# ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES.[1]
ENGLISH COURTS OF COMMON LAW AND EQUITY.[2]
SUPREME COURT OF OHIO.[3]
SUPREME COURT OF PENNSYLVANIA.[4]
SUPREME COURT OF WISCONSIN.[5]

ACTION. See *National Bank.*

*Taking of Land by Corporation.—Suit for Damages and also for Value of the Land.*—The owner of land, which has been unlawfully and wrongfully taken and appropriated to its use, by a corporation authorized by law to appropriate land, cannot maintain an action for the value of the land so taken and appropriated, and also damages accruing by reason of such taking and appropriation, if the circumstances are such that he may recover the land itself: *Atlantic and Great Western Railroad Co.* v. *Robbins et al.*, 35 Ohio St.

AGENT. See *Broker.*

*Undisclosed Principal, Sale of Goods to Agent of—Payment by Principal, under what Circumstances an Answer to an Action brought by the Seller for the Price.*—The defendants employed C., a broker, to buy oil for them. C. accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery;" but though it is not infrequent in the oil trade, in such a case, to require payment before delivery, there is no invariable custom to that effect. The plaintiffs delivered the oil to C., without insisting on prepayment, and the defendants, not knowing that the plaintiffs had not been paid, paid C. Shortly afterwards C. stopped payment, and the plaintiffs thereupon sued the defendants for the price: *Held*, affirming the decision of BOWEN, J., that, as the plaintiffs at the time of the sale knew the broker was buying for principals and not on his own account, the fact of the defendants having paid the broker did not preclude the plaintiffs from suing them for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker, and that the mere omission on the part of the plaintiffs to insist on prepayment was not, in the absence of an invariable custom to that effect, such conduct as would reasonably induce such belief: *Irvine* v. *Watson*, Law Rep., 5 Q. B. Div.

---

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1879. The cases will probably be reported in 12 Otto.

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

[3] From E. L. De Witt, Esq., Reporter; to appear in 35 Ohio St. Reports.

[4] From A. Wilson Norris, Esq., Reporter; to appear in 90 Penn. St. Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 50 Wis. Reports.

*Heald* v. *Kenworthy*, 10 Ex. 739; 24 L. J. Ex. 76, followed. *Armstrong* v. *Stokes*, Law Rep., 7 Q. B. 598, discussed: *Id.*

AMENDMENT.

*Variance—Restatement of Cause of Action.*—In an action on contract, where the facts proven by evidence received without objection, show that plaintiff has a good cause of action against defendant, on a contract different from that set out in the complaint, *it seems*, that the complaint may be amended in accordance with those facts, or the variance may be disregarded. So intimated where the suit was upon an account, and the other cause of action proven (if any) was upon defendant's endorsement of a promissory note transferred by him, before due, to the plaintiff, and which he alleges that plaintiff, by his default in respect to collecting or returning the same, had made his own: *Marschuetz* v. *Wright*, 50 Wis.

ATTORNEY.

*Services to Receiver—How Compensation to be obtained.*—Where the compensation of an attorney for professional services in securing a fund in the hands of a receiver for distribution is, by the rules governing courts of equity, a proper charge upon the fund, application for such compensation out of the fund should be made in the action in which the receiver was appointed: *Olds* v. *Tucker*, 35 Ohio St.

BROKER.

*Agent—Broker's implied Undertaking for Skill and Care.*—M. & Co., who were bankers and brokers, gave to J. a letter to their correspondent, G., a broker in Philadelphia, stating, "this will introduce to you J. Any orders he may give you, please execute on our account and advise us." G. took his orders from J. in the purchase and sale of stocks, but reported to M. & Co. and made his calls upon them for the necessary margins. In their accounts, M. & Co. also treated J. as dealing directly with them, and he was charged on their books with the stocks, commissions and interest, and credited with the proceeds of sales. *Held*, that M. & Co. were the agents of J., and they could not ignore G.'s agency, and cast the responsibility of a loss upon J., simply because his orders were taken and obeyed in the purchase and sale of the stocks: *Gheen, Morgan & Co.*, v. *Johnson*, 90 Penn. St.

G. deposited a margin with B., another broker, without demanding security therefor, but, according to the custom of the Board of Brokers, it was optional with G. to do so. He acted in good faith, and when the deposit was made with B., the latter was in full credit. *Held*, that there was no evidence of negligence, such as would make G. responsible for a loss occurring through B.'s insolvency: *Id.*

The law implies a promise from brokers, bankers or other agents, that they will severally exercise competent skill and proper care in the services they undertake to perform, but it neither implies nor requires anything more: *Id.*

COMMON CARRIER.

