ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ERRORS OF CONNECTICUT.[2]
COURT OF APPEALS OF MARYLAND.[3]
SUPREME COURT OF MICHIGAN.[4]
SUPREME COURT OF MISSOURI.[5]
SUPREME COURT OF OHIO.[6]

ACCOUNT.

Attachment of Balance due.—Arbitration.—In an action for an account and the recovery of money, where the defendant admits his indebtedness to the plaintiff in a certain sum, but sets up that a judgment-creditor of the plaintiff has a suit in aid of execution then pending against the plaintiff and defendant, in which such indebtedness is sought to be subjected to the payment of his judgment: *Held*, that it is error to render judgment for the amount so admitted to be due, until such judgment-creditor is made a party, or his right in the premises is determined: *Benson's Adm.* v. *Stein*, 34 Ohio St.

But where a judgment is so erroneously rendered, the error is cured whenever it is made to appear of record in the case that such action in aid of execution has been dismissed by the party: *Id.*

Where, in an action to compel the statement of an unsettled account between the joint owners of a steamboat, with a prayer for a judgment for the amount that may be found due to the plaintiff, the defendant answers that the amount due the plaintiff has been ascertained and fixed by an award upon submission to a third person, and the plaintiff replies, admitting the submission and award, and asks judgment thereon, there is no such departure in pleading as will vitiate a judgment for the amount admitted to be due by the answer. The judgment in such case rests on the petition and answer, and not on the reply: *Id.*

ACTION.

Suit to recover back Compulsory Payments.—Payment made under stress of a legal process is compulsory, and if unlawfully exacted, the person making it can sue to recover it back: *People ex rel. Gebhart* v. *East Saginaw*, 40 Mich.

Mandamus to compel payment to a contractor from a special assessment, was denied where the assessment had been adjudged invalid in a suit brought by a tax-payer to recover back what he had paid: *Id.*

ASSIGNMENT. See *Debtor and Creditor.*

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

[2] From John Hooker, Esq., Reporter; to appear in 45 Conn. Reports.

[3] From J. Shaaf Stockett, Esq., Reporter; to appear in 48 Md. Reports.

[4] From H. A. Chaney, Esq., Reporter; to appear in 40 Michigan Reports.

[5] From T. K. Skinker, Esq., Reporter; to appear in 68 Mo. Reports.

[6] From E. L. DeWitt, Esq., Reporter; to appear in 34 Ohio State Reports.

BILLS AND NOTES. See *Set-off.*

CONSTITUTIONAL LAW. See *Taxation.*

Corporations—Impairing Obligation of Contracts—Statute.—By the statutory code of Georgia, which came in force January 1st 1863, it was enacted that private corporations were subject to be changed, modified or destroyed at the will of the creator, except so far as the law forbids it, and that in all cases of private charters thereafter granted, the state reserved the right to withdraw the franchise, unless such right is expressly negatived in the charter. Two railroad corporations created prior to 1863, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the legislature, passed on the 18th of April 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges and immunities which the companies held by their original charters: *Held*, 1. That by the consolidation a new corporation was created, and the original companies were dissolved. 2. That the new corporation became subject to the provision of the code which reserved the right of the legislature to withdraw its charter, or to change, modify or destroy it. 3. That a subsequent legislative act taxing the property of the corporation as other property in the state is taxed, was not prohibited by that provision of the Constitution of the United States which denies to a state the power of passing a law impairing the obligation of contracts: *Atlantic and Gulf Railroad Co.* v. *State of Georgia*, S. C. U. S. Oct. Term 1878.

The judgment of the highest court of a state, that a statute has been enacted in accordance with the requirements of the state constitution, is is conclusive upon this court, and it will not be reviewed: *Id.*

CONTEMPT.

Habeas Corpus.—The regularity of a committal for contempt in refusing to pay alimony will not be reviewed on an application for the writ of habeas corpus, if it was regular on its face: *In re Bissell*, 40 Mich.

COPYRIGHT.

