

the maxim of *caveat emptor* does by the law of England apply; but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

BYLES, J.—I am of the same opinion. It has frequently been said that a mere sale of chattels, like copyright or patent right, does not involve a warranty of title; but there has been no judgment on that point, and it is clear that there may be a warranty of title, by the conduct of the party, or by the surrounding circumstances of the case. In 2 Kent's Com. 487, it is said, "That if the seller has possession of the article, and he sells it as his own, and not as agent for another, for a fair price, he is understood to warrant the title; but if the possession be in another, the rule of *caveat emptor* applies," and he refers to a *dictum* of HOLT, C. J., in *Medina vs. Stoughton*, 2 Salk. 210; and also one of BULLER, J., in *Pasley vs. Freeman*, 3 T. R. 58.

KEATING, J., concurred.

Rule discharged.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.<sup>1</sup>

SUPREME COURT OF NEW YORK.<sup>2</sup>

SUPREME COURT OF MASSACHUSETTS.<sup>3</sup>

SUPREME COURT OF ILLINOIS.<sup>4</sup>

SUPREME COURT OF NEW HAMPSHIRE.<sup>5</sup>

### ADMINISTRATOR.

*May recover back Claim paid if the Estate appears to be insolvent.—Statute of Limitations.*—If an administrator has, within a year after his appointment, paid a claim against the estate of his intestate, in the honest belief that the estate was solvent, and the estate has been subsequently declared insolvent, and after due proceedings a dividend has been ordered to be paid from all the assets then available, the administrator

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<sup>1</sup> From J. W. Wallace, Esq., Reporter; to appear in Vol. 2 of his Reports.

<sup>2</sup> From Hon. O. L. Barbour, Reporter; to appear in Vol. 43 of his Reports.

<sup>3</sup> From Charles Allen, Esq., Reporter; to appear in Vol. 9 of his Reports.

<sup>4</sup> From N. L. Freeman, Esq., Reporter.

<sup>5</sup> For these abstracts we are indebted to the kindness of the Judges. The volume of Reports in which they will appear cannot yet be designated

may at once commence an action to recover back the excess so paid, above the amount of the dividend, although there are some further assets which may at some time in the future be realized; and the Statute of Limitations will begin to run against the claim of the administrator from the date when the dividend was ordered: *Richards vs. Nightingale*, 9 Allen.

#### AGREEMENT.

*Mutual Covenants—Waiver of Breach—Measure of Damages.*—The plaintiff and defendants entered into a written agreement, by which the former agreed, for a certain sum, to be paid him by the latter, to do all the carpenter's work upon a school-house to be erected, and to furnish and use all the requisite materials: and that he would commence said work, and would "proceed therewith, without delay, and in such a manner as not to delay the contractor for the mason-work:" Held, that this latter covenant raised an implied obligation on the part of the defendants to have the building in readiness for the plaintiff to perform the condition: *Allerman vs. The Mayor, &c., of Albany*, 43 Barb.

Held, also, that this was a mutual covenant, binding on both of the parties, on the part of the plaintiff, that he would commence and proceed at once, and on the part of the defendants that they would be ready to allow him to do so: *Id.*

And that the plaintiff, having sustained damage by reason of the defendants' delay in having the building ready for him to do the work stipulated, he could maintain an action to recover the amount: *Id.*

Held, further, that the plaintiff did not waive the defendants' breach of the contract, by going on, without complaint or objection, and completing the work. That he had a right to proceed with it, after the breach, and compel the defendants to pay the increased expenses incurred by reason of the delay: *Id.*

And, that an action to recover such increased expenses might be maintained upon a *quantum meruit*, independent of the contract: *Id.*

Held, also, that the plaintiff having been delayed in the performance of his contract, by the act or omission of the defendants, until wages were higher, and the prices of materials increased, he was entitled to recover the additional amount he was obliged to expend, in completing his contract: *Id.*

#### BLOCKADE.

*May be by Batteries on Land as well as by Ships—Does not terminate by Capture of the Place—Is presumed to continue until Discontinuance is announced by the Blockading Government—Vessel is liable to Capture from time of Sailing—Evidence of Intent to break Blockade.*—A blockade may be made effectual by batteries on shore as well as by ships afloat; and, in case of an inland port, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter: *The Circassian*, Sup. Ct., U. S.

