benefit, but one with Roberts to exonerate him from his liability for the debts of the firm, payment of which Green was to make, and in case of his default such payment to be made by Nichols. All the liability incurred by either was upon the bond, and this was to the obligees only."

The case of *Vroom* v. *Turner*, 69 N. Y. 283, was also the case of a mortgage. ALLEN, J., says: "To give a third party who may derive a benefit from the performance of the promise an action there must be first an intent by the promisor to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited."

In *Simoon* v. *Brown*, 68 N. Y. 361, the court says: "But it is not every promise made by one to another, from the performance of which a benefit may accrue to a third person, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must have been made for his benefit as its object, and he must be the party intended to be benefited."

We advise the Superior Court to render judgment for the defendant.

In this opinion the other judges concurred.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[2]
SUPREME COURT OF OHIO.[3]
SUPREME COURT OF PENNSYLVANIA.[4]
SUPREME COURT OF WISCONSIN.[5]

ATTACHMENT. See *Conflict of Laws.*

Conflict of Laws—Order in one State on Corporation in Another.—An order made by force of the New York code, upon a debtor of a defendant in a judgment, to pay the debt due to the plaintiff in the judgment, in part satisfaction thereof, will be held to be conclusively

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

[2] From Hon. John H. Stewart, Reporter; to appear in 35 N. J. Eq. Reports.

[3] From E. L. DeWitt, Esq., Reporter; to appear in 37 or 38 Ohio St. Reports.

[4] From Hon. A. Wilson Norris, Reporter; to appear in 95 Penn. St. Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 54 Wisconsin Reports.

binding in New Jersey: *Elizabethtown Sav. Ins.* v. *Gerber*, 35 N. J. Eq.

And if the debt so ordered to be paid were in the custody of the Court of Chancery, such foreign order of judgment would lay in itself a ground for a bill seeking such money: *Id.*

But where such moneys were in the hands of a corporation of New Jersey, and it appeared that such corporation was not cited in the proceeding in New York, and did not appear therein such foreign order requiring it to pay said moneys is void: *Id.*

Query—Whether moneys can be attached in a foreign state in the hands of a litigant in the courts of New Jersey when the time for pleading, on the part of such litigant, has expired: *Id.*

Attorney.

Disbarring—For what Offences.—An attorney can only be disbarred for misconduct in his professional capacity or respecting his professional character: *Ex parte Steinman and Hensel*, 95 Penn. St.

Although there may be cases of misconduct not strictly professional which would clearly show a person to be unfit to be an attorney, as theft, forgery or perjury, yet even for such an offence he cannot be summarily disbarred, without a formal indictment, trial and conviction: *Id.*

Courts have jurisdiction and power upon their own motion, without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll provided he has had reasonable notice and an opportunity to be heard: *Id.*

The office of an attorney is his property, and he cannot be deprived of it unless by the judgment of his peers and the law of the land. To deprive him of it summarily for the publication of a libel on a man in a public capacity, or where the matter was proper for public investigation, would be unconstitutional: *Id.*

A libel of the court, to amount to a breach of professional duty, must have been designed to acquire an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice: *Id.*

Bailment.

Lien of Workman.—It cannot be doubted that a lien is given by the common law to a tradesman or artisan who, in the course of his trade or occupation receives personal property upon which he bestows labor, &c., and his right to a lien on the property is equally good whether there be an agreement for a stipulated price or only an implied contract to pay a reasonable compensation: *Hensel* v. *Noble*, 95 Penn. St.

It is equally clear on principle as well as authority that where there is an entire contract for making or repairing several articles for a gross sum, the tradesman has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed upon for repairing the whole, but for such amount as he may be entitled to for labor, &c., bestowed upon all the articles embraced in the contract: *Id.*

Bill of Review.

Not Granted by Court of Appeal.—Where the Court of Errors and

Appeals has rendered a decree after hearing on the merits, and the decree has been entered in the minutes in accordance with the views of the court, and the record has been regularly remitted to the court below, it has no further jurisdiction of the case, and therefore will not entertain an application for leave to file a bill of review. Such application is to be made to the Court of Chancery: *Putnam* v. *Clark*, 35 N. J. Eq.

BUILDING ASSOCIATION. See *Corporations.*

CONFLICT OF LAWS.

