ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

Negotiable Paper—Signature as "Cashier"—Parol Evidence to explain.—Where negotiable paper is drawn to a person by name with addition of "Cashier" to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation: *Baldwin* vs. *Bank of Newbury.*

Decree in Admiralty—Reversal for Irregularity.—Although the language of a decree in admiralty may declare a decision which might not be capable of being supported, still, if it is obvious from subsequent parts of the record that no error has been committed, the Court will not reverse for this circumstance.

Ex. Gr. Where a decree allowed a certain sum for repairs to a vessel, and rejected (improperly perhaps) a claim for demurrage, the decree was not reversed on that account; it appearing from a subsequent part of the record that the judge had in fact considered the sum he allowed for repairs, eo nomine, was too large for repairs simply, but was "about just" for repairs and demurrage together: *Sturgis* vs. *Clough.*

Negotiable Bonds—Municipal Subscription to Stock, &c.—Authority of.—An authority given by Act of Legislature to a city corporation to subscribe for stock in a railway company "as fully as any individual," authorizes also the issue by the city of its negotiable bonds in payment of the stock. The opinion of the Supreme Court of a State taking this view of an Act of Assembly passed by that state approved: *Seybert* vs. *Pittsburgh.*

Municipal Subscriptions to Railroads, &c.—Constitutional Law—Contracts entered into on faith of Decisions of Court afterwards overruled—Deference by this Court to Decisions of State Courts on State Laws.—By a series of decisions of the Supreme Court of Iowa prior to that, A. D. 1859, in *The State ex rel. The Burlington and Missouri River Railroad Co.* vs. *Walpello Co.* (13 Iowa 388), the right of the Legislature of that state to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly,

[1] From J. W. Wallace, Esq., Reporter, to appear in Vol. I. of his Reports.

was settled in favor of the right; and those decisions meeting with the approbation of this court, and being in harmony with the adjudications of sixteen states of the Union, will be regarded as a true interpretation of the constitution and laws of the state, so far as relate to bonds issued and put upon the market during the time that those decisions were in force. The fact that the Supreme Court of Iowa now holds that those decisions were erroneous, and ought not to have been made, and that the Legislature of the state had no such power as former courts decided that it had, can have no effect upon transactions in the past, however it may affect those in the future: *Gelpcke et al.* vs. *Dubuque.*

Although it is the practice of this Court to follow the latest settled adjudications of the state courts giving constructions to the laws and constitutions of their own states, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law: *Id.*

Municipal bonds with coupons payable to "bearer," having, by universal usage and consent, all the qualities of commercial paper, a party recovering on the coupons will be entitled to the amount of them with interest and exchange at the place where, by their terms, they are made payable: *Id.*

Aliens—Power to hold Lands—Law of Rhode Island relating to.—The well-settled principle that aliens may take land by deed or devise, and hold against any one but the sovereign until office found, holds in Rhode Island as elsewhere; not being affected by that statute which allows them to hold land, "provided" they previously obtain a license from the Probate Court: *Cross* vs. *De Valle.*

Although equity will, in some cases, interfere to assert and protect future rights, as, *ex. gr.*, to protect the estate of a remainderman from waste by the tenant for life, or to cut down an estate claimed to be a fee to a life interest only, where the language, rightly construed, gives but an interest for life; or will, at the request of trustees asking protection under a will, and to have a construction of the will and the direction of the court as to the disposition of the property, yet it will not decree *in thesi* as to the future rights of parties not before the court or *in esse: Id.*

Langdale vs. *Briggs* (39 Eng. Law and Eq. 214), followed and approved, distinguished from *Lorilard* vs. *Coster* and *Hawley* vs. *James* (5 Paige 172, 442): *Id.*

SUPREME COURT OF ILLINOIS.[1]

Swamp Lands—Character of the Grant to the State.—By the grant of swamp and overflowed lands to the state of Illinois, under the provisions of the Act of Congress of September 28th, 1850, to enable the state of Arkansas and other states to reclaim the "swamp lands" within their limits, a fee-simple estate passed unconditionally. The state became the absolute owner of the lands, with power to dispose of them in such manner, and for such purposes, as to the Legislature might seem most expedient: *Supervisors of Whiteside Co.* vs. *Burchell et al.*

