ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ERRORS OF CONNECTICUT.[2]
SUPREME COURT OF ILLINOIS.[3]
COURT OF ERRORS AND APPEALS OF MARYLAND.[4]
SUPREME COURT OF MICHIGAN.[5]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[6]

ABATEMENT.

Denying Service of Process.—A corporation may put in issue the fact of the service of process upon it by plea in abatement, and thus contradict the officer's return, which is only a *prima facie* evidence of the truth of the facts therein recited: *Union National Bank* v. *First Nat. Bank*, 90 Ill.

ACTION.

Municipal Assessment.—An action will not lie for the money paid on a municipal assessment for benefits, unless such assessment has been judicially annulled: *Davenport* v. *City of Elizabeth*, 12 Vroom.

And this is the doctrine even though such assessment has been laid under an unconstitutional provision: *Id.*

AGENT. See *Usury.*

Knowledge or Notice to.—The knowledge of the agent is chargeable upon his principal, whenever the principal, if acting for himself, would have received notice of the matters known to the agent: *Sooy* v. *State*, 12 Vroom.

In a matter wherein the legislature properly acts as agent of the state, notice to the members of the legislature individually, is not notice to the state; such notice to bind the state must be given to one of the legislative branches in organized session: *Id.*

ASSUMPSIT.

Money had and received.—An employer reserved a certain amount from the wages of his employees, under an arrangement by which he was to pay their grocery accounts, but did not pay it to the party to whom it was due. *Held*, that the latter had an action against him for money had and received: *Donkersley* v. *Levy*, 38 Mich.

BANKRUPTCY.

Exclusiveness of Jurisdiction of Federal Courts—Composition.—While

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1879. The cases will probably be reported in 10 or 11 Otto.

[2] From John Hooker, Esq., Reporter; to appear in 46 Conn. Reports.

[3] From Hon. N. L. Freeman, Reporter; to appear in 90 Ills. Reports.

[4] From J. Shaaf Stockett, Esq., Reporter, to appear in 49 Md. Reports.

[5] From Henry A. Chaney, Esq., Reporter; to appear in 38 Mich. Reports.

[6] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 12 of his Reports.

a bankrupt is going through the process provided for the discharge of his debts under the direction of the only jurisdiction that can discharge them, the state court cannot intervene and enable the creditors to pursue their remedies as if no such proceeding had taken place: *Deford et al.* v. *Hewlett*, 49 Md.

Under the constitution of our courts growing out of the form of our government, made up of state and federal authority, the bankrupt laws clearly provide for the *exclusive* jurisdiction of the Federal Court over matters of bankruptcy, and when that court has acquired jurisdiction it is not suspended by the proceedings for a composition: *Id.*

The bankrupt laws mean by a composition, not the partial but total satisfaction of the debts of the bankrupt when approved by the court. The composition proposed and accepted, and performed by payment in *money* or *promissory notes* equivalent thereto, is binding upon the creditors, extinguishes and discharges the debts, and is an effectual proceeding to accomplish such result: *Id.*

Creditors have no right under such circumstances to resort to the state courts for the recovery of their original debts in case the notes are not paid: *Id.*

Until the bankrupt performs the terms of the composition by payment in money, or his promissory notes to be treated as money, the composition is incomplete and ineffectual; but that would not invest the state court with jurisdiction. The remedy must be sought in the bankruptcy court, and the provisions of the statute point out the mode of redress; and that must be exclusive. But when the bankrupt complies and performs the same by the payment in money, or with money and notes, the composition is an accomplished fact, and the results provided for in the act necessarily follow: *Id.*

Creditors having proved their claims in bankruptcy, and agreed to the composition, and the *pro rata* payment having been made to them by the bankrupt, part in money and part in his promissory notes, to be treated as money, were bound thereby, and had no right to pursue the recovery of their debts through the state courts as if there had been no proceeding in bankruptcy: *Id.*

BILLS AND NOTES. See *Frauds, Statute of.*

Bill of Exchange—What amounts to—Oral Acceptance.—An order drawn thus, "Mr. A. M. W. Please pay J. J. $189 and charge the same to me. W. M." *Held* to be a bill of exchange: *Jarvis* v. *Wilson*, 46 Conn.

A bill of exchange may be accepted orally. The Statute of Frauds does not apply to such an undertaking: *Id.*

After acceptance the acceptor cannot set up want of funds of the drawer in his hands: *Id.*

Notice of Defence—Taking under circumstances of Suspicion.—Where a banker purchases notes on farmers, residing in the vicinity, of a stranger known to be engaged in selling churns through the country, the notes being offered for sale at an unusually large discount, the fact of the proposed large discount being a suspicious circumstance, is enough to put a reasonably cautious person on inquiry as to the consideration of the notes before buying: *Anten* v. *Gruner*, 90 Ill.