Attachment—Receiver—Rolling Stock of Railroad.—In a suit in chancery, pending in a Kentucky court, wherein the trustees of an insolvent railroad corporation sought to enforce their rights under certain mortgages of the road and its equipment, the conditions of which had been broken, an application was made for the appointment of a receiver to take charge of and operate the road. Pending this application, certain rolling stock covered by the mortgages was temporarily in Ohio, and while there was seized in attachment by an unsecured Kentucky creditor. The entire property was insufficient to pay the debts secured by the mortgages, or to earn income to pay the interest. The order of the court appointing a receiver, made subsequent to the seizure in attachment, ordered him to take possession of all the property, including that seized, and authorized him to sue in his own name as such receiver, whenever necessary to perform his duties. *Held*, that the mortgages covered the rolling stock, though temporarily in Ohio, and the receiver might, under the comity between states, by an action brought in that state in his own name, assert his right to the possession thereof, where such right is not in conflict with the rights of the citizens of the latter state, nor against the policy of our laws: *Merchant's Nat. Bank* v. *McLeod*, 37 or 38 Ohio St.

CONSTITUTIONAL LAW

Statute—Failure of Title to Indicate Contents.—An entire Act of Assembly is not necessarily unconstitutional because the title fails to give notice of some particular matter contained therein. The rule has been to sustain that portion of which the title gives notice: *Dewhurst* v. *City of Allegheny*, 95 Penn. St.

CORPORATIONS. See *Insurance.*

Corporations de facto—Liability of Stockholders to Creditors.—Where a corporation *de facto*, in a proceeding in quo warranto, has been ousted from the franchise of being a corporation, such ouster is no defence to a suit by a creditor against stockholders to enforce payment of their stock subscriptions. *Gaff* v. *Flesher*, 33 Ohio St. 115, 453, approved and followed: *Rowland* v. *Meader Furniture Co.*, 37 or 38 Ohio St.

Corporations *de facto* and *de jure* stand on the same footing as respects their liability to creditors; and the liability of the stockholders of the former, whether arising by statute or on stock subscription, may be enforced for the benefit of creditors, the same as the liability of the latter: *Id.*

Director—Agreement for Repayment of Mortgage.—A director of a building association, who gave to the association an ordinary bond and mortgage for a loan, cannot set up as a defence to its foreclosure that by a secret parol agreement between him and the other directors the loan was to be and had been repaid and the mortgage satisfied by his shares of stock in the association having been fully paid up after the loan was made: *Pangborn* v. *Citizens' Building Association,* 35 N. J. Eq.

Acts beyond Corporate Powers—Who can take Advantage of—Wharf.—The fact that the use of a wharf by a railroad company as a public wharf is *ultra vires* is no ground for an injunction at the suit of one whose only interest is that as lessee of an adjoining public wharf he will be injured by the competition in business: *New Orleans M. & T. Railroad Co.* v. *Ellerman,* S. C. U. S., Oct. Term 1881.

Contract to Purchase Stock from Stockholder.—An executory agreement between a manufacturing corporation and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced either by action for specific performance or for damages: *Coppin* v. *Greenlees & Rawsom Co.,* 37 or 38 Ohio St.

COSTS. See *Judgment.*

CRIMINAL LAW.

Juror—Previous Opinion.—A person summoned as a juror who states upon his *voir dire* that he has formed or expressed an opinion, touching the guilt or innocence of the accused is *prima facie* incompetent, and such *prima facie* incompetency is not removed until it has been made to appear that such opinion was formed from reading mere newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and that, notwithstanding such previously formed or expressed opinion, the juror is able to render an impartial verdict upon the law and the evidence: *McHugh* v. *State,* 37 or 38 Ohio St.

Frazier v. *State,* 23 Ohio St. 551, followed and approved: *Id.*

DAMAGES. See *Patent.*

EQUITY. See *Tax.*

ERRORS AND APPEALS.

Interlocutory Orders—Master's Report—Failure to File Exceptions.—An appeal from a final decree brings before the appellate court all interlocutory orders or decrees involving the merits: *Clair* v. *Terhune,* 35 N. J. Eq

On appeal from the final decree, the appellate court will decide whether a decree of reference, prescribing the limits of the accounting, be right. But items clearly within the limits of the reference, not allowed by the master, where exceptions to the report have not been filed, will not be considered: *Id.*

Action for Penalty Imposed by Ordinance—Quasi Criminal Proceeding.—When a city or village ordinance prohibits that which is a

crime or misdemeanor and punishable at common law or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, the action to recover such penalty is *quasi* criminal, and cannot be brought to this court on the plaintiff's appeal: *President, &c., of the Village of Plattsville* v. *McKernan*, 54 Wis.

EVIDENCE.

