

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MICHIGAN.<sup>1</sup>SUPREME COURT OF NEW YORK.<sup>2</sup>SUPREME COURT OF PENNSYLVANIA.<sup>3</sup>SUPREME COURT OF VERMONT.<sup>4</sup>

## AGENT.

*When a Trustee for Principal.*—An agent or attorney buying property under a judgment of his principal, becomes a trustee if he pay with the money of his principal or purchase for less than his claim, but the principal is not obliged to take the land, or consider the purchaser as his trustee, but may elect to treat him as a debtor and claim the money instead of the property: *Eshleman v. Lewis*, 13 Wright.

A purchaser of such real estate at a subsequent judicial sale without notice of the intention of the principal to enforce such resulting trust, or of the conduct of the agent which would entitle him to do so, cannot be disturbed in his possession in an action of ejection based on the known fact that the property had been previously purchased by plaintiff's agent under a proceeding to collect a judgment held against a former owner, especially where the evidence was that the principal had elected to waive the trust and treat the agent as a debtor: *Id.*

*Assumpsit, where it lies*—*Proper remedy against Agent for improper application of Money intrusted to him.*—Where a duty arises out of an implied undertaking to do an act requiring skill or fidelity, an action of *assumpsit* upon the special promise or an action upon the special case for the tort will lie for breach: *Reeside's Executor v. Reeside*, 13 Wright.

If an agent who receives money from his principal to perform a certain trust, wholly neglects to perform his duty and converts the money, he is liable to an action in form *ex delicto*, or to an action for money had and received to plaintiff's use: *Id.*

But neither action will lie against the agent for an alleged balance of moneys intrusted to be laid out in a special manner where he actually enters upon and performs the duties of his trust: the remedy is by bill in equity or account render: *Id.*

The nature of the duty to be performed by the agent determines the form of the action against him on the part of the principal: if the trust be to pay to him directly, then *assumpsit* is the proper action: but where it is one of outlay, requiring an exhibit of the sums expended, *assumpsit* will not lie, until it be ascertained in an action of account render that a balance is due: *Id.*

Where an executrix deposited money, for the purpose of paying the

<sup>1</sup> From Hon. T. M. Cooley; to appear in 13 and 14 Michigan Reports.

<sup>2</sup> From Hon. O. L. Barbour, Reporter; to appear in vol. 44 of his Reports.

<sup>3</sup> From R. E. Wright, Esq., late Reporter; to appear in vol. 13 of his Reports.

<sup>4</sup> From W. G. Veazey, Esq., Reporter; to appear in 37 Vermont Reports.

debts of testator, with an agent who entered upon the duties of the agency and became her substitute in the general administration of the estate, compromising, settling with, and paying the creditors; a special action on the case would not lie against him for an alleged unexpended balance of money intrusted by her: and it was not error, upon the trial, to enter a nonsuit: *Id.*

*Agent becoming personally liable.*—When an agent becomes personally responsible for goods purchased for his principal, the latter cannot claim that their relations as principal and agent are changed thereby: *Dow v. Worthen*, 37 Vt.

#### AGREEMENT.

*Performance prevented by Fire—Act of God.*—Where a plumber agreed to do the plumbing work to a house then about to be erected, and to furnish the materials for a gross sum to be paid in instalments, the last two to be paid as follows: \$1500 when all the work should be completed, and the balance, \$1000, when the work should be tested and found to be sufficient; the payments to be made upon the certificate of a certain architect that they were due according to the contract; and a substantial part of the work was not yet finished when an accidental fire occurred, and destroyed the building; the work not having been tested, and no certificate obtained from the architect: *Held*, that the plumber could recover no part of the last two payments: *Niblo v. Brusse et al., Ex'rs., &c.*, 44 Barb.

No excuse for the non-performance of a contract is recognised by the law, except where performance has been rendered impossible by the act of God, by the act of the law, or by the act of the other party: *Id.*

Accidental fire is not deemed so far the "act of God" as to be received as a legal excuse for the non-performance of a contract: *Id.*

In legal acceptation the act of God is such an act as could not happen by the intervention of men. Every other kind of impossibility the law requires of every man who contracts to perform any work for another, to provide against in his contract: *Id.*

Where the law creates a duty or charge, and the party is disabled from performing it, without any default in himself, and he has no remedy over, then the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity; because he might have provided against it by contract. And the law will no more rectify or supplement, than it will create, contracts; except in cases of fraud or mistake: *Id.*

