He did not wait for the policy to become a claim, he did not resort to a court of equity to have the policy established, and he did not elect to consider the policy at an end. But he brought a suit on an alleged implied promise, and seeks to recover the full amount of the premiums paid, with interest, leaving the question of the defendants' liability on the express promise contained in the policy, an open one. This we think cannot be done.

The plaintiff's declaration is insufficient and the superior court is advised to arrest the judgment.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF IOWA.[2]
SUPREME JUDICIAL COURT OF MAINE.[3]
SUPREME COURT OF MISSOURI.[4]
SUPREME COURT COMMISSION OF OHIO.[5]

AGENT. See *Officer; Railroad.*

Note in Agent's Name as Treasurer, &c.—A promissory note of this form: "One year after date we promise to pay to the order of A. B., one thousand dollars, value received," and signed, "George Moore, Treasurer of Mechanic Falls Dairying Association," is the note of Moore, and not of the association; and it makes no difference that the plural "we" is used instead of "I:" *Mullen* v. *Moore*, 68 Me.

AUCTIONEER. See *Constitutional Law.*

BILLS AND NOTES. See *Agent; Collateral Security.*

Endorser's Liability.—Evidence will not be received for the purpose of showing that a payee of a promissory note, who has transferred it by an endorsement in blank, verbally agreed, at the time of making the endorsement, to assume an absolute and unconditional liability, and not the liability simply of an endorser: *Rodney* v. *Wilson*, 67 Mo.

CHATTEL MORTGAGE. See *Mortgage.*

COLLATERAL SECURITY.

Demand and Notice as against an Endorser holding security for his indemnity.—Demand and notice is not necessary as against an endorser,

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[1] Prepared expressly for the American Law Register, from original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

[2] From J. S. Runnells, Esq., Reporter; to appear in 47 Iowa Reports.

[3] From J. D. Pulsifer, Esq., Reporter; to appear in 68 Maine Reports.

[4] From T. K. Skinker, Esq., Reporter; to appear in 67 Missouri Reports.

[5] From E. L. DeWitt, Esq., Reporter; to appear in 32 Ohio St. Reports.

who, at the date of the maturity of the note, has sufficient property of the maker in his possession held as security against his liability. *Beard* v. *Westerman*, 32 Ohio St.

A party holding one of a series of notes secured by chattel mortgage, who obtains possession of the property mortgaged, holds it in trust for the owners of the notes; and if he purchase such property at a sale made by himself, he will be held to account for the fair value of the same: *Id.*

CONSTITUTIONAL LAW.

Auctioneer's Sales, Tax on—Regulation of Commerce.—A tax laid by a state on the amount of sales made by an auctioneer is a tax on the goods sold: *Cook* v. *Pennsylvania*, S. C. U. S., Oct. Term 1878.

Where the goods sold for which he is required to collect and pay a tax are imported goods in the original package, sold for the importer, the law which authorizes the tax is void as laying a duty on imports and as a regulation of commerce: *Id.*

CONTRACT. See *Name.*

CORPORATION. See *Agent.*

Contracts ultra vires.—Corporations possess such powers, and such only as the law of their creation confers upon them; and when created by public acts of the legislature, parties dealing with them are chargeable with notice of their powers, and the limitations upon them, and cannot plead ignorance in avoidance of the defence of *ultra vires*: *Franklin Company* v. *Lewiston Institution for Savings*, 68 Me.

The trustees of the Lewiston Institution for Savings subscribed for $50,000 of the capital stock of the Continental Mills, and having no money to pay for it, the Franklin Company, another corporation, paid that amount at the Continental Mills, taking the notes of the savings institution therefor, and a certificate of the stock in their own name as collateral security for the payment of the notes. *Held*, that the action of the trustees of the savings institution was *ultra vires;* that it is not within the authority of savings institutions, at a time when they have no funds for investment, to purchase stocks or other property not needed in immediate use, on credit, and thus create a debt binding on the institution; that the Franklin Company, having participated in the illegal transaction, could not claim the privileges of a bona fide holder of commercial paper; and that the savings institution, having received no benefit from the transaction, was not estopped to set up the defence of *ultra vires*: *Id.*

Semble, upon the authorities cited, that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law: *Id.*

CRIMINAL LAW.

