## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF NEW YORK.[1]

*Vendor and Purchaser—Will—Judgment, Lien of—Constructive Notice—Ejectment—Sheriff's Deed.*—From the time of making a contract for the sale of land, and more especially if the vendee enters into possession, and makes improvements on the premises, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase-money, a trustee for the vendor. And until payment, the vendor has a mere *lien* on the land, for the purchase-money: *Smith* vs. *Gage*.

The interest of the vendor, in such a contract, is not real estate, but only personal estate; and in case of the vendor's death, the unpaid purchase-money is treated as only personal estate, and goes, not to his heirs, but to his personal representatives: *Id.*

Where a vendor, who had executed various contracts for the sale of land in a certain tract, devised to his son J. L. all his lands in that tract, and also all contracts that had been entered into for the sale of any of said lands, and all moneys which might remain due and unpaid thereon, upon the purchasers' complying with the terms thereof, *Held*, that it was the intention of the testator to give to J. L. the moneys remaining unpaid upon the land contracts, as *money*, and not to devise to him the *title* to the lands, which was in the purchasers: *Id.*

A judgment against the holder of the legal title of lands sold by an executory contract is not, under all circumstances, a lien to the extent of the purchase-money unpaid at the time of its being docketed: *Id.*

Such lien, if any, is always subject to the equitable rights of the party in the occupation of the lands, under a prior contract to purchase the same from the legal owner: *Id.*

And payments made by the purchaser, to the vendor or his assignee or devisee or personal representative, after the docketing of such judgment, but without actual notice thereof, and even after the sale, and the execution of the sheriff's deed, are as valid, against the grantee of the sheriff, as if made before the docketing of the judgment: *Id.*

What is known in law as constructive notice—such as the docketing of the judgment, the sheriff's certificate of sale, and the recording of the

[1] From the Hon. O. L. Barbour, Reporter; to appear in the 36th volume of his Reports.

purchaser's deed—is not notice to a purchaser of the executory contract, from the vendee: *Id.*

Whatever may be the equitable rights of a party in the occupation of lands held under a prior executory contract, they have preference over the lien of a subsequently acquired or subsequently docketed judgment: *Id.*

Where a judgment is recovered against the vendor in an executory contract for the sale of land, and the vendee subsequently pays to the vendor the balance of the purchase-money, without actual notice of the judgment, he will be protected, and the judgment will not be a lien upon the unpaid purchase-money, as against him: *Id.*

The possession of the vendee, under his contract as purchaser, is notice to all persons who may subsequently become interested, in any way, in the premises, not only of his possession, but of the terms of the contract, and of all his existing rights under it: *Id.*

A subsequent judgment-creditor of the vendor is chargeable with notice of the vendee's rights, and is therefore bound, in order to secure his lien, to use all diligence in giving notice to the vendee, and in restraining him from making any further payments on his executory contract: *Id.*

Ejectment is a *legal* action, in which the plaintiff can succeed only by making out a *legal* title in himself, in the pursuit of a legal remedy. If the equitable title is in the defendant, and the only right the plaintiff can claim is that of an equitable lien upon an equitable title, he must fail: *Id.*

A sheriff's deed need not contain a recital of the particular execution by virtue of which he sells real estate: *Id.*

*Recording of Deeds—Memorandum of Alterations.*—It is the duty of a county clerk to record the memorandum of alterations and interlineations in a deed; and it is not erroneous for a judge to charge the jury that the absence of any such memorandum, in the record, is a circumstance for their consideration in connection with the question of an alleged fraudulent insertion in the deed: *Heyer* vs. *Heyer.*

*Guaranty.*—A guaranty of collection implies that a note or other evidence of debt is good, or good and collectable against the principal debtors; and this means collectable by due course of law: *Cady et al., Ex'rs.*, vs. *Sheldon et al.*

Ordinarily, to test that question, it is necessary that the customary legal proceedings should be resorted to: *Id.*

Yet it is not absolutely *indispensable* that legal proceedings should be resorted to, if it otherwise satisfactorily appears that such proceedings would be entirely ineffectual: *Id.*