*Railroad Company.*—A railroad company having become insolvent and unable to pay its debts, certain of the bondholders and other creditors agreed that they would purchase the road, &c., at any sale that might be made thereof, and would organize a new company; that the new company should execute a first mortgage on the road to the amount of the then existing first mortgage on the old road, to secure bonds of the new company; the bonds under the old mortgage to be exchanged for the new bonds. The subscribers to the agreement agreed to surrender their bonds, with all the coupons thereon, whenever they should be required so to do and to receive in lieu thereof the new bonds. The plaintiff, a

bondholder, signed this agreement, and received notice to surrender his bonds, but failed to do so until after the purchase of the road and the formation of the new company: *Held*, that not having complied with the terms of the contract, he had no right to claim any benefits under it, or to insist on the delivery of new bonds: *Carpenter v. Catlin and others*, 44 Barb.

#### APPEAL.

*Probate Cases—Parties.*—In probate cases, where one party appeals to the Circuit Court, all who do not appeal stand in the position of appellees; and if the decision of the Probate Court is simply affirmed, no party is in position to remove the case to the Supreme Court by writ of error, except such appellant, since no others can claim to be "aggrieved" by the judgment of the Circuit Court: *Jackson v. Hosmer*, 14 Mich.

#### BILLS AND NOTES.

*Negotiable Paper—Holder for Value.*—One who receives negotiable commercial paper from the payee, in satisfaction of a precedent debt, is a holder for value, and not affected by the equities between the original parties if he received it before due: *Outwite v. Porter*, 13 Mich.

*Presentation for Payment—Notice of Protest.*—Where a promissory note is payable at a place other than a bank, and there is no custom to control the contract, the holder must present the same, and demand payment, on the day of its maturity, and at a reasonable time during business hours. If payment be refused, the paper is then dishonored, and immediate notice of such dishonor may be given: *Etheridge et al., Adm'rs., v. Ladd*, 44 Barb.

And if notice is so given to the indorser, it will fix his liability, notwithstanding the maker has the whole day within which to make payment, if he chooses to seek the holder for that purpose: *Id.*

If the presentation is made in reasonable time, the holder, after having given the indorser notice of the dishonor, has performed his whole duty. He is not bound to remain at the place of payment all day, nor to wait until the close of the day, unless the note is payable at a bank; nor is he bound to repeat the demand: *Id.*

Under the custom of banks, giving to the maker all of bank hours, within which to pay, notes payable at a bank are usually left there, and demand is made at the close of the day: *Id.*

If a note is duly protested and the indorser charged, the mere providing of funds at the place of payment, after that, will not discharge him: *Id.*

#### COLLATERAL SECURITY.

*Duty of Pledge—Equity in favor of Pledgor for wrongful Conversion of Pledge, available to Accommodation Indorser on Notes discounted afterwards by Bank.*—A debtor to a bank pledged to it as collateral security for existing and future liabilities certain stocks, which were afterwards, by virtue of a power of attorney, executed by the debtor, transferred to the bank, a credit entered the next year in the books of the bank therefor, for a less amount than the debt at the time of the pledge, and the following year sold and transferred by the bank to its own officers without notice or judicial sale. In an action by the bank

against the accommodation indorser of the debtor, on two notes given subsequently to the pledge, on an affidavit of defence, alleging the wrongful conversion, and an increase in the value of the stocks pledged, exceeding the debt at the time of the pledge and the amount of the notes sued on: *Held*,

That the bank held the stocks as a pledge, pawn, or collateral security, first for the indebtedness existing at the time, and next for any future indebtedness, and that the notes in suit were such a future debt as were protected by the pledge, after the payment of the prior debt: *Sitgreaves v. Farmers' and Mechanics' Bank*, 13 Wright.

That it was the duty of the bank, as the holder of the pledge for an indefinite time, to have called upon the pledgor to redeem, and if he failed, upon due notice to have sold the stocks pledged and applied the proceeds to the payment of the debt: *Id.*

That the bank, in instituting no proceedings for a judicial sale, nor calling on the debtor to redeem, nor giving notice of a sale, nor making public sale, had grossly failed in its duties to the pledgor, and that the private sale to its own officers was an illegal mode of dealing with the collateral held in trust: *Id.*

That the indorser was entitled to avail himself of the equities which had arisen between the bank and the principal debtor, as set out in the affidavit of defence, and that the entry of judgment for want of a sufficient affidavit, was error: *Id.*

#### CONSTITUTIONAL LAW.

*Legislature to judge of Election of Members.*—An act of the legislature cannot be declared void on the ground that a portion of the members, whose votes were necessary to its passage, were not legally elected, and were retained in their seats by a decision of the House which was opposed to the Constitution. Each house is the sole judge of the election of its members, and the courts must accept its decisions as conclusive: *People v. Mahaney*, 13 Mich.

