

Against any injury or wrong from mere wilfulness, caprice, or favoritism on the part of the majority owners of a ship, the master contracting can protect himself by bond, covenant, or otherwise; and if he neglect thus to guard his interests, himself, not the law, should he blame, if his employers dismiss him at a moment's notice, and without (so far as he may know or is entitled to know) any cause, reasonable or unreasonable.

---

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF GEORGIA.<sup>1</sup>

SUPREME COURT OF KANSAS.<sup>2</sup>

SUPREME COURT OF NEW YORK.<sup>3</sup>

CONTRACT.

*Penalty and Liquidated Damages.*—Where there was a written agreement that one party would furnish and the other take all the crude turpentine made on a certain plantation when delivered in lots of forty barrels and pay for the lots on delivery, and if either party failed he should forfeit \$1000, *Held*, that the \$1000 is to be considered a penalty and not liquidated damages, and on a failure of either party the actual damages are all that can be recovered: *Lee, Wylly & Co. v. Overstreet*, 42 or 43 Ga.

DEBTOR AND CREDITOR.

*Sale with Intent to defraud Creditors—Innocent Purchaser.*—When one party sells goods with the intent to defraud his creditors, but the other party purchases them in good faith and without notice of such fraudulent intent, the purchaser obtains a good title to the goods: *Diefendorf v. Oliver et al.*, 8 Kans.

In such a case if the purchaser pays for the goods by giving to a third person his negotiable promissory notes (four in number) he is not thereafter indebted to the person from whom he purchased the goods. After two of the notes have been paid, but before the other two have become due, which other two still remain in the hands of a person who took them with notice of the fraudulent intent of the person who sold the goods, the giver of the notes cannot be garnished by the creditors of the person who sold the goods: *Id.*

EVIDENCE.

*Declarations.*—Declarations to be admissible as part of the *res gestæ*

---

<sup>1</sup> From J. H. Thomas, Esq., to appear in 42 or 43 Georgia Reports.

<sup>2</sup> From W. C. Webb, Esq., Reporter; to appear in 8 Kansas Reports.

<sup>3</sup> From Hon. O. L. Barbour, Reporter; to appear in Vol. 61 of his Reports.

must be contemporaneous with some principal fact which they serve to qualify or explain: *State v. Montgomery*, 8 Kans.

#### FRAUDS, STATUTE OF.

*Estate in Land by Operation of Law not within.*—While sect. 8 of the act concerning conveyances (Gen. Stat. 180), sects. 5 and 6 of the act relating to frauds and perjuries (Gen. Stat. 505), and sect. 1 of the act concerning trusts and powers (Gen. Stat. 1096) make void every *parol agreement* which attempts to create an estate in lands, yet said sections do not make void an estate which results or which is created by operation of law: *Moore v. Wade*, 8 Kans.

#### HIGHWAY.

*Dedication to Public Use.*—A mere project or plat of land upon paper, laying off streets, blocks and houses in a city, is not itself a dedication of the streets to public use, and when there is a proposition to the city authorities to receive and adopt said streets, as public streets, the dedication is not complete unless the authorities affirmatively receive and adopt the same, and this must appear by the minutes of the council: *Parsons et al. v. The Atlanta University*, 42 or 43 Ga.

In the absence of any formal acceptance by the public authorities of a dedication of a street, there must be clear proof of a continuous and notorious use for a reasonable time by the public to constitute an acceptance: *Id.*

Where there is a controversy pending between the public authorities and a citizen as to the existence or non-existence of a public street, and the public authorities are temporarily enjoined by bill from opening the same, it is not competent for private citizens, as such, to file a new bill pending the other, to enjoin the obstruction of the street, unless they show some special damages to themselves from said obstruction, different from the injury to the public: *Id.*

#### HUSBAND AND WIFE.

*Judgment—Party not served.*—A husband cannot, without authority from his wife, acknowledge service of a summons for her: *Moore v. Wade*, 8 Kans.

A judgment rendered against a party who has not been served with summons, and who has not made any appearance in the case, is erroneous: *Id.*

A judgment determining that a woman has no right or interest in a certain piece of land, except such as she may have by virtue of being the wife of a certain man, is a judgment affecting her substantial rights: *Id.*

*Power of Wife to Contract—Right to Earnings.*—By virtue of the Statutes of 1860 and 1862, relative to the rights of married women, a married woman may make bargains, carry on any trade or business, and perform labor and services on her own separate account, and for her own exclusive benefit, the same as though she were unmarried; and all the earnings and profits belong to her exclusively, and are her sole and separate estate: *Foster et al. v. Conger*, 61 Barb.