CONFLICT OF LAWS. See *Executor.*

CONSTITUTIONAL LAW.

Swamp Lands granted by Congress to the States—Disposal of by State.—Though the grant made by Congress by Act of Sept. 28th 1850, of the swamp and overflowed lands to the states in which they lie, is expressed to be for the exclusive purpose of enabling the states with the proceeds thereof to reclaim the land by levees, &c., it is questionable whether the security for the due application of such proceeds does not rest upon the good faith of the state alone; at all events it seems that Congress alone can take advantage of the non-performance by the state of the conditions of the grant. And as the application of the proceeds to the named objects is only prescribed "as far as necessary," room is left for the exercise by the state of a large discretion as to the extent of the necessity: *American Emigrant Co.* v. *County of Adams*, S. C. U. S., Oct. Term 1879.

Removal of Officers by the Governor.—The Constitution of Illinois, giving the governor power to remove from office any officer appointed by him, for incompetency, &c., being silent as to the mode of its exercise, it follows that the governor may determine whether any of the causes exist for removal from the best lights he can get, and adopt such mode of procedure as he may deem proper and right, and it is not for the courts to dictate to him in what manner he shall perform the duty: *Wilcox* v. *The People*, 90 Ill. 186.

CONTRACT. See *Covenant; Statute.*

Abandonment of—Contractor abandoning his work liable for Loss sustained in completing his work.—J. M. L. made a parol contract with J. H. to plaster for him five houses for $1500, the latter furnishing all the materials as needed. The work proceeded according to the mutual convenience of the parties, and was paid for as it progressed. When the work was partially completed, and J. M. L. had received $650, he abandoned it, alleging that J. H. did not furnish the necessary materials as needed. After notice to J. M. L., other mechanics were employed by J. H., and the work was finished at a cost of $328. J. M. L. afterward filed a mechanic's lien claim for $850 balance claimed to be due under the contract, and a bill in equity was filed to enforce said lien claim. *Held*, 1st, That leaving out of the calculation any claim of J. H. by way of compensation for damage sustained by him, by reason of the non-performance of his contract by J. M. L., he paid for the work $978, and this deducted from $1500, the contract price, left $522 due to J. M. L., which was the full extent of his claim, and which he was entitled to recover. 2d. That as to any claim of J. H., on account of damage occasioned by the delay, it was competent for him at any time, after notice to J. M. L., to proceed with the work, and having the materials ready, if there was failure on the part of J. M. L., to engage other parties to finish his work, and hold J. M. L., if delinquent, for the consequent loss sustained through his non-performance: *Hampson* v. *Lewis*, 49 Md.

CORPORATION. See *Abatement.*

Right of, when Chartered by one State to hold Property in Another—Whether Property is necessary for its Business, no concern of Third Par-

ties.—By the general comity which obtains through the states and territories of the United States, corporations created in one state or territory are permitted to transact business and acquire, hold and transfer property in another. If the policy of the latter state restricts this right, it must be expressed in some affirmative way, and cannot be inferred from the fact that the legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law: *Cowell* v. *Colorado Springs Co.*, S. C. U. S., Oct. Term 1879.

When a corporation is authorized to hold real property, necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the state and the corporation, and is no concern of third parties: *Id.*

Covenant.

Contract—Rescission.—It is only when covenants are mutual and dependent, or when their performance is made an express condition, that a breach involves an avoidance of the contract: *American Emigrant Co.* v. *County of Adams*, S. C. U. S., Oct. Term 1879.

Criminal Law. See *Evidence.*

Selling Liquor to one in the habit of getting Intoxicated.—To support a conviction for selling intoxicating liquor to a person in the habit of getting intoxicated, it is not essential the evidence shall show, beyond a reasonable doubt, that such person is constantly or usually intoxicated; but it is sufficient to show that he has been frequently intoxicated, and has thereby acquired an involuntary tendency to become intoxicated: *Murphy* v. *The People*, 90 Ills.

Error in Statement of Facts by Judge.—It is error in law, if in the charge of a judge in a criminal case, a fact of moment clearly connected with the merits is stated to be in proof, when such fact has neither testimony nor the color of testimony to support it: *Smith* v. *State*, 12 Vroom.

The charge stated that it was a part of the story of the defendant, that the murderer had come in through an opening in the floor of a closet, the fact being that she had never made such a statement: *held*, error, and the judgment reversed: *Id.*

Larceny—Intent Negatived by Drunkenness.—Larceny involves a felonious intent, and if one who takes property is too drunk to have any intent, he is not guilty of it: *The People* v. *Walker*, 38 Mich.

