonging to another, agrees with that other to pay it to a third, an action lies by the person beneficially interested, does not apply where the contract is for the benefit of the contracting party and the third person is a stranger to the contract and consideration; the action then must be by the promisee: *Guthrie* v. *Kerr*, 85 Penna. St.

Where the contract leaves the promisor subject to a suit by the promisee or his personal representatives, and likewise to a third person beneficially interested, the latter cannot maintain an action: *Id.*

A legatee cannot maintain a common-law proceeding against the debtor of his testator's estate: *Id.*

AGENT.

Declaration of.—The declaration of an agent when acting within the scope of his agency, and when made in connection with some transactions as such, are receivable as part of the *res gestæ*, but mere possession of chattels by an agent cannot empower him to admit away the title of his principal: *The Michigan Punching Machine and Manufacturing Co.* v. *Eugene Parcell*, S. C. Mich., April Term 1878.

To Sell not authorized to Barter.—Neither by the common law nor under any statute of this state, can a person intrusted with merchandise simply as an agent for the sale thereof, dispose of it by *barter* to one who knows the goods bartered for to be for the agent's own use, or pledge it for his own indebtedness for goods sold to him as for his own use: *Victor Sewing Machine Co.* v. *Heller*, 44 Wis.

Sect. 3, ch. 91 of 1863, which provides that a factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, &c., shall be deemed the true owner thereof so far as to give validity to any contract made by him with any other person for the sale or disposition of such merchandise "for any *money advanced or negotiable instrument or other obligation in writing given* by such other person on the faith thereof," is inapplicable in terms to the case above stated; and, being in derogation of the common law, must be strictly construed. *Price* v. *Wis., M. & F. Ins. Co.*, 43 Wis. 267, distinguished: *Id.*

ASSUMPSIT. See *Action.*

Trespasser—Implied Promise.—Assumpsit does not lie for the value of personal property taken by a trespasser and applied to his own use. The law implies no promise under such circumstances: *Tolan* v. *Hogeboom*, S. C. Mich., April Term 1878.

BAILMENT. See *Negligence.*

Bills and Notes.

Action on Lost Note—Indemnity.—Where a note though negotiable, is payable to order and unendorsed and is accidentally destroyed by fire while in the possession of the payee: *Held*, the payee can maintain an action on such lost instrument without first tendering or giving a bond of indemnity: *Welles, Adm'r*, v. *Wade*, 20 Kans.

Acceptance of Bill by one Partner.—It is well settled that an acceptance by a partner in his own name of a bill of exchange drawn upon the firm, for goods sold to it, binds the firm: *Tolman and another* v. *Hanrahan*, 44 Wis.

Contract implied from Endorsement—Parol Evidence not admissible to vary.—The contract which the law implies from the endorsement of a negotiable note is as conclusive against parol testimony as though it were written out in full above the endorser's signature: *Doolittle* v. *Ferry et al*, 20 Kans.

Parol testimony is inadmissible to change a simple unqualified endorsement, whether in full or in blank, into an endorsement without recourse: *Id.*

Irregular Endorsement.—The names of the payees appeared on the back of a note in the usual position of the first endorser, about three inches from the left end, and that of the defendant in the opposite direction, about the same distance from the right end of the note, so that the latter with reference to the former may be said to have been inverted. *Held*, that this irregular endorsement did not relieve the defendant of liability, as he could have recourse against the payees: *Arnot's Adm'r* v. *Symonds*, 85 Penna. St.

Boundary. See *Prescription.*

Monuments.—In determining disputed boundaries, original monuments will govern, if they can be found and identified; *Marsh* v. *Mitchell*, 25 Wis. 706; and if none such can be found at the lot or block in dispute, more distant monuments may be consulted, from which a survey and measurements may be made: *Nys* v. *Biemeret*, 44 Wis.

If no certain monuments can be found, nor any data to determine courses and distances, long-continued occupancy and acquiescence, and even reputation and hearsay, as to boundaries, may have weight: *Id.*

Chattel Mortgage.

Without actual Consideration—Rights of Assignee.—Where a chattel mortgage not securing negotiable paper is given for a sum named, but really to secure future advances, and none have been made, an assignee, though taking it for value and in good faith, supposing it to have been given for an actual indebtedness, has no rights superior to those of the mortgagee: *Judge* v. *Vogel*, S. C. Mich., April Term 1878.