When a mortgage is given, as collateral to the bond guarantied, it is not indispensable that the holders of the bond should seek satisfaction out of the mortgaged premises, by a foreclosure, if it appears that that remedy would have proved fruitless: *Id.*

*Breach of Promise to Marry; Action for; Evidence in.*—In an action by a female to recover damages for a breach of a contract to marry, the judge allowed the plaintiff, after she had testified, without objection, to the defendant's promise that she should not be any the worse for him, nor come to any disgrace by him, and if she did he would marry her, to testify that she was pregnant by defendant at the time he abandoned her. *Held*, that the evidence was properly received: *Hotchkins* vs. *Hodge.*

A wrong done to the female, such as sexual intercourse with her, by her alleged suitor, will not make a promise to marry, founded thereon, or arising therefrom, invalid or inoperative. Such a promise is not liable to the objection that it encourages immorality: *Id.*

It is not indispensable that a promise to marry should be *express.* It may be *implied* from circumstances; and it may rest partly on both; that is, on express words, and on conduct and acts reasonably leading to the same conclusion: *Id.*

Long-bestowed and particular attentions, having apparently an honorable object, furnish sufficient evidence from which the jury may imply a promise of marriage: *Id.*

*Principal and Agent.*—Where an agent is prosecuted, and a judgment obtained against him, for an act done in obedience to instructions from his principal, such act being done in good faith and under the belief that the instructions were reasonable and the act lawful, he is entitled to reimbursement from his principal, for all the damages he has sustained: *Howe* vs. *The Buffalo, New York and Erie Railroad Company.*

And it is immaterial whether the act for which the recovery was had, against the agent, was in fact lawful or unlawful; the instructions being, in either case, the proximate cause of action and recovery: *Id.*

The settlement of the judgment, by the agent, after he has been charged on execution, by giving his note for the amount, is a good payment of the judgment: *Id.*

If the agent is charged in execution upon the judgment recovered

against him, this is the highest satisfaction known to the law: and is equivalent to an actual payment by him, in money, of the judgment, for the purpose of charging his principal with the liability for full reimbursement: *Id.*

*Agreement.*—The plaintiff agreed to deliver to defendants a force-pump, for $60, promising that if the defendants could not make it operate, he would take it away again; the defendants agreeing that if the plaintiff would send them such a pump, on trial, they would try it, after which, if they liked it, they would buy it. *Held*, that this was not a sale of the pump, but a conditional agreement to purchase it at a future time: *McDonald* vs. *Pierson.*

*Held, also*, that the defendants were bound to try the pump within a reasonable time; and that they having kept the same in their possession for nearly two years, without making any trial of its sufficiency, or showing any valid excuse for the neglect, the plaintiff was at liberty to treat the condition as waived, and was entitled to recover the stipulated price of the pump: *Id.*

*Held, further*, that a trial of the identical pump was what the agreement required, and no other test was admissible. Hence the opinions of mechanics and experts, who had pronounced the pump insufficient to accomplish the purpose for which it was designed, furnished no excuse to the defendants for omitting to make a trial thereof: *Id.*

*Judgment—Evidence.*—Where, in an action upon a judgment, the defendant, by his answer, puts in issue the existence of a regular, valid, and legal judgment, any evidence tending to show the judgment illegal or void is competent. Hence, a certified copy of the judgment record, showing that since the joining of the issue the judgment has been vacated, is admissible: *Kinsey* vs. *Ford.*

### SUPREME COURT OF RHODE ISLAND.[1]

*Guaranty—Construction.*—The cardinal rule in the construction of all instruments, guaranties included, is, "to read the writing," and, taking its language in connection with the relative position and general purpose of the parties, to gather from it, if you can, their intent in the questionable particular. If, thus considered, its language is equally susceptible of either of two reasonable interpretations, *that* is to be adopted which makes

[1] From Hon. Samuel Ames, Reporter; to appear in the 4th volume of his Reports

most strongly against the maker of the instrument, or party using the am biguous words; and this rule, in application to guaranties, is quite compatible with another, that no one can claim under a guaranty who does not bring himself fairly within its terms: *Deblois* vs. *Earle.*