What constitutes an Infringement.—The complainants were owners of a copyright of a series of maps of the city of New York, prepared for the use of those engaged in the business of fire insurance, the title of which was as follows: "Maps of the city of New York, surveyed under the direction of insurance companies of said city, by William Perris, civil engineer and surveyor, 1852. Volume 1, comprising the 1st, 2d, 3d and 4th wards." The maps exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference. The maps were made after a careful survey and examination of the lots and buildings in the enumerated wards of the city, and were so marked with arbitrary coloring and signs, explained by a reference, or key, that an insurer could see at a glance what were the general characteristics of the different buildings within the territory delineated, and many other details of construction and occupancy necessary for his information when taking risks The defendant made the necessary examination and survey, and published a similar series of maps for Philadelphia. At first he used substantially the same system of coloring, signs and key, but afterwards changed his signs somewhat, and his key: *Held*, that the

publication of the defendant did not infringe the copyright of the complainants: *Perris* v. *Hexamer*, S. C. U. S., Oct. Term 1878.

A simple copyright of a map does not give a publisher an exclusive right to the use upon other maps of the particular signs and key which he saw fit to adopt for the purpose of his delineations: *Id.*

CORPORATION. See *Constitutional Law; Municipal Corporation.*

Charter—Validity not impeachable collaterally—Estoppel—Res Adjudicata.—The validity of the articles of incorporation of an association cannot be inquired into incidentally and collaterally: *Keene* v. *Van Reuth*, 48 Md.

A party to proceedings in equity under which the title to property has been acquired, is estopped from disputing the title so acquired: *Id.*

Consolidation of—Rights of New Corporation—Equity.—A general law of the state of New York authorized any railroad companies having continuous lines to unite and form a single corporation. Two railroad companies owning roads, one of which was wholly within that state and the other partly within that state and partly within the state of Connecticut, made an agreement to consolidate, and took all the formal measures required to accomplish it, but a question was made as to the validity of the consolidation by reason of the roads not having at the time a completed continuous track. A resolution of the legislature of Connecticut had provided that, whenever a company owning the road lying partly within this state should be consolidated with any other company in the state of New York, in pursuance of the laws of that state, the new company should have all the rights within this state that were possessed by the old: *Held*, 1. That an act subsequently passed by the legislature of New York recognising the consolidated corporation as in existence, validated and established the agreement under which the consolidation was made. 2. That when the legal existence of the new corporation in the state of New York became thus established, it satisfied the requirements of the Connecticut act, and the new company became possessed of all the rights in this state which had been possessed by the old company: *Mead* v. *N. Y., Housatonic & Northern Railroad Co.*, 45 Conn.

The new corporation succeeded to the power possessed by the old company, both in this state and in the state of New York, to issue its bonds to an amount necessary for completing its road, and to mortgage its property and franchise for their security: *Id.*

And this power included the power to issue its bonds in exchange for, and to take up, bonds previously issued by the old company and secured by a mortgage of its property: *Id.*

A bill in equity alleged that the new corporation duly issued its bonds and disposed of a large number of them to divers persons, who were *bona fide* holders of the same and entitled to receive the money due thereon and to the benefit of the mortgage; *Held*, to be a sufficient averment that the bonds were lawfully issued and used: *Id.*

After the bonds were issued and the mortgage executed, and while both were outstanding unsatisfied, but before the mortgage had been recorded, a creditor of the company, with knowledge of all the facts, attached and afterwards levied his execution upon the mortgaged property: *Held*, that he stood no better than if, with such knowledge, he had taken a conveyance of the property, and that he did not obtain priority of title: *Id.*

A court of chancery in this state has jurisdiction of a bill for the foreclosure of such a mortgage, although embracing property out of this state as well as within it: *Id.*

It is a well-established principle that a court of chancery, acting primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree, upon the ground of a contract or an equity subsisting between the parties, respecting property situated out of the jurisdiction: *Id.*

COUNTY. See *Municipal Bonds.*

CRIMINAL LAW. See *Limitations, Statute of.*

Absence of Prisoner.—It is no ground for the reversal of a judgment, that a motion for a new trial was made, argued and overruled in the absence of the prisoner, where no objection was made till after sentence: *Griffin* v. *The State*, 34 Ohio St.

