ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

SUPREME COURT OF MARYLAND.[2]

SUPREME COURT OF MASSACHUSETTS.[3]

SUPREME COURT OF MISSOURI.[4]

SUPREME COURT OF NEW YORK.[5]

SUPREME COURT OF PENNSYLVANIA.[6]

AGENT.

Right of Attorney to bind Client in Case Stated—Liability of Agent on Personal Contract—What Contracts are within the Statute of Frauds.—*Semble,* that an attorney at law has authority to bind his client by stating a case for the judgment of the court: *Whitcomb et al.* v. *Kephart et al.*, 14 Wright.

Where, after a contract made by G. with a lumbering firm to cut saw-logs on their land, and a sub-contract by him to K. & Brother, a new contract was entered into between the K.'s, G., and W. & Sons, who were the general agents of the firm, but did not sign the contract as such,—whereby it was stipulated that the K.'s should go on with their work, and that W. & Sons should pay according to the sub-contract rate, except so far as G. himself should pay them out of the sum coming to him under the original contract; after completion of the work by the K.'s, and suit brought by them against W. & Sons for the balance due, which was admitted in a case stated by the attorneys of the parties, *Held*, That as the defendants contracted to pay personally, and not as agents, out of money furnished by their principals, they were personally liable, and that the entry of judgment by the court on the case stated was not error: *Id.*

The undertaking on the part of the defendants was original, and therefore not within the Statute of Frauds: *Id.*

AGREEMENT.

Equitable Relief.—It is not the province of courts of equity to relieve parties failing to perform their contracts, from the legal consequence of such failure, unless it has resulted from mistake, fraud, or accident, or the acts and dealings of the parties show an assent to the delay by the

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[1] From Hon. N. L. Freeman, Reporter; to appear in 35 and 36 Illinois Reports.

[2] From N. Brewer, Esq., Reporter; to appear in 21 Maryland Reports.

[3] From Charles Allen, Esq., Reporter, to appear in vol. 10 of his Reports.

[4] From C. C. Whittlesey, Esq., Reporter; to appear in 36 Missouri Reports.

[5] From Hon. O. L. Barbour, Reporter; to appear in vol. 44 of his Reports.

[6] From R. E. Wright, Esq., late Reporter; to appear in vol. 14 of his Reports.

party insisting upon the forfeiture, and it appears that under the circumstances it would be inequitable for him to insist upon it: *Tibbs* v. *Morris*, 44 Barb.

Within the Statute of Frauds.—B. let W. have ten sheep, of a certain quality and grade of wool, W. agreeing to deliver to B. at the end of four years twenty sheep of as good quality and grade. At the expiration of four years the parties made another agreement, by which W. instead of delivering the twenty sheep then due, promised to deliver to B. forty sheep of as good quality and grade at the end of four years more, which B. agreed to accept in lieu of said twenty sheep. *Held*, that the last agreement was within that provision of the Statute of Frauds which makes void every oral agreement, that by its terms is not to be performed within one year from the making thereof: *Bartlett* v. *Wheeler et al.*, 44 Barb.

Although an agreement on which a party relies is void by the Statute of Frauds, he is not, in general, without remedy, inasmuch as where a contract has been fully performed, and the performance accepted, a recovery may be had on a *quantum meruit* or *valebat*, if not on the contract itself: *Id.*

Attachment.

Garnishee.—The garnishee stands in the position of the defendant in the attachment suit, and any defence which he can set up against such defendant, he may also use in resisting the claim of the attaching-creditor: *Friebaugh et al.* v. *Stone*, 36 Mo.

Attorney

Authority.—Where several suits were brought by the same plaintiff against different defendants, the referees being the same in each case, the attorneys of the several parties agreed that all the cases should abide the final decision in one case: *held*, that the agreement was within the authority of the attorneys, and was binding upon the parties: *North Mo. Railroad Co.* v. *Stephens*, 36 Mo.

Banks.

Constitutionality of National Bank Acts.—National banks are instruments employed by the government of the United States in the prosecution of its fiscal operations; and their creation is within the constitutional power of Congress: *The People ex rel. Lincoln* v. *The Assessors of the Town of Barton*, 44 Barb.

The proviso of the Act of Congress, passed February 25th 1862, prohibiting the taxation, under state laws, of the shares in national banks, at a higher rate than is imposed upon the shares of the state banks, was within the constitutional power of Congress to make, and is valid and controlling: *Id.*

Assessors have no authority under the Act of the Legislature, of March 9th 1865, enabling the banks of this state to become banking associations under the laws of the United States, to assess the shares of a stockholder in a national bank: *Id.*

Bills and Notes.