Where the plaintiff, in an indenture of lease, by the words—"I agree to and with the said J. E. H. to lease to him"—leased to J. E. H. certain premises, and by the same phrase agreed in the same instrument, at the option of said J. E. H., to lease to him the premises for another year upon the same terms and conditions, at a certain rent, payable at a certain time named in the lease, and the defendant, by a covenant next following in the instrument the stipulation for another year, agreed, "that in case the said J. E. H. shall neglect or refuse to pay the aforesaid rent in manner aforesaid, I will pay the same within ten days thereafter," *Held*, that the defendant's guaranty applied to the second year's rent, as well as to the first: *Id.*

*Mortgage in trust—Compensation of Mortgagee—Just Allowances—Misrepresentation in Conditions of Sales—Demurrer.*—A mortgagee in trust, with a power of sale, may hold the mortgaged estate against the purchaser of the equity as charged with the expenses of a sale by such mortgagee attempted and discontinued in accordance with his trust and of obtaining necessary legal advice in the execution of the trust, under the head of *just allowances;* but, unless expressly stipulated in the mortgage, cannot hold it charged with any commissions or fees for his own services: *Allen* vs. *Robbins.*

Where the assignees of a mortgaged estate sold the equity, subject to the mortgage, at auction, and in the conditions of sale described the mortgage as amounting to a sum certain, for principal and interest, but in the same conditions allowed the purchaser ten days after the sale within which to examine the title, promising to cure any objection to it, or to annul the sale, and the purchaser long subsequent to the sale took from the assignees a quit-claim deed, without warranty, of their title to the estate, subject to the mortgage: *Held*, upon demurrer to a bill by the purchaser against the assignees, to compel them to pay in his discharge certain expenses of the mortgagee which formed just allowances to him under the mortgage, that, as the bill charged no fraud in the assignees in their said misrepresentation, the above facts stated in it would not maintain a suit, either at law or in equity: *Id.*

*Release under a Voluntary Assignment—Sunday.*—The delivery of a

release by a creditor to an assignee under a voluntary assignment, who is authorized by the assignor to receive it for him, is equivalent to a delivery of the same to the assignor personally: *Allen* vs. *Gardiner*.

The execution of such a release by delivery on *Sunday*, is not void under ch. 216, s. 7, of the Revised Statutes; not being labor, business, or work, within *the ordinary calling* of either of the parties to it, prohibited by that section: *Id.*

*Sole and separate use, Estate for; what will create—Curtesy of Husband.*—Although no particular form of words is necessary to create an estate to the sole and separate use of a woman as against her present or future husband, yet such words must be used in the language limiting the use, as clearly and unequivocally express the intent to exclude his marital rights, and does not leave that intent a matter of doubt and speculation: *Nightingale et al.* vs. *Hidden et al.*

Hence, where the guardian and brother of a feme sole who was under age and contracted to be married, at her request, purchased an estate with her money, and took the deed to himself in fee, described therein as her guardian, *habendum* "to him, his heirs forever, to and for the only proper use, benefit, and behoof" of his ward, "her heirs and assigns forever," and the covenants of warranty and for quiet enjoyment ran to him, "his heirs and assigns, to and for the sole use, benefit, and behoof of her, her heirs and assigns," it was *held*, that these words, merely, did not create a trust for the sole and separate use of the ward, but, there being nothing for the guardian to do under the provisions of the deed, the Statute of Uses transferred the legal title to the ward, so as to admit her husband to curtesy in her estate: *Id.*

## SUPREME COURT OF MASSACHUSETTS.[1]

*Set-off—Notice—Promissory Note.*—An overdue negotiable promissory note of a plaintiff, indorsed to and held by the defendant before the commencement of an action against him, is a proper subject of set-off, although no notice that the defendant held the same was given to the plaintiff before the commencement of the action: *Cook* vs. *Mills*.