There is a tendency to prove one guilty of larceny in evidence that he was found with another's money; that he had a chance to steal it, and that the owner at once accused him of doing so; that he lied about the manner in which he obtained it; that when accused he claimed it as his own, but afterwards admitted it to be the other man's, and said that the latter had intrusted it with him for safety: and that he had been seen acting as if trying to pick the other's pocket: *Id.*

Damages.

Remote—Contract between Third Persons—Pleading.—Where a water company, organized for the purpose of supplying the inhabitants of a

city with water, contracted with the city to supply the city hydrants with water, and by their neglect to do so the fire department of the city was not able to extinguish a fire occurring in the city, it was held that the water company was not liable in damages to the owner of the property burned, for the neglect to supply the water: *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn.

The allegation of a duty is insufficient without the allegation of facts showing the existence of the duty: *Id.*

An allegation that the defendants were a corporation organized to supply the city with water to extinguish fires—held not to show a duty to supply the water: *Id.*

DURESS. See *Officer.*

EJECTMENT.

Right of Way.—The purchaser of land, over which a railroad is constructed and operated without having acquired the right of way, may, upon receiving a conveyance of the legal title, maintain ejectment against the company for the land so tortiously taken and occupied: *C. & J. Railroad Co.* v. *Hopkins*, 90 Ills.

EQUITY. See *Municipal Corporation; Nuisance.*

Remedy at Law.—Where the allegations of a bill in equity are sufficient to give a court of equity jurisdiction, and the case goes to a hearing upon its merits and the facts are found, the jurisdiction is not defeated by the fact that the finding shows that the petitioner had adequate remedy at law: *Brewster* v. *Colegrove*, 46 Conn.

EVIDENCE.

Murder—Evidence of Married Persons against each other as to Crimes Committed after Separation.—A woman was on trial for a murder committed in an attack by herself and others upon her husband and some associates. The husband and wife had been living apart in great hostility, and divorce proceedings were pending. *Held*, that the husband could testify to the facts of the murder: they had not come to his knowledge in the confidence of the marriage relation: *The People* v. *Marble*, 38 Mich.

Evidence cannot be excluded for proving a distinct offence as well as the one on trial: *Id.*

Three persons were attacked at once. One was killed outright, another was pursued, and all were fired at. The whole transaction lasted about two minutes. *Held*, that in a trial for the murder it was competent to give evidence of the whole transaction as an entirety, including what happened after the killing as well as before: *Id.*

EXECUTOR.

Foreign Executor bringing Assets into State—Remedy is in Forum of original Administration.—A foreign executor, who, after proof of the will at the place of the testator's domicile in another state, comes into this state to reside, and brings with him property belonging to the estate cannot be made liable here, upon the suit of a creditor of the testator,

to the extent of the property brought here: *Hedenberg* v. *Hedenberg*, 46 Conn

The remedy of the creditor is in the forum of the original administration: *Id.*

There is a distinction as to the rights of creditors here, between the case of property thus brought into the state and that of property already here, which the foreign executor comes here to secure: *Id.*

Fixtures.

Machinery converted into Fixtures and brought within a Mortgage.—Chattels may be converted into realty by the purchaser even though he has not paid for them, if they were sold to him without conditions: *Coleman* v. *Stearns Manufacturing Co.*, 38 Mich.

Machinery was set up in a building as follows: A boiler was erected in a brick arch, an engine fastened on timbers let into the ground and resting on a foundation of masonry, and a saw-mill placed over the engine, connected with it by belts and chains and fastened by bolts or screws to the frame work of the building. *Held*, that the mode and degree of annexation was enough to convert these chattels into realty:

Foreign Corporation. See *Corporation.*

Frauds, Statute of. See *Bills and Notes.*

Written Guaranty—Agreements to answer for the Debt or Default of another—Consideration—Parol Proof.—A written guaranty in the following words: "April 17th 1875. We guarantee the payment of a note endorsed by G. W. D., W. M. D., J. T. D., the amount being five hundred dollars, date of note April 19th 1875," is within the Statute of Frauds, and void for want of a sufficient consideration appearing on its face: *Ordeman* v. *Lawson*, 49 Md.