Absence of Prisoner during Trial—Evidence—Reputation.—The fact that the prosecuting attorney began his closing argument to the jury while the defendant was temporarily absent from the court room, will not warrant the reversal of a judgment of conviction, in the absence of evidence that the defendant was prejudiced thereby, or that any substantial portion of the argument was made before his return: *State* v. *Grate*, 68 Mo.

A witness who is well acquainted with a person whose character is in question, and lives in his neighborhood, will be allowed to testify to his general reputation, although he may never have heard it discussed or questioned. Frequently the highest evidence which can be offered of character is of this negative kind: *Id.*

Evidence—Bigamy—Mormonism.—If a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence: *Reynolds* v. *United States*, S. C. U. S., Oct. Term 1878.

In an indictment for bigamy, it is no defence that the accused was a member of the Church of Jesus Christ of Latter Day Saints, commonly called the Mormon Church, and that he married the second time because he believed it to be his religious duty: *Id.*

Murder—Evidence.—On an indictment for murder the prisoner's counsel offered to prove by the widow of the murdered man that her husband was jealous of her, and had accused her of being too intimate with other men than the prisoner, and stated to the court at the time of the offer that he proposed to follow up this proof by evidence tending to prove that the killing for which the prisoner was indicted grew out of a quarrel between the prisoner and the deceased, occasioned by the deceased having charged the prisoner with being too intimate with the wife of the deceased: *Held*, that the proof offered, whether considered by itself or in connection with the evidence with which it was proposed to follow it up, was inadmissible: *Costley* v. *State*, 48 Md.

The general reputation in the neighborhood that the deceased was jealous of his wife, could not possibly furnish any explanation of the circumstances under which his life was taken, and was therefore not admissible in evidence: *Id.*

Personation of Juror.—Where, in a capital case, a person not summoned as a juror personates one who was returned on the venire, sits at the trial and joins in a verdict of guilty, the verdict will be set aside and a new trial granted, it appearing that neither the accused nor his counsel was guilty of laches: *McGill* v. *The State*, 34 Ohio St.

Verdict silent as to one of the Counts of the Indictment.—When an indictment, in distinct counts, charges a rape and an attempt to commit a rape upon the same person, referring to the same act, a verdict of guilty as to either count amounts to an acquittal of the crime charged in the other. The failure of the jury to make an express finding as to the latter, therefore, is not error requiring a reversal of the judgment: *State* v. *Cofer*, 68 Mo.

Debtor and Creditor.

Assignment for Benefit of Creditors—Preference.—The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results from that absolute ownership which every man claims over that which is his own: *Reed* v. *McIntyre*, S. C. U. S., Oct. Term 1878.

Assignments of property for such purposes, not made with the intent to hinder, delay or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects: *Id.*

An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law, was not, for that reason alone, fraudulent and void. If not made with the *intent* to hinder, delay, or defraud creditors, it was sustained at common law: *Id.*

Good Faith—Sale Fraudulent as against Creditors.—A purchaser's good faith is not conclusively established by his uncontradicted testimony. The question is for the jury: *Molitor* v. *Robinson*, 40 Mich.

A sale made by a debtor and not accompanied by immediate delivery is only *prima facie* fraudulent as against his creditors, and not conclusively so: *Id.*

Easement. See *Ejectment.*

Ejectment.

For Easements.—Ejectment does not lie to recover an incorporeal easement, such as the use of an alley: *Taylor* v. *Gladwin*, 40 Mich.

The recital of an incorporeal right in a judgment of ejectment is nugatory and does not affect its validity: *Id.*

Equity. See *Corporation; Specific Performance.*

Ignorance of Law.—Courts of equity may grant relief against acts and contracts executed under mistake or in ignorance of natural facts, but it is otherwise where a party wishes to avoid his act or deed on the ground that he was ignorant of the law: *Ignorantia legis non excusat*: *Andreae* v. *Redfield*, S. C. U. S., Oct. Term 1878.

Opening Decree to let in Defence.—Where a decree has been passed by default, without a hearing upon the merits, a court of equity has power, in the exercise of a sound discretion, to vacate the enrolment in order to let in a meritorious defence, and this may be done upon pe-

tition, without a bill of review or an original bill for fraud: *First National Bank* v. *Eccleston*, 48 Md.