*Insolvency—Action by Foreign Corporation.*—A certificate of discharge in insolvency is no bar to an action by a foreign corporation against the payee of a note who indorsed it to them in blank before its maturity,

[1] From Charles Allen, Esq., Reporter; to appear in the 5th volume of his Reports.

although the note itself was executed and made payable in this commonwealth, by a citizen thereof: *Producers' Bank* vs. *Farnum.*

*Wrongful Acts by Persons acting separately—Joint Trespass—Action against one.*—If several different creditors, acting separately, without concert, and without knowing that they were employing a common agent, have wrongfully caused their debtor to be arrested on their several writs, by the same officer, who served the writs simultaneously, and by virtue thereof committed the debtor to jail, where he was confined upon all of them at the same time, they are to be regarded as joint trespassers; and full satisfaction received by the debtor from one of them is a bar to an action by him against the others: *Stone* vs. *Dickinson.*

*Conditional Promise—Burden of Proof.*—If a written promise to pay money is given with a condition providing that it shall be void upon the happening of a certain event, the burden of proof, in an action against the maker, is upon the defendant to show that the event has happened: *Thayer* vs. *Connor.*

*Collateral Security—Absolute Bill of Sale intended for.*—Taking a bill of sale of personal property absolute in terms, but intended as collateral security, amounts only to a pledge, which is lost by giving up the possession thereof to the general owner, even though under restrictions as to the use of it: *Walker* vs. *Staples.*

*Attached Property—Action against Officer for loss of.*—If attached property, of which due care is taken by the officer or keeper, is stolen, the officer is not liable for the loss: *Dorman* vs. *Kane.*

In an action against an officer to recover the value of attached property which has been stolen, if evidence has been introduced to show that in particular instances his keeper was careless in leaving the room in which the property was kept with the door unlocked, he may show in reply that it was the habit of the keeper to lock the door, when about to leave the room: *Id.*

If a judgment-debtor whose property has been attached on mesne process has paid the amount of the judgment, and informs the officer thereof, and demands the return of his property before the expiration of thirty days from the rendition of the judgment, and the officer, without asking for delay or authority from the judgment-creditor to deliver up the property, replies that it is lost and he cannot deliver it up, this is a waiver of any right which he might otherwise have had for further time: *Id.*

An officer is not made liable for the conversion of attached property, by proof that it has been stolen from his possession: *Id.*

*Statute of Frauds—Delivery and Acceptance—Duty of Judge where Evidence insufficient.*—If the evidence to show a delivery and acceptance of goods, sufficient to satisfy the Statute of Frauds, is so slight that the court would set aside any number of verdicts, finding such delivery and acceptance, that should be rendered upon it, *toties quoties*, it is the duty of the judge to withdraw the case from the jury; and an exception lies to his refusal to do so: *Denny* vs. *Williams.*

A delivery and acceptance of goods, sufficient to satisfy the Statute of Frauds, can only be shown by some clear and unequivocal act: *Id.*

*Jury Trial—Practice—Questions by Judge—Privileged Communications.*—The presiding judge at a trial may inquire of the jury on what ground they found their verdict, in the absence and without the consent of counsel; and their reply to such inquiry may be considered by this court, in determining the materiality of questions presented on a bill of exceptions: *Lawler* vs. *Earle.*

The owner of a building which has been set on fire may caution the persons employed by him therein, against a particular person suspected of being the incendiary; and his statements to them, if made in good faith for this purpose, are privileged communications, although they contain an unfounded criminal charge against the suspected person: *Id.*

*County Commissioners, facts certified by, not traversable on* Certiorari—*Proceedings of, not reversed for technical Inaccuracy.*—If county commissioners have certified to this court their proceedings in a case before them, in compliance with the command of a writ of *certiorari*, the facts certified by them are not traversable, nor is other evidence admissible to control or contradict them, or to show that the judgment or decree of the commissioners ought to be reversed: *Mendon* vs. *Commissioners of Worcester.*

If it appears from the whole record of the proceedings of county commissioners, as certified by them to this court, in compliance with the command of a writ of *certiorari*, that their decision of a question before them was founded upon a consideration of adequate and uncontradicted evidence, and was substantially correct, and worked no injustice to anybody, the proceedings will not be vacated, although the commissioners' view of the law as to the burden of proof was not expressed with technical accuracy: *Id.*

*Slander—Burden of Proof as to time of speaking.*—In an action for slander, the burden of proof is on the plaintiff to prove that the words were spoken within two years before the suing out of his writ: *Pond* vs. *Gibson.*