In order to bind a party upon a collateral promise to answer for the debt or default of another, it is necessary that the *consideration* as well as the *promise* should appear from the writing. It is not necessary, however, that the consideration should be stated in express terms, but it is sufficient if it may be collected or implied with certainty from the instrument itself: *Id.*

Where a third party writes upon a promissory note at the same time that the note itself is executed and delivered to the payee, a guaranty in these terms, "I hereby guarantee the *within* or *above* note," "or I hereby guarantee the payment of the *within* or *above* note," and signs it, thus making but one contract, in such case the consideration which upholds the note will support the guaranty, and the latter will be good: *Id.*

And if no date be affixed to such guaranty, so as to leave it uncertain whether it may not have been written *after* the note was executed and delivered, and received as a complete contract by himself, parol proof may be admitted to show *identity of time*, that is to say, that the guaranty was written and signed at the time of the execution and delivery of the note: *Id.*

If a guaranty containing no express consideration be a distinct instrument written upon a separate piece of paper, its reference to the note intended to be guaranteed must be so clear as to identify it *with cer-*

tainty before the consideration of the one can be taken to support the other: *Id.*

In such case though parol proof may perhaps be admitted to establish identity of time, where the instrument of guaranty is without date, yet it can never be resorted to for the purpose of identifying the note by supplying defects in, or removing doubts arising upon, the reference contained in the guaranty itself: *Id.*

The court, upon reading the instrument, must be able to say that there is no ground for any doubt respecting its reference to the note alleged to be guaranteed; and if this cannot be done, the case against the guarantor fails: *Id.*

GUARANTEE. See *Frauds, Statute of.*

HIGHWAY.

Canal Company cutting its Canal across a Public Highway—Obligation of the Canal Company in respect to such Highway—New road across another already in existence.—The appellant sued the county commissioners to recover damages for injuries sustained by reason of the defective condition of a bridge across the Chesapeake and Ohio Canal, over which he was riding on horseback. It was admitted that the road on which this bridge was situated was a public county road in Allegheny county and was such before the canal was constructed. The canal company in constructing their canal cut through and severed this road about the year 1846, and afterwards erected a bridge over the canal at the place of severance. This bridge was burned down some time during the late civil war, and the bridge standing at the time of the accident was shortly afterwards built by the canal company in the place of the one destroyed. The defendants insisted that they were not responsible in this action, because the canal company was by law bound to erect, maintain and keep the bridge in repair. *Held*, 1st. That where a new way or road is made across another already in existence and use, the crossing must not only be made with as little injury as possible to the old road, but *whatever structures* are necessary for such crossing must be *erected and maintained* at the expense of the party under whose authority and direction they are made. 2d. That the duty of maintaining and keeping the bridge in repair devolved upon the canal company. 3d. That the bridge on which the accident happened was a *county bridge*, under the charge and control of the county commissioners, and one which in discharge of their duty to the public they were bound to keep in repair if the canal company neglected its duty in that respect: *Eyler* v. *County Commissioners of Allegheny Co.*, 49 Md.

HUSBAND AND WIFE. See *Evidence; Insurance.*

INJUNCTION. See *Municipal Corporations; Nuisance.*

INSURANCE.

For benefit of Wife—Subsequent Divorce.—A husband procured a policy on his life, payable to his wife for her sole use, or in case of her death before his, to their children, the charter of the insurance company providing for such insurance and protecting the interests of the beneficiaries. The policy was issued to the wife and delivered to and kept by her. She obtained a divorce from him seven years after, and after-

wards, without his knowledge, surrendered the policy to the company and took a paid-up policy, conforming in all respects to the original one. The husband had paid the annual premiums, except the one next preceding the divorce, which was paid by her. There were no children. She soon after died, and a little later he also. *Held*, that her representatives and not his were entitled to the insurance money: *Phœnix Mutual Life Ins. Co.* v. *Dunham*, 46 Conn.

The paid-up policy required an annual payment of interest on certain premium notes. The wife paid the interest till her death, and the next payment, the only later one before the husband's death, was made by him. *Held*, that his representatives were entitled to repayment from the money received of the interest so paid: *Id.*

INTEREST.

When due on Moneys not accounted for by public Officer.—A paymaster's bond was conditioned that he should regularly account when thereunto required, for all moneys received and "should refund at any time when thereunto required, any public moneys remaining in his hands unaccounted for." In an action against his sureties, *held*, that no breach of the bond occurred until notice was given that a definite sum had been found by the proper accounting officer to be due and payment of the same required, and that until such breach no interest accrued on such sum: *United States* v. *Curtis*, S. C. U. S., Oct. Term 1879.

At what Rate to be Charged.—On loans and forbearances of money, the rate of interest agreed upon, or if no rate be agreed upon, the legal rate then prevailing is the rate that will run until the actual repayment of the money: *Mayor of Jersey City* v. *O'Callaghan*, 12 Vroom.

But where damages for breach of contract, or for torts, are to be assessed, the rate of interest will change as the statutory rate changes during the accrual of the damages: *Id.*

JUDICIAL SALE.

