intention of the parties can be ascertained. There was no intention to make an illegal contract; and to hold it illegal, we must be able to say that the mere fact that Scott forwarded this note to his surety for his signature, and that it was signed and delivered by the surety in Ohio, and the money there paid (more than probably as a mere matter of convenience), has the effect of defeating the intention of the parties. It is difficult to perceive upon what principle we should so find.

We do not, in thus holding, encourage two citizens of Ohio, to attempt to contract here for money to be used here, and make their notes payable in another state; nor, in any way, relax the strictness of the rules which prevent any form of evasion of the law against usury; but we hold that it is not repugnant to such laws for a person to contract with reference to the law of his domicile, for money to be used there, when no such evasion is sought or intended.

Judgment affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ILLINOIS.[2]
COURT OF ERRORS AND APPEALS OF MARYLAND.[3]
SUPREME COURT OF MISSOURI.[4]
SUPREME COURT OF OHIO.[5]

ADMIRALTY. See *Shipping.*

Damages for Collision—Appellate Jurisdiction.—The libellant in a suit *in rem*, in admiralty, against a vessel, for damages growing out of a collision, claimed, in his libel, to recover $27,000 damages. After the attachment of the vessel in the District Court, a stipulation in the sum of $2100, as her appraised value, was given. The libel having been dismissed by the Circuit Court on appeal, the libellant appealed to the U. S. Supreme Court: *Held*, that the matter in dispute did not exceed the sum or value of $5000, exclusive of costs, as required by sect. 3 of the Act of February 16th 1875, and that the Supreme Court had no jurisdiction

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 107 Otto.

[2] From Hon. N. L. Freeman, Reporter; to appear in 105 Ill. Reports.

[3] From J. Shaff Stockett, Esq., Reporter; to appear in 59 Md. Reports.

[4] From T. K. Skinker, Esq., Reporter; to appear in 76 Mo. Reports.

[5] From E. L. De Witt, Esq., Reporter. The cases will probably appear in 38 or 39 Ohio St. Reports.

of the appeal: *Starin* v. *Schooner Jessie Williamson, Jr.*, S. C. U. S., Oct. Term 1882.

A decree against the vessel for $27,000 would not establish the liability of the claimant to respond for that amount *in personam*, unless he was the owner of the vessel at the time of the collision, and that fact must appear by the record, in order to be so far a foundation for such liability as to authorize the court to consider the $27,000 as the value of the matter in dispute on such appeal: *Id.*

AGENT.

Contract—Enforcement of by Principal.—Where an agent enters into a contract without disclosing his principal or agency, the principal, if he takes advantage of the contract, must do so subject to all the rights and equities of which the other contracting party, who had no knowledge of the agency, might avail himself as against the agent, assuming the latter to be a principal: *Miller's Ex'rs.* v. *Sullivan*, 38 or 39 Ohio St.

Liability for Tort in Business of Principal—Distinction between General Superintendent and Intermediate Manager.—The law is established that in the case of an agent or steward committing a tort while acting within the scope of his employment, he and his employer may be sued separately or jointly at the election of the party injured. Nor is it material to the latter's right to sue, in what proportions, if any, they share the benefits of the wrongful act: *Blaen Avon Coal Co.* v. *McCulloh*, 59 Md.

The cases in which the intermediate manager or head employee has been held not liable for trespasses of workmen under him, and in which recourse can be had only to the actual wrongdoer, or to the master, on the principle of *respondeat superior*, are distinguishable from those where the tort is in consequence of the command or neglect of the general superintendent: *Id.*

ASSIGNMENT. See *Bank; Estoppel.*

ATTORNEY.

Striking from Roll—Breach of Private Trust.—Where property is conveyed to an attorney in trust, without his professional advice, and he mortgages the same, for the purpose of raising a sum of money which he claims is due him from the *cestui que trust*, and the trustee afterwards sells the property and appropriates the proceeds of the sale to his own use, the relation of client and attorney not being created by such trust, his conduct, however censurable as an individual occupying the position of a trustee, is not such as to warrant the summary disbarring of him on motion to the court to strike his name from the roll of attorneys, but the injured party must be left to his proper remedy by suit: *The People* v. *Appleton*, 105 Ill.