*Undertaking as Insurer of Baggage does not extend to Trunk of Samples of Merchandise.*—The implied undertaking of a carrier to insure

the safety of baggage does not extend to the contents of a trunk, consisting of samples of merchandise, which the passenger, a travelling salesman, carries to facilitate his business in making sales. But the carrier, by taking the property into his charge and putting it in his warehouse for safe keeping, assumes the relation to it of an ordinary bailee, and he is bound to take such care of the property as a man of ordinary prudence would of his own, under like circumstances: *Pennsylvania Co.* v. *Miller & Co.*, 35 Ohio St.

CONFLICT OF LAWS. See *Contract.*

CONTRACT. See *Evidence.*

*Illegal Consideration—Promise not to prosecute Criminal.*—A promissory note is void, where the consideration therefor is the promise of the payee that he will refrain from prosecuting the son of the maker for forgery: *National Bank of Oxford* v. *Kirk*, 90 Penn. St.

*Fulton* v. *Hood*, 10 Casey 365, distinguished: *Id.*

*In Restraint of Trade—Validity—Limitation as to Space—Reasonableness—Foreign Judgment—Enforcing by English Court.*—There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space. The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space: *Roussillon* v. *Roussillon*, Law Rep. 14 Chan. Div.

*Allsopp* v. *Wheatcroft*, Law Rep., 15 Eq. 59, disapproved; *Leather Cloth Co.* v. *Lorsont*, Law Rep., 9 Eq. 345, followed: *Id.*

If an agreement, contrary to the policy of the English law, is entered into in a country, by the law of which it is valid, an English court will not enforce it: *Id.*

The policy of the English law in favor of trade, applies to foreigners trading in England equally with English subjects: *Id.*

The principles on which the court acts in enforcing judgments of a foreign court discussed: *Id.*

The defendant, a Swiss subject, entered into an agreement with the plaintiffs, French subjects, residing in France, when he was in France on a temporary visit, he being then domiciled in Switzerland, but residing in England. The plaintiffs afterwards obtained judgment against him in a French court for breach of the agreement. He was not in France at the commencement of or at any time during the action, and he had no notice of the proceedings, though the plaintiffs knew his address in England, where he was then still residing: *Held*, that the judgment could not be enforced by an English court: *Id.*

*Schibsby* v. *Westenholz*, Law Rep., 6 Q. B. 155, considered: *Id.*

*Subscription for certain Purpose—Failure of Consideration—Practicability of Carrying out the Purpose Contemplated.—Foreign Government—Revocation of a Concession.*—Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no

such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands: *National Bolivian Co.* v. *Wilson*, Law Rep. 5 Appeal Cases.

Where there is a right dependent on the practicability of doing a certain work, the question of its practicability is not to be determined solely by physical or financial reasons, but conditions previously stipulated (especially where the interests and the rights of third parties are concerned) must be considered: *Id.*

Thus, where a loan was raised to make a railroad in a foreign country, such loan being raised on the faith of a prospectus which set forth, as a security to the bondholders, the grant of a concession by the foreign government, in virtue of which the bondholders would have the benefit of the customs duties imposed by that government on goods passing along that railroad, and the foreign government, finding the railroad not made, revoked its concession, the loss of the security which the concession had afforded to the bondholders, entitled them to treat the scheme as a failure, and to demand the return of their subscriptions: *Id.*

A foreign government granted a concession, on the terms of which a company was formed and a loan raised, and bondholders constituted. The government afterwards revoked the concession. *Held*, that its right to do so could not be questioned in any legal proceedings in this country: *Id.*

*Written cannot be Varied by Parol Agreements at the Time or Previously—Construction of.*—A written contract cannot be varied or controlled by parol agreements between the parties made previously to, or simultaneously with, its execution: *Cooper et al.* v. *Cleghorn*, 50 Wis.