Order of Re-sale at the risk of the Purchaser, without Notice, erroneous—Proceedings against Purchaser failing to comply with Terms of Sale.—A trustee made report of the sale of certain mortgaged real estate and on the same day of reporting the sale, he filed a petition alleging the failure of the purchaser to comply with the terms of sale, and praying an order for re-sale; thereupon an order for re-sale at the risk of the purchaser was passed without giving him notice or affording him an opportunity to be heard. Under the order of re-sale the property was re-sold. The first purchaser filed a petition asking that the order for re-sale be rescinded and that the first sale be ratified, alleging himself willing and ready to comply with the terms of sale as prescribed by the decree. *Held*,

1st. That the sale having been reported by the trustee, no order affecting the rights of the purchaser should have been passed without notice, and an opportunity afforded of showing cause against such order.

2d. That an order for re-sale was clearly erroneous and without warrant in law, as it was not only passed *ex parte* and without notice, but the re-sale was ordered to be made at the risk of the purchaser.

3d. That where a sale is reported and the purchaser refuses to comply with the terms of the sale, the court may order that cause be shown

why the terms of sale are not complied with, and if sufficient cause be not shown, may either ratify the sale or set it aside, as will best subserve the interest of the parties concerned. In such case if the sale be set aside, the court may properly impose upon the party returned as purchaser, all the costs and expenses attending the sale, as the condition of his release from the purchase and the consequences of his default.

4th. That if the sale be ratified and the party still fail to comply the court may then proceed in a summary way, by order *nisi* and final order to direct a re-sale of the property at the risk of the purchaser: *Schaefer* v. *O'Brien*, 49 Md.

LAND DAMAGES. See *Action; Railroad.*

Assessment for Benefits.—A municipal council cannot set aside an assessment for benefits which has been paid, unless by special statutory authority: *Campion* v. *City of Elizabeth*, 12 Vroom.

Money paid on such assessment cannot be recovered so long as the assessment is unrevoked by competent authority: *Id.*

LANDLORD AND TENANT. See *Vendor.*

Lease—Surrender.—An agent executed a lease to certain parties for his principal. While it was still in force, the principal executed an independent lease of the same premises to the agent, who then verbally leased them for a smaller rent than before to the original tenants, who continued in possession without change. *Held*, that the original lease was surrendered by operation of law and not assigned to the agent, and therefore that he could not claim from the tenants the difference in rent between the two: *Donkersley* v. *Levy*, 38 Mich.

LIEN. See *Railroad.*

LIMITATIONS, STATUTE OF.

Promise to pay by Legacy —D , a sister of O., rendered services for him, relying upon his promise to make provision for her by his will. Upon a claim made by her against his estate for the services, D. testified that O., several years before his death, had said to her that he could not then pay for her services, but would make provision for payment in his will; and that on being asked by her a few days before his death as to how she was to get her pay, he told her that he had bequeathed his property to her. The adverse party asked the court to instruct the jury as matter of law, that this declaration was insufficient to remove the bar of the Statute of Limitations. The court charged that the jury might consider it, and if from it they found that O. promised to pay in that mode for the services of D , her claim was relieved from the operation of the statute. *Held*, to be no error: *Watertown Eccl. Society's Appeal*, 46 Conn.

LIS PENDENS. See *Mortgage.*

MANDAMUS.

When not appearing to be Necessary or Effective will be Refused.—Where school directors refused to permit certain children to attend the public school, unless they would bring a written excuse for their previous absence, and it did not appear that the refusal was permanent, or

applied beyond the term, and the petition for a mandamus to compel the directors to admit the children without an excuse was filed one day before the close of the term so that it was not possible to have a hearing before the close of the term, it was *held*, that the application for the writ was properly denied: *Cristman* v. *Peck*, 90 Ills.

MORTGAGE.

Execution—Mortgagor's Equity of Redemption.—A mortgagor's equity of redemption in real estate may be levied on and sold under execution against him, and he cannot convey his equity of redemption to a prior mortgagee, and thereby cut off the lien of a judgment attaching while he held such interest, but it will still be liable to levy and sale: *Walters* v. *Defenbaugh*, 90 Ills.

A Mortgagee in Possession of the mortgaged premises is only required to account for actual receipts less such sums as he may pay out for taxes and necessary repairs, unless it is shown that more could have been realized by reasonable diligence: *Clark* v. *Finlon*, 90 Ill.