Revision and Alteration of Sentence.—Where a court in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term, and before the original sentence has gone into opera-

tion, or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law. *Lee* v. *The State*, 32 Ohio St.

In the absence of anything on the record showing what the facts were, the reviewing court will presume that the court below acted upon sufficient and valid information : *Id.*

DEBTOR AND CREDITOR. See *Frauds, Statute of.*

DEED.

Weakness of Grantor's Intellect.—A deed will not be set aside because of the weakness of the grantor's intellect, unless undue advantage has been taken of such weakness in procuring its execution: *Marmon* v. *Marmon*, 47 Iowa.

EASEMENT.

Non-user—Abandonment —The non-user of an easement for twenty years is evidence of intention to abandon ; but it is open to explanation, and may be controlled by proof that the owner had no such intention while omitting to use it : *Pratt* v. *Sweetser*, 68 Me.

EQUITY.

Reformation of Policy of Insurance.—K. took out a policy of insurance on certain cotton, on account of the firm of which he was a member, but the policy did not state in terms that the insurance was for and on account of said firm. K., however, was assured by the agents for the insurance company, that this was not necessary. Relying upon these assurances, and ignorant that, by the terms and legal effect of the terms employed, no other interest in the cotton was insured except his, K. took the policy into his possession in the full belief that it covered the entire interest of the firm ; soon thereafter, however, upon being advised to the contrary by his attorney, he demanded of the insurance agents that the policy be corrected so as to conform to the real contract and agreement, but they refused to correct or alter the same in any way. *Held*, that a court of equity has jurisdiction in such a case to reform the policy: *Snell et al.* v. *Atlantic F. & M. Insurance Co.*, S. C. U. S., Oct. Term 1878.

ESTOPPEL. See *Husband and Wife.*

EVIDENCE. See *Bills and Notes ; Frauds, Statute of ; Officer ; Railroad ; Trial.*

Opinion of Witness—Intoxication.—A witness may state whether or or not in his opinion a person is intoxicated, and is not confined to a statement of the conduct and demeanor of the party inquired about: *The State* v. *Huxford*, 47 Iowa.

Upon the trial of a person indicted for being found in a state of intoxication, evidence respecting the conduct of defendant at other times when intoxicated is admissible, for the purpose of showing the character of the acts relied upon as evidence in the case : *Id.*

FIXTURES.

Manure on Farm.—Manure, accumulated in the course of husbandry from the occupation of a farm belonging to a wife, as between her and

her husband, is a part of the land belonging to her, although his stock and his hay, brought upon the place while occupied by them, in part produced the accumulation : *Norton* v. *Craig*, 68 Me.

FRAUDS, STATUTE OF.

Paying Debt of Another—Evidence.—A. being a creditor of B. and also debtor to C. in an equal amount, it was verbally agreed by way of settlement among them, that B. should pay C. what he owed A. *Held*, that the agreement was not within the Statute of Frauds, and was binding: *Wright* v. *McCully*, 67 Mo.

An order having been drawn by A. upon B. in favor of C., to carry out such an agreement : *Held*, admissible in evidence to show the exact amount B. has assumed to pay : *Id.*

HIGHWAY.

Town—Width of Highway—Combined effect of Defect and other cause.—A town is not required to render its roads passable for travelling for the entire width of their located limits, but only to keep a width thereof in a smooth condition, sufficient to render the passing over them safe and convenient: *Perkins* v. *Inhabitants of Fayette*, 68 Me.

A town has the right, in making or repairing a road, to remove stones and stumps on to, and leave natural obstructions upon, the sides of a way; provided the same are situated so far from the travelled track that persons with teams may pass without danger of coming in collision with them : *Id.*

A town is not liable for damage sustained by a traveller from the fright of his horse at meeting cows in the road with boards on their horns, and also from a defect in the way, the combined action of both causes operating to produce the accident: *Moulton* v. *Sanford*, 51 Me. 127, reaffirmed: *Id.*

HOMESTEAD. See *Husband and Wife.*

HUSBAND AND WIFE. See *Fixtures.*

Rights and Liabilities of Wife—Homestead.—By the laws of Iowa the wife has similar property rights and is chargeable with similar obligations with the husband under like circumstances, and coverture is no defence against the enforcement of the rights of others growing out of her contracts: *Spafford* v. *Warren*, 47 Iowa.