The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it

terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it and blockaded by its blockade: *Id.*

A public blockade, that is to say, a blockade regularly notified to neutral governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion, or under direction of his superiors, must, in the absence of clear proof of a discontinuance of it, be presumed to continue until notification is given by the blockading government of such discontinuance: *Id.*

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing; and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at time of capture, with ulterior destination to the blockaded port: *Id.*

Evidence of intent to violate blockade may be collected from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture: *Id.*

#### BOND.

*Executed on condition that it shall be signed by Another.*—A bond for the payment of money, was executed by several persons, at the same time, as sureties, upon the representation that another person, D., would sign it as co-surety, and with the understanding that B., one of the obligors, was to take the bond, but was not to deliver or use it, until after it was signed by D. Some of the obligors would not have signed the bond except on this condition, and they did not otherwise authorize its delivery. B. delivered the bond to the obligee without having procured the signature of D. thereto: *Held*, that there was no valid delivery of the bond; that it was incomplete, and the transaction not consummated; and, that the condition on which the instrument was executed not having been performed, the obligors were not liable: *The People vs. Bostwick et al.*, 43 Barb.

*Held, also*, that this was not a case where the rule that where one of two innocent parties must suffer, he who has employed the agent, and enabled him to commit a fraud, should be the loser, rather than a stranger, was applicable; the plaintiffs occupying the position of one taking a security, to which the party giving it had no title: *Id.*

That, if the rule of principal and agent applied, then the obligors would only be liable for such acts as they authorized. And the power given being conditional, and the condition on which its exercise depended not having occurred, and the delivery being entirely unauthorized, the principals were not bound: *Id.*

#### CONSTITUTIONAL LAW.

*Obligation of Contracts.*—A statute repealing a former statute, which made the stock of stockholders in a chartered company liable to the corporation's debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void. And this is so, even though the liability of the stock is in some

respects conditional only; and though the stockholder was not made, by the statute repealed, liable in any way, in his *person* or property generally, for the corporation's debts: *Hawthorne vs. Calef*, Sup. Ct., U. S.

*Jurisdiction of National and State Courts.*—In trespass in a state court against the marshal of the United States for levying on goods which ought not to have been levied on, the marshal's title as marshal is not necessarily drawn in question. He may be sued, not as marshal, but as trespasser. Hence, a suit in a state court against a marshal for making a levy alleged to be wrong, is not necessarily a proper subject for review in this court, under the 25th section of the Judiciary Act, allowing such review in certain cases where "an authority exercised under the United States is drawn in question, and the decision is against its validity:" *Day vs. Gallup*, Sup. Ct., U. S.

Where a proceeding in the Federal court is terminated so that no case is pending there, a state court, unless there be some special cause to the contrary, may have jurisdiction of a matter arising out of the same general subject, although, if the proceeding in the Federal court had not been terminated, the state court might not have had it: *Id.*

#### CONTRACT.

*Title to Reward offered for Recovery of Stolen Property.*—If a reward is offered by the owners of stolen property, for its recovery or the detection of the thief, one who gives to them information by which, with reasonable diligence on their own part, they are enabled to recover the property and detect the thief, is entitled to the reward, although he does nothing further to aid in the recovery of the property or conviction of the thief: *Besse vs. Dyer*, 9 Allen.

*Excuse for Non-Performance—Suit while the Contract is Executory—Abandonment of Contract—Acceptance by Other Party.*—Performance of a contract to build a house for another on the soil of such person, and that the work shall be executed, finished, and ready for use and occupation, and be delivered over so finished and ready to the owner of the soil, at a day named, is not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be partially taken down and rebuilt on artificial foundation: *Dermott vs. Jones*, Sup. Ct., U. S.

