but the public against fraud and alterations, by refusing to sign negotiable paper, made in such form as to admit of fraudulent practices upon them, with ease and without ready detection." By executing a note in such form, that a material part may be detached and a perfect instrument left, the maker places it in the power of the payee to perpetrate fraud with ease and facility, and without risk of detection. By intrusting such paper to the payee, the maker asserts his confidence that the payee will practise no fraud; and if that confidence is misplaced, the maker, rather than an innocent holder, must suffer. Confidence under such circumstances is certainly a species of negligence: *Putnam* v. *Sullivan*, 3 Mass. 45. The maker places it in the power of the payee to do the wrong; his act facilitates and invites the fraud, and he ought to suffer any loss resulting therefrom. It follows from the foregoing views that the facts stated in the reply are sufficient to avoid the answer, and the demurrer is therefore overruled.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ALABAMA.[1]

SUPREME COURT OF MICHIGAN.[2]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF NEW JERSEY.[4]

SUPREME COURT OF WISCONSIN.[5]

AGENT.

Admissibility of Statements by.—Statements made by a general agent, in order to be evidence against his principal, must have been made in the course of the business intrusted to him: *Ashmore* v. *Pennsylvania Steam Towing Co.*, 9 Vroom.

This rule excludes all statements or narrations of such agent which, although relating to the business of the principal, were not made in execution of the agency: *Id.*

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[1] From Hon. Thos. G. Jones, Reporter; cases decided at January Term 1875; the volume in which they will be reported cannot yet be indicated.

[2] From Hoyt Post, Esq., Reporter; cases decided at February and April Terms 1875.

[3] From John M. Shirley, Esq., Reporter; to appear in 54 & 55 N. H. Reports.

[4] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 9 of his Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 36 Wisconsin Reports.

BILLS AND NOTES. See *Pleading.*

Payment of Interest by Partner after Dissolution—Married Woman.—Payment of interest on a note drawn by a firm, by one of the members after the dissolution of the firm, but within six years after the maturity of such note, will renew it as against the Statute of Limitations: *Merritt et al.* v. *Day et al.*, 9 Vroom.

Nor will the fact that one of the firm is a married woman alter the effect of such renewal: *Id.*

BREACH OF PROMISE.

Evidence.—In an action for breach of promise evidence was offered to show the statements of the plaintiff to third persons, made within a few days after the defendant's final refusal to marry her, that she cared nothing about him; that all she wanted was his money; that she only proposed to marry him to spite his family; that she had refused to live in any residence he had or place where he was living, and the like. This evidence was rejected on the ground that they were made after the engagement had been broken. *Held*, That the evidence proposed would have tended to show feelings on the part of the plaintiff while the engagement was in force, inconsistent with any purpose to fulfil the engagement in a spirit befitting the relation contemplated by it, and such as must have rendered a breach of the contract by defendant of little or no injury to her; and that such feelings and purposes as were proposed to be shown may be shown as well by admissions made after a breach of the engagement as before: *Miller* v. *Rosier*, S. C. Mich.

It is also alleged for error that the plaintiff was allowed to show the value of the farm belonging to the defendant's father. The only ground on which it is claimed this was admissible was that from other evidence it had been shown defendant had stated to plaintiff that his property was invested in this farm. How much was invested he did not state, nor was it shown. *Held*, That the court below correctly ruled that evidence of defendant's pecuniary circumstances might be put in by the plaintiff; but that this evidence only went to show the father's circumstances, which were wholly immaterial: *Id.*

The circuit judge, at the request of the plaintiff, instructed the jury that if they found for plaintiff they should award her such damages as would place her in as good a condition, pecuniarily, as she would have been if the contract had been fulfilled. *Held*, That this ruling is one the elements of which are altogether too complicated and conjectural, and that it should not have been given: *Id.*

CANAL COMPANY.

Ultra Vires.—It is not *ultra vires* for a canal company, having the right to draw water from a public river for its chartered purpose, to agree to discharge its waste water at a certain point: *Armstrong v. Pennsylania Railroad Co.*, 9 Vroom.

Quere. Whether such agreement can stipulate for a continuance of such supply, notwithstanding that, in the fair judgment of the officers of the company, its convenience or real interest requires the cessation of such privilege: *Id.*

CHANCERY. See *Election.*

CHATTEL MORTGAGE. See *Infant; Mortgage.*

CONTEMPT.