*Capacity to sue and be sued.*—She may also sue and be sued, upon

any and all bargains, obligations, and liabilities made or incurred in her business, the same as though she were sole : *Id.*

*Actions and Judgments against.*—If an action is brought against her, in reference to her business, it is brought in the same manner as against any other individual. The liability is personal, and if judgment is obtained upon it, it is a personal judgment, to be enforced against any property she may have liable to execution, as in ordinary cases : *Id.*

If, in such an action, the plaintiff would be entitled to judgment were the defendant a single woman, he is entitled to it though she be married. The obligation and the liability of the wife in such a case are the same precisely, as though she had never contracted marriage : *Id.*

It is not of the slightest consequence, in respect to the plaintiff's right of action, and to recover a judgment against the defendant, that she had no separate estate before engaging in the business in which the debt was contracted, nor that the debt was not contracted for the benefit of a separate estate afterwards acquired by her : *Id.*

When a wife by the consent of her husband makes a contract for her own labor, in which contract it is agreed that she is herself to receive the compensation, she may under our laws sue and recover in her own name : *Merrivether v. Smith*, 42 or 43 Ga.

#### INJUNCTION.

There is no precedent for an injunction to restrain acts, on the ground that they may possibly or probably result in forming and casting a cloud upon the title of a party. Per JOHNSON, J. : *Phelps v. The City of Watertown*, 61 Barb.

#### LIMITATIONS, STATUTE OF.

A cause of action to recover damages for fraudulent representations made upon a sale of real estate, in regard to encumbrances, accrues the moment the bargain is completed by the conveyance of the premises to the purchaser ; and unless an action is commenced within six years from that time, it will be barred by the Statute of Limitations : *Northrop v. Hill*, 61 Barb.

It is of no consequence whatever that the purchaser did not discover the fraud within the six years. Even though the vendor or his agent conceals the defect of title, that will not prevent the statute from running : *Id.*

In such a case it is the act of misrepresentation, and not the resulting damages which constitutes the cause of action : *Id.*

#### MORTGAGE.

*Deed absolute on its Face*—*Mortgage need not be to secure a Debt.*—A deed of land absolute upon its face, if taken as a security, is only a mortgage : *Moore v. Wade*, 8 Kans.

While it may not be sufficient to show by parol evidence that a deed absolute upon its face was understood or intended or agreed to be a mortgage, or was understood or intended or agreed to be defeasible, yet it has always been sufficient in a court of equity to show a *state of facts* outside of the deed, which would render the deed a mortgage, or would render the deed defeasible : *Id.*

It is not necessary that a mortgage shall always be given to secure the payment of a debt. It may be given to secure the performance of any other act which the law permits to be performed: *Id.*

#### MUNICIPAL CORPORATIONS.

*Supervisory Power of Courts of Equity.*—Courts of equity have no general supervisory power over the government of municipal corporations, or over the acts and proceedings of their governing bodies: *Phelps v. The City of Watertown*, 61 Barb.

It was never the province of a court of equity to interfere, in such cases, between the individual citizen and the municipal authority, except where it is shown by the complaint that the rights of the person prosecuting have been either injured or menaced in a matter falling under some recognised head of equity, and which it is the peculiar province of a court of equity to prevent or redress: *Id.*

*Restraining them from the Prosecution of a Public Work, &c.*—In an action brought against a city corporation and others, by a resident and tax-payer of said city, the complaint alleged that the city authorities had entered into a contract with the other defendants to make certain improvements in the streets of the city; that the contractors, as the work progressed, were paid in drafts upon the city treasurer; that the work was still being prosecuted, and other drafts about to be given; that the city authorities had no power to make such contract, or to give such drafts; and that the contract and drafts were void. The plaintiff prayed for a perpetual injunction, restraining the further prosecution of the work and the issuing of further drafts; that the contract might be declared void, and the contractors ordered to surrender, and be enjoined from transferring the drafts. The complaint did not show that the plaintiff's premises had been interfered with, nor that any assessment had been made or tax levied to raise funds to meet the drafts. *Held*, that the facts stated did not constitute any cause of action against the defendants, in favor of the plaintiff, nor give him any title to the relief demanded: *Id.*

#### NEGOTIABLE INSTRUMENT.

An obligation which, though called a bond, is payable to a person named therein, "or to his certain attorney, executors, administrators or assigns," belongs to that class of obligations which has been expressly held, in this state, not to be specialties, but in the nature of commercial paper, negotiable by delivery under an assignment in blank: *Blake v. The Board of Supervisors of Livingston County*, 61 Barb.

An action upon such an obligation is to be governed, in all respects, by the rules applicable to commercial paper: *Id.*

#### PARTNERSHIP.

A charge by one partner against another for his personal services in superintending and managing the affairs of the partnership, cannot be sustained and allowed, without proof of an express agreement that compensation should be allowed for such services: *Lyon et al., Ex'rs v. Snyder*, 61 Barb.