Swamp Lands—Policy of the State.—It was the intention of the General Assembly, under the various acts on the subject, to grant to the several counties in the state the swamp and overflowed lands within their limits, respectively, and to remit to such counties the exclusive control over these lands, and over their proceeds: *Id.*

Swamp Lands—Rights of Purchasers—Obligation of Counties.—So, where a party purchased swamp lands from a county in 1856, and executed his notes for the absolute payment of the purchase-money, he has no remedy to compel the county to appropriate the proceeds of the sales of such lands to their reclamation, as was contemplated by the legislation on the subject, in force at the time of his purchase; but his rights in that regard are to be determined by the policy subsequently adopted by the Legislature, which placed the whole subject of the control of these lands, and the appropriation of their proceeds, in the hands of the several counties, and released them from all the liabilities and obligations theretofore imposed upon them respecting them: *Id.*

And where such purchaser claimed the right to pay the purchase-money for which he had given his notes, in labor to be bestowed in the reclamation of the lands, it was *held*, that he could in no way have insisted upon such right, except by being the lowest bidder at the lettings of the work under the Act of June 22d, 1852, and that under the subsequent legislation, the county was under no obligation to carry out the system of reclamation of the lands as contemplated by that act: *Id.*

Power of Courts over the Legislature.—Even if the grant of the swamp lands to the state had been made upon the trust that the proceeds of the lands should be expended in reclaiming them, such a trust would have

[1] From Norman L. Freeman, Esq., Reporter; to appear in 31 Illinois Reports

been of municipal and not fiducial concern, over which the power of the state would have been plenary and exclusive. The courts have no power to compel the legislature to execute such a trust: *Id.*

Mortgage with power of Sale—Foreclosure in Equity.—A mortgage contained a power of sale on notice by advertisement. The mortgagee filed his bill in equity to foreclose, making the subsequent incumbrancers parties defendant. Pending the bill, the mortgagee advertised and sold to A., who had no actual notice of the pendency of the foreclosure suit. B., a subsequent mortgagee, and defendant in the foreclosure suit, filed his cross-bill to redeem from the first mortgage, and to have the sale to A. set aside: *Held*, 1st, that it was a fraud to advertise and sell under the power while the foreclosure suit was pending, and that the purchaser at that sale was chargeable with notice of the suit pending; 2d, that A., the purchaser at that sale, was a proper party defendant to the cross-bill: *Hurd et al.* vs. *Cone et al.*

SUPREME COURT OF MISSOURI.[1]

Dower.—The widow is entitled to dower in the lands which her husband held under an inchoate title, although he may have conveyed it prior to the confirmation; and, to the extent of her dower, the widow is the representative of the claimants: *Margaret Thomas* vs. *Frederick Hesse et al.*

Dower—Conveyance.—If the husband sell the land without the relinquishment of dower by the wife, she will be endowed in accordance with the law in force at the time of the husband's conveyance. Under the statutes of 1825, the wife is not barred by the fact that the husband owed debts at the date of his deed or the time of his death, unless the claims of the creditors be properly enforced. A third person cannot set up the debt as a bar to the action for dower: *Id.*

Dower—Action.—Where the alienees of the husband have subdivided the land, which is held in several parcels, the dower of the widow shall be assigned in each parcel separately: *Id.*

Equity—Trusts.—An agent who buys with his own funds, at a public sale by third parties, the reversionary estate in the lands of his principal,

[1] From Charles C. Whittlesey, Esq., Reporter; to appear in Vol. XXXIV. of Missouri Reports.

will not be held a trustee for his principal unless he purchased under an agreement to that effect: *Ophelia Kennedy* vs. *Mary Keating et al.*