*Exemption from Attachment—Gen. St. c.* 133, *s.* 32.—Under Gen. Sts c. 133, s. 32, machines of simple construction, moved by the hand or foot, and used in the manufacture of boots, are exempt from attachment, although the owner employs a number of men under him in carrying on the business, by whom the machines are generally used: *Daniels* vs. *Hayward.*

SUPREME COURT OF PENNSYLVANIA.[1]

*Right of Way by User—Presumption of Grant.*—The use of a road over the land of another, without permission or objection, is adverse, and if enjoyed uninterruptedly for twenty-one years, gives a right of way: *Pierce* vs. *Cloud.*

Without evidence to explain how it began, the enjoyment is presumed to have been in pursuance of an unqualified grant; and the burden of showing the contrary is upon the owner of the land: *Id.*

In an action of trespass for entering the plaintiff's field, over which defendant alleged a right of way by user for more than forty years, the plaintiff gave in evidence declarations of defendant that he held the right of way by sufferance, though other declarations, inconsistent therewith, were proved to the effect that he would stand upon his legal rights. The court declined to instruct the jury, that the evidence, if believed, showed that the way was used under favor and not adversely, and charged that the declarations were insufficient to affect defendant's rights. On writ of error, it was *Held,* that as the declarations of defendant were equivocal and inconsistent, they were not sufficient to repel the presumption of a grant, and that the instruction of the court was not erroneous: *Id.*

Where the points of the plaintiff in error presented to the court below, are answered with sufficient distinctness in the answers, when taken in connection with the general charge to the jury, it is not a ground for reversing the judgment that direct and unequivocal answers were not made to each: *Id.*

*Constitutionality of the Act of March* 13*th* 1862, *authorizing the Arrest, &c., of Professional Thieves, &c.*—The constitutional provision relative

[1] From Robert E. Wright, Esq., State Reporter; to be reported in the 6th volume of his Reports.

to trial by jury was intended to preserve that right as it existed at the formation of our state government, and not to increase or extend it, and must be construed with reference to the statutes that were in force in England, and in the province of Pennsylvania, at the adoption of the first constitution of the state: *Byers and Davis* vs. *The Commonwealth.*

The Act of March 13th 1862, authorizing the arrest of professional thieves, burglars, &c., in the city of Philadelphia, and their commitment to prison by the mayor, or public magistrate of the central station, is not in conflict with the constitutional right of trial by jury, nor prohibited by the ninth section of the bill of rights: *Id.*

A conviction by a magistrate under this act, which in describing the offence, follows the words of the statute, and sets out the fact that the charge was satisfactorily proven, is neither illegal or void: *Id.*

*Answer of Court to Prayer for Instruction to Jury, when sufficient.—Accord and Satisfaction not valid without Performance.*—In an issue to ascertain how much, if anything, was due on a cautionary judgment, the court submitted to the jury a question, arising out of a settlement between the plaintiff and defendant and the giving of a note thereon by the defendant, whether the note was received and accepted in satisfaction of the judgment, or was only a liquidation of the amount due, without distinctly affirming defendant's points, to the effect that if the jury believed the evidence, their verdict should be for the defendant. *Held*, that as the question was one of fact for the jury, the ruling of the court below was not error: *Schilling* vs. *Durst.*

Where the defendant agreed to build a house for the plaintiff within a specified time, in consideration of a given sum, a release of all claims against him including the judgment, and security for the performance of the agreement, which the defendant gave, but did not build the house, the agreement and giving security under it, would not discharge or satisfy the judgment: the covenants between the parties constituted an entire contract, with mutual and dependent conditions, and the defendant could not claim the satisfaction of the judgment, as part of his compensation *after* finishing the house, without performance of his covenants to build it, notwithstanding the security given: *Id.*

"*Nephews and Nieces*" *of Testator, definition of.*—A testatrix by will made a residuary bequest to "all my nephews and nieces." *Held*, that only her own nephews and nieces were included, and not those of her husband: *Green's Appeal. Satterthwaite's Appeal. Mary Paul's Estate*