Evidence.—In general, proceedings for a contempt of court, not committed in the presence of the court, ought to be substantially according to the course of practice in criminal trials; and so, where evidence is introduced in such case beyond the answers of the respondent, it ought generally to be such as would be admissible on the trial of an indictment for the same offence: *Bates's Case*, 55 N. H.

CONTRACT. See *Vendor.*

CORPORATION. See *Canal Company.*

Estoppel of Parties dealing with—Legality of Proceedings.—One who gives a note to a corporation will not be permitted to deny that there is such a corporation: *Nashua Fire Ins. Co.* v. *Moore*, 55 N. H.

In an action brought by a corporation, the defendant, by pleading the general issue, admits that the plaintiffs are a corporation capable of sustaining an action: *Id.*

A provision in the by-laws of a corporation, which requires the directors to be chosen at the annual meetings of the corporation, is directory only, and not restrictive. Its observance is not essential to the exercise of the power of election: *Id.*

The legality of the election of directors of a corporation cannot be brought collaterally in question; but the proceedings must be instituted for the express purpose of evicting them, if not properly elected: *Id.*

CRIMINAL LAW.

Error—Doubt—Evidence.—In a criminal case, especially when there is conflict between the witnesses for the state and defence, it is error to charge the jury, "that although they may have a reasonable doubt of any single fact in the testimony of any witness, they cannot acquit, unless such fact is material to the issue joined:" *Williams* v. *The State*, S. C. Ala.

Such a charge is calculated to mislead the jury, withdraw from their consideration material evidence and submits to them the determination of a question of law whether any of the facts in evidence, are material to the issue joined: *Id.*

Multifariousness in Pleading.—An indictment (founded upon Gen. Stats., ch. 264, sec. 15), charging that the respondents," with force and arms in and upon one Stephen Lohiel, of said Hart's Location, feloniously did make an assault, and him the said Stephen Lohiel in bodily fear and danger of his life then and there feloniously did put, and two bank bills for the payment of two dollars each, and of the value of two dollars each, of the national currency of the United States, and two United States treasury notes of the value of two dollars each, of the goods, chattels, and moneys of him the said Stephen Lohiel, from the person and against the will of him the said Stephen Lohiel then and there feloniously and putting in fear did steal, take, and carry away, contrary to the form of the statute," is not bad for uncertainty, duplicity, or repugnancy: *State* v. *Gorham*, 55 N. H.

An indictment which charges the commission of an offence which in

its nature includes several inferior offences, is not, for such reason, multifarious: *Id.*

A single count in an indictment may allege all the circumstances necessary to constitute two different crimes, where the offence described is a complicated one, comprehending in itself divers circumstances, each of which is an offence: *Id.*

Where goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of the bailor or of the bailee, although the goods were never in the real owner's possession, but in that of the bailee merely: *Id.*

Bank bills are the subject of larceny, and no other description of them is required than that employed in the portion of the indictment recited in the first paragraph above: *Id.*

The offence of robbery is sustained by proof of a felonious taking of property from the person of another by assault, although without putting in fear. This is equally true with reference to our statute and to the common law: *Id.*

DAMAGES. See *Nuisance.*

DEBTOR AND CREDITOR.

Application of Payment.—A debtor, paying money to a creditor who has several claims against him, may direct to which the payment shall be applied. If the debtor makes no application, the creditor may apply it to any lawful demand due and payable: *Bean* v. *Brown*, 54 N. H.

Composition Deed—Illegal Consideration for Signing.—A note given by a debtor to induce his creditor to sign a composition deed, without the knowledge of the other creditors who are parties to the deed, is illegal and void, and it will make no difference if the note is given to a third party, who pays the amount to such creditor, having knowledge of all the circumstances: *Winn* v. *Thomas*, 55 N. H.

Such note being illegal and void cannot be the consideration of a new promise: *Id.*

DEED.

Obligation of conditions on Grantee—Easement.—The grantee of a deed *inter partes* is bound by the conditions, covenants and stipulations therein on his part, although the deed is only signed by the grantor. If they be such as are legally sufficient to create easement in the premises granted, the grantee takes the land subject to that servitude: *Earle* v. *New Brunswick and Mitchell*, 9 Vroom.

