ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CONNECTICUT.[1]

SUPREME COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF MICHIGAN.[3]

COURT OF CHANCERY OF NEW JERSEY.[4]

SUPREME COURT OF NEW YORK.[5]

SUPREME COURT OF PENNSYLVANIA.[6]

AGREEMENT.

Completeness of Portions.—Where a contract is made for the sale and delivery of two several parcels of goods, to arrive in different ships, at different periods of time, each portion of the contract is complete in itself, without reference to the other: *Swift et al.* v. *Opdyke et al.*, 43 Barb.

Though the parties may, by express terms, make such a contract, not only one and the same, but also indivisible; yet if nothing of the kind appears, showing that the time of payment is to be deferred until the delivery of all the goods, it will not be assumed that the two distinct parts of the contract were intended to be dependent on each other. The implication must be plain and unmistakable, to justify such a conclusion: *Id.*

Whether such a transaction be deemed one and the same contract, and yet divisible, or whether it be deemed two distinct and separate contracts, the delivery of a portion of the goods will take the claim for that portion out of the Statute of Frauds: *Id.*

In the one case it will amount to a part performance, and in the other to an entire performance of one of the contracts: *Id.*

ASSUMPSIT.

For Labor and Services.—After proof of a relation which entitles to wages, the law implies a contract to pay, and it is the province of the jury, under the evidence of the value of the services, to fix the sum to be recovered: *Gardner's Adm.* v. *Heffley*, 49 Penn.

The relationship between a decedent and his niece by marriage, is not sufficient to rebut the presumption of promise to pay for services rendered by her for a number of years in his family: *Id.*

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[1] From John Hooker, Esq., Reporter; to appear in 32 Conn. Reports, pt. 2.

[2] From Charles Allen, Esq., Reporter; to appear in vol. 9 of his Reports

[3] From Hon. T. M. Cooley; to appear in 13 Mich. Reports.

[4] From T. N. McCarter, Esq., Reporter; cases decided in May Term, 1865.

[5] From Hon. O. L. Barbour, Reporter; to appear in vol. 43 of his Reports.

[6] From R. E. Wright, Esq., Reporter; to appear in vol. 49 Penn. State Rep.

Hence, evidence of his declarations in relation to her services, and their value, that if she would stay she should be well paid, and that she should be well rewarded by him, though not made in her presence or shown to have been communicated to her, were legitimate evidence to repel the inference arising from her relationship to his wife, that she was merely a member of his household, and to show that she was living there under a contract relation: *Id.*

Where the family relation is apparent as between a father and son, proof of an intended promise to pay for services rendered must be clear and convincing, and show a precise and definite contract for wages; but the more remote the relation, the nearer the character of the proof approaches to the ordinary: *Id.*

Goods in Possession of Third Person—Failure to Deliver.—If, in an action to recover for money paid as the price of goods in the possession of a third person, who has given to the defendant a written promise to deliver them to him, it appears that the defendant has assigned the written promise to the plaintiff, who has been unable to obtain the goods of the promissor, and that the plaintiff has accordingly returned the written promise to the defendant, who has refused to take it, saying that he had sold it to the plaintiff and had no more to do with it, the plaintiff may recover, without demanding the goods of the defendant or returning to him again the written promise: *Griggs* v. *Morgan*, 9 Allen.

Bills and Notes.

Note for Goods sold with Warranty of Quality.—If the vendor of an article, with warranty of quality, takes a promissory note for the price, payable on demand to a third person, and the article proves worthless, the maker of the note may rely upon the breach of warranty, in defence to an action upon it by the payee, although he cannot show that the payee had any knowledge of the warranty, or took the note otherwise than in good faith and for value: *Aldrich* v. *Stockwell*, 9 Allen.

Accommodation Note—Misappropriation—Pleading.—The facts that a note sued on was made by the defendant without consideration, and was delivered to the payee solely for his accommodation, and that it was transferred by the payee to the plaintiff after it became due, will not, alone, constitute any defence: *Corbitt* v. *Miller*, 43 Barb.