Will—Devise.—A will made in 1824, and properly attested, provided as follows:—"I do nominate for my sole and only heir of all the goods, chattels, rights and credits, and effects, which I shall be possessed of at the time of my death, I do bequeath the whole unto my adopted child, Sophia," &c., "to inherit and enjoy all and singular the said goods, chattels, rights, credits, and effects, which I shall be possessed of at the time of my death." *Held*, that real estate did not pass by the will: *James B. Brown* vs. *Jacques Furman.*

Practice—Negligence.—Negligence and unskilfulness are matters of fact, and their existence is a question for the jury. A court cannot direct a jury that such or such supposed facts show or do not show negligence: *Bertha Huelsenkamp* vs. *Citizens' Railway Company.*

Damages—Negligence.—In an action against a carrier, under the statute for the better security of life, &c. (1 R. C. 647), if the deceased was killed by reason of his voluntarily taking an improper or dangerous position by which he lost his life, the carrier is not liable: *Id.*

Action—Contract.—Sub-contractors, not contracting with the owner of a building, but with a person with whom the owner agreed for the construction, are not liable to the owner in an action for negligently and unskilfully doing their work, by which the owner is injured. There is no privity of contract. The action must be brought against the principal contractor: *Geo. R. Bissell* vs. *David Roden et al.*

Note—Interest.—A note for a certain sum, "with ten per cent. interest thereon till paid," carries interest from date: *Hail W. Pittman* vs. *Richard F. Barret et al.*

Administration—Trust.—Where a party, acting as executor *de son tort*, procures a lease of premises which had been previously held by his testator, but which had been forfeited for non-payment of rent, he will hold the property as trustee for the benefit of the distributees or representatives of the deceased: *Geo. Lich* vs. *John L. Bernicker et al.*

Landlord and Tenant.—A tenant, holding under a lease for a definite period of years, which requires the landlord to pay the appraised value of the buildings erected by the tenant and remaining at the expiration of the lease, cannot hold over the possession after the term, on the ground that he has not been paid such value by his landlord, unless such authority

be given by the terms of the lease. The tenant must seek his remedy by action upon the lease: *Theresa Speers* vs. *Thomas Flack.*

Banks—Forfeiture.—A debtor sued by one of the banks of this state cannot plead, in bar of the suit, that the bank has suspended payment of its liabilities in specie, and has thereby forfeited its charter by virtue of the provisions of § 9, art. 1, of the act of incorporation. (Sess. Acts, 1856–7, p. 17.) Such a forfeiture can only be enforced by the state in a direct proceeding for that purpose: *The Farmers' Bank* vs. *Andrew Garten et al.*

Note—Indorser.—A party indorsing a blank note cannot, as against an indorsee for value without notice, object that the blanks have been filled contrary to the agreement made between the parties: *Id.*

Banks.—A debtor to a bank cannot plead, as a defence to a suit by the bank, that it has refused to redeem its five-dollar notes in coin; or that it has not kept in its vaults the amount of coin required by its charter. Such violations of the law cannot be inquired into collaterally, but only by some direct proceeding on the part of the state: *Id.*

Covenant.—A. sold to B. a part interest in a steamboat, and covenanted to put B. in possession and command of the boat as captain. A. put B. in possession and command, but subsequently B. was removed from his command by the owners, and another person placed in charge. In a suit upon the covenant by B. against A., *held*, that A. was not bound to maintain B. in his command of the boat: *Isaac H. McKee et al.* vs. *Jos. Kinney.*

Vendor's Lien.—The vendor of land who has given his bond for a conveyance upon full payment of the notes given for the purchase-money, cannot be required to convey to an assignee of the vendee until the purchase-money be paid, although he may have given up the notes and have accepted a new note from the vendee with collateral security: *Geo. T. Johnson* vs. *Elijah Scott et al.*

Bills and Notes—Illegal Banking.—The indorsee of a bill or note even with notice takes the instrument, subject only to such defences and equities as attach to the instrument itself. That a corporation indorsing a note had violated the provisions of the act concerning illegal banking, R. C. 1855, sec. 4 and 5, by receiving and passing the notes of non-specie-paying and foreign banks, does not affect the note itself, but is a defence only when the party is sued by the corporation: *William Mattoon* vs. *Wm. G. McDaniel.*