Executors having a general power to sell, laid out a tract of the testator's lands into building lots, fronting on proposed streets, and made and filed a map on which such streets were delineated. The deed from the executors to the plaintiff's grantor for several of these lots, after a description by boundaries on such streets contained also a grant of the land forming part of Townshend street, as marked on the map, "subject to the use at all times of the same by the owners of lots on said ways, and by the public generally, as and for said Townshend street, as laid down on and according to the aforesaid map," *Held*, that the lands conveyed within the lines of Townshend street were by such description dedicated to

public use for a street; and that the public authorities could not be sued as trespassers for an entry on the lands to open the street: *Id.*

EASEMENT. See *Deed.*

ELECTION.

Advancements—Taking under a Will.—Where a Court of Chancery takes jurisdiction of an administration, it applies, according to its own practice, the laws relating to administrations, in the Probate Court, and may, when necessary to a distribution among heirs and distributees, decree an account of advancements: *Key et al.* v. *Jones*, S. C. Ala.

Verbal declarations of a distributee, after the death of the intestate, that he had received a full share and would retain it and not claim any more, and proof that partial distributions were made by him, as administrator of the intestate, in which he made no claim to share, do not establish an election by him to retain the advancements and waive his claim to share in the distribution: *Id.*

Whether the statutory mode of making such election precludes all others, not decided; but if such elections can arise by matters *en pais*, it must be by clear, unequivocal acts, with a full knowledge of all the circumstances and the party's right. Mere intention to elect, casual declarations or loose conversations, will not suffice; especially, when not acted on to the prejudice of another: *Id.*

EMINENT DOMAIN.

Appointment of Commissioners to estimate Damages for Land taken for Railroad.—On an application for the appointment of commissioners to estimate the damage on a condemnation of land for the use of a railroad, the only inquiry that as a general rule will be made is, whether the applicant has a *primâ facie* right: *Delaware, Lackawanna & Western Railroad Co.* v. *Hudson Tunnel Railroad Co.*, 9 Vroom.

In this summary proceeding contestable questions will not be considered: *Id.*

EQUITY. See *Election; Partnership.*

Evidence—Error.—The chancellor in ascertaining the existence of facts from conflicting evidence is not necessarily to be governed by the preponderance of the testimony. The material inquiry for him, is whether the evidence generates in his mind a clear and rational belief of the existence of the fact affirmed, essential to relief sought, or defence interposed: *Marlowe and Wife* v. *Benagh*, S. C. Ala.

The Appellate Court will not reverse the finding of the chancellor upon facts merely because it cannot see that his decree is right—it must be fully convinced that it is wrong. The presumption in favor of the judgment of the court below, prevails as well to its finding upon facts as to its rulings upon the law: *Id.*

Relief against Forfeiture caused by Accident—Cannot take away Legal Rights.—This was a bill to redeem a mortgage which had been foreclosed by advertisement. The sale was made September 21st 1871, in parcels, all of which were bid off by Adams, the mortgagee, for the aggregate amount of $315.12. Complainants claim the property to be worth $3000. The sale appears to have been regular. Adams re-

sided in Pennsylvania, and the mortgaged premises are in Newaygo county. Before the foreclosure was begun the mortgage was in the hands of one Riblet, Adams's agent, who had received and remitted several payments. In June 1871, the mortgage was put into the hands of Fuller, an attorney at Newaygo, for foreclosure. After the sale, and on December 14th 1871, complainant paid Riblet $100, for which the latter gave his receipt as payment on the mortgage. Before the year ran out complainant became dangerously ill and unable to attend to any business and was delirious much of the time, and by reason of this misfortune was, as he claims, prevented from redeeming. In October 1872, Riblet offered to return the money paid to him, which complainant refused. Complainant afterwards tried to come to some arrangement for getting back the land, but failed. The grounds relied on to support complainant's right of redemption are: First, the waiver of defendant's statutory rights by the receipt of the payment of the $100; second, the accident and misfortune which prevented redemption within the year by an unavoidable mental and physical disorder; and third, inadequacy of price. *Held*, 1. That the evidence shows that the payment of the $100 was made, not as a separate payment to redeem particular parcels, nor with the idea that the statutory foreclosure was to be waived, but with the clear understanding that he was to complete the redemption by paying the whole sum necessary for that purpose within the year allowed by the statute, and was therefore in affirmance rather than in avoidance of the sale. 2. That while courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end, they have no such power to relieve against statutory forfeitures in the absence of fraud. 3. That the inadequacy of price cannot vitiate such a sale if otherwise fair and regular: *Cameron et al.* v. *Adams*, S. C. Mich.