Attorney—Assignment.—An attorney who receives a note for collec-

tion, after its maturity, has no power to sell or assign the note: *Goodfellow* v. *Lamlis*, 36 Mo.

Guaranty—Assignment.—An indorsement of a promissory note by the payee, in this form: "I guaranty the collection of the within note," is nothing more than a simple assignment; for, by the statute of Illinois, the assignor, in every case, unless restricted by the terms of the assignment, undertakes that the note can be collected, and if it cannot be, then he will pay it. On such an indorsement, if due diligence to collect the note is shown, the indorser is liable. An assignee of a negotiable note is not bound to sue the maker out of the county where the latter resides. Ordinary diligence to collect, is all to which the assignee is bound: *Judson* v. *Goodwin*, 36 Illinois.

Protest—Indorsers—Evidence.—To secure the liability of the indorsers of a bill of exchange or negotiable promissory note, demand of payment must be made of all the makers, and notice of demand and refusal must be given to the indorsers. A notary's protest which stated "that he presented the same at the office of the makers and was refused payment," without stating from whom payment was demanded, does not show a proper demand and refusal of payment. In a suit against indorsers, such protest may be properly excluded as evidence. A demand of payment may be made by the holder of a note or bill, or any agent for him: *Nave* v. *Richardson et al.*, 36 Mo.

Grace—Bank—Negligence—Action.—A check drawn upon a bank, requesting it to pay money, at a day subsequent to its date, to a third party, or order, is entitled to grace; and a presentment on the day named is not a good presentment so as to bind an indorser upon demand and refusal of payment and notice: *Ivory* v. *Bank of the State of Missouri*, 36 Mo.

A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand: *Id.*

Protest—Evidence—Notary Public.—The official protest of a notary is the proper legal evidence of the presentment, demand, and refusal of payment of a foreign bill of exchange, and such protest cannot be dispensed with as in cases of inland bills: *Commercial Bank of Kentucky* v. *Barksdale et al.*, 36 Mo.

The presentment and demand of payment of a foreign bill of exchange must be made by the same notary who protests the bill; it cannot be done by his clerk, nor by any other person as his agent, although he be also a notary. Notaries are public officers, and as such cannot act as partners. A protest made by one notary, when another notary made the demand of payment, is not a legal protest. The protest, or the noting of the bill for protest, must be made upon the same day the presentment is made: *Id.*

COMMISSIONS.

20 *per Cent.*—A commission of 20 per cent. for the collection of assigned accounts, consisting of small bills of book accounts, which cause much trouble and loss of time in their collection, is not unreasonable: *Wynkoop, Receiver, &c.*, v. *Shardlow et al.*, 44 Barb.

Corporation.

Measure of Damages for refusing to permit a Transfer of Stock—Power of Attorney to transfer, valid, though executed in Blank.—In an action against an association for refusing to permit a transfer of stock, the measure of damages is its actual value at the time of the refusal to transfer: *German Union Building Association* v. *Sendmeyer*, 14 Wright.

The delivery by an owner of stock of a power of attorney to transfer, executed in blank, with the certificates, is evidence of an implied authority to fill up the power with the name of an attorney to make the transfer: *Id.*

Equity—Bill to enforce Performance of Public Duties by a Corporation, not maintainable at Suit of Private Party.—A bill in equity to enforce the performance of public duties by a corporation, cannot be maintained by a private party in the absence of a special right or authority: *Buck Mountain Coal Co.* v. *The Lehigh Coal and Nav. Co.*, 14 Wright.

Therefore, where the slackwater navigation of the Lehigh Coal and Navigation Company, with dams, locks, and other devices, were damaged, broken, and swept away by the flood of the 4th of June 1862, it was *held*, that a bill in equity could not be maintained by another company, to enjoin the respondents from neglecting to repair and put in operation their navigation; and that complainants had no right to a decree compensating them for any damages suffered as incident to the non-repair: *Id.*

Semble, that a bill for an injunction, sued out on the part of the Commonwealth by the attorney-general, would lie against the respondents, to compel them to observe their charter obligations: *Id.*

Amotion and Disfranchisement of Members of Private Corporations, discussed and distinguished.—The power of amotion for adequate cause is an inherent incident of all corporations, whether municipal or private, except, perhaps, such as are literary or eleemosynary; but the exercise of this power does not affect the private rights of the corporator in the franchise: *Evans* v. *The Philadelphia Club*, 14 Wright.