#### RECONSTRUCTION.

*Acts of Congress.*—Appointments under the Reconstruction Acts of

Congress to civil office by the general commanding were not by virtue of the Constitution of the state, but by the power of the Acts of Congress, and did not confer upon the incumbents any title to the same longer than the acts themselves were in force: *Stone v. Wetmore*, 42 or 43 Ga.

General Terry did not by his removal of Wetmore as the Ordinary of Chatham county and *appointment* of Stone thereto, convey such *title* to the office, as upon the application of Stone to the civil courts, they could enforce under the Constitution and laws of this state: *Id.*

That Stone, after the removal of Wetmore by General Terry, was appointed to the office and filed his bond and was *commissioned by the governor*, did not confer such a *right* to the office as courts can recognise. The commission did not convey more than the order of appointment upon which it was based, and that appointment expired with the powers that gave it existence: *Id.*

#### SUNDAY.

When a contract for labor was entered into on the Sabbath, and the contract was performed afterwards by the laborer, the promissor cannot defend by setting forth the illegality of the contract: *Merrivether v. Smith*, 42 or 43 Ga.

#### TROVER.

*Prescription.*—When a defendant relies on his title by prescription he cannot tack to his own possession the possession of prior holders of the property, unless he shows the character of that possession, as to its good faith, &c., and that he holds under the parties so having *bonâ fide* acquired possession: *Worthy v. Kinaman et al.*, 42 or 43 Ga.

Title by capture during a war can only be set up by the organized and recognised parties to the war, or by those claiming and acquiring title from said organized and recognised parties: *Id.*

#### WAIVER.

The mere occupation of a building by the owner, is not a waiver of strict performance by the builder. The question of waiver is one of intention, depending on the circumstances: *Wells v. Selwood*, 61 Barb.

#### WARRANTY.

*Action for Breach of:*—In case of a breach of warranty on the sale of goods, the buyer may bring his action at once, founding it on such breach without returning the goods; but his continued possession of the goods, and their actual value, will be considered in estimating the damages: *Wells v. Selwood*, 61 Barb.

*Reasonable Time for Examination by Purchaser.*—If, upon a breach of warranty on a sale of property which does not turn out to be of as good a quality as warranted, and continues to grow worse with the lapse of time, the purchaser is to be charged with its true value, he ought to have the right at any time within the limitation of the statute to see how worthless it will become. He is entitled to a reasonable time for

examination. What is a reasonable time, is matter of evidence for the referee: *Id.*

#### WATERS AND WATERCOURSES.

*Spring—Rights of Owner.*—Every owner of land has the right to clean out and tube or wall up a natural spring upon his own land, for his own use and convenience, when he does not thereby change the natural course of the flow of the water therefrom, and makes no change to the injury of another, except what may result from an increased flow of water in the natural channel and outlet of such spring: *Waffle v. Porter*, 61 Barb.

To do so is not such a wrongful use of the easement or abuse of the right as will give a right of action to the owner of the servient estate: *Id.*

There being a living spring upon the defendant's premises, above the plaintiff's land, which spring was surrounded by a wet, marshy piece of ground, the natural outlet and watercourse for such marsh and spring being over plaintiff's land; the defendant dug out the spring and placed therein a curb or tube. About four inches above the surface a hole was cut in the curb for the escape of the water. The water never overflowed the curb nor rose above the hole, but ran constantly from the hole in larger or smaller volume as the season varied. *Held*, that the natural outlet and watercourse from this spring having been always through the plaintiff's land, the defendant had an easement there for the flow of that water: *Id.*

*Held*, also, that it was the defendant's watercourse, and if, by reason of the improvement of the spring, an additional quantity of water was made to pass through it, at certain seasons of the year, to the plaintiff's injury, it was *damnum absque injuria*: *Id.*

#### WITNESS.

A partner, who has assigned all his interest in the copartnership to a copartner, is not a competent witness to prove an agreement that a partner, since deceased, should be allowed a compensation for his services in managing the affairs of the partnership, in an action brought by the executors of such deceased partner against the assignee for an accounting, &c. *Lyon et al., Ex'rs, v. Snyder*, 61 Barb.

In an action by an executrix, upon a promissory note made by one of the defendants, and endorsed to the testator by the others, the maker is an incompetent witness, as between the defendants and the plaintiff, to prove that the note, at the time it was made, was infected with usury, or that the time of payment had been extended by an agreement between the testator, in his lifetime, and the witness, without the consent of the endorsers: *Genet, Ex'x, v. Lawyer*, 61 Barb.

Where an action is commenced, upon a promissory note, against the maker and endorsers, by the service, upon all, of a summons in which all are named, the maker is clearly a "party" to the action. The fact that he does not appear nor put in an answer, but suffers default, does not operate to sever the action, or to discontinue it, as to him. And being a party, he is an incompetent witness against the plaintiff suing as executrix, in respect to transactions between him and the testator: *Id.*