Common Carrier.

Special Conditions—Alternative Rates.—The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses, to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendants had two rates of carriage, a higher

rate when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk," the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed. *Held*, that as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable, and that the injury to the cheeses had not arisen from the wilful misconduct of their servants: *Lewis* v. *The Great Western Railway Co.*, Law Rep. 3 Q. B. D. (Ct. App.).

CONSTITUTIONAL LAW.

Statute—Inquiry by Courts into Action of Legislature in passing.—An alleged disregard of the forms of legislation required by the constitution in the passage of a law is not the subject of judicial inquiry. So far as the duty and conscience of the members of the legislature is involved, the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved and certified in due form the courts cannot go behind the law as duly certified, to inquire into the observance of form in its passage: *Kilgore* v. *Magee*, 85 Penna. St.

CONTRACT. See *Action*.

Rescission of Sale—Warranty—Offer to return Property—Damages.—To constitute a rescission of a contract of sale for breach of warranty the vendee's offer to return the property should be unconditional, and should assign the breach of warranty as the ground thereof: *Churchill* v. *Price*, 44 Wis.

The warranty claimed in a sale of oxen was, that they were sound and true, and in all respects suitable for defendant's purposes. There was proof that some time after the purchase, the vendee wrote to the vendor that he was so much disappointed in the oxen that he would not pay the note he had given the vendor for $118, the purchase price; that they were not worth $75; and that the vendor might take them away, upon which vendee would pay for the use of them, or might leave them, in which case he would pay $75 for them. *Held*, that there was no error in refusing to instruct the jury upon this evidence, as matter of law, that defendant had rescinded the contract: *Id.*

It is generally a question of fact for the jury, whether an offer to return goods sold, and rescind the contract, is made *within a reasonable time*: *Id.*

A continued use of the whole or a part of the property sold, after an alleged offer to rescind, is inconsistent with the claim to have rescinded, or at least strong evidence against it: *Id.*

In assessing damages for a breach of warranty, the jury are not bound to accept the amount estimated by any of the witnesses, nor the average of the amounts estimated by different witnesses, but must exercise their

own judgment upon all the facts in evidence, including the opinions of witnesses as to the difference between the actual value of the article and what it would have been worth, if as warranted: *Id.*

Sale of Intoxicating Liquors—Illegal Consideration.—A sale of intoxicating liquors made while the prohibiting law was in force is not a lawful consideration for a promise subsequent to the repeal of the act: *Ludlow* v. *Hardy*, S. C. Mich., April Term 1878.

Corporation.

Foreign—Suits by.—Foreign corporations may maintain suits in the courts of this state; and foreign insurance companies may take securities in this state for debts due them from residents thereof, without complying with the statutory conditions to their transaction here of the business of insurance: *Charter Oak Life Ins. Co.* v. *Sawyer*, 44 Wis.

Criminal Law. See *Jury.*

Evidence—Dying Declarations—Witness—Co-defendant.—Where several parties unite to make an assault, which results in homicide, the acts and declarations of the defendant immediately prior to the assault, what was said in his presence by those acting in concert with him, and what occurred after the attack, are competent evidence: *Kehoe* v. *The Commonwealth*, 85 Penna. St.

In a trial for homicide it was shown that the deceased was terribly beaten and left insensible by his assailants. He was carried to a house near by, and on the following morning started to his home, about a mile distant, unaccompanied and on foot. About midway to his home he was met by an acquaintance, whom he accosted, saying, "Bill, it is all up with me; I will never get over it;" and then went on to speak of his wounds and how they were inflicted, and from the effects of which he died two days thereafter. *Held*, that this evidence was properly received as dying declarations: *Id.*

Where one has been convicted of an infamous crime, but not sentenced, and motions in arrest of judgment and for a new trial are pending, he is not a competent witness for another who was jointly indicted for the same offence and granted a separate trial: *Id.*

Where several parties are jointly indicted and separate trials granted, one who has not yet been tried is not a competent witness for either of the others on trial: *Id.*

Damages. See *Contract.*

Debtor and Creditor.