Plaintiffs entered into contract with defendants to furnish machinery for a grist-mill in Wisconsin. By its terms they promised and agreed to sell certain described machinery, including an engine and boiler; also the necessary plans, drawings and specifications and bills of material, and the necessary time of a competent mechanic to superintend the erection of said engine and boiler, and the time of "a competent millwright" to superintend the erection of the other machinery; said machinery to be ready for delivery at plaintiff's iron works at Mt. Vernon, Ohio, on the 20th of July 1875; said sale to be made upon the payment by defendants of $8400 as follows: $400 by June 1st 1875, $5000 on or before the shipment of the machinery, and the balance four months thereafter. Plaintiffs agreed to deliver the machinery, boxed and in good order for transportation, at the depot at Mt. Vernon; and it was further agreed that "the title, ownership and right of possession of the aforesaid machinery shall remain in the first party (the plaintiffs) until the cash is paid as above agreed, when the same shall vest in the party of the second part." *Held*, that, the machinery having been so affixed to the mill that it cannot be removed without material injury to the realty, and this having been done by the act of defendants, and pursuant to the intention of the parties when the contract was entered into, plaintiffs, treating the transaction as a sale of the machinery, may enforce a *lien on the buildings* for the amount still due them under the contract: *Id.*

The contract provided that plaintiff should furnish defendant certain burr mill stones "*faced and furrowed*;" and it clearly appears that

plaintiff furnished such stones, and that the words "faced and furrowed," as used among millers, did not imply that the stones should be dressed and in a condition to use. *Held*, that it was incompetent for defendants to show that, from conversation with one of the plaintiffs prior to the execution of the contract, they were led to suppose that stones which were faced and furrowed would be dressed and in condition for immediate use: *Id.*

If it appeared that the millwright furnished by plaintiffs under the contract was a perfectly "competent" one, and yet that he made serious mistakes in superintending the work, *quære* whether plaintiffs would be responsible therefor, or whether such millwright would be deemed defendants' agent and employee in superintending the work: *Id.*

CORPORATION. See *Action*; *Sale.*

DAMAGES.

*Measure of—Agreement to sell Property in Consideration of Payment of Debts—Insolvency of Vendors—Action by Trustee for Breach of Contract—Nominal Damages.*—A. & S. being traders in embarrassed circumstances, sold their business to the defendant, upon condition that he should pay certain debts owing by them. This he failed to do, and left a balance of 1750*l.* unpaid to the creditors of A. & S. A. & S. afterwards liquidated their affairs by arrangement, under the Bankruptcy Act, 1869, and the plaintiff having been appointed trustee, brought an action for breach of contract: *Held*, that he was entitled to recover the sum of 1750*l.*, and not merely nominal damages: *Ashdown* v. *Ingamells*, Law Rep., 5 Ex. Div.

*Porter* v. *Vorley*, 9 Bing. 93, disapproved of: *Id.*

*Railway Accident—Loss of Profits of Trade or Profession.*—In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative, professional practice: *Phillips* v. *London and South Western Railway Co.*, Law Rep., 5 C. P. Div.

DEBTOR AND CREDITOR.

*Notes of Third Party as Security—Failure of Creditor to collect when due.*—A creditor who receives from his debtor the note of a third party as collateral security, and without negligence on his part, fails to collect such note when due, and afterwards, in the absence of any demand by the debtor, retains possession of the note, will not be preventeu by those facts from recovering the full amount of his demand against such debtor: *Marschuetz et al.* v. *Wright*, 50 Wis.

DEED.

*Acceptance binds Grantee.*—The acceptance by the grantee of a deed or land contract executed by the grantor alone, binds such grantee: *Hubbard* v. *Marshall*, 50 Wis.

EASEMENT.

*Alley way—Title by User must be by Adverse not Permissive Use.*—

In an action for damages for the obstruction of an alley, it is competent for the defendant to prove, by way of mitigation of damages, that it was not the plaintiff's only means of access to the rear of his property: *Demuth* v. *Amweg*, 90 Penn. St.

Twenty-one years adverse user of an easement gives rise to the presumption of a grant; that there was a gate maintained across an alley is of no consequence, if the plaintiff and those under whom he claimed, used it whenever he chose to do so: *Id.*

That the defendant or some one of his predecessors in title, gave notice at a sheriff's sale of the property, that he claimed the exclusive right and ownership of the alley in question, could not affect the plaintiff, if he were not present when such notice was given. Assertion of title is not enough: it must, to be effective, be accompanied with some act, which, at least for the time being, would prevent the use of the easement: *Id.*

If the use of the way by the plaintiff was merely a permissive use, and the jury, from the evidence as it appears in the case, might so have found, then he could not claim the easement as of right, for, in that event, no presumption of grant could arise from the mere lapse of time. In order to establish such right, the user must be adverse, not permissive: *Id.*

EMINENT DOMAIN. See *Action.*

*Improvements in Violation of Act of Congress—Appropriation of by Railroad.*—The fact that a riparian owner improves his property without complying with an Act of Congress relating to such improvements, does not relieve a railroad company, which appropriates such improvements, from liability to make compensation: *Davenport and Northwestern Railroad Co.* v. *Renwick*, S. C. U. S., Oct. 1879.