While a special contract remains executory the plaintiff must sue upon *it*. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue either on it, or in *indebitatus assumpsit*, relying, in this last case, upon the common counts; and in either case the contract will determine the rights of the parties: *Id.*

When he has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner nor within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in "*indebitatus assumpsit*:" *Id.*

He must produce the contract upon the trial, and it will be applied as

far as it can be traced; but if, by fault of the defendant, the cost of the work or material has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance: *Id.*

## CORPORATION.

*Books—Evidence—Entries.*—The books of a corporation, although evidence to prove the acceptance of its charter, its organization, election of officers, and other corporate acts, are not admissible in matters of a private nature, in support of its own claims against a stranger, nor even against a member who claims adversely, and not under the corporation: *Wheeler et al. vs. Walker*, Sup. Ct., N. H.

Entries by a person since deceased, made in the usual course of business, and by one whose duty it was to make them, and who had no interest to misrepresent the facts, are admissible in evidence: *Id.*

## COURTS.

*Jurisdiction of the United States not taken away by reduction of amount in controversy after it has once attached.*—The mere fact that an Act of Congress authorizes a judgment obtained by the government against a party, to be discharged by the payment of a sum less than \$2000, is no ground to ask a dismissal of a case of which the court had properly obtained jurisdiction before the act passed. The party may not choose thus to settle the judgment, but prefer to try to reverse it altogether: *Cooke vs. The United States*, Sup. Ct., U. S.

When the sum in controversy is large enough to give the court jurisdiction of a case, such jurisdiction, once properly obtained, is not taken away by a subsequent reduction of the sum below the amount requisite: *Id.*

## DEBTOR AND CREDITOR.

*Illegal Consideration.*—If A. is indebted to B. for the price of intoxicating liquors sold in violation of law, and B. is indebted to C. for a legal consideration, and A. executes, for his indebtedness to B., a note and mortgage to C., who has knowledge of the illegality of the debt to B., such note and mortgage are invalid: *Baker vs. Collins*, 9 Allen.

## DECEDENT'S ESTATE.

*Advancement by Executor for his Testator's Estate.*—Although an executor has advanced his own moneys to pay valid claims against the solvent estate of his testator, and dies without settling his account, or receiving enough from the estate to reimburse himself, and the balance due to him has been settled in the Probate Court upon an account filed by his administrator, the latter cannot maintain an action against the administrator *de bonis non* of the testator's estate to recover the amount so found due: *Munroe vs. Holmes*, 9 Allen.

## DOWER.

*Widow of Tenant in Common.*—The widow of a tenant in common,

whose interest was conveyed in his lifetime, without release of dower, to his co-tenant, may maintain a writ of dower, and have her dower set out to her by metes and bounds: *Blossom vs. Blossom*, 9 Allen.

#### EQUITABLE MORTGAGE.

*Revival of Mortgage after Payment.*—A. made three promissory notes to B. for \$6250 each, payable at different times, and executed a mortgage to secure them. The equity of redemption of the mortgaged premises was then transferred to C., under whom the defendants derived their title, with notice of the circumstances, to be detailed, claimed as constituting an equitable mortgage. The first note falling due was paid and taken up by C., B. receipting its payment on the back thereof. C. then applied to D., under whom the complainants claim, for a loan of money, and by an agreement between B., C., and D., the receipt of payment upon the note was erased, and it was indorsed to D. An agreement was then written on the back of the note, which was signed by C. and B. as follows:—"Received of D., as purchaser and assignee, the full amount of the within note and interest from date (the interest to the 10th May on the other two notes being paid by C. as above), and in consideration of such purchase-payment I hereby sell, assign, and transfer the within note to said D., with all interest accrued or to accrue, including the incident security by trust deed of A. the maker. But it is understood that D. is not to proceed thereon until I shall have had time and opportunity to collect my said two next notes, included in same security by deed or mortgage. It being understood that C., assignee of A. (who also undersigned), is to have three years from date to pay this note by his allowing or paying 10 per cent. interest on the advance purchase-money (amount on 10th May last \$6625; one and a half months more to 25th June is \$46.87—\$6671.87), so advanced in purchase of this note by said D. B.