This discretion extends as well to the time when the petition is to be filed as to the other circumstances creating a case: *Id.*

Will not relieve on a ground not stated in the Petition—Mistake.—Plaintiff being the beneficiary in a mortgage in which the land intended to be conveyed was not correctly described, brought his suit to have the mistake corrected. The holder of a later mortgage, covering the same land, was made co-defendant with the mortgagor, the petition alleging that he knew of the mistake when he took his mortgage; and this was the only ground on which the pleadings placed the plaintiff's claim to relief as against him. At the trial it appeared that the later mortgage was given as security for a pre-existing debt. Plaintiff had judgment. On appeal by the holder of the later mortgage, it was contended, on behalf of the plaintiff, that even if the appellant had no notice of the earlier mortgage, as charged, still the judgment was right, since, the later mortgage being given to secure a pre-existing debt, the appellant was not a purchaser for a valuable consideration: *Held*, that the judgment could not be sustained on this ground, no such case being made by the pleadings; and the court having, upon an examination of the evidence, come to the conclusion that the appellant had no notice of the mistake, reversed the judgment: *Cox* v. *Esteb*, 68 Mo.

ESTOPPEL. See *Corporation.*

EVIDENCE. See *Criminal Law.*

Impeaching Party's own Witness.—The defendant after having introduced the testimony of Jonathan Brock, his own witness, taken under a commission issued by consent, offered Brock's previous letter to the defendant, for the purpose of impeaching his credit: *Held*, that when Brock was testifying under the commission, as the defendant's witness, the opportunity was afforded the defendant of confronting him with his letter, but failing to do so, he could not offer his letter at the trial for the purpose of impeaching his credit: *Sewell* v. *Gardner*, 48 Md.

Where a witness gives evidence against the party calling him, who was misled by the prior statements of the witness, the party is not bound by whatever the witness may say, but he is permitted to call other witnesses not to impeach him, but to contradict him as to a fact material to the issue, in order to show how the fact really is; *Id.*

Party as Witness after death of other Party—Husband and Wife.—A widow having testified on her own offer and in her own behalf that her signature and acknowledgment to a certain deed executed by her and her former husband, were obtained from her by duress and fraud on his part, it was objected that she was not a competent witness, after the death of her husband, to testify that her signature to the deed was procured by his fraud and violence: *Held*, that the witness was competent; that such evidence was not excluded by the provision in the Evidence Act that "when an original party to a contract or cause of action is dead, either party may be called as a witness by his opponent, but shall not be admitted to testify on his own offer:" *First National Bank* v. *Eccleston*, 48 Md.

FORMER ADJUDICATION. See *Mandamus.*

FRAUD. See *Debtor and Creditor; Specific Performance.*

HABEAS CORPUS. See *Contempt.*

HOMESTEAD.

Widow's Homestead—Dower.—A widow entitled to both homestead and dower in land of her deceased husband, caused her dower to be assigned, and accepted the assignment, but, being ignorant of her right to a homestead, did not then claim it. Being administratrix of her husband's estate, she also procured from the probate court an order for the sale of all the lands of the estate, but no sale was ever made. In a proceeding subsequently instituted by her to have her homestead set out: *Held*, that her acts did not constitute either a waiver or an estoppel so as to prevent her from asserting her right: *Seek* v. *Haynes*, 68 Mo.

INJUNCTION. See *Mandamus.*

INSURANCE.

Paid-up Policy—Non-forfeiture.—In a life insurance policy the payment of premiums was to cease after ten years. The policy contained a provision that, after two or more of the annual premiums had been fully paid, the policy might be exchanged for a paid-up non-forfeiture policy, for an amount equal to the sum of one-tenth of the amount insured for each premium which had been so paid. A condition of the policy was that, if the amount of any annual premium should not be fully paid on the day and in the manner provided for, the policy should be "null and void and wholly forfeited," and that in case the policy became null and void, all payments which had been made thereon should be forfeited to the company: *Held*, that the right of the assured to exchange the policy for a paid-up non-forfeiture policy was limited to the time during which the policy was in force: *Bussing's Executors* v. *Union Mutual Life Ins. Co.*, 34 Ohio St.