Although the general rule is, that an attorney at law will not be disbarred for misconduct not in his professional capacity, but as an individual, there are cases forming an exception where his misconduct in his private capacity may be of so gross a character as to require his disbarment: *Id.*

BANK. See *National Bank.*

Notice—Assignment for Creditors—Check antedated.—L. & Co. made

an assignment for the benefit of creditors, under the insolvent laws of Ohio, on September 26th 1874. On September 29th 1874, L. & Co. gave their check on the First National Bank of Ravenna to H. & S., and dated it back to September 22d. On September 29th, the bank paid the check, with knowledge of the assignment of L. & Co., but without knowledge that the check had been dated back: *Held*, in an action by the assignee of L. & Co. to recover moneys on deposit with the bank at the date of the assignment, the knowledge of the bank that L. & Co. had made an assignment prior to the presentation of the check, put it upon inquiry as to whether or not the check had in fact been given before the assignment. And such payment of the check would not be a defence for the bank: *Chaffe* v. *First National Bank of Ravenna*, 38 or 39 Ohio St.

Sale of Stock—Representations of Officer—National Bank—Ultra Vires.—A person buying stock of a bank from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition; and, if already a stockholder, is not bound to avail himself of his right of examining the books of the bank: *Union Nat. Bank* v. *Hunt*, 76 Mo.

A representation by a bank officer that stock of his bank is worth $100 per share is a mere expression of opinion or commendation of the stock, and if it turns out to be false a note taken by him for the price of the stock will not thereby be avoided though it was relied on by the purchaser, but it is otherwise with a representation that the bank is in a solvent condition and doing a good business: *Id.*

When a national bank purchases its own stock to protect itself from loss upon a debt, it is bound to sell the stock within six months, and may sell on credit and take the purchaser's note, with the stock sold as collateral to secure it, provided this is done in good faith: *Id.*

An abuse of the corporate powers is not a sufficient defence to such a note. The question of misuser will not be decided collaterally by setting aside a sale otherwise good: *Id.*

Check—Right of Holder to Balance in Bank.—A bank is under no obligation to pay any sum on a check payable to the drawer's order and by him assigned, when the drawer has not sufficient money on deposit to his credit in the bank to pay the check in full, and no recovery in such case can be had by the assignee. The rule may be different when the drawer himself is plaintiff: *Coates* v. *Preston*, 105 Ill.

BILLS AND NOTES. See *United States Courts.*

Letter of Credit—Liability on—Consideration of Drafts.—In order to render the writer of a letter of credit liable, either upon an implied acceptance of, or an agreement to accept, drafts taken on the faith of such letter, the drafts must be taken for a valuable consideration: *Sherwin* v. *Brigham*, 38 or 39 Ohio St.

A promise to have the drafts discounted, and to take up notes on which the persons taking the drafts are liable as indorsers, is not a valuable consideration: *Id.*

If a letter of credit provides that drafts drawn under its authority shall be used only for the purpose of being discounted at a particular bank,

persons taking such drafts, with notice that they have been offered to the bank for discount and refused, cannot recover thereon: *Id.*

Signature obtained through Misrepresentation as to Character of Paper.—In an action by the holder of a promissory note against the person purporting to be the maker, the defendant testified that he had never given the note in suit, nor had ever seen the paper before its production in court. At this point he was interrupted by his counsel, who admitted that the signature was genuine. The defendant then testified in detail to his having been approached on the day of the date of the note by a person representing himself to be the agent of the persons named as payees, and who solicited him to become their agent; that he finally consented and signed a contract of agency in duplicate; and that he signed no other papers on that day or on any other day, and never signed such a paper as the note in suit, at all, and never saw it before seeing it in court. On a prayer offered by the plaintiff asserting the legal insufficiency of the defendant's evidence as a defence, it was *held*, that to render the defendant liable on said paper he must have been aware at the time of signing the same, or possessed opportunities, such as a reasonable cautious man would have exercised, of knowing that he was signing a note for the payment of money, as represented by the paper; and that although the genuine signature of the defendant was subscribed to the paper, he was not liable thereon, if his signature was obtained surreptitiously and by fraud, and with an understanding at the time had with the payees or their agent that he was signing a paper of a different character: *Kagel* v. *Totten*, 59 Md.