Attachment of Debt—Garnishee order—Salary not yet Payable.—The salary of a medical or other officer cannot, before it is actually payable, be attached by a garnishee order under the county court rules, 1875, for it is not "a debt due, owing, or accruing" to the judgment debtor: *Jones* v. *Thompson*, E. B. & E. 63, followed: *Hall et al.* v. *Pritchett*, Law Rep. 3 Q B. Div.

Deceit.

False Representations—Action for.—Where a party makes false representations of his solvency to induce credit, although at the time when

made he believed them to be true, he is not liable to an action of deceit, and the state of his belief is a question for the jury: *Dilworth* v. *Bradner et al.*, 85 Penna. St.

It was erroneous for the court to say that the jury must decide whether the party making such representations had *reasonable grounds* for his belief that they were true: *Id.*

EVIDENCE. See *Bills and Notes.*

FOREIGN CORPORATION. See *Corporation.*

FRAUD. See *Deceit.*

Mode of Averring.—Where relief is sought on the ground of fraud, the complainant is not required to set forth correctly the true theory of the fraudulent intent and purpose, and the means adopted to accomplish it. It is sufficient to set forth the substance of the transaction and the result, and relief will not be denied if it be shown that the fraud was successfully accomplished, though in a manner different from that charged: *Merrill* v. *Allen*, S. C. Mich., April Term 1878.

GARNISHEE. See *Debtor and Creditor.*

Discontinuance.—A garnishee proceeding is discontinued by plaintiff's failure to appear on return of a summons to show cause: *Johnson et al.* v. *Dexter*, S. C. Mich., April Term 1878.

Voluntary Appearance of Garnishees—Effect of Judgment.—A judgment against the garnishees upon their voluntary appearance to a second summons issued after such discontinuance, does not bar a recovery against them on a previous assignment from their creditor: *Id.*

GIFT.

Delivery—Transfer of Stock.—T. transferred stock to F., a niece of his wife, on the books of a corporation, but retained the certificates in his possession, and after his death they were found in an envelope, with his own name and that of F. endorsed thereon. F. had no knowledge of the transfer. She lived in the family of T. and was in all respects treated and regarded as his daughter. *Held* (affirming the court below), that the transfer on the books of the corporation vested in F. the legal title to the stock and she was entitled to the same: *Roberts's Appeal*, 85 Penna. St.

Held further, that the circumstances of the case rebutted the presumption of a resulting trust: *Id.*

HIGHWAY.

Insufficiency of, is question of Fact—Not for Opinions of Experts.—While in extreme cases the insufficiency of a highway may be so great and manifest as to warrant the court in holding it insufficient as a matter of law, the question is generally one of mere fact for the jury, upon evidence of the actual condition of the highway: *Benedict and Wife* v. *City of Fond du Lac*, 44 Wis.

While there might possibly be cases in which the opinions of experts would be admissible upon questions going to the sufficiency of a highway, yet generally the question of such sufficiency is not one of science or skill, and the opinions of witnesses thereon are inadmissible; and the

exclusion in this case of such testimony of one who had been a civil engineer, but did not appear to be an expert as to the construction of highways, was not error: *Id.*

INSURANCE. See *Corporation.*

Interest of Plaintiff at time of Loss— Vendor in Possession—Intended Demolition of Premises under Compulsory Powers.—The plaintiff insured his premises in the defendants' office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding 1600*l.* The premises were afterwards required by the Metropolitan Board of Works, under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the plaintiff was assessed by arbitration, according to the Lands Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire: *Held*, that the defendants were liable to pay the plaintiff 1500*l.*, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendants' contract: *Collingridge* v. *Royal Exchange Assurance Corporation*, Law Rep. 3 Q. B. Div.

JURY.

Presence of Unauthorized Person during Deliberations of.—It is the duty of the courts to enforce a rigid and vigilant observance of the provisions of the statutes designed to preserve inviolate the right of trial by jury and the purity of such trials: *State* v. *Snider*, 20 Kans.

After a conviction of an accused for the offence of obtaining by false pretences the signature of a firm to a check of $850, and in support of a motion for a new trial affidavits were filed proving that the bailiff who had the jury in charge, and who had testified on the trial on the part of the prosecution to material facts against the prisoner, was with the jury in the jury room the greater part of the time while they were deliberating on their verdict, and no explanation was made of the presence of the officer with the jury in their consultations together, and the state made no showing that the rights of the prisoner were not prejudiced by the acts and conduct of such officer and witness: *Held*, that the verdict should have been set aside and a new trial granted: *Id.*

LIBEL.