Stock Notes—Statute of Limitations.—The subscribers to the stock of an insurance company organized under a special charter granted prior to the adoption of the present constitution, gave to the corporation their secured promissory notes, payable on demand, for the amount of the stock by them respectively subscribed: *Held*, that the notes must be construed in connection with the nature of the business of the corporation, and in view of the object intended by the parties in giving their notes. Thus construed, the notes were intended to be payable on the call of the directors; and the Statute of Limitations is no more available as a defence against the collection of the notes, than it would have been against the collection of the subscriptions: *Kilbreath* v. *Gaylord*, 34 Ohio St.

INTOXICATING LIQUORS.

Damages caused in part by Sale of—Sunday.—The provision of the act of 1870, which creates a liability on the part of the seller for an injury resulting from intoxication, to which the liquor unlawfully sold or furnished by him contributes only *in part*, is not in conflict with the constitution: *Sibila* v. *Bahney*, 34 Ohio St.

In an action brought by a married woman, under said amended section, for an injury to her means of support in consequence of the intoxication

of her husband, it is not error for the court to refuse to charge that "if the jury award the plaintiff any amount by way of exemplary damages, they should not consider the fact, if such they find it to be, that certain of the illegal sales were made on Sunday:" *Id.*

JOINT DEBTOR. See *Limitations, Statute of.*

LAND DAMAGES. See *Municipal Corporations.*

LANDLORD AND TENANT.

Grant of Reversion—Mortgage.—It is a well-settled principle of the common law that the grant of the reversion or an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion: *King* v. *Housatonic Railroad Co.*, 45 Conn.

Since the statute of Anne, notice of the grant to the tenant has been sufficient in the English courts to entitle the grantee to demand and recover the rents. And that rule has been adopted by the courts of this state, and by those of many of our sister states: *Id.*

Where the grant of the reversion is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he allows the mortgagor to receive them, and afterwards elects to take them himself, and gives notice of his election to the tenant, he becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor: *Id.*

LIMITATIONS, STATUTE OF. See *Insurance.*

Concealment of cause of Action.—It is no answer to a plea of the Statute of Limitations that the cause of action was fraudulently concealed by the defendant until after the statute had attached, and that the suit was brought within the time limited by the statute after the discovery of the right to sue: *Andreae* v. *Redfield*, S. C. U. S., Oct. Term 1878.

Criminal withholding of Pension Money.—Whenever the act or series of acts necessary to constitute a criminal withholding by an agent of pension money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution: *United States* v. *Irvine*, S. C. U. S., Oct. Term 1878.

Joint Promissors.—One joint maker of a note shall not lose the benefit of the Statute of Limitations by reason of payments made by another: *Rogers* v. *Anderson*, 40 Mich.

Unexplained endorsements and endorsements written by or for the payee are not sufficient proof to take a case out of the Statute of Limitations: *Id.*

The admissions of one joint maker are not evidence against another: *Id*

Running when once commenced is not suspended by subsequent disability—A cause of action having accrued and the Statute of Limitations having commenced to run during the lifetime of the devisor of the plaintiff: *Held*, that the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the

plaintiffs, though minors at the time and under disability to sue: *Harris et al.* v. *McGovern et al.*, S. C. U. S., Oct. Term 1878.

When the statute once begins to run, it will continue to run without being impeded by any subsequent disability: *Id.*

United States not barred.—A state statute cannot bar the United States: *United States* v. *Thompson et al.*, S. C. U. S., Oct. Term 1878.

MANDAMUS. See *Action.*

Injunction to restrain Action at Law.—Mandamus will not lie to compel a court to proceed with a trial that has been enjoined: *People ex rel. Ives* v. *Circuit Judge for Muskegon Co.*, 40 Mich.

The sufficiency of an injunction bill cannot be reviewed in collateral proceedings: *Id.*

MORTGAGE. See *Landlord and Tenant.*

Foreclosure.—A mortgage may be foreclosed for interest overdue on the mortgage note, where the principal of the note is not yet due: *Butler* v. *Blackman*, 45 Conn.