ESTOPPEL. See *Corporation.*

EVIDENCE. See *Agent.*

FLOWAGE. See *Stream.*

HIGHWAY. See *Husband and Wife.*

Duty of Town to adjoining Landowner.—The owner of land adjoining a highway may maintain an action at common law against the town to recover damage caused to his land by the fault or negligence of the town in not building and maintaining the road in a reasonably suitable and proper manner: *Gilman* v. *Laconia*, 55 N. H.

Interest of Town in.—Towns have a qualified interest in the highways within their limits, which they have constructed and are bound to keep in repair, and may maintain case for their obstruction: *Laconia* v. *Gilman*, 55 N. H.

HOLIDAY.

Judgment of Court on Holiday—Sunday.—Defendant in error sued Hemmens to recover under the statute (Comp. L., chap. 69) for moneys paid to the latter by the husband of the former in the purchase of intoxicating drinks. The principal question is whether a previous suit be-

tween the same parties was not a bar to this. The court below held it no bar. It seems to have been made out that the previous suit was for the same cause of action. It was brought before a justice, and was tried without a jury, February 21st 1874. The justice states in his docket that after hearing the proofs "thereupon the court took till the 23d day of February 1874. at 10 o'clock A. M., to render his decision at his office in Clinton. February 23d 1874, 10 o'clock A. M., cause called and parties appeared. and I, the said justice, do decide and determine that the above-named plaintiff has no cause of action against said defendant, and judgment is hereby rendered in favor of the said defendant and against the said plaintiff for the sum of forty-seven cents and costs of suit." This judgment the plaintiff treated as void, and proceeded to institute the present suit. The statute (Compiled Laws, section 1559) requiring the 22d of February, among other days, to be treated for all purpose of holding courts, &c., as Sunday, provides that in case any of said holidays shall fall upon a Sunday, then the Monday following shall be considered as the said holiday. In 1874 the 22d of February fell upon Sunday. *Held*, that the test of what acts are included in the statute is whether the same acts, if performed on Sunday, could be sustained; that the act of rendering a judgment, if performed on Sunday, would be void; that rendering judgment is clearly a judicial act, and it is necessary to hold a court in order to perform it; and that, being void, no one was under obligation to regard it: *Hemmens* v. *Bently*, S. C. Mich.

Homestead.

City Lot—Street or Alley not included in Measurement.—The Homestead Exemption Act of this state must receive a liberal construction: *Weisbrod* v. *Daenicke*, 36 Wis.

Said act exempts from sale on execution one-fourth of an acre of land within a "recorded town-plat, or city, or village," and the dwelling house thereon, "owned *and occupied*" by the debtor as a homestead. *Held*, that the word "*occupied*" is to have a controlling effect in the application of the statute: *Id.*

While, by the law of this state, the owner of a lot bounded by a street, in a recorded town-plat, city or village, takes the fee to the centre of the street, he has no right to *occupy* any portion of such street as his homestead, such occupation and use being inconsistent with the public easement. Land included in a public street (or alley) is therefore *not to be reckoned* in determining the debtor's homestead exemption: *Id.*

Husband and Wife.

Suit by Husband for injury to Wife—Highway.—Sect. 120, ch. 19, R. S., provides that "if any damage shall happen to any person, his team, carriage or other property, by reason of the inefficiency or want of repairs of any * * road in any town in this state, the person sustaining such damages shall have a right to sue for and recover the same against such town." *Held*, that a married man may recover under this statute for loss of the services of his wife and expenses of her sickness, resulting from an accident caused by a defective highway: *Hunt* v. *The Town of Winfield*, 36 Wis.

INFANT.