EQUITY. See *Judicial Sale.*

EVIDENCE. See *Contract; Judicial Sale.*

*Parol, to Contradict Writing.*—Plaintiff sold, assigned and delivered to defendant, for an agreed consideration in money, certain notes and mortgages of a third party, and all his interest in a contract for the sale of certain land by him to such third party, the assignment being in writing under seal, executed by the plaintiff alone, and containing a statement of the consideration and stipulations for the security of the plaintiff and as to the effect of a default by the defendant to make the payments therein specified; and in execution of said agreement, defendant paid a part of the sum named as consideration, and delivered to plaintiff his three promissory notes for the remainder. In an action on the notes, *held*, that defendant cannot prove a contemporaneous oral agreement by which, in case the timber on the lands described in the contract should fall short of a certain amount, he was to be allowed at a certain rate per M. for the shortage, and that there was such a shortage: *Hubbard* v. *Marshall*, 50 Wis.

*Note whose Genuineness is Disputed.*—In an action on a note, where the genuineness of the signature was denied, and the attesting witness had given evidence having some tendency to show that the signature was genuine, it was not error to admit the note itself along with the

evidence bearing on the question of its genuineness: *Holmes Adm'r* v *Cook*, 50 Wis.

Where it was admitted by plaintiff that defendant made the note merely as a loan of his credit to the payee, and by defendant that at the date of said note he had indorsed for the payee's accommodation, there was no error in rejecting evidence for the defendant as to his dealings with the payee before and at the date of the note (to show that he was not indebted to the payee), or as to the amount of money which defendant had on deposit subject to his check; the evidence being immaterial: *Id.*

FOREIGN GOVERNMENT. See *Contract.*

FOREIGN JUDGMENT. See *Contract.*

FRAUD.

*Rescission of Written Instruments for—Husband and Wife.*—Written instruments will not be cancelled or rescinded on the ground of fraud, except upon clear and convincing proofs: *Lavassar* v. *Washburne*, 50 Wis.

Where a married woman sues to set aside a conveyance of her land executed by herself and her husband, on the ground that its execution was procured by defendant's fraudulent misrepresentations, if it appears that the negotiations which resulted in its execution were all between defendant and the plaintiff's husband acting as her agent, she is bound by his acts, and the case is as if the husband had been owner of the land and plaintiff in the action: *Id.*

HUSBAND AND WIFE. See *Fraud.*

*Authority to pledge Credit during Cohabitation—Necessaries—Revocation of Implied Authority.*—A husband, who is able and willing to supply his wife with necessaries, and who has forbidden her to pledge his credit, cannot be held liable for necessaries bought by her; and a tradesman, without notice of the husband's prohibition and without having had previous dealings with the wife with his assent, cannot maintain an action against him for the price of articles of female attire suitable to her station in life, and supplied to her upon his credit but without his knowledge or assent: *Debenham* v. *Mellon*, Law Rep., 5 Q. B. Div.

*Jolly* v. *Rees*, 15 C. B. N. S. 628, approved of: *Id.*

INSURANCE. See *Vendor and Purchaser.*

*Application is Part of Policy—False Representation—Intent not Material.*—Where, in a policy of insurance, the written application is referred to and expressly made part of the contract, such application thereby becomes part of the same as fully as if embodied in the policy: *Byers* v. *Farmers' Ins. Co.*, 35 Ohio St.

One condition of the policy was, "and any false representations made by the assured, of the condition or occupancy of the property, or any material fact—material to the risk," avoid the policy: *Held*, that representations concerning a matter material to the risk contained in the application, if untrue in fact, avoid the policy, whether made intentionally or otherwise: *Id.*

In said application the question was: "Is the property encumbered? If so, state to what amount, and the value of the premises." Ans.

Yes; mortgage, $2000—$10,000." When the fact was, this mortgage, which was made by the insured, was $3200 principal and $240, accrued interest: *Held*, that this was a false representation, material to the risk, which avoided the policy: *Id.*

It was a condition of the policy that, "if the property be sold or transferred, or any change take place in the title, either by legal process or otherwise, * * * without the consent of the company, the policy shall be void." This condition was not broken by the execution of a mortgage on the property, without such consent: *Id.*

*Seaworthiness.*—To render a ship "seaworthy," within the meaning of a contract of insurance, she must be sufficiently furnished with proper cables and anchors: *Lawton* v. *Royal Canadian Ins. Co.*, 50 Wis.