*General Principles.*—An act of the legislature restricting the powers of local government vested in a city, and vesting the control of its police, and the power of taxation within the city for their support, in the state, cannot be declared unconstitutional because abridging the right of self-government, or for any general objection which does not point out a discrepancy between the act and the constitution. And the conflict must be clear beyond reasonable doubt: *People v. Mahaney*, 13 Mich.

#### CONTRACT.

*Rescission.*—A purchaser cannot rescind a contract induced by misrepresentation and fraud, after he has disposed of the purchased property, by offering to restore to the vendor what he, the purchaser, has received for it, although he disposed of it before discovering the fraud: *Mc Crillis v. Carlton*, 37 Vt.

His remedy will be an action for damages or a reduction from the contract price, to the same extent, if that is yet unpaid: *Id.*

*Non-Compliance.*—By the contract the plaintiff was to furnish a monument of "good white marble." He did furnish a monument of

which the material was "good white marble," but it had a discoloration on it, produced by accident, but temporary in its character, and by lapse of time and by exposure to the open air and frost would disappear: *Held*, that the contract was not complied with, and the plaintiff was justified in refusing to accept the monument: *Viall v. Hubbard*, 37 Vt.

The substitution of "Octavia J." for "Octavia Jane" was also a substantial defect, although made by the marble-worker in good faith, believing the inscription as he made it would look better and be more satisfactory: *Id.*

*Statute of Frauds.*—D. sold to H. a quantity of apples and sent several barrels more than H. agreed to take, with notice that what H. could not sell D. would take back. H. afterwards concluded to take all that D. had sent. They then agreed upon the price of the whole before unsettled at \$75, and that this sum should remain in the hands of H. as part payment for a lot of poultry which D. was then negotiating to purchase and finally did purchase of H.: *Held*, that the contract for the poultry was binding within the Statute of Frauds: *Dow v. Worthen*, 37 Vt.

#### CORPORATION.

*Practice as to Bill in Equity where Parties are improperly named as Complainants—Right of Stockholder to restrain Corporate Acts by Injunction—Receiver not to be appointed where Company is not a party to the Bill.*—When parties named as complainants in a bill in equity are joined without their knowledge or assent, the bill as to them should be dismissed: *Gravenstine's Appeal*, 13 Wright.

Though a stockholder of a corporation may interfere in equity for the protection of the company, yet something less or more than what is allowed by the terms of the charter, must have been done by the managers or directors, to authorize such an interference; and where a debt authorized by the company is created by and with the consent of the stockholders and directors, and judgment confessed therefor, a consenting stockholder is not entitled to an injunction against an execution issued thereon: *Id.*

Thus, where one who had been a stockholder, and had, under a resolution, voted for by him as such, sold to the company his stock, taking the company's note therefor, less expenses, it was held that he could not claim as a stockholder; nor as creditor could ask an injunction to restrain another creditor, whose debt was of the same nature in creation and consideration, from obtaining satisfaction by means of a prior levy upon the corporation effects: *Id.*

Where the company was not a party to the bill, nor in court upon notice for a preliminary injunction, it was held error to appoint a receiver: *Id.*

#### CRIMINAL LAW.

*Statement of Prisoner—Counsel.*—Under the statute which permits a prisoner in a criminal case to make a statement to the jury relative to the transaction charged against him, it is erroneous for the court to refuse to allow counsel to call his attention to the facts when on the stand. A proper course to do this would be, not by putting questions as to a witness, but by submitting to the judge in writing the question

proposed, and then, if approved, putting it to the prisoner: *People v Annis*, 13 Mich.

#### DISCOVERY.

*Title to Land by Discovery—Guano Islands.*—Individuals cannot obtain a right to the exclusive possession of islands in the sea, by virtue of discovery, irrespective of the Act of Congress passed in August 1856: *The American Guano Co. v. The United States Guano Co. et al.*, 44 Barb.

Islands newly discovered by its citizens, belong to the United States; and until some exclusive rights are obtained, in pursuance of the provisions of that statute, all the citizens of the United States possess equal rights to go there: *Id.*

But where the plaintiff, while an island remained in an unoccupied condition, went upon it, by their agents, and expended money in erecting works and making improvements, and mining guano, which they conveyed to the shore: *Held*, that they were entitled to be protected in the enjoyment of such property, and in the possession of the guano so mined: *Id.*

One who, acting upon information obtained from another, of the existence of a guano island discovered by the latter, takes the first actual possession thereof, cannot claim an exclusive title as discoverer, under the Act of Congress of August 1856, even as against third persons: *Id.*

#### ELECTION LAW.

*Indictment—Defective Averments.*—An indictment against judges of election, for refusing to receive the vote of a qualified elector, is fatally defective if it fails to allege that the name of the voter was duly registered,—the statute requiring registry as a prerequisite to the right to vote: *People v. Wattles*, 13 Mich.