Affirmance of Contract—Chattel Mortgage.—The court below put this case to the jury under instructions in substance that an infant who borrows money for a business enterprise and gives chattel mortgages to secure the payment thereof with interest, cannot disaffirm this contract without restoring the consideration received therefor, which in this case would be the money borrowed. The circuit judge appears to have regarded the mortgage as an executed contract, which was only to be disaffirmed on placing the parties in *statu quo*. *Held*, that this view was erroneous; that the mortgage, so far as the right to enforce it by taking possession and making sale was concerned, was only an executory contract to perform by the payment of the sum borrowed; that whether it was actually void or only voidable is immaterial in this case, as this suit was brought before the infant reached her majority and no question of affirmance can be made; that the result of the ruling in this case was to enforce the contract which confessedly was at least voidable against this infant, though she had neither affirmed it nor as yet reached the age when affirmance by her was practicable; that the ground on which one who, by reason of a voidable contract made in his infancy, has obtained possession of property which he retains on coming of age, is required to return the property in order to disaffirm the contract, is, that the retention of the property and dealing with it as his own after he reaches the age of discretion operates as an affirmance of the contract and precludes him from relying on an infant's privilege: *Corey* v. *Burton et al.*, S. C. Mich.

INSURANCE.

Condition against other Insurance.—The plaintiff obtained a policy of insurance from The Niagara Insurance Co. on his house, barn and other property, which contained a condition that "if the assured shall have existing, during the existence of this policy, any other contract for insurance (whether valid or not) on the same property, unless consented to, &c., then this insurance shall be void." Afterwards, without surrendering or cancelling this policy, he obtained a policy from the defendants on part of the same property, which contained the usual condition against double insurance. Up to the time the property was destroyed by fire the plaintiff was not aware of the condition in either policy, and acted in good faith throughout. *Held*, that the insurance in the Niagara company was subsisting, within the fair meaning of the condition in the defendants' policy, at the time that policy was obtained, so that the plaintiff cannot recover in this action for property covered by the Niagara policy: *Gee* v. *Cheshire County Mut. Fire Ins. Co.*, 55 N. H.

Quære, whether the condition in the Niagara policy, so far as it speaks of an *invalid contract of insurance*, is not void for repugnancy to the contract of indemnity of which the policy is evidence: *Id.*

JUDGMENT. See *Holiday*.

Power of Court over—Mortgage—Setting aside Judicial Sale.—Except in cases of judgments taken against parties through their mistake, inadvertence, surprise or excusable neglect (R. S., ch. 125, sect. 38), the court has no power, *at a subsequent term*, to set aside a *valid*

judgment for error in law or in fact committed by the court in rendering it or before it was pronounced: 14 Wis. 28; 15 Id. 475; 20 Id. 265: *Quaw* v. *Lameraux and others*, 36 Wis.

In foreclosure of a mortgage, the Circuit Court for the proper county acquired jurisdiction by personal service of the summons upon one of the heirs of the mortgagor; and it rendered judgment of foreclosure and sale, and the land was sold, and report of the sale made by the sheriff. At a subsequent term, none of the grounds of relief mentioned in the statute (sect. 38, ch. 125, R. S.) being shown, defendant moved to set aside the judgment and the sale and report. *Held*, that the court properly refused to vacate the *judgment*, although there were errors therein which would have been fatal on appeal: *Id.*

The mortgage was of an undivided half of a certain tract of land; and after it was given, the mortgagor and his co-tenants made partition of the land, the mortgagor taking the *south half* thereof. At the mortgage sale, the sheriff was offered for an undivided half of said *south half* of the tract, the whole amount of the debt, &c., for which sale was directed to be made, but refused such bid, and sold the *whole* mortgage premises. The party by whom such bid was made states (in his affidavit in support of the motion to vacate) that if a re-sale is ordered, he will bid and pay for said undivided half of the south half of the tract, the whole amount required to satisfy the judgment. *Held*, that the court erred in refusing to set aside *the sale* and report thereof: *Id.*

The fact that the purchaser at the mortgage sale has conveyed a part of his interest to another party should not prevent the court from vacating the sale; such conveyance having been made *pending the motion* to vacate: *Id.*

Lien.

For hauling Lumber.—A. contracted with B. to haul for him a quantity of lumber at a stipulated price per thousand feet. *Held*, that he had a lien on the whole quantity drawn, within sixty days next prior to the date of his writ brought to enforce his lien for the price of the hauling within that time, and not a separate lien on each thousand feet for the price of drawing the same: *Bean* v. *Brown*, 54 N. H

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

Title to Personal Property.—In order that the title to a personal chattel pass by operation of the Statute of Limitations, there must at least be some use or appropriation of it, or some act of dominion over it, inconsistent with an absolute right of property in the owner, and such as would lay the foundation of an action for its recovery: *Baker* v. *Chase*, 55 N. H.