The wife may ratify a defective and void conveyance of her homestead, in all cases where her husband could ratify such an act: *Id.*

A void deed of a homestead, in all cases where a similar deed of other property could be ratified, may be ratified by the assent or contract of the parties, expressed or presumed from their acts : *Id.*

Where a conveyance of the homestead by the wife was void, but she surrendered possession of the property voluntarily, made no objection to the grantee's title when in her presence he offered to sell it, and permitted him to remain in quiet possession for more than three years and make improvements without protest, *held*, that her conduct amounted to a ratification of the deed; *Id.*

Necessaries—Liability of Husband for, when Wife living separate.—Where a wife is living separate and apart from her husband, and, in a suit against him for divorce and alimony, has obtained a decree fixing

the amount of alimony to be paid by the husband for her sustenance during the pendency of her petition, and the husband is not in default in respect to the payment of the alimony so allotted, he is not liable for necessaries subsequently furnished at her request during the pendency of her petition: *Hare* v. *Gibson*, 32 Ohio St.

Persons dealing with the wife, under these circumstances, do so at their own peril, and are chargeable with knowledge of the allotment and payment of the alimony: *Id.*

The adequacy of the alimony decreed in such case, can not be collaterally drawn in question, especially by a stranger to the suit: *Id.*

INSURANCE. See *Equity*.

Marine Insurance—Particular Average—Partial Loss.—The memorandum clause in an open policy of insurance, on three barge loads of wheat, described the risk as 39,085 bushels bulk wheat, at $1.15 per bushel—sum $449.45; rate 1; premium $449.45; to be conveyed from Lansing to St. Louis by steamer and barges. In an action upon the policy, it was held that the wheat was insured in bulk, and not in packages, either of one bushel or one barge each; that a clause in the policy, "Each package shall be subject to its own average," did not apply to such a risk; and that, in determining the percentage of partial loss, the proportion between the entire actual loss and the value of the entire shipment must be ascertained: *Haenschen* v. *Franklin Ins. Co.*, 67 Mo.

INTEREST.

Special Rate—Note payable on demand.—On a note payable on demand, with interest at ten per cent., that rate of interest is recoverable up to the date of the verdict, when damages are assessed by a jury, and up to the date of judgment, when a default is entered in a suit on the note: *Paine* v. *Caswell*, 68 Me.

INTOXICATION. See *Evidence*.

LANDLORD AND TENANT. See *Mortgage*.

LUNATIC. See *Deed*.

MASTER AND SERVANT. See *Railroad*.

MORTGAGE. See *Collateral Security; Possession*.

Rule of State Courts or Statute as to Order in which Real Estate shall be subjected to Satisfaction of Mortgage, followed by Federal Courts.—Right of Redemption.—The order in which real estate which has been mortgaged, and subsequently sold at different times to different purchasers, shall be subjected to satisfaction of the mortgage is, where the rule is established by state statute or the decisions of state courts, a rule of property which will be followed by the federal courts sitting in such state: *Orvis* v. *Powell*, S. C. U. S. Oct. Term 1878.

The right of redemption, after sale on foreclosure, in Illinois, as decided in *Brine* v. *Insurance Co.*, 6 Otto, re-affirmed: *Id.*

When not recorded—Landlord's Lien.—An unrecorded chattel mortgage is not valid as against a mortgage subsequently executed and entered of record: *Pitkin* v. *Fletcher*, 47 Iowa.

By taking a mortgage which, from a failure to record it, cannot be enforced, a landlord does not lose his landlord's lien upon the property of his tenant: *Id.*

MUNICIPAL BONDS.