Medical Books.—Portions of medical books cannot be read to the jury as evidence, although such books have been shown by expert testimony to be "standard works in the medical profession:" *Stilling* v. *Town of Thorp*, 54 Wis.

EXECUTION. See *Injunction.*

Sheriff's Sale—Title of Purchaser.—The sheriff sells only the title of the defendant in an execution, and the real owner besides trespass against the sheriff may maintain replevin or trover against his vendee: *Reichenbach* v. *McKean*, 95 Penn. St.

In the case of a pawn or pledge there is a special property in the pawnee. It is liable to be sold on an execution against the pawnor but subject to the rights and interests of the pawnee: *Id.*

The taking of the property out of the possession of the pawnee by a sheriff's sale does not divest his property, is in no sense a relinquishment of his lien, and a *bona fide* purchaser from the sheriff's vendee takes it subject to said lien: *Id.*

EXECUTORS AND ADMINISTRATORS.

Deposit in Bank—Loss.—Where an administrator deposits in his own individual name funds of the estate, in a bank which fails while holding such deposit, the loss is his own, and not that of the estate; and this though he has no other funds in such bank, and informs its officers, at the time of making the deposit, that the funds are held by him in trust. A remark by PAINE, J., in *School District* v. *Zink*, 25 Wis. 636, so far as inconsistent with this view, overruled: *Williams* v. *Williams*, 54 Wis.

FRAUDS, STATUTE OF.

Written Negotiations—Failure to Execute Formal Agreement.—Where, in cases within the Statute of Frauds, the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, the agreement will be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, to be prepared and signed. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his lawfully authorized agent, there exist all the materials which the court requires to make a legally binding contract: *Wharton* v. *Stoutenburgh*, 35 N. J. Eq.

HUSBAND AND WIFE.

Joint Contract to Support Third Person.—Where a certain sum of money was paid to a husband and wife, and in consideration thereof they covenanted to support and maintain one X. during the remainder of her natural life. *Held*, that the wife's interest in the sum so paid is her separate estate, and she is liable upon the covenant as well as her husband: *Houghton* v *Milburn*, 54 Wis.

Injunction.

Foreclosure Sale—Embarrassed Title—Execution against Party not Holding Title.—A mortgagor who mortgages an embarrassed title, or whose title has subsequently become clouded, cannot, in the absence of fraud, have the foreclosure proceedings stayed on account of an apprehension that the mortgaged premises will not bring full value at a foreclosure sale. His remedy is by redemption: *Am. Dock and Imp. Co.* v. *Trustees of Public Schools*, 35 N. J. Eq.

A court of equity will ordinarily not interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another, for the reason that such a sale will not prejudice the rights of the latter. To warrant resort to the restraining power of the court, the case must present some recognised ground for equitable relief—fraud or irreparable injury: *Id.*

Insurance.

Misrepresentation—Temperate Habits—Occasional Excess.—An application for a policy contained the following question: "Is the party of temperate habits? Has he always been so?" The answer was, "Yes." In a suit on the policy the company proved that during the year previous to taking the policy the insured had been once treated for delirium tremens. There was counter evidence as to his temperate habits. The court charged that if the habits of the insured in the usual ordinary and every day routine of his life were temperate, the representation was not untrue within the meaning of the policy, although he might have had an attack of delirium tremens from an exceptional over indulgence. *Held*, not to be error: *Knickerbocker Life Ins. Co.* v. *Foley*, S. C. U. S., Oct. Term 1881.

Stipulation against other Insurance—Effect of such other Insurance.—Where there are two policies of fire insurance on the same property, each containing the condition that if the assured shall have, or shall thereafter make, any other insurance on the property, without the consent of the company written thereon, then the policy shall be void, the second policy, without such consent, does not invalidate the first, for it never effected an insurance: *Jersey City Ins. Co.* v. *Nichol*, 35 N. J. Eq.

Although there is a second policy, there is no fraud in the statement, in proof of loss, that there is no other insurance, if the second policy was never valid; *Id.*

Mutual Benefit Company—Corporation not for Profit—Provision for Payment of Loss to other Persons than Family of Insured.—A corporation for the mutual protection and relief of its members, and for the payment of stipulated sums to the family or heirs of deceased members, belongs to the class of corporations formed for purposes other than for profit: *Ohio* v. *Standard Life Association*, 37 or 38 Ohio St.