Lien of—Conveyance of Land subject to in parcels at different times—Order of Subjection to Lien—Record Notice—A mortgagor conveyed whiteacre, a part of a tract covered by the mortgage, to E., by a warranty deed, with a covenant against encumbrances, and afterwards blackacre, another part of the tract, by quit-claim deed to S., both deeds being duly recorded. Whiteacre by successive conveyances became the property of D. S. having been compelled to pay the whole mortgage-debt, brought a bill against D., as owner of whiteacre, to compel him to contribute such part of the sum paid as the value of whiteacre was of the value of the whole tract. *Held*, that whiteacre was discharged from the burden of the mortgage-debt, and that D. was not bound to contribute: *Sanford* v. *Hill*, 46 Conn.

The conveyance of whiteacre to E. from encumbrance, with a record of the deed, was a declaration to all the world that the burden of the mortgage was assumed wholly by blackacre: *Id.*

If, however, blackacre should not be sufficient to satisfy the mortgage-debt, whiteacre would be liable to make up the deficiency, and the record of the mortgage showed this liability: *Id.*

The lien of the mortgagee upon the whole land was not affected by the equities that had arisen between whiteacre and blackacre, and in a decree for a foreclosure of the mortgage these equities would not be taken notice of. They could be settled only in a suit between the owners of these pieces: *Id.*

Upon the conveyance of whiteacre by the mortgagor to E., free from encumbrance, E. agreed by parol to pay a certain sum to the mortgagee upon the mortgage-debt, which sum was allowed as part of the price of the land. D., the final owner of this piece, bought in good faith for full value, with no notice of this agreement. *Held*, that he was not affected by it: *Id.*

D. bought while a foreclosure suit upon the mortgage was pending, and of a party who, purchasing from E., had agreed to pay the sum which E. had promised to pay on the mortgage-debt. *Held*, that, having bought in good faith and without notice, the fact that the foreclosure suit was pending did not affect the question of his liability to contribute, this question not being involved in that suit: *Id.*

MUNICIPAL CORPORATION. See *Action.*

Power to Regulate use of Steam Engines—Ordinance giving Absolute Discretion to one Officer not Valid use of Power.—Though the legislature has granted ample power of legislation upon the subject of the erection and use of steam engines within the city limits, to the mayor and city council of Baltimore, independent of the power "to prevent and remove nuisances;" and though as to the necessity for municipal legislation on this subject, the mayor and city council are the *exclusive judges*, while the selection of the means and manner of enforcing such legislation is committed to their *sound discretion;* yet this discretion is not absolutely and in all cases beyond judicial control; for there may be a case in which an ordinance, passed under a grant of power like this, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interposing and setting it aside as a plain abuse of authority: *Mayor, &c., of Baltimore* v. *Radecke*, 49 Md.

An ordinance requiring the removal of steam engines, after notice from the mayor, not prescribing regulations for their construction, location or use, but committing to the unrestrained will of a single public officer a power over the use of steam within the limits of Baltimore city, practically absolute, so that he might prohibit its use altogether: thus clothing a single individual with such power, the exercise of which may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives, easy of concealment and difficult to be detected and exposed, hardly falls within *the domain of law*, and is void and inoperative: *Id.*

Where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction, at the suit of any person who is injuriously affected thereby, to stay its execution by injunction: *Id.*

NEGLIGENCE.

Injury from Sewer.—Where a party's sewer and catch basin have been properly constructed, so as to carry off the water and have been kept in repair, he cannot be held liable for the damages an adjacent owner of premises may sustain, by water overflowing the basement of his building: *Kohlhammer* v. *Weisbach*, 90 Ills.

NOTICE. See *Mortgage.*

NUISANCE.

Stationary Steam Engine not in itself a Nuisance.—A stationary steam engine is not in itself a nuisance, even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets: *Mayor of Baltimore* v. *Radecke*, 49 Md.

The liability of a steam engine, in common with all other steam boilers to explode, and its use in a business in which combustible materials are necessarily brought into dangerous proximity to the fire in the boiler, thereby subjecting buildings and merchandise in that vicinity to increased danger from fire, do not make it a nuisance: *Id.*

Structure to annoy Neighbor—Injunction.—The statute (Gen. Stat. tit. 19, ch. 17, part 9, sect. 4), provides, that an injunction may be

granted against the malicious erection upon one's own land of any structure intended to annoy or injure any proprietor of adjacent land, in respect to his use of the same. *Held*, that where such a structure was maliciously erected, and was injurious to the adjoining owner, it was no defence that it served to screen the respondent's premises from observation: *Harrison* v. *White*, 46 Conn.

And where such a structure was stealthily erected and was completed before an application for an injunction could be made, it was held that the court would grant an injunction against its continuance: *Id.*

OFFICER. See *Interest; Surety.*

Bond—Duress—Notice.—A bond for the faithful performance of official duty, given to the state by a treasurer, holding over because of failure to appoint his successor, and sureties, on the demand of the two houses of the legislature, declaring that, if it was not given, they would appoint his successor, is not vitiated by duress, but is valid as the voluntary act of the obligors: *Sooy* v. *State*, 12 Vroom.