Publication.—An averment, in libel, that the defendant, "composed, *uttered*, wrote and sent to R. Dunn & Co., in Milwaukee, Wis. (a commercial agency)," certain words concerning the plaintiff, sufficiently avers *publication* of the words: *Benedict* v. *Westover*, 44 Wis.

Persons convicted of Felony—Effect of enduring the Punishment—Justification.—In an action by the editor of a newspaper for libel in calling him a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labor. The plaintiff replied that after his conviction he underwent his sentence of twelve months' imprisonment and hard labor and so became as cleared from the crime and its consequences, as if he had

received the Queen's pardon under the great seal. On demurrer: *Held*, a good reply: *Leyman* v. *Latimer*, Law Rep. 3 Ex. Div.

Semble, that it is defamatory to call a person who has been convicted of felony "a convicted felon," if he has received a pardon or suffered his sentence: *Id.*

Lien.

Statutes creating, to be strictly construed.—It is a general principle that lien laws being innovations on the common law, their provisions cannot be extended in their operation and effect beyond the plain sense of their terms, and parties asserting liens or titles resting upon them, must bring themselves and their titles distinctly within these terms: *Wagar* v. *Briscoe et al.*, S. C. Mich., April Term 1878.

Mandamus.

Impossibility of performing Statutory Duty—Want of Funds.—The court will not issue a writ of mandamus against a public body when it is clearly shown that the performance of the duty sought to be enforced is impossible, by reason of want of funds not involving any default on the part of such body. An order was issued by the board of trade, under the 7th section of the Railway Clauses Act, 1863 (26 and 27 Vict., ch. 92), directing a railway company to make a bridge for the purpose of carrying a turnpike road over their line instead of crossing the same on the level. Previously to the making of this order the company had exhausted all their powers of raising money in making the line, and, the undertaking proving a failure, they had leased their line in perpetuity to another company, and such lease was confirmed by a special Act of Parliament. The lessees took all the profits of the line, paying a portion of the interest due to the company's debenture stockholders. The company consequently had no funds for the construction of the bridge. On an application for a mandamus to compel the company to comply with the order of the board of trade, the above facts being shown, the court discharged the rule for the mandamus: *Re The Bristol & North Somerset Railway Co.*, Law Rep. 3 Q. B. Div.

Master and Servant. See *Negligence.*

Railroad Company—Inspection of Cars—Negligence.—A railroad company is under obligations to its employees to exercise reasonable diligence in inspecting and repairing its cars, and is liable for injury to an employee caused by a defect in one of its cars, which the company, in the exercise of ordinary care, would have discovered and remedied: *Wedgwood* v. *C. & N. W. Railway Co.*, 44 Wis.

The question of defendant's negligence was properly submitted to the jury, upon evidence that a bolt in the brake beam of one of its cars projected unnecessarily for a considerable distance, so as to be in the way of a brakeman coupling such car to another, and that the injury complained of, received by plaintiff while coupling for defendant, was caused by such projection: *Id.*

Such projection, if a defect, being an *obvious* one, which defendant was bound to remedy, there was no error in refusing to charge the jury that if the car became thus defective after it was first put in use by defendant (several years before the accident), the latter was not liable

unless it had *notice* of the defect. *Smith* v. *The C., M. & St. P. Railway Co.*, 42 Wis. 520, distinguished: *Id.*

After charging that any contributory negligence of plaintiff at the time of the accident would prevent a recovery, the court did not err in refusing to charge that if plaintiff had as good opportunity or means of knowing the defect as defendant had, but overlooked it, this was negligence which would prevent a recovery. And especially was this not error where there was no evidence that plaintiff was familiar with the car, or had ever before coupled it: *Id.*

In the absence of proof that plaintiff was in charge of the car at the time of the injury, except so far as is implied in his service as brakeman or had any duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it and to avoid it if dangerous, and that his failure to do so would prevent a recovery: *Id.*

MINE.

Working by Tenant for Life—Waste.—A tenant for life may, when not precluded by restraining words, work open mines to exhaustion: *Westmoreland Coal Co.'s Appeal*, 85 Penna St.