## Interest.

*Covenant to pay Money on a Day certain—Rate of Interest*—By a mortgage-deed reciting an agreement for an advance at 10*l.* per cent., the mortgagor covenanted for payment of the principal sum at the expiration of twelve months, and for the payment of interest in the meantime at the rate of 10*l.* per cent. per annum, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for repayment. The money was not repaid on the day, but interest at 10*l.* per cent. was paid for several years. The mortgagor having died, and a decree having been made for administration of his estate, the mortgagee proved as a creditor for the principal sum and interest. *Held*, that interest was recoverable only as damages, and ought to be limited to 5*l.* per cent. *In re Roberts. Goodchap* v. *Roberts*, Law Rep. 14 Chan. Div.

## Judgment.

*Of Restitution by Superior Court in reversing Judgment is Conclusive.*—The court reversing a judgment has inherent power to make an order of restitution, which order when made will be final and conclusive between the parties, and cannot be questioned by them collaterally; and, in such case, an action may be maintained by the plaintiff in error against the defendant in error, to recover money paid by the former on the judgment prior to the reversal, in which action it will be no defence for the defendant in error to show that the money was paid voluntarily: *Hiler* v. *Hiler*, 35 Ohio St.

## Judicial Sale.

*Impeaching Title of Purchaser.—Irregularities in Proceedings.*—The title of a purchaser at a judicial sale, as a general rule, cannot be impeached, in equity, for errors or irregularities in the proceedings; but where a tract of land not in fact sold, and for which no consideration was paid or intended to be paid, is, by mistake, included in the report of sales, such mistake may be corrected, in equity, as against the purchaser or his heirs, even after confirmation and deed in pursuance thereof: *Stites* v. *Wiedner*, 35 Ohio St.

Parol evidence may be admitted to prove such mistakes: *Id.*

## Mechanics' Lien.

*Extra work—Degree of Certainty required—Architect.*—Extra work

and materials done and furnished by a contractor during the performance of his agreement, may be included in and constitute a part of his claim, if the claim be filed within the statutory period after the completion of the contract. Though outside the contract, they are so closely connected with it that they have always been included, in filing the claim, with those done and furnished under the contract: *Rush* v. *Able*, 90 Penn. St.

All that is required to validate a mechanics' lien, is such certainty as will enable those interested to discover during what period the materials were delivered, or the work done, so as to individuate the transaction: *Id.*

Where an architect claims to have a lien for charges and fees, he must show work done for which the statute gives a lien; and such work is not shown by the name of his calling. Especially should the kind of work be set forth distinctly, when it is claimed as extra work by the contractor: *Id.*

*Bank* v. *Gries*, 11 Casey 423, distinguished, and *Price* v. *Kirk*, 9 Norris 47, followed: *Id.*

### National Bank.

*Actions against.*—Section 5198, Revised Statutes, providing for suits against a national bank in the United States courts in the district, and in the state courts in the county in which the bank is located, applies only to transitory actions. In local actions such bank may be sued where the property in controversy is situated, although not in the district or county in which the bank is located: *Casey, Receiver, &c.*, v. *Adams*, S. C. U. S., Oct. Term 1879.

### Negligence.

*Contributory—When for Jury.*—Where there is evidence of negligence on the part of defendant, and evidence from which it might be inferred that the plaintiff was guilty of contributory negligence, the evidence on both questions should be submitted to the jury: *North Pennsylvania Railroad Co.* v. *Kirk*, 90 Penn. St.

On the line of defendant's railroad, plaintiff owned a lumber and coal yard, in which his son was employed. A siding ran from the railroad to a warehouse in the plaintiff's yard. A lumber car was left standing on the siding, beyond the period when the rules of the company required them to remove it. It had a defective brake and it was not shown that it had been sufficiently blocked. A number of cars from a freight train were started on to the siding from the main track, and striking the lumber car, forced it down towards the warehouse, into which it crashed with great violence. There was evidence also that the nearest of their cars had a defective brake. The son of the plaintiff, hearing the sound of the approaching train, hurried towards the warehouse and entered it and was found crushed to death against the doors. *Held*, that it was properly left to the jury to determine whether defendants were guilty of negligence, and whether the deceased by his own negligence contributed to the accident: *Id.*

The son was twenty-eight years of age when the accident happened. He had been away from home, at intervals, after he attained his majority and had been in business on his own account. He had returned, however, to his father's house and was engaged in his father's

business, for which no compensation was paid him. It appeared that he intended to remain with his father, and that his services were valuable to him in his business. *Held*, that it was for the jury to decide whether there was a reasonable expectation of pecuniary advantage accruing to plaintiffs, which was destroyed by the loss of his son: *Id.*