COURT OF APPEALS OF NEW YORK.[1]

Evidence of Expert.—Evidence by an expert that a machine was not constructed in a workmanlike manner is admissible, though the party offering the evidence decline to follow it by proof of the particulars in which the machine was defective: *Curtis* vs. *Gano et al.*

Railroad Company—Exaction of greater Fare than allowed by Law.—The penalty imposed by chapter 185 of 1857 upon a railroad corporation for exacting a greater rate of fare than is allowed by law, is incurred where its conductor illegally required five cents in addition to the legal fare, because the passenger had no ticket: *Chase* vs. *The N. Y. Central R. R. Co.*

Chapter 228 of 1857 allows the charge of five cents for not having a ticket only when the company has its ticket office, at the station where the passenger starts, open at the time of starting, though this be at midnight, and the statute imposes no duty upon the corporation of keeping its ticket offices open after 9 P. M.: *Id.*

Insurance—Evidence of receipt of Premium—Waiver of Conditions by Agent.—The acknowledgment in a fire policy of the receipt of premium does not, it seems, estop the insurer from showing that it has not been paid. It is evidence, but not conclusive: *Sheldon et al.* vs. *Atlantic Ins. Co.*

The cases relating to marine insurance by brokers, who kept open accounts with the underwriters and assured, and credited the one, and were allowed by the other for the premium as paid, discriminated, by EMOTT, J.: *Id.*

A general agent of the insurer may waive a condition in the policy that no insurance should be considered as binding until actual payment of the premium: *Id.*

Where the agent sent a policy by mail to an applicant for insurance, with a statement that the premium charged was higher than usual, and saying, "Should you decline the policy, please return it by mail; if you retain it, please send me the premium"—*Held*, that this was a waiver of prepayment, and that the policy became effectual upon the insured retaining and thereby accepting it, or, at all events, that the question should have been submitted to the jury: *Id.*

A nonsuit in such case will be set aside on exceptions, though the plaintiff did not expressly ask that the evidence be submitted to the jury: *Id.*

[1] To appear in Vol. XII. of E. P. Smith's Reports.

Bank—Receipt of Notes for collection—Title to Notes so received—Assignment of cause of Action—Fraud in Assignment.—A bank, receiving from another notes for collection, obtains no better title to them, or the proceeds, than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title: *McBride* vs. *The Farmer's Bank.*

It is not a purchaser for value by reason of its having a balance against the remitting bank, for which it had refrained from drawing, and from having discounted notes for the latter upon its indorsement, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure: *Id.*

The remitting bank, having demanded the notes before maturity and the proceeds afterwards, and both of them being foreign corporations, assigned its demand to the plaintiff. No new demand was necessary to enable him to sustain an action, nor is it an objection that his assignor, as a foreign corporation, could not have sued out an attachment against another foreign corporation on a cause of action not arising in this state: *Id.*

The cause of action is assignable, notwithstanding any personal disability of the assignor or the assignee to maintain an action in this state: *Id.*

It is no fraud against our statute or the defendant to assign the cause of action to a resident, to obviate the objection to an attachment by a non-resident. If it were, it lies with the defendant to prove the fraud, by showing the assignor's knowledge that the plaintiff was a resident; and *it seems* that the objection is waived by a full appearance to the action: *Id.*

Mutual Insurance Company—Division of Risks—Insolvent Corporation—Receiver's Expenses.—A mutual insurance company, organized under the general law (ch. 308 of 1849), may divide its business and risks into distinct departments, or classes, pledging the premiums received in each department as the primary fund for the payment of losses in that department: *Sands* vs. *Boutwell.*

Whether a provision is valid which exempts premium notes received in one department from liability to assessment for losses incurred in another department, *quære*: *Id.*

The receiver of an insolvent corporation organized under this act may include in his assessment a reasonable sum for the expenses of making and collecting the same. In the absence of any proof to the contrary, ten

per cent. upon the amount of losses assumed to be a reasonable charge for such expenses: *Id.*