In an action by the indorsee of a promissory note against the maker, the answer alleged that the note was made and given to C., for the purpose of enabling him to raise money to buy or pay a mortgage held by the plaintiff, on property owned or claimed by C.; that the note was not used for that purpose, but remained in the hands of C. until after the same became due, and was then transferred to the plaintiff: *Held*, that if this could be deemed a misappropriation, in any sense, in order to render it available as a defence, the answer should have shown that it was, or might have been, injurious to the defendant: *Id.*

But the answer merely alleging, that it was expected and intended that the plaintiff should have the proceeds of the note, after it was negotiated, and that instead of the proceeds he had taken the note; *it was held*, that this was not a misappropriation within any of the cases: *Id.*

EQUITY.

Reforming Contract—Enforcing Forfeiture.—A contract cannot be reformed in equity by the addition of another stipulation, where no fraud or mistake is alleged in drafting it: *White* v. *Port Huron, &c., R. R. Co.*, 13 Mich.

Equity will not interfere to enforce a forfeiture, but will leave the party claiming it to such remedy as he can obtain elsewhere: *Id.*

EVIDENCE.

Dying Declarations.—The dying declarations of a person fatally injured by the act of another, as to the facts attending the injury, are not admissible in evidence against the defendant, in a civil suit brought for the injury: *Dailey* v. *New York and New Haven R. R. Co.*, 32 Conn

Commission not properly executed.—In this case the evidence of one of the witnesses, who resided in Minnesota, taken by commission issued out of this court, is objected to because the commission was not executed pursuant to the statute:

1. That it nowhere appears, in the commission or return, that the officer before whom the commissioner was sworn, was duly authorized to administer an oath in the state when the commission was executed. The fact does appear by the statutes of Minnesota published by authority—this is sufficient. It is not necessary (though proper and expedient) that the authority should appear on the face of the return.

2. It is no objection to the admission of the evidence that the witness is dead. That is one of the contingencies, which, by the express terms of the act, renders the evidence competent.

3. The oath taken by the commissioner is not the oath required by the statutes. It is identical with the form found in Pott's Precedents, page 107, and which has long been in use in the English Court of Chancery. The oath in its terms is materially different from that prescribed by our statutes, Nix. Dig. 325, § 2: *Lawrence et al.* v. *Finch*, N. J. Chancery.

The authority to take testimony in this manner, is in derogation of the rules of the common law, and has always been construed strictly: *Id.*

It is necessary to show that all the requirements of the statutes have been complied with, or the testimony is not admissible: *Id.*

Res gestæ.—Defendant was informed against as a receiver of stolen property. It appeared that the thief, who was defendant's brother, had been arrested and placed in jail, where defendant called to see him. Trunks were afterwards found at defendant's house containing some of the stolen property, and it was claimed by the defence that these trunks were sent to the house by the thief, and that he was allowed to do so on his statement that they contained only his clothing. A witness who was present at the interview in the jail was asked, "What was said by James Durant (the thief) to the defendant at the jail in regard to sending his trunks to her house?" Objected to, and objection sustained. *Held* by the Supreme Court, that the ruling was erroneous. The actual circumstances, the arrangement or understanding under which the goods were received being the *res gestæ*, the real essence of the inquiry, it necessarily followed that any facts might be shown which had any

tendency to prove such circumstances or understanding, even though they might fall short of positive proof: *People* v. *Durant*, 13 Mich.

Prisoner's Statement to Jury.—The statute having allowed the defendant in a criminal prosecution to make his statement to the jury, the jury are authorized to give it such credence as they think it entitled to, and they are not obliged to believe the sworn statements of witnesses in preference if they think the statement of the prisoner more credible. *Held*, therefore, that it was error to lay down as a rule of law to the jury that the statement would not warrant them in setting aside unimpeached sworn evidence: *Id.*

INFANT.

Maintenance allowed out of Legacy.—Where one, by written instrument, gave to his granddaughter a sum of money as an "Erbschaft," or inheritance, and appointed his son-in-law guardian, providing, however, that in case of her death before arriving at the age of twenty-one years the amount given, with interest, should be paid to him or his heirs, she would be entitled to a reasonable allowance out of the interest for her support, education, and maintenance, if otherwise unprovided for, whether the legacy was vested or contingent: *Leiby's Appeal*, 49 Penn.

MILITARY SERVICE.