PARTNERSHIP.

Accounting.—Upon a bill for an accounting it appeared that no loss had occurred in the business, but that defendant had kept no such books as would enable full accounts to be stated. *Held*, proper to require defendant to account for all the money put into the business by complainant: *Robertson* v. *Gibb*, 38 Mich.

An accounting will not be disturbed because of erroneous allowances against the appellant when errors of equal magnitude are discovered in his favor: *Id.*

PLEADING. See *Damages.*

POWER.

Valid exercise of.—To constitute the execution of a power of appointment by will, there must be a reference to the power itself or to the subject of it, unless the intention is manifest from the fact that the will would remain inoperative without the aid of the power, or is so clearly demonstrated by words or acts that the transaction is not fairly susceptible of any other interpretation: *Hollister* v. *Shaw*, 46 Conn.

A testator gave a portion of his estate to trustees, to pay over the income to his daughter M. during her life, and on her death to convey the same to her children if she left any, and in default of children to such person or persons and in such portions as M. by her last will should appoint, and in default of such appointment to her heirs at law. M. afterwards died, leaving a will and $50,000 of property of her own, giving several legacies and making a residuary bequest, but making no allusion to the trust fund nor to the power of appointment, but speaking of the property disposed of as "my estate." Her own property was more than enough to pay all her debts, and to meet all the demands of the will. *Held*, that she had not executed the power of appointment *Id.*

PUBLIC LANDS. See *Constitutional Law.*

RAILROAD. See *Ejectment.*

Mortgage—Subsequent Judgment—Lien—Construction of Statute.—

A reorganized railroad company executed a mortgage under a statute of Ohio, which provided that the lien of such a mortgage should be subject to the lien of subsequent judgments for injuries, &c. A suit was brought for such injuries and judgment recovered, which however was not a lien, there being no real estate of the corporation in the county. Pending the suit and before judgment, the road was sold under the mortgage. Upon a distribution of the proceeds, *held*, that the judgment creditor was not entitled to priority of payment: *Jeffrey, Adm'r*, v. *Moran*, S. C. U. S., Oct. Term 1879.

Railroad in the Public Street—Damages to Abutting Owner not owning Soil in the Street.—A street railway track may be lawfully authorized in a city street without compensating adjacent owners. But a railroad cannot: *Grand Rapids & Indiana Railroad Co.* v. *Heisel*, 38 Mich.

Where a railroad has been built in a city street without compensating such abutting owners as own the soil of the street, these owners have a right of action for any consequent injury to their freehold, such as injury to its market and rental value, and annoyances to business or family occupation: *Id.*

The general principles on which to assess the damages resulting to a freehold from the operation of a railroad on the adjacent highway, are the same as if no highway had previously existed; and its existence would only be a circumstance tending to diminish the recovery: *Id.*

REPLEVIN.

Seizure from a Third Party owning the Goods.—Replevin is founded on an unlawful detention whether there was an unlawful taking or not: *Sexton* v. *McDowd*, 38 Mich.

The description in a writ of replevin is sufficient if, with outside help, the officer executing it can identify the property: *Id.*

Seizure in replevin must be from the actual or constructive possession of the defendant: *Id.*

A writ of replevin will not protect an officer in taking the property described from some person besides the defendant, owning and holding it in good faith: *Id.*

In a suit against the sheriff for the conversion of an article seized under a writ of replevin, the special verdict rendered in the replevin suit, that the defendant was not in possession when the article was demanded or suit was brought was introduced in evidence. *Held*, that it would not warrant an instruction that the right of the plaintiff in replevin had been adversely decided by it and that evidence to the contrary need not be considered: *Id.*

SET-OFF.

Waiver of Right of—The execution of a promissory note with a cognovit authorizing the entry of judgment thereon, after the rendering of services by the maker of the note to the payee, is a waiver of the right to interpose the value of such services as a set-off to the note. *Gross* v. *Weary*, 90 Ills.

STATE. See *Agent.*

STATUTE.

Construction of.—Section 94 of the Revenue Act of 1864 (13 stat.

264), as amended in 1866 (14 stat. 128), provided that, "all gas companies, whose price is fixed by law, are authorized to add the tax herein imposed to the price per thousand feet on gas sold, and all such companies which have heretofore contracted to furnish gas to municipal corporations, are in like manner * * * authorized to add such tax to such contract price" *Held*, that a municipal corporation was not liable for the tax in a case where a gas company had, for a valuable consideration, contracted to furnish the corporation with gas "free of charge:" *Pittsburgh Gas Co.* v. *Pittsburgh*, S. C. U. S., Oct. Term 1879.