In 1861 the plaintiff bought a piece of land on which were lying some split stones, the property of the defendant. For more than six years the stones were not moved by either party, and no claim of ownership in them was asserted by either to the other. *Held*, that the title to the stones did not pass to the plaintiff by virtue of the statute: *Id.*

Married Woman. See *Bills and Notes.*

Mortgage. See *Infant; Judgment.*

Of Chattels—Pledge.—A. gave his note to B., and as collateral secur-

ity for its payment, transferred and set over to B., by a written instrument of the same date, two notes of one M. and a chattel mortgage securing them, with condition that if default were made in the payment of the A. note, B. should have authority to collect the M. notes, *or to negotiate them*, for the purpose of liquidating said note of A. *Held*, that this was a *mortgage*, and not a *pledge*, of the M. notes, and vested the title of them, conditionally, in B.: *Fraker* v. *Reeve and another*, 36 Wis.

A. having made default in the payment of his note, B., upon due notice to A., sold the M. notes at public auction. *Held*, that he was not liable to A. as for a *conversion* of said notes: *Id.*.

Municipal Corporation.

New Street—Liability for Damage by Drainage.—A city is not liable for damage done by surface-water running down in large quantities through a new street constructed over the crest of a hill, and there connected with traverse streets: *Town of Union* v. *Durkes*, 9 Vroom.

Contra, if the opening of such new street draws off the water from a natural watercourse: *Id.*

Negligence

Contributory—Risks of Employment.—The plaintiff was employed as an engineer in running one of the passenger trains of the defendants in error, and on the evening of November 23d 1871, and when a switch near the Grand Trunk junction was misplaced, ran his train off upon a side track and against cars which were standing there, and received an injury for which he brought suit against the company. Under the ruling of the court below the jury returned a verdict for defendants. The evidence conclusively showed that in managing and running the train at the time, he disregarded the instructions which the company had issued for his guidance, and was therein guilty of gross negligence, which directly conduced to the injury complained of. *Held*, 1. That upon such facts the plaintiff was not entitled to recover, and the ruling of the court below was correct. 2. That there is also much room for saying that this accident was within the risks the plaintiff assumed by entering into the employment: *Lyon* v. *Detroit, Lansing & Lake Michigan Railroad Co.*, S. C. Mich.

Nuisance.

Action by Individual for Public—Pollution of Waters of Stream—Riparian Owner—Special Damages.—An action by an individual will not lie for a *common* nuisance, unless special damages to the plaintiff be alleged and shown; but he may recover actual damages peculiar to himself: *Green* v. *Nunnemacher and others*, 36 Wis.

A proprietor of the land has a right to enjoy the use of the waters of a river which flows upon his land, for his cattle and for domestic purposes, without having their purity destroyed by the discharge of slops, manure and other offensive and deleterious substances, from a distillery, cattle stables or hog yard maintained by an upper proprietor on the same stream; and a violation of this riparian right may be such ground of special damage as will entitle him to maintain a private action as for a nuisance against such upper proprietor: *Id.*

The description of plaintiff's premises by metes and bounds, given in the complaint, shows that the whole western boundary thereof is the "right bank" of a river flowing in a northerly direction at that place *Held*, that such a boundary would not give him the rights of a riparian proprietor: *Id.*

But the complaint further alleges that said river flows "partly around and *partly through*" plaintiff's said land. *Held*, that this averment, taken as true, shows that plaintiff is a riparian proprietor on such river: *Id.*

The complaint further avers, in substance, that by reason of the unwholesome condition of the atmosphere around plaintiff's premises, caused by the nuisance complained of, plaintiff has been and is deprived of a great many customers and much patronage in his business as a tavern or saloon-keeper; that his profits have thus been diminished at least five thousand dollars a year; and that he and his family have been greatly injured in health, and subjected to frequent illness from the same cause. *Held*, on demurrer, that these averments show special and peculiar injury for which plaintiff may maintain an action: *Id.*

PARTNERSHIP. See *Bills and Notes.*

Real Estate bought with Partnership Funds.—Real estate purchased with partnership funds for partnership business, is treated in equity as partnership property, without regard to the manner in which it was bought, or to the person to whom the legal title was conveyed: *Little* v. *Snedicor*, S. C. Ala.