The power of disfranchisement which does destroy the member's franchise must in general be conferred by statute, and is never sustained as an incidental power except on conviction of the member in a court of justice for an infamous offence, and for the commission of some act against the society which tends to its destruction or injury: *Id.*

Though the power to make by-laws is incidental to corporations, and is generally expressly conferred by statute, yet by-laws which vest in a majority the power of expulsion for minor offences are, in so far, void, and expulsions made under them will not be sustained in courts of justice: *Id.*

In joint stock companies or in any corporation owning property, no power of expulsion can be exercised unless expressly conferred by the charter: *Id.*

Where two members of a private corporation or club were sitting together in conversation in the bar-room of the club-house, a third came in and used insulting language, understood by one of the two to be applied

to himself, who thereupon struck the offender: the act was held not such as would justify his expulsion from the club, by the members thereof: *Id.*

COUNTY.

Action—Neglect of Duty.—Counties are *quasi* corporations, created by the legislature for purposes of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute: *Reardon* v. *St. Louis County*, 36 Mo.

CRIMINAL LAW.

Appellate Jurisdiction of Supreme Court in Capital Cases—General Threats, when Evidence of Malice on Trial for Murder—Record of Finding of Grand Jury, when Sufficient—Evidence.—The Supreme Court have no power in capital cases to review points which were not taken in the court below nor filed of record, but are confined to exceptions taken on the trial to some question of law or evidence, or to the opinion of the court below upon a written point, which, together with the decision, must be filed of record as in civil cases: *Hopkins* v. *The Commonwealth*, 14 Wright.

Threats made by a prisoner within an hour before the commission of the murder, that "he would kill somebody before twenty-four hours," are evidence of malice prepense, though they did not expressly refer to the deceased, and if he killed anybody in pursuance of such malice, it was murder in the first degree: *Id.*

The short entry on the docket of "true bill," is a sufficient record of the finding of the grand jury: *Id.*

ERROR.

Practice.—Where no exceptions are saved in the inferior court, the Supreme Court will only notice errors apparent on the face of the record: *Mason* v. *Barnard et al.*, 36 Mo.

INNKEEPER.

Liability of, for Goods of a Guest, lost or stolen.—Innkeepers are liable for the goods of a guest brought *infra hospitium*, though not delivered to him, or his attention specially called to them, and though the person who may have stolen or carried them away is unknown: *Burrows* v. *Trieber*, 21 Md.

It is not necessary when the goods are proved to have been lost or stolen, to show negligence on the part of the innkeeper to fix his liability: *Id.*

Such liability may, however, be discharged, where the loss is the result of inevitable accident, or the acts of public enemies; or where the owner takes upon himself the care of his property, though it still be *infra hospitium*, and its loss or injury may be attributed to his own neglect, while a guest at the inn: *Id.*

LANDS.

Pre-Emption—Equity.—The Act of Congress concerning pre-emptions, gives the officers of the land department the right to determine all questions arising between different settlers. The fee of the lands in

this state being originally in the government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor of the action of the officers designated to execute the laws made for that purpose. Where the officers are vested with discretionary power, their acts are not subject to the revision of our courts; but when they act without authority of or in violation of law, then jurisdiction will be assumed. A patent carries the legal title, and the presumption is that all necessary preliminary steps have been taken, and in favor of its validity, and the burden of proof is upon him who impeaches it: *Hill* v. *Miller*, 36 Mo.

Landlord and Tenant.

Where the military authorities took possession of demised premises, and held possession of the same without the consent of the lessee after the expiration of the term: *Held*, that the lessee was not liable for rent of the premises after the expiration of the term, although he had received from the government the rents accruing during the term: *Constant* v. *Abell*, 36 Mo.

Mortgage.

Practice—Deed of Trust—Notes—Mortgagor—Substitution.—Under the statute of this state, the proceeding for the foreclosure of the equity of redemption of a mortgage, or deed of trust, is a proceeding at law and not in equity: *Mason* v. *Barnard et al.*, 36 Mo.

Where a deed of trust given to secure the payment of several notes falling due at different dates—provided, that if any should remain unpaid after it fell due, that then all the notes should become due—the notes become due only for the purpose of distributing the fund realized by the sale under the power. Such a provision will not authorize the rendition of a personal judgment against the maker before the notes mature: *Id.*

A. executed a deed of trust, in the nature of a mortgage, to secure a debt, and subsequently by deed-poll conveyed the property to B., reciting in the conveyance that part of the consideration was the payment of the incumbrance by B.: *Held*, that B. could not be considered as a mortgagor, and that a personal judgment against B. for the mortgage-debt was erroneous: R. C. 1855, p. 1089, §§ 10, 14: *Id.*

Municipal Corporations.

Streets—Sidewalks—Bridges—Duty of, to make and repair them.—Cities are under a political obligation to open such streets as the convenience of the community requires; but courts cannot compel the performance of such a duty, or hold them responsible for its non-performance: *City of Joliet* v. *Verley*, 35 Ill.