At the close of the plaintiff's evidence, the defendants moved for a nonsuit, unless the court should be of opinion that they would thereby be precluded from offering any evidence, if the motion was overruled. The court expressed the opinion that they would be precluded by such motion made and overruled. To this ruling an exception was taken. *Held*, that the expression of the court on a motion in a form so peculiar, was not such a ruling as entitled the defendants to an exception and a review in this court: *Id.*

A brakeman of defendant was asked: "Did you omit to do anything you could have done to prevent this accident?" *Held*, that it was competent to prove all the witness had done, but it was for the jury to decide whether by acts done or duties omitted he had been guilty of negligence: *Id.*

For the purpose of showing that the plaintiffs had been indemnified for the loss of their son, the defendants offered to show that they had received $5000, the amount of a policy of insurance on the life of their son. *Held*, that the court properly excluded this evidence: *Id.*

*Contributory Negligence—When Nonsuit may be Granted—Railroad Crossing—Injury to Traveller.*—In an action for an injury, occasioned by negligence, where the circumstances require of plaintiff the exercise of due care to avoid the injury, and his testimony does not disclose any want of such care on his part, the burden is upon defendant to show such contributory negligence as will defeat a recovery: *Baltimore & Ohio Railroad Co.* v. *Whitacre*, 35 Ohio St.

But if plaintiff's own testimony in support of his cause of action raises a presumption of such contributory negligence, the burden rests upon him to remove that presumption: *Id.*

In an action by a traveller on a public highway, against a railroad company, to recover for injuries by collision with a passing train at a public crossing, alleged to have been caused by negligence in the management of the train, where the evidence tends to show that he did not exercise proper care and caution to avoid the injury, it is competent for him to show that there was no signboard up, as is required by law, as reflecting upon the question of his want of care, although the want of such signboard is not alleged as a ground of recovery: *Id.*

Where a person familiar with a dangerous railroad crossing, in passing over the same, neglects the exercise of any care to ascertain if a passing train is near, and in consequence of such neglect is injured by a collision with the train, he is guilty of negligence, and the mere fact that he had forgotten that he was in the vicinity of the crossing will not excuse such neglect: *Id.*

## New Trial.

*Verdict based on either of two Grounds—Failure of Court to Instruct.*—Where a verdict for the plaintiff may have been rendered upon either of two causes of action, but it does appear upon which, a refusal to give a proper instruction on behalf of the defendant, as to either

cause of action, will entitle him to a new trial: *Pennsylvania Co.* v. *Miller & Co.*, 35 Ohio St.

### Office.

*Elegibility at Time of Election not Requisite.*—The doctrine that a person elected to an office, though not eligible at the time of the election, may take and hold the office, if his disibility is removed within the time limited to him by law for entering upon its duties, adhered to: *State of Wisconsin and Geilfuss* v. *Trumpff*, 50 Wis.

### Party Wall.

*Exclusion of one Tenant by the Other.*—The most ordinary and the primary meaning of the term "party-wall," is a wall of which the two adjoining owners are tenants in common: *Watson* v. *Gray*, Law Rep. 14 Chan. Div.

If one of the two tenants in common of such a wall excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction: *Id.*

The owners in fee of two adjoining houses derived title to them from a common predecessor in title. In the conveyances from that predecessor to the two owners respectively, was contained a declaration that the wall which divided the yards at the back of the two houses should be and remain a party-wall. *Held*, that the two owners were tenants in common of the wall: *Id.*

Pleading. See *Amendment.*

Practice. See *Amendment; Verdict; Witness.*

Railroad. See *Eminent Domain; Negligence.*

Receiver. See *Attorney.*

### Sale.

*Assignment of Future-acquired Property—Stock in Trade, Substitution of.*—By a bill of sale the grantor assigned to the grantee the stock in trade then in certain specified premises, and also the stock in trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock in trade therein at the date of the bill of sale. *Held*, that the assignment was sufficient to pass the property in stock in trade afterwards brought into the premises in addition to or in substitution for that previously there: *Lazarus* v. *Andrade*, Law Rep., 5 C. P. Div.

*Conditional Sale of a Horse—Death of the Horse before the Sale became absolute.*—A horse was sold by the plaintiff to the defendant, upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party. *Held*, that the plaintiff could not maintain an action for the price, as for goods sold and delivered: *Elphick* v. *Barnes*, Law Rep. 5 C. P. Div.