"Chicago, June 24th, 1856.

"And said C. hereby agrees to pay the within note and interest accrued, besides the 10 per cent. hereafter as above. C.

"Chicago, June 24th, 1856."

*Held*, that although the agreement between the parties was insufficient to revive the mortgage at law, as to the first note, it was clearly sufficient to charge the land as an equitable mortgage: *Peckham vs. Had-duck*, Sup. Ct., Ills.

#### EQUITY.

*Enforcement of Stale Trusts.*—Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where

1. The trust is *clearly* established.
2. The facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*: *Badger vs. Badger*; Sup. Ct., U. S.

And in cases for relief, the *cestui que trust* should set forth in his bill, specifically, what were the impediments to an earlier prosecution of his

claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of his rights: *Id.*

#### HOMESTEAD.

*Jurisdiction of Probate Court.*—The probate court has no jurisdiction to set out an estate of homestead, if the right to it is disputed by the heirs or devisees: *Woodward vs. Lincoln*, 9 Allen.

*Abandonment—Ejectment.*—Where the plaintiff in ejectment, A., being the owner of the premises in controversy, which were worth less than one thousand dollars, and occupying them as his homestead, conveyed them by deed, executed by himself and wife, but containing no release of the homestead, either in its body or acknowledgment, to B., and after the execution of the deed removed from the house with his family and gave possession to B., who moved in and occupied the same until he, B., sold and conveyed to the defendant in error, when the latter succeeded to his possession: *Held*, that these circumstances created an estoppel *in pais* against both husband and wife, and would for ever debar them from asserting a homestead right as against their grantee, or persons claiming under him: *Brown vs. Coon*, Sup. Ct., Ills.

*Married Woman—Estoppel.*—Although a married woman may not be bound by the covenants in her deed, even by way of estoppel, yet in reference to the homestead right she may well be held estopped by her voluntary acts *in pais*, as completely as if she were *feme sole*—at least to the extent of preventing the commission of fraud: *Id.*

*Cases Explained.*—The language of the court in *Patterson vs. Knight*, 29 Ills. 514, and *Best vs. Allen*, 30 Id. 30, apparently importing that a deed conveying a homestead, but not containing a special release thereof, according to the statute of 1857, is an absolute nullity, is too general and sweeping, though, if interpreted with reference to the case before the court, there is nothing in it to which exception could be justly taken. Such a deed is not an absolute nullity. When the plaintiff made his deed it was not void, but remained inoperative until the actual occupancy of the homestead was transferred to the grantee. It then took effect as fully as if it had been executed in conformity with the requirements of the Homestead Law. Where the naked legal title to the fee was vested, intermediate to the delivery of the deed and the delivery of the possession, is purely a metaphysical speculation, into which it is bootless to inquire: *Id.*

*Mortgage of Homestead.*—The cases of *Boyd vs. Cudderbuck*, 31 Ills. 113, and *Smith vs. Miller*, Id. 157, holding that when the value of the homestead premises exceeds one thousand dollars, a mortgage upon them is good for the excess, though the homestead right does not pass by the deed,—confirmed: *Id.*

#### ILLEGAL VOTING.

*Indictment—Sufficiency of Evidence.*—In an indictment for illegal voting at a town meeting, it is sufficient to allege that such meeting was duly holden, without stating how, or by what authority it was warned: *State vs. Christopher J. Marshall*, Sup. Ct., N. H.