The term "mine," when applied to coal, is equivalent to a worked vein, and if it be worked a tenant for life may pursue it to the boundaries of the tract: *Id.*

Where there are two different tracts separated by an intervening tract owned by another, with a vein extending beneath them, the opening on one tract does not extend to the other, and the tenant for life mining under the unopened one is guilty of waste: *Id.*

NEGLIGENCE. See *Master and Servant.*

Bank—Special Deposit of Bonds.—A special deposit of bonds was left by a customer with the cashier of a national bank for safe keeping, with the knowledge of its directors, and the cashier gave a receipt therefor. The bonds were subsequently stolen and the bank offered no satisfactory explanation of the manner of the theft. *Held*, that there was sufficient evidence of gross negligence to be submitted to the jury. *Held, further*, that a recovery could be had against the bank if the bonds were stolen through the gross negligence of its officers: *First National Bank of Carlisle* v. *Graham*, 85 Penna. St.

NOTICE. See *Possession.*

PAINTINGS.

Painting or Picture—Patterns and Designs.—The word "paintings" in the Carrier's Act (11 Geo. 4, and 1 William 4, ch. 68) sect. 1, is used in its ordinary and popular sense to denote works of art. Colored imitations of rugs and carpets and colored working designs, each of them valuable, and designed by skilled persons and hand painted, but having no value as works of art, *held*, not to be paintings within the Carrier's Act: *Woodward* v. *The London & Northwestern Railway Co.*, Law Rep. 3 Exch. Div.

PARTNERSHIP. See *Bills and Notes.*

Claim of one Partner against another before Settlement—Waiver of

Objection by going to Trial.—It is the settled law of this state, that before the partnership transactions are closed and an accounting had, one partner has no claim against his co-partner individually on account of such transactions, although a final settlement of the affairs of the firm would show a balance in his favor: *Tolford* v. *Tolford*, 44 Wis.

But where such a claim was set up in connection with other money demands, and the case was fully tried and submitted to the jury upon all the alleged causes of action, the objection that such claim was not a valid cause of action not being taken in any form before or at the trial, and a new trial being asked only on the ground that the verdict was "contrary to law and the evidence:" *Held*, that the error of law was waived, and is no ground of reversal: *Id.*

Liability of Incoming Partner.—An incoming partner may undoubtedly by agreement become liable for debts contracted by the firm previous to his entering it, but the presumption of law is against any such liability and requires proof to remove it: *Kountz* v. *Holthouse*, 85 Penna. St.

Possession.

Notice of Rights.—Actual, open and notorious possession of land is constructive notice of the possessor's rights (*Wickes* v. *Lake*, 25 Wis. 71); and where C. was in possession of land under a parol contract of sale, and M. took from C.'s vendor a mortgage of the land, with knowledge of C.'s possession, but in ignorance of his rights as purchaser, the mortgage was void as against C.: *Cunningham* v. *Brown*, 44 Wis.

Prescription.

Division Line agreed upon and occupied for Twenty Years.—If two coterminous proprietors agree upon and establish a dividing line between their premises, and actually claim and occupy the land on each side of that line, continuously, for twenty years, such possession is *adverse*, and confers title by prescription: *Bader* v. *Zeise*, 44 Wis.

In ejectment, where there was a road along and over the strip of land in controversy, and the respective parties or their grantors had built fences, adjoining the road, each on that side of it on which the body of his land lay: *Held*, that if the centre of the road was agreed upon and established as the true boundary, and each party had claimed and occupied up to the fence maintained by him, for twenty years before the action was commenced, he was precluded from claiming a different boundary: *Id.*

Replevin.

Sale by Sheriff of wrong Person's Goods—Parties.—Where a sheriff seizes the personal property of A. on an attachment against the property of B., and thereafter he sells the same at a public sale, upon a valid order of sale, after judgment, and at such sale delivers the actual possession of the property to the purchaser and thereafter has no actual nor constructive possession of the property nor any interest therein, contingent or conjoint, and no part or connection with the detention of the property from A.; *Held*, such sheriff is not a proper party defendant in an action of replevin brought after such sheriff's sale to recover the property and damages for its detention: *Moses* v. *Morris*, 20 Kans.

Mixture of Goods with those of Another.—Where the plaintiff's goods have been commingled with like goods of the defendants by the wrongful act of a third party, replevin will nevertheless lie therefor: *Wilkinson, Carter & Co.* v. *Stewart et al.*, 85 Penna. St.