Recital on their Face of Election to authorize their Issue—Innocent Holder.—Where municipal bonds, upon their face, refer to the ordinance of the city council authorizing their issue, printed on the back, and in the ordinance it is distinctly recited that the election required by law was held, pursuant to notice, given in accordance with the provisions of the act authorizing a subscription, and that upon a canvass of the votes "it appeared that there had been cast for subscription a large majority of the votes of said city, the number of votes given being a large majority of all the votes polled at the last general election in said city, and a much larger vote than that required by the act aforesaid to authorize said subscription," and the said bonds are in the hands of an innocent holder. *Held*, that it is not error in the court below to sustain a demurrer to pleas which simply tender an issue as to the authority of the city to issue the bonds, and as to the fact of an election in the manner provided by law: *City of Nauvoo* v. *Ritter*, S. C. U. S., Oct. Term 1878.

NAME.

Signature Binding, though not in usual Name.—A contract is binding when signed by the party making it, though he may use an English translation of a French name, as Seam for Couture, in his signature thereto: *Augur* v. *Couture*, 68 Me.

NEGLIGENCE.

Railroad Crossing—Negligence as Matter of Law.—Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed: *Pennsylvania Co., &c.* v. *Rathgeb*, 32 Ohio St.

In an action for damages for alleged negligence, the question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is generally a mixed question of law and fact, to be decided by the jury, under proper instructions from the court: *Id.*

But if all the material facts touching the alleged negligence be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of negligence becomes a matter of law merely, and the court should so charge the jury: *Id.*

The court, in charging the jury, observed: "I will not say to you that the plaintiff should have looked east along the track. I will only say that he was obliged to use his sense of sight in a reasonable manner; and it is for you to say whether he ought to have looked to the east along the track or not, before he attempted to cross." If it appear that by looking he could have run and avoided the danger, it was his duty to look; and in such case the court should have charged, as matter of law, that it was his duty to look: *Id.*

NUISANCE.

Increase of Population—Effect on Trades in certain Localities—Abatement of Nuisance.—Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity and that it must yield to by-laws and other regular remedies for the suppression of nuisances: *Northwestern Fertilizing Co.* v. *Village of Hyde Park*, S. C. U. S. Oct. Term 1878.

In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offence and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it: *Id.*

OFFICERS. See *Railroad.*

Public Officers—Judicial notice will be taken of the powers and authority of public officers when they are prescribed by law. They need not be pleaded: *State ex rel. Clark* v. *Gates*, 67 Mo.

Where an agent is clothed with general powers, the means and measures necessary to carry them into effect are also granted: and this principle is applicable to public as well as private agents: *Id.*

The state treasurer may pay a demand upon the treasury by a check upon a bank where he has money on deposit, that mode of payment being in accordance with immemorial commercial usage: *Id.*

When a county treasurer receives from the state treasurer a bank check for money due from the state to the county, it is his duty to make presentment for payment within a reasonable time, and if he neglects to do this, and before the check is paid the bank fails, the loss will fall upon himself: *Id.*

PARTNERSHIP.

What does not Constitute.—The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not constitute them co-partners: *Donnell* v. *Harshe*, 67 Mo.

POSSESSION.

Adverse—Extent of when Part of Tract only is occupied—Mortgage.—One who enters upon land under color of title, intending to take possession of the entire tract, no part of which is held adversely at the time of his entry, is deemed to be in possession to the extent of his claim: *Clark* v. *Potter*, 32 Ohio St.

Prior to the code of civil procedure, equity followed the law in determining when time would begin to run against the right of a mortgagor to redeem and when such right would be barred: *Id.*

Hence, if the mortgagee, with the knowledge and acquiescence of the mortgagor, takes actual, open and notorious possession of the mortgage premises and holds and controls the same adversely to the rights of

the mortgagor to redeem for twenty-one years, under color of title derived from the mortgage and from a decree of foreclosure and sale of the same to him, the equity of redemption is barred, although the decree foreclosing the mortgage was null and void: *Id.*

Where the mortgaged premises is an entire tract, as a farm, part of which only is improved, with a tenement thereon, and the possession to the whole is so far adverse as to create a cause of action in favor of the mortgagor, and cause time to commence running against the right to redeem; the temporary interruption of *actual residence* on the land, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenantable for the time being, will not prevent the statute from continuing to run where there is no adverse entry or offer to redeem, and the mortgagee does not abandon his possession and control, but continues to exercise all such acts of ownership and dominion over the premises as the nature of the land and its condition will admit of: *Id.*

RAILROAD. See *Negligence.*

Agency—Officer—Evidence.—No recovery can be had against a railroad company for drugs furnished to a person who has been hurt by the company's locomotive, on the order of a division superintendent of the road, without proof that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer: *Brown* v. *Missouri, Kansas & Texas Railway Co.*, 67 Mo.