#### EVIDENCE.

*Parol Evidence to contradict Record—Suit on a Justice's Judgment.*—The docket recited an appearance of the parties before the justice, joinder of issue, trial, and judgment. The defendant in this suit offered to prove that in fact he never appeared or was served with process: *Held*, that the evidence was not admissible: *Facey v. Fuller*, 13 Mich.

#### HUSBAND AND WIFE.

*Nullity of Marriage for prior Unchastity.*—Bill filed by a husband several years after the marriage, to have it annulled on the ground of fraud; the alleged fraud consisting in the woman passing herself off as chaste when she was not, and the bill alleging that the facts had just come to the complainant's knowledge. Several children had been born to the parties and were still living, and no complaint was made of the wife's conduct after marriage. Bill dismissed as unprecedented and shameful: *Leavitt v. Leavitt*, 13 Mich.

*Fraud by Husband upon Wife.*—A husband who, under the pretence of a contract, obtains his wife's property for a consideration entirely nominal, which neither benefits her nor really incommodes him, is bound

to make clear and satisfactory proof of fair dealing, or a court of equity will set aside the transfer: *Stiles v. Stiles*, 14 Mich.

#### JUDGMENT.

*Distribution of Proceeds of Sheriff's Sale—Where Validity of Prior Judgment is successfully attacked, benefit of Verdict enures to attacking Parties, and Judgment is void only as to them.*—In questions of distribution among contesting lien-creditors, those creditors only who unite in asking an issue to contest an older lien can derive benefit from a successful contest; and the judgment, whether found void in whole or in part, is void only as to the attacking parties and valid as to all others: *Shick's Appeal*, 13 Wright.

Hence in the distribution of the proceeds of a sheriff's sale, it is error to set aside a judgment in behalf of creditors, who excepting thereto before the auditor, demanded no issue, and filed no affidavit as required by law to ground the issue upon: *Id.*

*Duration of Lien of Judgment transferred from one County to another.*—The lien of a judgment transferred from one county to another continues for the full period of five years from the date of its entry in the county to which it has been removed: *Knauss's Appeal*, 13 Wright.

#### JUSTICE OF THE PEACE.

*Justices of the Peace and Aldermen have no Jurisdiction of an Attachment Execution against Wages of Labor or Salaries—Agreement to waive the Proviso exempting Wages from Attachment, void.*—The civil jurisdiction of aldermen and justices of the peace, being created by statute, is to be limited within the statutory bounds, and measured strictly by the statute law: *Firmstone et al., Garnishees, v. Mack*, 13 Wright.

Therefore, where the Act of Assembly, extending jurisdiction in attachment execution to aldermen and justices of the peace, expressly provided that wages of laborers and salaries should not be liable to attachment in the hands of the employer, the wages of labor and salaries must be regarded as excepted out of the grant, and jurisdiction in such cases withheld: *Id.*

An agreement by a laborer to waive the proviso exempting wages from attachment, embodied in a promissory note, is void: *Id.*

#### LIBEL.

*Discovery of Books and Papers.*—In an action to recover damages for an alleged libel, published in a newspaper, the plaintiff is not entitled to a discovery of the books and papers of the defendants for the purpose of enabling him to prepare his complaint, and to insert therein the names of real defendants in the place of certain fictitious names contained in the summons: *Opdyke v. Marble et al.*, 44 Barb.

Parties are not allowed to *fish* for evidence in the private books of account of others, who are parties to an action, upon a simple guess that there may be some entry that will help their case: *Id.*

The office of a discovery is to obtain facts necessary to a statement of the cause of action. Where the facts which are the cause of action are well known to the plaintiff, and he seeks a discovery only to find out whom he can sue for it, a discovery will not be granted: *Id.*

## LIEN.

*When divested by a Sheriff's Sale—Mortgage subsequent to such Lien.*—Parties to deeds of conveyance may by clear and express words create liens upon land, either for purchase-money or for the performance of collateral conditions, which will be binding between themselves and their privies; but such liens will be divested by subsequent sheriff's sales, unless they are in the nature of testamentary provisions for wives and children, or are incapable of valuation, or are expressly created to run with the land.