Charity.

Gift for, when valid.—Sect. 2419 of the Code of Georgia is as follows: "No person leaving a wife or child, or descendants of a child, shall by will devise more than one-third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void: *Held*, not to invalidate a charitable devise contained in a will executed within ninety days before the testator's death, *unless* he leaves a wife or child or descendants of a child: *Jones* v. *Habersham*, S. C. U. S., Oct. Term 1882.

Check. See *Bank.*

Conflict of Laws. See *Municipal Corporation.*

Common Carrier.

Delay in delivery—Liability for—Form of Action—Measure of Damages.—In actions against a common carrier, for the breach of a contract for the carriage and delivery of goods, the suit may be framed either *ex contractu*, upon the breach of the engagement, or *ex delicto*, upon the violation of the public duty. But whether the action be assumpsit on the contract, or case for the violation of duty, the same law is applicable to both classes of action, and the measure of damages is equally a question of law, and as much under the control of the court, as if the right rested in agreement only: *Baltimore and Ohio Railroad Co.* v. *Pumphrey*, 59 Md.

As a general rule the measure of damages in such cases is the value of the goods at their place of destination, with compensation for the actual loss, which is the natural and proximate consequence of the act, and excluding remote or indirect losses. The loss sustained by the plaintiff in his general business does not come under this rule: *Id.*

Common carriers deliver property at their peril; for if delivery be to a wrong person, they will be responsible to the rightful owner. It is their duty, therefore, in all cases to be diligent in their efforts to secure a delivery to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them, that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery; but it is their duty in all cases to be diligent in their efforts to secure a delivery to the person entitled: *Id.*

CONSTITUTIONAL LAW. See *Eminent Domain.*

Power to amend Charters of Corporation.—The Constitution of Georgia provides that "the General Assembly shall have no power to grant corporate powers and privileges to private companies, except, &c. * * * But it shall prescribe by law the manner in which such powers shall be exercised by the courts:" *Held*, not to take away from the General Assembly the power to amend the charters of existing corporations by modifying or enlarging their powers; *Jones* v. *Habersham*, S. C. U. S., Oct. Term 1882.

Suit by one of the United States to recover a Debt due to its Citizens by another State.—The states of New Hampshire and New York, passed Acts of Assembly authorizing the assignment to the state of claims of citizens against another state and the prosecution of suits thereon in the name of the state, but at the expense and for the benefit of the assignors: *Held*, that suits brought under these acts were within the eleventh amendment to the constitution declaring that the judicial power "shall not be construed to extend to any suit in law or equity, *commenced or prosecuted* against one of the United States by citizens of another state:" *The State of New Hampshire* v. *The State of Louisiana*, S. C. U. S., Oct. Term 1882.

The right of suit against a state granted to the citizen by the original constitution took away any indirect remedy he might otherwise have claimed through the intervention of his state, upon any principle of the law of nations; the eleventh amendment took away this special remedy without restoring any power taken away by its original grant: *Id.*

One state can not create a *controversy* with another state within the meaning of that term as used in the judicial clauses of the constitution by assuming the prosecution of debts owing by the other state to its citizens: *Id.*

Law with one Object and Expression of same in Title.—The Constitution of New Jersey provides: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title:" *Held*, that this provision does not require that the title of an act shall embody a detailed statement, nor be an index or abstract, of its contents; nor does it prevent the uniting in the same act of any number of provisions

having one general object fairly indicated by its title; and that the powers, however varied and extended, which a new township may exercise constitute but one object which is fairly expressed by a title showing nothing more than the legislative purpose to establish such township: *Township of Montclair* v. *Ramsdell*, S. C. U. S., Oct. Term 1882.

CONTRACT. See *Rescission.*

Illegality of—Rights of Co-Principals against each other.—While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property belonging to his principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction: *Norton* v. *Blinn*, 38 or 39 Ohio St.

CORPORATION. See *Bank; Constitutional Law.*

DAMAGES. See *Common Carrier.*

EQUITY.