It seems, however, that if the character of the goods is so essentially changed by the mixture that one aliquot part would not be the equivalent for another, the case would present a different question: *Id.*

SALE. See *Contract.*

Implied Warranty of Merchantable Quality—Rescission.—A vendor impliedly warrants goods sold by him without any opportunity of inspection on the part of the buyer to be of a merchantable quality and reasonably fit for the purpose intended, and if when the goods are delivered to the buyer, they are unmerchantable and unfit for use, the buyer may return them without unnecessary delay and rescind the contract; and if the goods on being returned to the vendor are injured or damaged without any fault or negligence on the part of the buyer, such injury does not prevent a rescission of the contract: *Bigger* v. *Bovard*, 20 Kans.

SET-OFF. See *Action.*

Practice—Assignment of Chose in Action—Set-off and Counter-claim for Damages against Assignee for Breach of Contract by Assignor.—The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counter-claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor: *Held*, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor, and that the form of the defence must be amended accordingly: *Young* v. *Kitchin*. Law Rep. 3 Exch. Div.

STATUTE. See *Constitutional Law.*

State Laws—Volumes published under Authority of State, Prima Facie Evidence.—The publication of an act in the bound volumes of session laws of the year in which it purports to have been approved, verified by the secretary of state, creates a presumption that it became a law pursuant to the requirements of the constitution: *Bound* v. *Wisconsin Central Railroad Co.*, 44 Wis.

Where the journal of a branch of the legislature, published as required by the constitution, gives a list of the numbers and titles of numerous bills in immediate succession, followed by the words "*was* read a third time," &c.: *Held*, that the word "was" is an obvious clerical error for "were," and the journal is evidence that *all* the bills named in such list were read a third time: *Id.*

TIME.

Fraction of Day—Keeping Dog without License—License subsequently obtained on the same Day.—On the 21st of October, the respondent

kept a dog without having in force a license granted under 30 Vict. c. 5. He thereby became liable to a penalty under s. 8. His default was discovered by the Excise, and he took out a license at a later hour on the same day. Sect. 5 enacts that every license shall commence on the day on which the same shall be granted. An information against him laid before a magistrate, charged his offence to have been committed on the 21st of October. At the hearing, he produced the license granted on the 21st of October, and the charge was dismissed: *Held*, that the dismissal was wrong, because an offence had been committed on the 21st of October, and the subsequent license operated only from the time when it was granted, and did not relate back to the earliest moment of that day so as to justify the violation of the act before the license existed: *Campbell* v. *Strangeways*, Law Rep. 3 C. P. Div.

TORT. See *Action.*

VERDICT.

Alteration of, before Recording.—After the delivery of the verdict, the judge told the jurors that they were discharged; but immediately thereafter, before they had left their seats or communicated with any one, he called their attention to imperfections in the verdict, and put it into the form which the jurors affirmed they intended, and, as amended, it was signed by the foreman, and declared by the jury to be their verdict. *Held*, no error: *Victor Sewing Machine Co.* v. *Heller*, 44 Wis.

WARRANTY. See *Contract; Sale.*

WASTE. See *Mine.*

WILL.

Intoxication as affecting Testamentary Capacity.—A will is not necessarily void for the testator's intoxication. Intoxication is a term capable of no precise definition, and there are many degrees of it. If the act which the testator does, is one which his intoxication does not prevent him from doing with comprehension, it cannot of itself avoid it. As a will is generally the result of previous deliberation, and not entirely of the single interview when it is executed, it is not impossible for a person more or less intoxicated to make one which is not the product of the intoxication: *Pierce et al.* v. *Pierce et al.*, S. C. Mich., April Term 1878.

The presumption of undue influence from the retention of a will uncancelled by a testator, is no more significant than such retention would be in case of intoxication. The inference that it was not procured to be executed against his will or without his intelligent consent arises as naturally in cases of asserted intoxication as in those of fraud or undue influence: *Id.*

The question of the effect of intoxication upon the person's capacity is not a scientific question to be determined by experts, but one within common observation, depending on the facts of each case, and as it is a temporary condition, the testimony must be confined to the time involved in the transaction in controversy: *Id.*

WORDS. See *Paintings.*