Priority of Mortgage for Purchase-money.—A mortgage given to a vendor to secure an unpaid balance of purchase-money of land and recorded on the same day, has priority of one which is given by the vendee, before he has concluded the purchase, to a person who furnishes him the money to make the cash payments, notwithstanding the latter is recorded first: *Turk* v. *Funk*, 68 Mo.

MUNICIPAL BONDS.

County Bond Tax—Limitation of the Rate, part of the Contract.—One who takes county bonds issued under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent., is chargeable with knowledge of the limitation. It enters into and forms part of the contract between him and the county; and the county court cannot be compelled, by mandamus, to appropriate other funds in the county treasury, raised for other purposes, to the payment of such bonds. Neither the fact that they have been reduced to judgment, nor the fact that the specific fund provided is inadequate, can change this rule: *State* v. *Macon County Court*, 68 Mo.

The extraordinary indebtedness incurred by a county in issuing bonds to pay a railroad subscription, is not one of the "expenses of the county" within the meaning of Wag. Stat., sect. 166, 1193, and cannot be paid out of the fund raised by taxation under that section: *Id.*

The county court will not be compelled, by mandamus, to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness, when the result would be to withdraw from the treasury all the funds necessary for the support of the county government, and thus to disrupt and disorganize it: *Id.*

When the county court has refused the application of a creditor of the county, whose claim has been reduced to judgment, for a warrant on the treasury payable out of a particular fund, it will not be compelled, by mandamus, to change its decision and grant the warrant; 1st. Because its action on the appllcation is judicial; 2d. Because an appeal lies from its order to the Circuit Court: *Id.*

The case of the *United States ex rel.* v. *Clark County Court*, 96 U. S. Rep. 211, disapproved.

MUNICIPAL CORPORATION. See *Action.*

Cannot delegate its Legislative Powers— Wharves.—It is well settled that the legislative powers of a municipal corporation cannot be delegated. They are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. Hence, a city authorized by its charter to erect, repair and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharfage; and a contract whereby the city undertakes to do these things is void: *Matthews* v. *City of Alexandria*, 68 Mo.

Damage by grading Street.—The owner of a lot abutting on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power: *City of Akron* v. *Chamberlain Co.*, 34 Ohio St.

The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or, where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade: *Id.*

Whether a grade be unreasonable or not, must be determined by the circumstances existing at the time the grade was established and not by the circumstances existing at the time the abutting lots may have been improved: *Id.*

Within the principle of municipal liability, as above stated, is the case where a lot is improved in anticipation of, and with reference to, a reasonable future grade which is afterward established, and damage results from a subsequent change in the grade: *Id.*

Paramount right over its Streets for the purpose of constructing Sewers —The use of a Street for Railway purposes subject to such paramount right.—On a bill for an injunction to restrain the appellants from removing the railway tracks of the appellee on a portion of Carey street, in the city of Baltimore, the object of such removal being to construct a sewer under the bed of said street, in pursuance of a contract made by the appellants with the city authorities, it was *Held*, That in the exercise of the power to construct sewers they had the right not only to obstruct, but to discontinue entirely the use of Carey street as a highway, so long as it might be necessary for the purpose of constructing a sewer under the bed of the street: *Kirby* v *Citizens' Railway Co.*, 48 Md.

Held further, That the easement of appellee was subject to this *paramount right*, and in constructing its railway the appellee knew, or was bound to know, that its use of the bed of the street for railway purposes, was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare: *Id.*

The power being lawful in itself, it could only become unlawful in consequence of the mode in which it was carried into execution. It was apparent from the bill in this case that the sewer could not be constructed without interfering with the railway track, and whatever injury might result therefrom must be regarded in law as "*damnum absque injuria.*" *Id.*

National Bank.

Competency to hold Real Estate—Mortgage.—Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction: *Union National Bank et al.* v. *Matthews*, S. C. U. S., Oct. Term 1878.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose: *Id.*

New Trial.

In Criminal Case.—Upon a petition for a new trial for newly-discovered evidence, after a conviction for a rape, it was *Held*, 1. That the fact of the evidence of the newly-discovered evidence could not be proved by mere *ex parte* affidavits. 2. That new evidence was not sufficient that merely went to show that the principal witness had before the trial made a statement inconsistent with that made on the trial. 3. Nor that which showed that the witness (the victim of the rape), had altered her opinion as to the petitioner being the person who committed the crime, where the change of opinion originated in a suggestion by another and was arrived at by a process of reasoning: *Shields* v. *The State*, 45 Conn.