Feigned Issue—Not demandable of Right.—An issue of fact from a court of equity to be tried by a jury is not a matter of right, at any stage of the proceeding; and in the exercise of a discretion it should only be allowed where the proof before the judge creates doubt, by reason of conflict or doubtful credibility of witnesses, or where from a mass of circumstances, it may be difficult to draw a proper conclusion. It is never allowed as a substitute for the failure of proof, or for omitted evidence: *Chase* v. *Winans*, 59 Md.

A court of equity has full power and right to decide every question of law or fact which may arise out of the subject-matter before it, and over which it has jurisdiction; and the trial by issue forms no necessary incident to the proceedings of such court. It is resorted to simply as a means of informing the conscience of the court, and is not binding upon it: *Id.*

Pleading—Multifariousness.—A bill against several defendants to set aside several distinct conveyances made to them separately on the ground of fraud, one general right being claimed, is not multifarious: *Bobb* v. *Bobb*, 76 Mo.

Bill to remove Cloud from Title—Possession of Defendant.—There are only two cases, under the laws of Illinois, in which a party may file a bill to quiet title or remove a cloud from the title to real property: First, when he is in possession of the lands; and second, when he claims to be the owner, and the lands in controversy are unimproved and unoccupied: *Gould* v. *Sternburg*, 105 Ill.

Where the defendants are in the actual possession of land, though acquired by force and violence, a court of equity will not undertake to determine the validity of the respective titles of the parties, but will leave the complainant to his remedy at law. The rule is of general application, that where there is a plain and adequate remedy at law a court of equity will not interfere: *Id.*

EMINENT DOMAIN.

Condemnation of Land—Amount of Land necessary—How deter-

mined.—Where the description of the land and the purpose for which it is sought to be taken are stated in the petition, as they must be in every case, whether the land is reasonably necessary for the purpose stated depends mainly upon the facts thus stated in the petition. But the court in passing upon this question, as it must before submitting the question of damage or compensation to the jury, should take into consideration the section of the country and the particular locality in which the improvement is to be constructed—whether in an obscure country village, or in a great commercial centre—and acting upon its own knowledge of the commerce and business necessities of the country, must, upon the facts stated in the petition, determine this question for itself. The jury impanelled can find no fact except what is just compensation to the owner: *Smith* v. *C. & W. I. Railroad Co.*, 105 Ill.

Every company seeking to condemn land for a public improvement must, in a modified degree, be permitted to judge for itself as to the amount that is necessary for such purpose. This right is subject to all constitutional and statutory restrictions, and to the further limitation that the courts are clothed with ample power to prevent any abuse of the same: *Id.*

ERRORS AND APPEALS. See *Admiralty.*

Right of Administrator.—An administrator may maintain an appeal from an order of payment on the ground that it lays down a rule of apportionment which works injustice as between the creditors of the estate: *In re Estate of McCune,* 76 Mo.

Waiver of Appeal— Consideration.—By an agreement, free from all shadow of fraud, mistake or surprise, signed by counsel representing the executors, and others interested in the distribution of a testator's estate, and filed in the case, the right of appeal from a decree passed some six months previously, construing certain clauses of the testator's will, was waived, and consent was given to the passage of a decree for the final distribution of the testator's estate. Accordingly an order was passed for the immediate distribution of the residue. The consideration moving to K., one of the parties to the agreement, to waive his right of appeal, was the immediate possession of his share of the residue of the estate without further litigation or delay. *Held*, that the agreement to waive his right of appeal was binding, being supported by a sufficient legal consideration, and K. was concluded thereby from maintaining an appeal: *Mackey* v. *Daniel,* 59 Md.

ESTOPPEL. See *Former Recovery.*

Assignment of Stock by blank Power of Attorney—Bona fide Purchaser.—Where certificates of stock in a private corporation are assigned in blank, with a power of attorney authorizing the transfer of the stock on the books of the corporation, with no limitation as to their use by the assignee, the assignee or holder will be authorized, as to persons dealing with him without notice of any defect of power in him, to make any legitimate use of them a rightful owner might, and a sale or pledge of such certificates by him, in the usual course of business, to a party taking in good faith for value, will be valid and binding on the original owner or assignor, though the legal title may not have passed, for want of a transfer on the books of the corporation: *Otis* v. *Gardner,* 105 Ill.