The heirs of one deceased partner, where the title was in him, will be treated as trustees for the surviving partner. It is immaterial that the trust should be expressed; if it exists and is clearly proved, it will be enforced as other resulting trusts: *Id.*

A bill filed for account and settlement of partnership affairs, praying that land, alleged to have been purchased by one of the partners, &c., be decreed partnership assets, &c., should set forth, by appropriate allegations, the contract or agreement of partnership, and the agreement and facts concerning the purchase of the land so as to enable the court to judge whether a co-partnership was in reality formed, and to see without doubt that the land purchased was to be partnership property: *Id.*

Where it is alleged that the partnership was formed at a given time, in a certain year, when each of the partners contributed, as capital stock of the firm, the amounts respectively shown by an exhibit which does not show any such contributions at the time stated, but consists merely of a statement in figures of various sums of money as having been contributed by the parties respectively for a series of years, beginning after the year in which it is alleged the partnership was formed, there is repugnancy between the allegations and exhibit: *Id.*

PLEADING. See *Corporation.*

Immaterial Averments.—It is only where the pleader attempts to declare upon the contract in *hæc verba*, that a technical variance in an immaterial matter becomes of consequence; such particularity is not requisite when the contract is declared on according to its legal effect: *Preston* v. *Dunham*, S. C. Ala.

A note payable "by" the 1st day of November 1870, to "John L.

Dunham, agent or bearer," may be properly declared on as payable to John L. Dunham "on" the 1st day of November 1870 : *Id.*

RAILROAD. See *Negligence.*

RIPARIAN OWNER. See *Nuisance.*

ROAD DAMAGES.

What are included in Assessment.—An assessment for damages for land taken to widen a road, includes all damages occasioned by reducing the land so taken to the grade of such road, and consequently where the grade of such road was subsequently changed, the damages occasioned by such change were held not to include any but such as arose by the alteration of the road in its entire width from the old established grade to the new grade: *Van Riper* v. *Essex Public Board*, 9 Vroom.

SPECIFIC PERFORMANCE.

Family Arrangement—Want of Precision in Contract.—This was a bill for the specific performance of an alleged agreement to convey lands. Defendant is father of complainant, and the agreement set up is that the defendant, in consideration of the work already performed by complainant, and the money already paid by complainant to defendant, and of love and affection, undertook and agreed that if complainant would go on to said land and improve it, he, the defendant, would give complainant a good warranty deed of the same. The bill does not disclose the fact shown by the proofs, that there never was any written agreement. *Held*, 1. That the contract set out by the bill is very vague as to the kind and extent of the improvements to be made and the time within which they were to be made, and it furnishes no criterion by which to determine when the work had been performed, and that specific performance cannot be granted until the contract is made clear and definite. 2. That the proofs fail to establish any contract or to show possession taken with a view of carrying out any supposed contract; that they indicate nothing more than a vague intention of giving the land at some time or other. 3. That this case is an effort to make an agreement out of one of those family arrangements which are understood to rest on the will of the parties, where each sees fit to rely on an expectation and does not require a binding contract; and that whatever may be the hardships of being disappointed in such expectations, parties cannot ask courts to frame contracts in their behalf which they have neglected to make for themselves: *Wright* v. *Wright*, S. C. Mich.

STATUTE.

Repeal by new Act revising the same Subject.—A statute which revises the whole subject-matter of a former statute, works a repeal thereof, without any express words of repeal: *Oleson* v. *G. B. & Lake Pepin Railway Co.*, 36 Wis.

Ch. 182, Laws of 1872 (relating to the grant of railroad aid by towns, &c.), provides (section 11) that if any county, town, city or village shall issue and deliver to any railroad company any bonds in pursuance of the provisions of this act, it shall not thereafter issue or deliver any bonds or incur any liability in aid of the construction of

the railroad of such company, *by virtue of the authority of any other law of this state. Held, that* the words "other law of this state" must be understood of other laws existing at the time of the passage of said ch. 282, as it was not within the power of one legislature to bind future legislatures by such a provision, and the subsequent passage of an act in conflict with it would operate as a repeal of said chapter *pro tanto: Id.*

Construction of Supplement.—An act and its supplement are to be construed as one law, so that the terms of the act may, in their construction with the supplement, have a broader meaning than they originally possessed: *Van Riper* v. *Essex Public Road*, 9 Vroom.