Where it is alleged that a town meeting was duly holden for the elec-

tion of two representatives to the General Court, and that the inhabitants were also "called on to give in their votes for Member of Congress," &c., it was *held* that in respect to the representatives to Congress, as well as representatives to the General Court, these allegations were to be regarded as descriptive of the purpose for which the meeting was called, and not that at a meeting called for another purpose, votes for a Member of Congress were called for: *Id.*

The law requiring six months' residence in a town or ward to entitle a person to vote, is valid and constitutional: *Id.*

To establish the fact that the respondent was not entitled to vote in the ward in question, it may be sufficient to prove the circumstances of his actual residence during the year previous to the election; and the state is not necessarily bound to prove directly where his domicile was before that time, or that it had not been in the ward in question: *Id.*

#### INSURANCE.

*Mutual Company—Suit on Premium Note.*—In *assumpsit* by a mutual fire insurance company against one of its members upon his premium note, promising to pay to them a certain sum of money in such portions and at such times as the directors of the company may, agreeably to their act of incorporation and by-laws, require, where, under the charter and by-laws, the defendant is liable to assessment only for losses and expenses occurring during the term mentioned in his policy, the plaintiffs cannot recover unless they show an assessment duly made for such losses or expenses: *The Great Falls M. F. Ins. Co. vs. Harvey, et al.*, Sup. Ct., N. H.

Where A. has duly become a member of a mutual fire insurance company, and subsequently the company passes a by-law, which is in conflict with their charter, this by-law cannot, unless assented to by A., impair his rights under his previous contract: *Id.*

In a suit by a mutual fire insurance company against a member upon his premium note, the assent of the member to a by-law, adopted by the company after the making of his contract with them, will not be presumed, if the by-law is in conflict with the charter of the company, and if it would change and impair his rights under his contract: *Id.*

#### MORTGAGE.

*Tender—Interest—Sales of several Parcels—How charged—Redemption.*—Where one having the right to redeem mortgaged lands, tendered to the holder of the mortgage the full amount of the mortgage-debt, which was refused, and afterwards brought his bill in equity to redeem: *held*, that the defendant was not entitled to interest after such tender, although the bill at first omitted to offer payment of the mortgage-debt, but was subsequently amended for that purpose; it appearing that it was merely a formal defect in the bill. In such case the holder of the mortgage having unreasonably resisted the redemption, was required to pay costs: *Brown vs. Simons et al.*, Sup. Ct., N. H.

Where the plaintiff had acquired from the mortgagor a portion of the mortgaged land, and afterwards the mortgagor sold several other parcels to other parties, it was decreed, that the plaintiff might redeem by pay-



ing to the mortgagee the amount so tendered and refused; and then to have and retain a lien upon all the mortgaged lands for the sum so paid, and interest thereon from the time of the tender, together with the sums paid by him for taxes to preserve the estate: and it was further decreed, that the lands still held by the mortgagor being primarily charged, and then the parcels so sold, being charged in the inverse order of sales, that the owners of such parcels should severally be permitted to redeem his or their parcel, by paying to the plaintiff the value thereof, as ascertained by a master, with interest, within one year—payments to be made in the order above named, until the whole sum is paid—and if any such owner shall fail to redeem his or their parcels, as aforesaid, within the time limited for it, then the right of redeeming such parcel shall be for ever barred and foreclosed, and the land accounted for at the aforesaid value upon said mortgage-debt: *Id.*

It was further decreed, that the expenses of the plaintiff, for counsel-fees in this suit, and time bestowed upon it by himself, are not to be added to the sum to be paid him for redemption, and that as between him and the defendants, who were holders of the parcels so sold by the mortgagor, no costs are to be allowed either way: *Id.*

#### MUNICIPAL CORPORATION.

*Dedication of Land for Street—Rights of Proprietors—Conveyance bounded by Street—Accretions on the Line of such Street.*—A plat of an addition to a town, not executed, acknowledged, and recorded in conformity with the laws of Illinois, operates in that state as a dedication of the streets to public use, but not as a conveyance of the fee of the streets to the municipal corporation: *Banks vs. Ogden*, Sup. Ct., U. S.