If the owner of property or choses in action voluntarily clothes another with the *indicia* of ownership, by which the latter is enabled to sell or pledge the same, for his own benefit, to an innocent party for value, the former can have no relief against such act to the prejudice of the pledgee or vendee. Where one of two or more persons must suffer loss, it must fall upon him whose conduct made it possible for loss to occur: *Id.*

EXECUTORS AND ADMINISTRATORS. See *Errors and Appeals.*

FIXTURES.

Tests as to what constitutes—Evidence of Custom.—Whether a chattel becomes a fixture or not does not depend so much upon the character of the fastening by which it is held down (whether slight or otherwise), as upon the nature of the article, and its use as connected with the use of the freehold. As between the mortgagor and mortgagee, the true criterion consists in the united application of several tests: 1st, Real or constructive annexation of the article in question to the realty. 2d, Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made: *Thomas* v. *Davis*, 76 Mo.

As between landlord and tenant, evidence of custom with respect to chattels annexed to the realty, by which they are treated as personalty, is admissible, but not so with respect to articles annexed by a mortgagor or grantor before the execution of his conveyance: *Id.*

FORMER RECOVERY.

Waiver of Defences not pleaded—Not applicable to Defence constituting Counter-claim—Equitable Title.—The general rule is that a defendant is bound to set up every defence, legal or equitable, or both, which he may have to the action, and waives those not pleaded; but where the facts claimed to afford a defence are sufficient to constitute a counter-claim, there is an exception to such general rule: *Witte* v. *Lockwood*, 38 or 39 Ohio St.

A defendant relying solely on his legal title, in an action to recover the possession of real property, and failing, is not estopped to maintain an action to correct mistakes in the deeds under which the parties to such action respectively claimed. He has his election to rely on such equitable title as a defence or a counter-claim, or he may maintain an action thereon: *Id.*

Assumpsit and Trover—Recovery in One a Bar to Other.—The law is adverse to multiplying suits, and if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal, either for or against him, as a general rule he will not be permitted to resort to the other: *Walsh* v. *Chesapeake and Ohio Canal Co.*, 59 Md.

The plaintiffs recovered judgment in an action of assumpsit, and

afterwards sued the same defendant in an action of trover, to recover damages for the conversion of the same property which had formed the subject of the action of assumpsit. On a plea of former recovery it was *held*, that in the judgment in the first action the cause of action was merged, and could only have been revived by apt proceedings terminating in striking the judgment from the record in the court of original jurisdiction, or by its reversal on appeal: *Id.*

Intoxicating Liquor.

Suit by Wife for Sale to Husband—Independent Sales by two Persons—Joint Liability.—In an action by a wife against two persons for injury to her means of support resulting from the habitual intoxication of her husband caused by intoxicating liquors sold and furnished him by the defendants, and where, from the facts found, it appeared that the defendants each sold intoxicating liquors to the husband, and that they were in no way connected in business, and that neither of them was in any way interested in the sales made by the other; but that the husband of the plaintiff, during the time in which the sales were made, was habitually intoxicated, and that the sales were made by both defendants with knowledge of this fact, and the sales thus made contributed to keep up said habit: *Held*, that the defendants were jointly liable: *Rantz* v. *Barnes*, 38 or 39 Ohio St.

Libel.

False Statement as to Conviction of Crime.—The publication in a newspaper of a false statement that a person was convicted and sentenced to prison for libel, is actionable, without proof of special damage: *Boogher* v. *Knapp*, 76 Mo.

Malicious Prosecution.

Civil Suit—Injunction—Corporation—Measure of Damages—Mining Company.—The N. C. Co., a corporation, with malice and without probable cause, sued U. and others, in a civil action and by an order of injunction made on its *ex parte* application, prevented U. and others from entering upon and enjoying their property, and also from prosecuting a profitable business. After a year had passed, the N. C. Co. dismissed its action. U. and others thereupon sued the company, claiming damages for said malicious prosecution: *Held*, 1. They can maintain the action. 2. The measure of the damages is the value of the right of U. and others to possess their property and prosecute their business during said period of ouster and suspension: *i. e.*, the value of the use of the property, in the business, during that time: *Newark Coal Co.* v. *Upson*, 38 or 39 Ohio St.