A certificate of membership in such a corporation by which the corporation in consideration of the payment by the member of a membership fee, annual dues and a pro rata assessment with his fellow members to pay a sum of money to the family or heirs of a deceased member, stipulates to pay at his death to his family or heirs a sum of money, graduated by the number of members in his class, is a contract of life insurance: *Id.*

Such a contract of insurance to pay in case of a member's death "to himself or assignees," "to his estate," "to his executors or administrator," or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void: *Id.*

JUDGMENT.

Mandamus Proceeding—Lot Owner.—The owner of a city lot, not being made a party to a proceeding by mandamus to compel the common council of the city to levy a special tax or assessment thereon, is not bound by the judgment in such proceeding: *Rork* v. *Smith*, 54 Wis.

Power to Change—Costs.—This court has no power to modify its own judgment as to costs, rendered at a former term, as by changing it from a judgment against the plaintiff (who brought the suit in his official capacity upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought: *Boland* v. *Benson*, 54 Wis.

JUROR. See *Criminal Law.*

LEGACY. See *Tax.*

LIEN. See *Bailment.*

LIMITATIONS, STATUTE OF.

What Acknowledgment sufficient to revive Debt.—To take a case out of the operation of the Statute of Limitations it is not essentially necessary that the promise to pay should be actual or express. A clear, distinct and unequivocal acknowledgment of a debt is sufficient. It must be an admission consistent with a promise to pay. If so the law will imply the promise without its having been actually made: *Palmer* v. *Gillespie*, 95 Penn. St.

There must be no uncertainty as to the particular debt. It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning: *Id.*

MANDAMUS. See *Judgment.*

County Treasurer—Taxes Due State.—Proceedings by mandamus, on the relation of the treasurer of state, will lie to compel the treasurer of a county to transfer to the state treasury the state's proportion of taxes collected by such county treasurer: *Ohio* v. *Staley*, 37 or 38 Ohio St.

A petition for a writ of mandamus in such case, which shows the collection of such taxes by the county treasurer, is not defective for want of an averment that the taxes so collected remain in the county treasury subject to the command of the writ: *Id.*

MORTGAGE.

Acceptance of Collateral—Effect of.—The giving of a bond as collateral security to a subsisting bond and mortgage, does not, *per se*, and in the absence of any ancillary agreement, operate as a suspension of the right to prosecute such bond and mortgage: *Firemen's Ins. Co.* v. *Wilkinson*, 35 N. J. Eq.

A surety of the mortgagor will not be released by the mere giving of such collateral bond: *Id.*

Statutory Right of Redemption—Sale of Property—Bill to Redeem when too Late.—After the statutory period for redemption of property sold under foreclosure proceedings has expired without any offer on the part of defendant to redeem, he cannot maintain a bill to redeem on the ground that in decreeing the sale of the property the court failed to secure to him such statutory right of redemption: *Burley* v. *Flint*, S. C. U. S., Oct. Term 1881.

Municipal Bonds.

Bonds of Precincts—Suit against County—Jurisdiction of Federal Courts.—A state statute authorized precincts of counties to vote for the issue of bonds in aid of internal improvement, and provided that upon such vote the county commissioners should issue special bonds for such precinct and levy a special tax to pay the interest and principal thereof upon the property within the bounds of such precinct. *Held*, that suit upon such bonds should be brought against the county and not against the precinct. *Held further*, that it was no defence to an action at law upon such bonds in a federal court that the state statute had provided a remedy by mandamus: *Davenport* v. *County of Dodge*, S. C. U. S., Oct. Term 1881.

Municipal Corporation.

Liability for Injury to Property in Grading Street.—A municipal corporation in making a street along a hillside so excavated the ground in the street as to cause the land above to slide and injure the lot of the plaintiff. *Held*, that the fact that the plaintiff's lot did not abut immediately on the street did not exempt the corporation from liability. Its liability did not depend upon the ownership of the injured property, but upon the extent of the injury of which its removal of the lateral support of the hill was the efficient cause: *Keating* v. *City of Cincinnati*, 37 or 38 Ohio St.

In such case the liability extends to damages to buildings as well as to the land in its natural state, where the owner is not chargeable with negligence in making such improvements, and such damages result from want of due skill and care in making the street: *Id.*

Negligence.

Railroad—Trespasser—Injury to Child.—Except at public crossings, where the public has a right of way, a railroad company has the exclusive right to its track, and it owes no duty to the father of a child of tender years trespassing thereon, nor to the child itself: *Cauley* v. *Pittsburgh, Cincinnati and St. Louis Railway Co.*, 95 Penn. St.

Parents who permit their children to trespass upon a railroad track are guilty of contributory negligence, and the fact that the trespass was without the knowledge of the parents is not material: *Id.*

Nuisance.