A conveyance, by the proprietor of such an addition, of a block or lot bounded by a street, conveys the fee of the street to its centre, subject to the public use: *Id.*

When a street of such an addition is bounded on one side by Lake Michigan, the owner of the block on the other side takes only to the centre; while the fee of the half bounded by the lake remains in the proprietor, subject to the easement: *Id.*

When the lake boundary so limits the street as to reduce it to less than half its regular width, the street so reduced must still be divided by its centre line between the grantee of the lot bounded by it and the original proprietor: *Id.*

Accretion by alluvion upon a street thus bounded will belong to the original proprietor, in whom, subject to the public easement, the fee of the half next the lake remains: *Id.*

The limitation of the 8th section of the Bankrupt Act of 1841 does not apply to suits by assignees or their grantees for the recovery of real estate, until after two years from the taking of adverse possession: *Id.*

Doubted, whether that limitation can be applied to sales of real estate by assignees under orders of district courts having general jurisdiction in bankruptcy: *Id.*

*Ordinance to prohibit Swine from running in Streets.*—A city ordinance, providing that no person shall permit any swine under his care to go upon any sidewalk in the city, or otherwise occupy, obstruct, injure,

or incumber any such sidewalk, so as to interfere with the convenient use of the same by all passengers, is within an authority conferred by the charter to make all such salutary and needful by-laws as towns by the laws of the Commonwealth have power to make: *Commonwealth vs. Curtis*, 9 Allen.

*Contracts of; Validity of Ordinances.*—An ordinance passed by a municipal corporation must be made to conform strictly to the provisions of the charter; otherwise, the proceedings under it will be without authority and void; and no action will lie against the corporation to recover for work and labor done under it: *Cowen vs. The Village of West Troy*, 43 Barb.

Where the contract under which work is done for a municipal corporation is void, because entered into in violation of its charter, the contractor cannot recover for the work in any form; neither under the contract nor upon a *quantum meruit*: *Id.*

A person contracting with a municipal corporation is bound to see that the provisions of its charter have been complied with; and, if he proceeds without doing so, he must take the consequences of his temerity or want of care: *Id.*

#### PLEADING.

*Set-Off.*—If a defendant files a set-off, under the provisions of Gen. Sts., c. 130, the plaintiff, in answer to the declaration in set-off, may in his turn file a set-off to the defendant's demands: *Galligan vs. Flaunder*, 9 Allen.

#### RES ADJUDICATA.

*Rule not confined to Cases where the matter is patent in the Pleadings—Parol Proof—Ejectment—One Judgment may be conclusive by state law, and this will be binding on United States Courts.*—The established rule, that where a matter has been once heard and determined in one court (as of law), it cannot be raised anew and reheard in another (as of equity), is not confined to cases where the matter is made patent in the pleadings themselves. Where the form of issue in the trial, relied on as estoppel, is so vague (as it may be in an action of ejectment) that it does not show precisely what questions were before the jury and were necessarily determined by it, parol proof may be given to show them: *Miles vs. Caldwell*, Sup. Ct., U. S.

The reasons which rendered inconclusive one trial in ejectment have force when the action is brought in the fictitious form practiced in England, and known partially among ourselves; but they apply imperfectly, and have little weight, when the action is brought in the form now usual in the United States, and where parties sue and are sued in their own names, and the position and limits of the land claimed are described. They have no force at all in Missouri, where the modern form is prescribed, and where, by statute, one judgment is a bar: *Id.*

A state statute, enacting that a judgment in ejectment—provided the action be brought in a form which gives precision to the parties and land claimed—shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as of practice, and being conclusive on title in the courts of the state, is conclusive, also, in those of the Union: *Id.*

## SALE.

*Vendor's Lien ; Waiver of.*—A vendor's lien upon the land sold, for the purchase-money, can only be waived by taking collateral security, or by an express agreement to that effect. The party disputing the lien must show that the vendor agreed to rest on other security, and to discharge the lien: *Dubois vs. Hull*, 43 Barb.