Liability of Company for tortious entry of its Contractor on Lands of another.—A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon land which it has acquired, subject to an existing lease, is liable as a joint tort-feasor with the contractor and his servants, for damages done by them, in the prosecution of the work to the crops of the lessee: *Ullman* v. *Hannibal & St. Joseph Railroad Co.*, 67 Mo.

SHIPPING.

Stipulation of Seaworthiness—Implied Contract—Liability of Owner.—Where the owner of a vessel charters her, or offers her for freight, he is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear: *Work* v. *Leathers*, S. C. U. S. Oct. Term 1878.

The owner is liable for the breach of his contract, but the stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable in such case for any of the charter-money. If he uses her he must pay for the use to the extent to which it goes: *Id.*

STATUTE.

Special License followed by General Statute.—Where the legislature by special act grants to A. the privilege or license to do a certain act, as to erect a weir in certain tide waters, and afterwards by a general act gives all others the same right under certain conditions precedent: *Held*, that the general act does not operate as a repeal or modification of the special act: *State* v. *Cleland*, 68 Me.

SURETY.

On Official Bond—Imposition of new Duties on Officer not a discharge of Surety.—The addition of duties to the office of collector of customs different in their nature from those which belonged to the office when the official bond was given will not impose upon an obligor in the bond, as such, additional responsibilities, and such an addition of new duties does not render void the bond of the officer as a security for the performance of the duties at first assumed. The surety, in such bond, will, therefore, not be discharged: *Gaussen, Executrix of Elgee,* v. *United States,* S. C. U. S., Oct. Term 1878.

Requiring a person, who is a collector of customs, to receive a sum of money and apply it in discharge of some liability of the government outside of his ordinary employment, for example, to pay debentures, to disburse money for the construction of a new marine hospital, or for the maintenance and supply of existing hospitals and lighthouses, may impose a new duty upon him, but it leaves his office, as collector, untouched and his accountability in it unimpaired: *Id.*

Bond—Alternative Condition.—Where the condition of a bond for duties is that, within one year, the importer shall pay to the collector $425, *or* the amount of the duties which should be ascertained to be due; *or* should, within three years, withdraw and export them, or transport them to a Pacific port, the condition is in the alternative, and the word "or" cannot be construed "and:" *Dumont* v. *United States,* S. C. U. S., Oct. Term 1878.

TAXATION. See *Constitutional Law.*

TRIAL.

Admissions for purposes of—How far binding.—An admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding justice, in the exercise of his discretion, thinks proper to relieve the party from it: *Holly* v. *Young,* 68 Me.

TRUST AND TRUSTEE. See *Collateral Security.*

Holder of Money for Indemnity is Trustee—Liable for Interest if he uses the Money.—Where the grantee of land holds the purchase-money in his hands after it becomes due by agreement with the grantor, to indemnify himself from loss by reason of an encumbrance on the land, and enjoyment of the rents and profits thereof until the encumbrance is removed, he holds the amount due to the grantor as his trustee, and if he uses the money for his own benefit, he is chargeable with interest on the money from the time it becomes due until paid: *McCrea* v. *Martien,* 32 Ohio St.

UNITED STATES COURTS. See *Mortgage.*

USURY.

Extension of Time of Loan—Surety.—The extension of time of payment of a loan is a loan of money within the meaning of a statute, and where the sureties upon a note executed a new note for the consideration of the extension of time upon the original undertaking, the transaction was held to be usurious: *Kendig* v. *Linn,* 47 Iowa.