SURETY.

Consideration.—An extension of credit will uphold a contract of suretyship: *Lee* v. *Wisner*, 38 Mich.

The payment of money by a surety for his principal's benefit raises an implied promise against the principal to refund on demand, and giving credit for it is equivalent to an extension of credit: *Id.*

A creditor is not precluded from recovering against his debtor's surety, if he does not know of any confidential relation between the two, and has no reason to believe the debtor was guilty of fraud or improper concealment as against the surety: *Id.*

Public Officer—Moneys received under Act passed Subsequent to Date of Bond—Correction of Errors of Computation.—Sureties on a bond of a public officer, conditioned that he shall pay over to the United States all public moneys which may come into his possession, are liable for his failure to pay over public moneys received by him, under authority of an Act of Congress passed after the giving of the bond: *Soule* v. *United States*, S. C. U. S., Oct. Term 1879.

Errors of computation against the United States upon the audit of an officer's accounts are no more vested rights in favor of sureties than in favor of the principal. All such mistakes may be corrected by a re-statement of the account: *Id.*

TAX. See *Statute.*

TRUSTEE.

Who may be—Officer of Corporation to Secure whose Debt the Trust is Created—Validity of Sale by such Officer to Corporation—Deed.—M. borrowed money from a corporation, to secure which he executed to E. a deed of trust with power of sale on default of payment. Default being made, E. sold in the manner directed, the corporation becoming the purchasers, and receiving a deed from E. Upon a bill filed by M. to redeem the property: *Held*, that the fact that E. was actuary of the corporation, while it would cause the court to scrutinize his actions closely would not incapacitate him from acting as trustee. *Held, further*, that as the purchaser could compel the trustee to execute a sufficient deed, the court would not inquire into the sufficiency of the deed actually executed: *Clark* v. *Commissioners of Freedmens' Saving & Trust Co.*, S. C. U. S., Oct. Term 1879.

UNITED STATES COURTS.

Courts Martial—Who may be Tried—Power to correct Sentence—Exercise of Discretion not Reviewable.—A paymaster's clerk may be

tried by court martial, under Rev. Stat. U. S., sect. 164, arts. 4 and 14: *Ex parte Reed*, S. C. U. S., Oct. Term 1879.

Such court may before it is dissolved revise and correct its sentence upon the proceedings being remitted to it by the authority by which it was convened: *Id.*

The proceedings of a court martial cannot be collaterally impeached for any mere error or irregularity. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations, which give conclusiveness to the judgment of other legal tribunals. The exercise of its discretion, within authorized limits, cannot be assigned for error: *Id.*

Usury.

Excessive Interest taken by Agent without Authority is not Usury.—Where a principal does not authorize his financial agent, in placing a loan, to charge a greater rate of interest than the law allows, and has no knowledge that a larger rate is charged by the agent, and does not receive the excess of interest, the defence of usury cannot be sustained against him. On such case no unlawful and corrupt intent can be imputed to the principal, and he is not bound by the agent's act beyond the scope of his authority: *Boylston* v. *Bain*, 90 Ills.

Vendor and Purchaser.

Party purchasing from Tenant.—A party purchasing and taking possession of property from one who is a tenant, takes but his interest, and subject to his obligation to pay rent to the landlord: *Furnam* v. *Hohman*, 90 Ills.

Verdict.

True Verdict is that rendered by the Jury and recorded as such, though the Jury made out a Paper for a different Amount.—The verdict of a jury in a civil case is not complete until it has been read to them, and they have assented to it as read: *Watertown Ecclesiastical Society's Appeal*, 46 Conn.

A written verdict for the plaintiff was for "sixteen and seventy-four dollars." The clerk read it as "sixteen *hundred* and seventy-four dollars," and as such it was accepted by the court and ordered to be recorded. It was then in the same manner read again to the jury by the clerk, who said to them after reading it, "This is your verdict; so say you all;" to which they all assented. *Held*, that the real verdict was the verdict as read and assented to, and not the verdict as written: *Id.*

Will. See *Power.*

Evidence of Undue Influence.—On the contest of a will and codicil when offered for probate, on the ground of want of mental capacity, and of undue influence by a second wife, it is error to exclude evidence of matters occurring in the testator's family within a year preceding the making of the will, which affords an insight into the private history of the family, and furnishes an understanding of the relations of the testator with his wife, to whom the principal part of the estate was devised, and which also tends to show the means employed by the wife to alienate the affections of the testator from his children by a former wife, and to obtain the control of his property: *Reynolds* v. *Adams*, 90 Ills.