It is a general rule that a new trial will not be granted upon the mere after-recollection of a former witness: *Id.*

Motion not reviewable on Appeal.—The motion for a new trial being addressed to the discretion of the court, its action thereon cannot be reviewed on appeal: *Zitzer* v. *Jones*, 48 Md.

Partnership.

Partnership promise to pay a Third Person's Debt—Accommodation Endorsements—Declarations and Admissions of Partners.—A partner is not bound by an accommodation endorsement made in the name of his firm, but without his assent: *Heffron* v. *Hanaford*, 40 Mich.

A partner's declarations cannot bind his associates in concerns foreign to the partnership, nor can his admissions bring such matters within the scope of the business: *Id.*

A note was given by a debtor to an execution-creditor to obtain a release from a levy, and was endorsed in the name of a firm by one of the partners. There was no showing that the firm received any consideration, or that one of the partners consented to the endorsement: *Held*, that it must be presumed that it was purely an accommodation endorse-

ment, and that the creditor, who of course was not a *bona fide* holder, was privy to all the facts: *Id.*

Where the authority of a partner to speak for his associates is not shown, his statements, so far as concerns them, are mere hearsay: *Id.*

PAYMENT. See *Action.*

RAILROAD. See *Municipal Corporations; Taxation.*

REMOVAL OF CAUSES.

After New Trial Granted.—A cause can be removed from a state court to the Circuit Court after a trial and judgment in the state court if before the removal the first judgment has been set aside or vacated, and the right to a new trial perfected: *Chicago and Northwestern Railway Co.* v. *McKinley*, S. C. U. S., Oct. Term 1878.

SET-OFF.

Joint and separate Debts.—The general rule in equity, as at law, is, that joint debts can not be set off against separate debts, unless there be some special equity justifying it: *Second National Bank* v. *Hemingray*, 34 Ohio St.

If there are such equities, the bankruptcy of the party against whom they exist, is sufficient ground for the allowance of the set-off against notes not due at the time of the assignment.

Where a banker induced a firm to continue its deposit account with him, by deceptively holding himself out as being still the holder of several negotiable notes made to him by the principal member of the firm, when in fact he had assigned them as collateral security for a debt, and there was an understanding between the firm and the banker, from the course of dealing between them, that the notes of the individual members were to be paid through the deposit account of the firm, and which he had a right to treat as his own for that and other purposes; on the bankruptcy of the banker, *Held*, That after satisfying the debt for which the notes of the individual member were held as security, the latter, as against the assignees of the bankrupt, is in equity entitled to set off the firm account against the balance due on the notes; *Id.*

In an action on a negotiable note which the plaintiff holds by assignment before due, in consideration of, and as collateral security for a loan made by him to the insolvent payee, against whom the maker is entitled to an equitable set-off to the note, the plaintiff will be limited in his recovery against the maker to the amount of the debt which the note secures, and will not, in addition thereto, be allowed the amount of his attorney's fees in prosecuting the action: *Id.*

SLANDER.

Action by Husband and Wife for charging the Wife with Adultery—Words actionable per se—What is not special Damage.—In suits for slander, pecuniary loss to the plaintiff is the *gist* of the action, and courts at an early day recognised a distinction between words *actionable*, and words *not actionable in themselves.* In the former, the law *presumes* pecuniary loss, whilst in the latter it is necessary to prove special damage to the plaintiff: *Shafer* v. *Ahalt*, 48 Md.

When one charges another with the commission of an offence, it must be such an offence as subjects the party to *corporal punishment*, in order to render the words actionable *per se*: *Id.*

The crime of adultery is not so punishable, and hence to charge one with adultery is not actionable *per se*, and the plaintiff must prove special damage: *Id.*

Special damage in such cases is that which is naturally the consequence of the words spoken, and not such as is occasional and accidental. Sickness of the person slandered, resulting from the slanderous charge, is not sufficient to prove special damage: *Id.*

Specific Performance.