The principle of equitable lien is founded on the presumed intention of the parties: *Id.*

The law presumes an intention on the part of the vendor to retain his lien for the purchase-money, and imposes upon the purchaser the burden of proving the contrary: *Id.*

D., by his agent, proposed to sell a piece of land to a corporation, and to receive in payment therefor stock of the company to a specified amount. A committee of the corporation made a report recommending the acceptance of this proposition, which was adopted; but no further steps were taken to pay for the land in stock, nor was any stock ever issued for that purpose. D. conveyed the land to the corporation, but the consideration-money was never paid: *Held*, that the circumstances of the case did not show a waiver of the vendor's lien for the purchase-money. Nor did the fact that the vendor had put his demand for the purchase-money into a judgment, before attempting to enforce the lien, evince an intention to waive the lien: *Id.*

Where the vendor has recovered a judgment for the purchase-money, it is no defence to an action to enforce his equitable lien, that he has not issued an execution upon the judgment: *Id.*

## SECURITY.

*Mortgage to Accommodation Indorser.*—If the maker of a promissory note give a mortgage as security to an accommodation indorser, whose liability upon the note afterwards becomes fixed, the indorsee, after the insolvency of the maker and indorser, is entitled to have the mortgage assigned to him, although the condition of it is only for the security of the indorser, and not to pay the debt. If, however, the indorsee has proved the debt against the several estates of the maker and indorser in insolvency, and by his vote has secured the discharge of the indorser, he cannot afterwards, upon withdrawing his proof, compel an assignment of the mortgage to himself: *New Bedford Institution for Savings vs. Fairhaven Bank*, 9 Allen.

*Alteration of Bond without Knowledge of Surety.*—Where several persons sign a bond to the Government as surety for a Government officer, which bond, statute requires shall be approved by a judge, before the officer enters on the duties of his office, an erasure by one of the sureties of his name from the bond—though such erasure be made *before the instrument is submitted to the judge for approval*, and, therefore, while it is uncertain whether it will be accepted by the Government, or ever take effect—avoids the bond, after approval, as respects a surety who had not been informed that the name was thus erased; the case being one where, as the court assumed, the tendency of the evidence was, that the person whose name was erased signed the bond before or at the

same time with the other party, the defendant: *Smith et al. vs. United States*, Sup. Ct., U. S.

Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him: *Id.*

#### TAXATION.

*Life Estate where Tenant dies.*—If executors hold property in trust, the income of which is to be paid to A. during life, with remainder over to B., and it is taxed to the executors as of the 1st of May, and A. dies within the year and before the tax is paid, the tax cannot be apportioned by the executors between A.'s estate and B., but is chargeable wholly upon the income due to A.'s estate: *Holmes vs. Taber*, 9 Allen.

#### TROVER.

*Conversion—Notice.*—Purchasing a horse in good faith from one who had no right to sell him, and subsequently exercising dominion over him by letting him to another person, will amount to a conversion; and no demand by the owner is necessary before commencing an action therefor: *Gilmore vs. Newton*, 9 Allen.

#### VERDICT.

*Irregular Mode of estimating Damages.*—Where the jury agreed that to fix the amount of the plaintiff's damages, each juror should mark a sum, and that half of the aggregate of the highest and the lowest sums which should be marked, should be taken for such damages, and made up and returned their verdict according to this agreement and without any further deliberation: *Held*, that the verdict should be set aside: *Boynton vs. Trumbull*, Sup. Ct., N. H.

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#### USURY.

A correspondent at Toledo, calls our attention to the statement of the law of Ohio in regard to usury, in our article on that subject in our April number, p. 323, note. As our article might be apt to mislead the profession in other states, we subjoin the corrected statement of the present law, kindly furnished by our correspondent. (*Eds. Am. L. Reg.*)

"The law of Ohio (Act of January 12th, 1824) limits the rate of interest to six per cent. in all cases, and the Act of February 18th, 1848, provides: "that in all actions for the recovery of money," all payments of usurious interest shall be deemed, "as to the excess of interest above the rate allowed by law," as payments upon the principal—so, that only the *excess of interest* is forfeited."