*Conditional Sale—Failure to record—Validity of as against Mortgagees—Railroad*.—A statute of Iowa provided that a conditional sale of chattels should not be valid as against a creditor of or purchase from the vendee, unless recorded. *Held*, that an unrecorded conditional sale of rolling stock to a railroad, was valid as against prior mortgagees of the railroad and stock: *Meyer* v. *Western Car Co.*, S. C. U. S., Oct. Term 1879.

It makes no difference in such case that the laws of the state provide that property belonging to a railroad shall be deemed part of the road for the purposes of a mortgage. The mortgage only reaches such interest as belongs to the railroad company: *Id.*

*For Antecedent Debt—Question for Jury—Delivery.*—B. had a contract to deliver to a railroad company five hundred cords of wood. In preparing to meet this contract he received advances from a bank, giving his notes therefor. The bank declining to make further advances, he offered to sell to it the wood at a fixed price, to be paid for by the debt already incurred, and $400 additional in cash. Some of the wood was then in the yard of the railroad, but not yet accepted by it, and the balance was at different points in the vicinity. The railroad agreeing to accept the wood from the bank, the latter accepted B.'s offer and paid him the $400, but took his note therefor. It was subsequently alleged that this note was taken merely as a memorandum. By the terms of the arrangement B. was to put all the wood in the yard of the railroad, and he accordingly did so. A creditor having afterwards levied on the wood as the property of B., *Held*, that whether there was an actual sale to the bank was a question for the jury. *Held, further*, that if there was an actual sale, the placing of the wood in the yard of the railroad company was a complete delivery to the bank: *Wyoming National Bank* v. *Dayton*, S. C. U. S., Oct. Term 1879.

*Rescission for Fraud or Action for Damages—Rule does not apply to Shares in a Joint Stock Company—Action by Shareholder against the Company in Liquidation, for Damage caused by Fraudulent Misrepresentations of Directors inducing him to Purchase Shares*.—A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, elect to retain the chattel or goods, and still have his action to recover any damage he has sustained. But the same principle does not apply to shares or stock in a joint stock company, for a person, induced by the fraud of the agents of a joint stock company to become a partner in that company, can bring no action for damages against the company whilst he remains in it; his *only* remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible—by the winding up of the company or by any other means—his action for damages is irrelevant, and cannot be maintained: *Houldsworth* v. *City of Glasgow Bank*, Law Rep., 5 Appeal Cases.

H. bought from the City of Glasgow Bank, a co-partnership registered under the Companies Act 1862, 4000*l.* of its stock in February 1877. He was registered as a partner, received dividends and otherwise acted as a partner ever since. The bank went into liquidation in October 1878, with immense liabilities, and H. was entered on the list of contributors and paid calls. In December 1878, H. raised an action

against the liquidators, to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that after the winding up had commenced it was too late for him to have rescission of his contract, and *restitutio in integrum*. *Held*, that even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind his contract, rescission being now impossible, as decided by *Oakes* v. *Turquand*, Law Rep., 2 H. L. 325, and *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615, they afforded no ground for an action against the liquidators; therefore the action was irrelevant: *Id.*

STATUTE.

*Permissive and Obligatory Words*—"*It shall be Lawful.*"—The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it: *Julius* v. *Lord Bishop of Oxford*, Law Rep., 5 Appeal Cases.

The 3d section of the Church Discipline Act (3 & 4 Vict., c. 86), provides that in every case of any clerk in holy orders, who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese, within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to certain persons, for the purpose of making inquiry as to the grounds of such charge or report. *Held*, that this action gave the bishop complete discretion to issue or decline to issue such commission: *Id.*

Per Lord BLACKBURN.—There is no duty cast on the bishop by the statute, unless perhaps a duty to hear and consider the application: *Id.*

Enabling words are always compulsory, where they are words to effectuate a legal right: *Id.*

*Regina* v. *The Tithe Commissioners*, 14 Q. B. 459–474, and *Ditcher* v. *Denison*, 4 Q. B. Div., p. 273, commented on and explained; *Id.*

TRADE-MARK.