Mistake and Fraudulent Representation as Defences.—Where the facts would preclude an original contracting party from claiming specific performance because it would operate as a fraud on the defendant, no person claiming through him can assert a better right without showing that he is a *bona fide* purchaser: *Berry* v. *Whitney*, 40 Mich.

Mistake may be shown by parol as a defence to the specific performance of a written instrument: *Id.*

Fraudulent representations as to the legal effect of an instrument will avoid it, even if made to one who has actually read it, if unable to judge of its true construction. But the fraud must be contemporaneous with the execution of the instrument and must consist in obtaining the assent of the party defrauded, by inducing a false impression as to its legal or literal nature and operation: *Id.*

A mortgagor gave a warranty deed of the land, subject to the mortgage. A woman acting through her husband bought it from his grantee. The mortgage was foreclosed and the mortgagor bid in the land. The woman filed a bill to remove the cloud from her title and to compel the mortgagor to convey to her the interest he received by the foreclosure sale. The court found that she was not a *bona fide* purchaser without notice that the land was sold subject to the mortgage, and held that it would be unjust to compel a conveyance without payment of the mortgage, and dismissed the bill with costs: *Id.*

Statute.

See *Constitutional Law.*

Street.

See *Municipal Corporation.*

Surety.

Good Faith towards.—If a principal, having knowledge, or a belief founded on reasonable and reliable information, that his agent is a defaulter, requires sureties for his fidelity in the future, and holds him out as a trustworthy person, whereby such security is obtained, he cannot afterwards avail himself of a guaranty so obtained from a person who was ignorant of what was known to, and ought to have been disclosed by, the employer: *Dinsmore* v. *Sidball*, 34 Ohio St.

Taxation.

Exemption from—Constitutional Law.—The act incorporating the Baltimore and Ohio Railroad Company, provides "that the said road or roads with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company, incorporated by this act, and their successors for ever; and

the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden." Neither the act of incorporation nor the constitution of the state then in force, contained any provision reserving to the legislature the right to repeal or amend the charter of the company. *Held:* 1. That the exemption from taxation granted in the charter of the company, was a contract between the state and the corporators, within the protection of the Constitution of the United States, and therefore beyond the power of a subsequent legislature to repeal or in any manner impair. 2. That under the foregoing section of the act incorporating the Baltimore and Ohio Railroad Company, the property and franchises of the company were exempt from taxation; and the franchises being exempt, the gross receipts derived from the exercise of such franchises were also exempt: *State* v. *B. & O. Railroad Co.*, 48 Md.

The gross receipts of the entire road of the defendant from Baltimore to the Ohio river, and the gross receipts derived from the lateral roads built by the defendant, and from all buildings and works necessary and expedient to the operation of its road, were exempt from the imposition of any tax or burthen; and this too whether said road or roads and buildings and works were constructed with money derived from the subscription to its capital stock, or from sales of its shares of stock, or from money borrowed and secured by mortgage, or from the undistributed profits of the company, or from all these sources combined: *Id.*

The buildings and works necessary and expedient to the operation of the road within the meaning of the defendant's charter, were such buildings and works as were reasonably convenient and appropriate to the maintenance and operation of the road: *Id.*

The elevators, wharves, piers and docks owned by the defendant were necessary for its business as a common carrier for the purposes of receiving and storing grain and freight shipped over its road after the same had reached the place of destination, and previous to its delivery to the consignee or owner; but as such common carrier it had no right to own and use these structures for the storage of grain and freight after the owner or consignee had had a reasonable time to remove the same: *Id.*

While the defendant was not authorized by its charter to build and conduct hotels for the accommodation of the public generally, hotels or buildings for the accommodation of passengers over its road, were necessary to its business, and therefore within its charter: *Id.*

TRIAL.

Limiting number of Witnesses.—In an action for slander in charging the plaintiff with dishonesty, the defendant, for the purpose of lessening the damages, offered evidence of the plaintiff's bad reputation in that respect The court limited him to ten witnesses. *Held*, to be a ground for granting a new trial: *Ward* v. *Dick*, 45 Conn.

UNITED STATES COURTS. See *Constitutional Law.*