Thus where a father conveyed land to his son "subject to the payment of" a sum of money to the heirs of himself and wife, immediately after their decease, and the son again sold (taking a mortgage to himself for purchase-money) to a third person, as whose property it was sold at sheriff's sale after the death of the parents; on distribution of the proceeds, it was *Held*,

(1). That a lien was created by the deed of the father to the son, such as destroyed the priority of the mortgage taken by the son from his vendee: *Strauss's Appeal*, 13 Wright.

(2). That by the death of the parents before the sheriff's sale, the lien was divested thereby, and was entitled to be first paid out of the proceeds, and that the mortgage also divested by the sale was next entitled to payment: *Id.*

## MORTGAGE.

*Mortgage-Land sold in Parcels—Rights of the Purchasers.*—Where the owner of an equity of redemption conveys away a part of the lands, the remainder constitute the first fund for the payment of the mortgage, and the purchaser of it from the mortgagor cannot vary the rule by proof that the first conveyance was without consideration and made to defraud creditors. It makes no difference that the second grantee acquired his title at an execution-sale against the mortgagor: *Cooper v. Bigley*, 13 Mich.

*Mortgage by Infant—Affirmance.*—An infant who receives a conveyance of lands and gives a mortgage for the purchase-price, affirms the mortgage if he claims to retain the land after coming of age. The conveyance and the mortgage are all one transaction, and he cannot affirm it so far as it results to his benefit, and repudiate it in other respects: *Young v. McKee*, 13 Mich.

*Lien of.*—A lien cannot attach, under a mortgage, for a larger sum than that actually loaned; and payment cannot be enforced by the mortgagees, or their assignees, even as trustees for the original mortgagors, for the amount not actually advanced; although the latter have credited their grantees with the whole amount specified in the mortgage, on the purchase-money: *Freeman v. Auld*, 44 Barb.

And where a purchaser of premises subject to a mortgage nominally for \$4000, but upon which only \$2000 had been advanced, was informed, before his purchase, that the mortgage was claimed as a lien for the whole amount, and after making the contract of purchase he paid to the holders of the mortgage the interest upon it on the sum of \$4000: *held*, that this did not affect the principle above mentioned: *Id.*



## REAL ESTATE.

*Act of April 27th 1855 construed—Right of Illegitimate Children to inherit from Mother, along with Legitimate Child—Devise of Real Estate to Wife by Husband vests Title in her as the Stock of a new Descent.*—Under the Act of April 27th 1855, providing that illegitimate children shall take and be known by the name of their mother, and they and their mother shall respectively have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs in fee simple, illegitimate children are entitled to share in the proceeds of the real estate of their deceased mother equally with a legitimate child: *Opdyke's Appeal*, 13 Wright.

Where a mother takes real estate by devise from her husband, she becomes the stock of a new descent, and her illegitimate children are entitled to share in the proceeds, though not of the blood of the husband from whom the estate came: *Id.*

## STAMP.

*Award of Arbitrators.*—No United States revenue stamp is required upon an award of arbitrators in order to make it valid: *Adley v. Gray*, 37 Vermont.

## STAY LAWS.

*Law of April 18th 1861 construed—Right of Mortgagor and Terre-tenant of Mortgaged Premises, to stay of scire facias sur mortgage, issued while in Military Service.*—A *scire facias* upon a mortgage is "process" within the meaning of the Act of April 18th 1861, staying civil process against any person in the service of the state or of the United States, for the term of such service and thirty days thereafter: *Drexel et al. v. Miller*, 13 Wright.

Where one buys land, giving a mortgage for the purchase-money, and then sells to another, the mortgage, as an incumbrance upon the land, falls within the covenant implied in the words "grant, bargain, and sell" in the deed of the mortgagor and vendor; and therefore, having a direct interest to prevent immediate sale, and consequent breach of covenant against incumbrances, he has the right, if in military service, at the time the writ of *scire facias sur mortgage* issued, to intervene and procure a stay under the act: *Id.*

Whether the vendee, and terre-tenant of the mortgaged premises, also in military service when *scire facias* issued, can claim the benefit of the act, though not a party to the record, not decided: *Id.*

Where the mortgage contained no express waiver of the time or stay, the defendant, mortgagor, was held entitled to the benefit of the act: *Id.*

## VENDOR AND VENDEE.

*Subsequent Confirmation of Vendor's Title.*—A vendor who undertakes to sell a full title for a valuable consideration when he has less than a fee simple, but afterwards acquires the fee, holds it in trust for his vendee, and will be decreed to convey it to his use; and if the vendee mortgage his title, the perfection of the title to the vendor enures to the benefit of the mortgagor: *Clark v. Martin*, 13 Wright.