*Registration of similar Trade-mark.*—W. & Co. proposed to register as a trade-mark for ale a triangle with a double outline, inscribing within the double outline the words "Beccles Brewery. Established 1830," the inner triangle having within it a conspicuous figure of a church. B. & Co., whose trade-mark for pale ale was a plain triangle, which in use was colored red, applied to prevent the registration of the proposed trade-mark, as being so similar to theirs as to be calculated to deceive. *Held*, by JAMES and BRETT, L.JJ., affirming the decision of JESSEL, M.R., *dissentiente* COTTON, L. J., that as W. & Co. would be

at liberty to print their trade-mark in whatever color they pleased, and if printed on a red ground it would be so similar to that of B. & Co. that a purchaser might be misled, the registration ought not to be allowed: *In re Worthington & Co.'s Trade-mark*, Law Rep., 14 Chan. Div.

### Vendor and Purchaser.

*Fire Insurance—Insurance by Vendor—Fire after Contract, but before Completion—Right to Insurance Money.*—A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. After the date of the contract, but before the date fixed for completion, the house was burnt, and the vendor received the insurance money from the office. The contract contained no reference to the insurance. *Held*, that the purchaser was not entitled as against the vendor to the benefit of the insurance, either by way of abatement of the purchase-money or reinstatement of the premises: *Rayner* v. *Preston*, Law Rep., 14 Chan. Div.

*Quære*, whether in such a case, a contract of fire insurance being merely a contract of indemnity, the insurance company cannot compel the vendor to refund the money they have paid, if he gets his full purchase-money from the purchaser: *Id.*

### Verdict.

*May be in Writing—Preparation of Alternative Forms of by the Judge for Adoption by the Jury.*—The judge read to the jury from his written charge three forms of verdict, and afterwards wrote out the same forms separately and passed them to the jury before they retired, defendant's counsel expressly consenting thereto. *Held*, no error; nor was such consent necessary: *State* v. *Glass*, 50 Wis.

An oral statement to the jury that they should find one of said three verdicts, and that their foreman should sign the verdict as found, *held* no part of the "charge" which the statute required to be reduced to writing: *Id.*

Verdicts may be received in writing in the first instance; but if that were otherwise, a polling of the jury, and the assent of each to the verdict as read, would cure the error: *Id.*

*Special—Inconsistent Findings.*—A contract of marine insurance upon a steam-tug provided that the insurer should not be liable for losses arising from "incompetency of the master or insufficiency of the crew, and want of ordinary care or skill in navigating said vessel." It appeared that the master, while navigating Lake Michigan, the fuel being exhausted, let go the anchor in a storm, and with his crew abandoned the tug and went ashore; and that a few hours afterwards the cable parted and the tug was wrecked. In this action upon the policy, the jury found specially that the master did *not* do "all that a skilful, careful and prudent seaman could do to prevent the wrecking of the boat," and that it was his duty "to remain on board of the tug, or leave a man there to attend to the cable;" but to the question, "Did the master leave said boat only when, in his opinion, to stay longer would endanger the life of himself and the crew," they also answered "Yes." On appeal from a judgment in plaintiff's favor, *held*, that the findings

are so inconsistent as to require a new trial: *Lawton* v. *Royal Canadian Ins. Co.*, 50 Wis.

### WASTE.

*Permissive—Tenant for Life—Devise for Life of Premises subject to Obligation to Repair—Action for Non-repair by Remainderman in fee against Executor of Tenant for Life*—A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Wm. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property. *Held*, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death: *Woodhouse* v. *Walker*, Law Rep., 5 Q. B. Div.

### WAY. See *Easement.*

### WILL.

*Contest—Parties.*—In a suit to contest the validity of a will, the legatees and devisees are indispensable parties; and the omission to make a legatee a party to such suit is error, for which the decree setting aside the will will be reversed: *Reformed Presbyterian Church* v. *Nelson*, 35 Ohio St.

### WITNESS.

*When Defendant in Criminal Prosecution makes Himself a Witness—Recalling Witness for Further Examination.*—Under the statute which provides that "in all criminal actions and proceedings, the party charged shall, at his own request, but not otherwise, be a competent witness, but his refusal or omission to testify shall create no presumption against him" (R. S., sect. 4071), the voluntary testimony of such a party on his preliminary examination may be put in evidence by the state, upon his trial: *State* v. *Glass*, 50 Wis.

It is generally within the sound discretion of the court to allow a witness, who has been discharged from the stand, to be recalled for further cross-examination, even where other proceedings have intervened: *Id.*

After defendant, who had testified in his own behalf, had rested, and after the introduction of some rebutting testimony, the court permitted the prosecution to recall him for further cross-examination; but this consisted merely in asking him whether he signed a letter then shown him; and he anwered that he did not, and the contents of the letter were not disclosed. *Held*, no ground for a new trial: *Id.*