Where the by-laws required the notice of assessment to be published in one newspaper in the county of M., "and in such other newspapers as the directors may deem necessary," *it seems* that a publication in one newspaper in M. county is sufficient, unless a direction for further publication by the directors be shown: *Id*

SUPREME COURT OF NEW YORK.[1]

Malicious Prosecution—Probable Cause—Judgment, how far Evidence of—Testimony of Parties.—A judgment in favor of the plaintiff, in a justice's court, after a trial upon the merits, is sufficient evidence of probable cause to defeat an action against him for malicious prosecution, although on appeal to the county court it is reversed upon another trial: *Palmer* vs. *Avery.*

It is not, however, conclusive evidence of probable cause, but may be impeached for fraud, conspiracy, perjury, or subornation: *Id.*

Where no such evidence is offered to impeach the prior judgment, it is the duty of the court to order a nonsuit: *Id.*

The plaintiff is not competent to prove by his own oath, against that of the defendant, that the former judgment was obtained against him by the perjury of the defendant, when the question depends upon their credibility as witnesses: *Id.*

Want of probable cause cannot be inferred solely from the discontinuance of former suits. If the last suit resulted in a judgment in favor of the plaintiff, it furnishes sufficient evidence of probable cause to defeat an action brought by the defendant thereon against the plaintiff for malicious prosecution of the prior suits: *Id.*

Partnership—Division of Assets between Partners.—A division by partners of the partnership assets between themselves, and the transfer of such assets by the individual partners in payment of their private debts, when the partnership is insolvent, is in point of law a fraud upon the creditors of the partnership.

Such a transfer of the partnership effects is invalid, as against the creditors of the firm, and the property remains partnership property until it comes to the hands of a *bonâ fide* purchaser for a valuable and new consideration: *Id.*

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[1] From Hon. O. L. Barbour, to appear in Vol. XLI. of his Reports.

If the person to whom the property is transferred has notice that it is partnership property, and he takes it in payment of a precedent debt, he will not be deemed a *bonâ fide* purchaser: *Id.*

Use of Property—Damages for negligent Use.—The right of every one to use his own property as he pleases, for all the purposes to which such property is usually applied, is unlimited and unqualified up to the point where the particular use becomes a nuisance: *Fisher* vs. *Clark.*

Simply turning one's own sheep, having an infectious disease, into his own lot, adjoining the lot of another, occupied by sheep, is not unlawful, nor such an act of wrong or negligence as will give to the owner of the adjoining lot a legal cause of action for damage sustained in consequence of the disease being communicated to his sheep: *Id.*

Relief to Parties engaged in the Perpetration of a Fraud, &c., as particeps criminis, *as against each other.*—If parties engaged in the perpetration of a fraud, or concurring in the fraudulent purpose, as *particeps criminis,* are *in pari delicto,* neither can have relief as against the other, at law or in equity. But as there are degrees of crime, the courts can and do give relief in many cases as against the more guilty party: *Free-love and Wife* vs. *Cole.*

C. having obtained from F. and his wife, without consideration, a conveyance of a farm, upon a parol promise or agreement to take and hold the title until F.'s debts were arranged or paid, and then to convey the land to F.'s wife: *Held,* that he could not resist the claim of F. and wife that the parol agreement be specifically executed on the ground that the conveyance was made by F. to hinder, delay, and defraud his creditors; or on the ground that the agreement was within the statute declaring all parol trusts relating to land void: *Id.*

To exclude relief in such cases, the parties must not only be *in delicto,* but *in pari delicto.*

Where the parties to a conveyance did not stand on an equal footing, the grantor being infirm of mind, and incompetent to manage his business affairs with ordinary prudence and discretion, and the grantee was his son-in-law, confidential friend, and legal adviser, and was applied to for advice on this occasion: *Held,* that the grantor was not prevented from applying to a court of equity to enforce the performance of a parol agreement by the grantee, to reconvey the premises, although the object and intention of the grantor, in making the conveyance, was to place his property beyond the reach of his creditors, and the conveyance was in fact fraudulent as against such creditors: *Id.*