Municipal Corporations. See *Ordinance.*

Counties—Property of subject to Legislative control.—The property of a county being held for the public, it is under the uncontrolled power of the General Assembly, which is not restricted or limited in its absolute control over the same. A county can neither hold nor dispose of property except by constitutional or legislative authority, and the legislature has the power to sell or dispose of it without the consent of the county authorities: *Harris* v. *Board of Supervisors of Whiteside Co.*, 105 Ill.

Bonds of Municipal Corporations—Irregularity in Election by which they were authorized—United States Court when not bound by Decisions of State Court.—Where a municipal corporation in pursuance of legislative authority voted a donation to a railroad company, and issued bonds to pay the same which recited, on their face, that an election had been held in accordance with the authorizing statutes: *Held*, 1. That a defect in the method of holding the election by which the donation was voted in no way impairs the validity of the bonds in the hands of a *bona fide* holder. 2. That a decision of the state Supreme Court declaring that in consequence of such irregularity the bonds are void in the hands of *bona fide* holders is not binding on the U. S. Supreme Court. The proposition is one which falls among the general principles and doctrines of commercial jurisprudence, as to which it is the duty of the latter court to form an independent judgment, and in respect to which it is under no obligation to follow implicitly the conclusions of any other court however learned or able it may be: *Town of Pana* v. *Bowler*, S. C. U. S., Oct. Term 1882.

NATIONAL BANK. See *Bank.*

Power to receive Special Deposits—Liability for—Evidence.—The power to receive special deposits is conferred by the National Banking Act, upon banks organized under that act: *First National Bank of Mansfield* v. *Zent*, 38 or 39 Ohio St.

Where a national bank has been accustomed to receive United States bonds as special deposits, gratuitously, it is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value: *Id.*

A demand of such bonds, and a refusal by the bank to deliver the same, with no other explanation of such refusal than the statement that the bank has no such bonds in its possession, furnish sufficient proof of loss by such negligence as will render the bank liable therefor: *Id.*

Construction of National Banking Acts and Section 3466 Revised Statutes—Claims of United States when not Preferred.—The law of 1797, re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents cannot be applied to demands against National Banks which have failed. The provisions of that law and of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former must yield to the latter, and is, to the extent of the repugnancy, superseded by it: *National Bank* v. *The United States*, S. C. U. S., Oct. Term 1882.

At the time of its suspension a national bank had on deposit certain "postal funds" and "money-order funds" deposited by a deputy-postmaster. The Treasury Department, over and above a sum sufficient to secure the circulation of the bank's notes, had $30,000 belonging to it, but the liabilities of the bank exceeded its assets. *Held*, that the claim of the United States for moneys so deposited by the deputy-postmaster was not a preferred debt nor could it be set off against the surplus moneys remaining in the treasury of the proceeds of bonds deposited as security for the circulating the notes of the bank: *Id.*

NEGLIGENCE.

Railroad—Rate of Speed—Contributory Negligence—Duty of Court.

—Aside from statutory or municipal regulation, no rate of speed at which a railroad train may be run is negligence *per se*: *Powell* v. *The Missouri Pacific Railway Co.*, 76 Mo.

In an action grounded upon allegations of negligence, if the undisputed facts show that notwithstanding the defendant's negligence, the plaintiff would not have sustained the injuries complained of but for his own negligence directly tending to produce them, it is the duty of the court to direct the jury to find for defendant: *Id.*

Railroad—Escape of Fire—Presumption.—There is no legal presumption that a railroad company, while in the exercise of its lawful right to run its locomotives and trains over its road and to use fire in so doing, will not permit fire to escape from them: *Palmer* v. *Missouri Pacific Railway Co.*, 76 Mo.

The fact that a railroad company uses good machinery and the most approved appliances to prevent the escape of fire, and has careful and competent men in charge thereof, will not, in case fire does escape, of itself rebut the *prima facie* inference of negligence or exempt the company from liability for damages caused thereby: *Id.*

Railroad companies must use reasonable precautions to prevent fire from being carried from their locomotives by such winds as are usual and ordinary at the season and the place, and are only relieved from making provision against extraordinary and unusual winds: *Id.*

NOTICE. See *Bank.*

ORDINANCE.