The legal obligation of a city to repair highways, streets, sidewalks, and bridges, within its corporate limits, is one voluntarily assumed by its corporate authorities, and relates to such as are opened or constructed, or allowed to be opened or constructed, under its authority, and those which its officers assume control over for that purpose: *Id.*

So, the trustees of a canal cannot, by building a bridge over their canal within the limits of a city, impose upon the city the burden of keeping it in repair. Until the city assumes control over a bridge

erected without its assent or authority, it is not liable for its not being kept in repair: *Id.*

Nor is a city under any obligation to make approaches or passageways to a bridge so erected for the convenience of its citizens. Its obligation in this respect is the same as that in relation to opening new streets: *Id.*

Where a bridge is erected across a canal within the corporate limits of a city, without the authority of the city, as long as the trustees of the canal do not object, the city has ample authority to make approaches to the bridge and exercise control over them: *Id.*

And where the city, in the exercise of its authority, undertakes to make the passageways to a bridge erected under such circumstances, there can be no doubt of its obligation so to exercise its authority as not to endanger the lives or limbs of its inhabitants: *Id.*

If stone steps leading from an abutment of the bridge are so situated that no approach can be made which will be safe for the passage of travellers, it is a gross violation of duty on the part of the city to undertake to make one. Cities have no right to set man-traps thoughout their limits, and excuse themselves from liability for injuries resulting therefrom, on the ground that the localities are such that they could not render the places where they sit, safe and secure. If they cannot construct works so that they will be safe and secure, they can let them alone: *Id.*

Negligence.

Railroad Companies—Liability for Injuries to Passengers.—A railway passenger-train, moving at the rate of twenty-five miles an hour, was thrown from the track in consequence of the displacement of a rail of the main stem at a switch, occasionally used by a dirt train. At the time of the accident the *switch indicator*—it having been broken and deranged—indicated that the switch was in a position to be passed in safety; but it also appeared, that in consequence of their location with reference to a curve in the road, neither the *indicator* nor the rails of the switch themselves could have been seen by the engineer in time to have averted the accident. In an action for damages by a passenger who had been injured by the accident: *Held*,

1. That the occurrence of the accident and injury to the plaintiff were *primâ facie* evidence of neglect, and imposed upon the railroad company the *onus* of showing "the most exact care and diligence, not only in the management of the trains and cars but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers: Citing 4 Cush. 402.

2. That it was the province of the court to furnish to the jury the legal rule or standard by which the obligation of the railroad company was to be determined; but it was a question for the jury to determine from all the evidence, whether the injury to the plaintiff arose from any negligence on the part of the defendants or their agents; and if the jury should find that the injury was the result of an accident, or act against which human foresight and care could not guard, and was not the result of negligence in any degree on the part of the defendants, the plaintiff was not entitled to recover.

3. That in determining these questions, the jury were correctly

instructed to have regard to the character of railroad transportation: *Baltimore and Ohio Railroad Co.* v. *Worthington*, 21 Md.

PARTNERSHIP.

Dormant Partner.—In case of a dormant partnership, while the credit is given to an ostensible partner, because no other is known to the creditor, yet the creditor may also sue the the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the ostensible partner: *Richardson et al.* v. *Farmer*, 36 Mo.

RAILROADS.

Trespasses—Nuisances.—In the absence of any negligence, unskilfulness, or mismanagement in the construction of an embankment for the bed of a railroad over land through which there was no natural channel for the passage of water, the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed: *Clark's Administrator* v. *Han. & St. Jo. Railroad Company*, 36 Mo.

REPLEVIN.

Action against Officer.—The owner of goods, cannot maintain an action against an officer for taking them in the due service of a writ of replevin against another person who had them in his possession: *Willard* v. *Kimball*, 10 Allen

STAMP.

Evidence.—Under the Act of Congress of March 3d 1865, a note executed before June 1st 1863 is admissible in evidence, if the proper stamp be affixed before it is thus offered: *Deny* v. *Baker et al.*, 36 Mo.

TRESPASS.

Damages.—Exemplary damages would seem to mean in the ordinary and proper sense of the words, such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as might serve for a wholesome example to others in like cases. Where the defendants, forming part of a body of armed men, forcibly broke and entered the plaintiff's store, putting him in bodily fear, and took and carried away a large portion of the plaintiff's stock of goods, injuring his business, the mere value of the goods taken, with interest thereon, is not the proper measure of damages: *Frenlenheit* v. *Edmondson et al.*, 36 Mo.

TRIAL.

Practice—Instructions.—Where the plaintiff has closed his evidence, and it has no tendency whatever to prove the issue necessary to a recovery, the court may determine the whole case as a matter of law: *Boland* v *Missouri Railroad Co.*, 36 Mo.