Erection in Street—Liberty Pole.—Any unreasonable obstruction of a highway is a public nuisance for which an indictment will lie. It is not, however, every obstruction in the highway that constitutes a nuisance *per se*. When it is not, and whether a particular use is an

unreasonable use and a nuisance, is a question of fact to be submitted to a jury: *City of Allegheny* v. *Zimmerman*, 95 Penn. St.

The right to partially obstruct a street is not limited to a case of strict necessity; it may be extended to purposes of convenience or ornament provided it does not unreasonably interfere with public travel: *Id.*

The erection of "liberty poles" is a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people, and unless forbidden by the authorities, has been considered the exercise of a lawful license incident to citizenship: *Id.*

If it had been a uniform custom for the people to erect such poles in the streets of a city from its earliest history, under the implied assent of the municipal authorities, and if the one in question was carefully erected, having due regard to the material of which it was formed, and the manner in which it was secured, so that a careful and prudent person would have apprehended no danger therefrom, it was not a nuisance *per se*: *Id.*

PARENT AND CHILD. See *Negligence.*

PATENT.

Improvement—Infringement—Measure of Damages.—In estimating the profits for which an infringer of a patented improvement to a machine is liable, the principle to be applied is, that if the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, the infringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and the fruits of this advantage, for which he is liable, are the entire profits he has made in that market: *Goulds Manuf. Co.* v. *Cowing*, S. C. U. S., Oct. Term 1881.

In such case it is error to restrict the infringer's liability to such profits as were realized from the manufacture of the patented improvement as distinguished from the profits realized from the whole machine as improved: *Id.*

RAILROAD. See *Negligence.*

RECEIVER. See *Conflict of Laws.*

SLANDER.

Damages—Effect of Evidence as to Character.—In an action of slander the court charged the jury to consider "all the evidence on both sides touching the moral character of the plaintiff," but did not definitely state what effect, if any, such character should have in determining the amount of damages; and it refused to charge that in actions for slander "a person of bad character is not entitled to the same measure of damages as one of good character;" that if plaintiff's "general character" was bad, that fact must be considered in determining the damages; and that the jury were at liberty to find only nominal damages. *Held*, that such refusal was error: *Campbell* v. *Campbell*, 54 Wis.

SPECIFIC PERFORMANCE. See *Corporation.*

Parol Contract—Part Performance.—Where the negotiations have been conducted by parol, or are partly evidenced by writings duly

signed and partly rest in parol, and specific performance is sought on the ground of part performance, the terms of the contract must appear clearly, definitely and unequivocally. But it is sufficient that the terms of the contract be made out in a manner satisfactory to the court. The fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining what the terms of it really were and giving effect to the agreement, if the complainant shows himself entitled to a specific performance, by a part performance, which shall be referable only to a part execution of the agreement: *Wharton* v. *Stoutenburgh*, 35 N. J. Eq.

Delivery of possession by a vendor or lessor, accepted and acted upon by the vendee or lessee, is such an act of part performance by the former as to take the contract out of the Statute of Frauds, and to justify a decree of specific performance against the latter: *Id.*

Courts of equity will refuse to exercise jurisdiction by way of specific performance in a class of special and exceptional contracts, where the terms and provisions are such that the court could not carry its decree into effect without exercising some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, build or carry on railways, mines, and the like. A contract for a lease of mines, to be worked in a specified manner, is not within this principle. The court, in such cases, can grant relief at once by a decree that the lease be executed, leaving the complainant to his legal remedy thereafter for breaches of the covenants contained in it: *Id.*

STATUTE. See *Constitutional Law.*

SURETY. See *Mortgage.*

TAX.

Legacy Tax—Property in Remainder.—Under the provisions of the Act of Congress of July 14th 1870, repealing the legacy tax, personal property bequeathed to remaindermen after a life estate to testator's widow, prior to the passage of the act, but not vesting in possession through the death of the life-tenant until after the passage of the act, is not liable to the tax: *Mason* v. *Sargent*, S. C. U. S., Oct. Term 1881.

Claim for Deduction—When Demand of not Necessary—Relief in Equity.—Where it is reasonably certain, from the previous action and the declared intention of a tax-collector, that a demand for a reduction based upon a certain construction of a statute will be refused, such demand is not essential to enable the tax-payer to maintain a bill for relief against the collection of the tax without allowing the appeal: *Hill* v. *Nat. Albany Exch. Bank*, S. C. U. S., Oct. Term 1881.

TENDER. See *Tax.*

WHARF. See *Corporation.*