Rules of Construction—Pay of Officers.—The charter and ordinances of a city stand in the same relation to each other as the constitution and statutes of a state, and the rules applicable in deciding questions of conflict between the latter may be resorted to to determine similar questions between the former: *Quinette* v. *City of St. Louis*, 76 Mo.

Where a city charter provided that judges of election should receive no pay, and repealed all existing ordinances inconsistent with its provisions: *Held*, that an ordinance then in force providing for the pay of judges and clerks of election was repealed only so far as it related to the judges, and the clerks were entitled to pay at the rate fixed by the ordinance: *Id.*

PARDON.

Fraud in Procuring—Effect of, on Habeas Corpus after re-arrest—An unconditional pardon by the governor, delivered to and accepted by one convicted of felony, cannot be treated as a nullity, in a proceeding on habeas corpus prosecuted by such person against one who re-arrested him basing his right to do so on the ground that the pardon was granted by reason of acts of such convict affecting his health, done with the fraudulent purpose of obtaining such pardon, and by reason of fraudulent representations with respect to his health, made by such convict with like fraudulent purpose: *Knapp* v. *Thomas*, 38 or 39 Ohio St.

PARTNERSHIP.

Employment for Share of Profits.—A contract was made between E. and the Mayor and City Council of Baltimore, for the performance by E. of certain work for said corporation. The contract provided for the

retention by the city of one-fifth of the money due upon the monthly estimates, until the work was completed and accepted. Subsequently a written agreement was made between E. and R. by which R. was to superintend the work, and to receive therefor from E. one-sixth of the *net profits* arising from the contract with the city. It was further stipulated by this agreement that R. should have the privilege of drawing a fixed sum per month, to be charged against said one-sixth net profits, and should have the privilege of inspecting the books of account relating to the work; but in the concluding clause it was expressly agreed that R. was not a partner with E. in said work, nor was he to be in any manner liable for any damages growing out of its prosecution, other than as such superintendent. A bill was filed by R. against E. and certain assignees of E.'s interest in the contract with the city of Baltimore, and against the said city, for a discovery, and account, and a decree for the amount due him, and for a receiver to receive all sums payable by the city under its contract, and an injunction to prevent E. or his assignees from collecting, and the said city from paying to them, the sums due under said contract. On demurrer to said bill, it was *Held*, that in the face of the provision in the agreement between E. and R. that R. should not be a partner, it could not be said that the other clauses of the agreement, by which it was stipulated that he should receive one-sixth of the net profits growing out of the contract, as compensation for his management and superintendence of the work, made him such partner: *Reddington* v. *Lanahan*, 59 Md.

PLEADING. See *Equity*.

PUBLIC POLICY. See *Contract*.

RAILROAD. See *Eminent Domain*; *Negligence*.

REMOVAL OF CAUSES.

Separable Controversy—Local Prejudice Act.—A suit to recover certain real estate occupied by one Myers, a citizen of New York, was brought, in 1873, by citizens of North Carolina, in the state court, against Myers alone; and in 1877 was amended, bringing in other defendants, citizens of North Carolina, who, it was alleged, held the legal title. Myers alone answered the amended complaint, in Sept. 1877, and in March 1878 petitioned for removal, filing an affidavit to the effect that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court: *Held*, 1. That the application was too late to secure the benefit of the separable controversy provision in the Act of 1875. Such an application should have been made at or before the term at which the cause could be first tried, or rather, as this suit was begun before the Act of 1875 was passed, it should have been at or before the term at which the cause could be first tried after the act went into operation. 2. That while there is no doubt that the principal controversy is between Myers and the plaintiffs, yet as the legal title is thought to be in the other defendants, and the plaintiffs require the presence of the trustee defendants, in order to get Myers out of possession, it follows that they are not nominal but necessary parties; and as, under the local prejudice act, there can be no removal, unless all the necessary parties on one side

of the suit are citizens of different states from those on the other, the cause should be remanded to the state court: *Myers* v. *Swan*, S. C. U. S., Oct. Term 1882.