STREAM. See *Nuisance.*

Right of Flowage—User.—The same proof of user, which establishes the right to use the water of a stream in a particular way, is equally conclusive in establishing the limitations of that right. The doctrine of *Burnham* v. *Kempton*, 44 N. H. 78, affirmed: *Griffin* v. *Bartlett*, 55 N. H.

B. having gained by prescription a right to flow G.'s meadow, from October to June of each year, to the height of his ancient dam, repaired and tightened the dam, erected an additional mill, put in new and improved machinery consuming less water, and claimed the right to operate the mills as thus constructed, provided he did not raise the water above the top of his ancient dam. *Held*, that he could not flow G.'s land in a different manner nor to a greater extent than he had formerly done: *Id.*

G. having brought an action against B. for flowing his meadow, showed no title to the land flowed, except a deed dated in 1831, and no possession prior to that time. B. showed that G.'s meadow had been flowed prior to 1831 by a dam over which he (B.) had exercised control since 1868, and claimed that his right to flow B.'s meadow would be presumed, and that the burden of proof was on G. to show that he had acquired a right to hold his land free of water. *Held*, that the burden of proof was on B. to show that he had a right to flow as claimed by him: *Id.*

STREET. See *Municipal Corporation.*

TOWN. See *Highway.*

USURY.

Intent—Evidence of.—An *intent on the part of the lender* to stipulate for an unlawful rate of interest is essential, to render usurious a contract to pay more than a legal rate: *Grant* v. *Merrill*, 36 Wis.

But where it is shown that the lender *knowingly accepted and retains such a contract*, the intent is conclusively established: *Id.*

For a loan of $900 the lender's agent took defendant's note for $1000 with interest at ten per cent. (the highest legal rate), and gave such note to his principal, who then knew the amount thereof and of the loan, and the lender transferred such note to a third person, taking therefor his note for the same amount. *Held*, in an action on the first-mentioned note, that it was error to submit to the jury the question of the lender's intent: *Id.*

If one of the defendants, who was an accommodation maker, received from the other defendant a portion of the loan to indemnify him for signing the note, the amount so paid cannot be recovered from him in action *directly on the note*, by the owner thereof. Whether such plaintiff can recover the amount from said defendant in another action, is not here determined: *Id.*

There was some evidence that one of the defendants, for a valuable consideration, promised one D. to pay said note; but it does not appear that D. had any interest in its payment. *Held*, that such promise would not enure to plaintiff's benefit: *Id.*

Vendor and Purchaser.

Option to cancel Contract—Loss of by Acts.—By the terms of a contract for the sale and purchase of land, the vendee was empowered to terminate the contract at any time before the second instalment became due, forfeiting the sum already paid. Subsequently he assigned his interest in said contract and in the land to a third party, who took and retains possession of the land under the contract. *Held*, that the vendee, by putting it out of his power to surrender or cancel the written instrument, or to restore to the vendor the possession of the land, abandoned the right to terminate the contract, and remains liable in an action thereon by the vendor: *Stevens* v. *Millard*, 36 Wis.

Waters and Watercourses. See *Canal Company; Municipal Corporation; Stream.*

Riparian Rights.—Where a stream is a navigable highway for part of the year only for the purpose of running logs, it is to be considered as navigable and subject to the public easement only at such times in the year as when in its natural condition it is capable of being made use of for that purpose, and not when its whole capability for such use is created by artificial means and by abridging what but for the resort to these artificial means would be the unquestionable rights of riparian proprietors below; such a stream is a public highway by nature, but one which is such only periodically and while the natural condition permits of a natural use; during that time the public right of floatage and the private right of the riparian proprietor must each be exercised with due consideration for the other, and any injury which the latter receives from a proper use of the stream for floatage he must submit to as incident to his situation upon navigable waters; but at the periods when there is no highway at all there is no ground for asserting a right to create one by means which appropriate or destroy private rights, and an owner who dams up the water so as to interrupt the flow, and then lets the stream out at periods, to float his logs, is liable to an action for damages to a lower riparian owner: *Thunder Bay River Boom Co.* v. *Speechley*, S. C. Mich.

Witness.

Presumption as to Testimony of.—When nothing appears to the contrary, it will be presumed that what a witness states is within his knowledge, and that his knowledge was derived from proper sources: *Pearson* v. *Wheeler*, 55 N. H.