RESCISSION

Purchaser must rescind in toto.—A party will not be permitted to affirm a contract in part, and rescind as to the residue. If he rescinds at all, he must do so *in toto*. The opposite party must be placed in as good a condition as he was before the sale by a return of the property purchased, unless it is entirely worthless: *Harzfeld* v. *Converse*, 105 Ill.

Where the plaintiff, in an action to recover back a portion of the purchase price of certain goods, had purchased of the defendant six cases of beavers under an entire contract, and upon receiving the same made no objection to any part of them, and did not, before suit, offer to return to the defendant all the goods, but confined his offer to return to a portion, and expressly elected to retain the other part, it was *held*, that the plaintiff could not recover, in an action for money had and received, the price of the goods objected to: *Id.*

SALE. See *Rescission.*

SHIPPING.

Injury to Property on Shore—Jurisdiction of State Courts.—Where, through the negligence of those managing a steam tug-boat in towing a schooner in the navigable waters of the Chicago river, the schooner is run into an elevator situated on the land, breaking the same, and causing the loss of a quantity of grain, the tort is not a maritime one and within the exclusive jurisdiction of a court of admiralty. In such case the state courts may afford a remedy for the injury: *Johnson* v. *Elevator Co.*, 105 Ill.

SPECIFIC PERFORMANCE.

Doubtful Title—When good Defence—Every purchaser of land has a right to demand and to have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. But the doubt must be considerable and rational, such as would, and ought to induce a prudent man to pause and hesitate; such as would produce a *bona fide* hesitation in the mind of the judge passing upon the title: *Gill* v. *Wells*, 59 Md.

STATUTE.

Construction—Previous Construction in other State.—Where the statute of one state or country is re-enacted in another, the courts of the latter state will place the same construction on it as had been given to it by the courts of the state where it was originally enacted: *Skrainka* v. *Allen*, 76 Mo.

STOCK. See *Estoppel.*

SURETY.

Verbal Notice to proceed against Principal—Extension of Time.—A surety cannot base a claim to be released from his obligation on a verbal

notice to the creditor to proceed against the principal debtor. To be available the notice must be in writing: *Petty* v. *Douglass*, 76 Mo.

Part payment of a note after maturity is no valid consideration for an extension of time: *Id.*

TRADEMARK.

Bill to restrain use of Trademark dismissed when Trademark misrepresented the Person by whom, and place where, the Article was Manufactured.—The Manhattan Medicine Company filed a bill to restrain defendants from using the trademark "Attwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," claiming to be the exclusive owner of the formula and recipe for making the medicine, and of the right of using the said name or designation. It was admitted that whatever value the medicine possessed was given to it by its original manufacturer, Moses Attwood, who manufactured it at Georgetown, Mass., and that it is now manufactured by the plaintiffs in New York city. *Held*, that the statement that the article was manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it was manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance, and that the bill must be dismissed: *Medicine Co.* v. *Wood*, S. C. U. S., Oct. Term 1882.

The object of a trademark being to indicate, by its meaning or association, the origin or ownership of the articles, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practised upon the public and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer: *Id.*

TRIAL.

Practice—Admitting Evidence out of Order.—A sound exercise of the discretion vested in the trial courts of determining whether or not evidence should be received out of time, requires that when it appears that failure to offer material evidence in proper time was the result of inadvertence and that it was not kept back by a trick or for any unfair purpose and that the other party will not be deceived or injuriously affected by it, it should be let in even after a demurrer to the evidence has been sustained. For refusal of the trial court so to do, the appellate court will reverse: *Tierney* v. *Spiva*, 76 Mo.

UNITED STATES COURTS. See *Municipal Corporation.*

Indorsee of Note secured by Mortgage—Act of Congress March 3d 1875, c. 137.—When a promissory note, negotiable by the law merchant, is made by a citizen of one state to a citizen of the same state, and secured by a mortgage from the maker to the payee, an indorsee of the note can, since the act of March 3d 1875, c. 137 (1 Sup. Rev. Stat. 173), sue in the courts of the United States to foreclose the mortgage, and obtain a sale of the mortgaged property: *Tredway* v. *Sanger*, S. C. U. S., Oct. Term 1882.