Relation between Principal and Substitute.—The relation between a substitute and his principal is of contract simply; and if he deserts soon after enlistment as such, he cannot recover the amount contracted for, though the principal was relieved from service by the substitution: *Gaugler* v. *Price's Adm.*, 49 Penn.

Recruiting without Authority.—An indictment under stat. 1863, c. 91, § 1, for recruiting a person in and for the military service of the United States, without authority, is not sustained by proof that the defendant solicited and induced such person to leave this commonwealth and enlist in the military service elsewhere: *Commonwealth* v. *White*, 9 Allen.

MORTGAGE.

Parties to Bill of Foreclosure.—Although complainant in a foreclosure suit is not entitled to make persons defendants who claim by title paramount to the mortgage, in order to cut off their adverse claims, yet where such adverse claimant is also owner of an interest in the equity of redemption, it is proper to make him a party for the purpose of foreclosing such interest: *Horton* v. *Ingersoll*, 13 Mich.

To secure future Advances.—A mortgage cannot exist as a lien or incumbrance upon lands independent of some debt or obligation which it is given to secure. Where, therefore, a mortgage is executed and put upon record to secure future advances which it is optional in the mortgagee to make or not, and the mortgagor conveys away or incumbers the premises before such advances, such conveyance or incumbrance, if placed upon record before the advances are made, is entitled to precedence: *La Due* v. *Detroit & Milwaukie R. R. Co.*, 13 Mich.

The record of the first mortgage, in such a case, can only be held notice to subsequent mortgagees or purchasers, to the extent that advances have been made prior to such subsequent mortgage or purchase: *Id.*

Municipal Bonds.

Bounties to Recruits.—Bonds issued by or under the authority of the boards of supervisors of a county, to the supervisors of the several towns, in pursuance of a resolution passed by such board, under the 8th chapter of the Laws of 1864, for the purpose of paying bounties to recruits that shall be mustered into the service of the United States, to the credit of the respective towns, are county bonds, and binding as such upon the county at large: *The People ex rel. Rose* v. *The Board of Supervisors of the County of Livingston*, 43 Barb.

The board is also authorized to allow the towns to borrow upon their own credit. But unless the board provides by resolution for the issuing of town bonds, or of bonds upon the sole credit of the towns, or of any town, bonds so issued by such towns, or any of them, will be unauthorized and invalid: *Id.*

The board of supervisors has no right to lend the bonds of the county to the towns, so as to create town debts: *Id.*

Town debts can only be lawfully authorized under the Act of 1864, in the shape of town bonds; and such bonds can only be issued by the town authorities after a vote of the town, duly had at a regular town meeting, called and held for that purpose: *Id.*

County bonds, issued under the authority of the board of supervisors, for the payment of bounties, create a county debt, which can only be lawfully assessed upon the whole county. The board cannot lawfully make an unequal assessment upon the several towns, to pay such debt: *Id.*

Such bonds will not become town debts by force of any subsequent vote or resolution of the towns respectively, at special town meetings called for that purpose, but will remain county bonds, and be binding solely upon the body of the county at large: *Id.*

Bonds having been issued by a board of supervisors, on the credit of the county, the board may properly and lawfully adopt a resolution, directing that there be assessed, levied, and collected upon the taxable property of the county, an amount sufficient to pay the sums due thereon: *Id.*

Negligence.

Contributory Negligence—Damages.—Upon a hearing in damages after a demurrer to a declaration charging an injury by the negligence of the defendant, the defendant may show, for the purpose of reducing the damages to a nominal sum, that the plaintiff was guilty of negligence directly contributing to the injury: *Daily* v. *New York & New Haven R. R. Co.*, 32 Conn.

Liability of Owners of a Pier.—The owners of a pier are liable for injuries sustained by an individual, by reason of its defective construction and dangerous condition, notwithstanding the premises are, at the time, in the possession of a tenant who has covenanted to keep the pier in repair, if the defects existed when the owners leased the property to him: *Moody* v. *Mayor, &c., of New York*, 43 Barb.

Fellow-Servant.—In an action against the owner of a railroad, brought by his servant to recover damages for a personal injury sustained by rea-

son of a locomotive engine's running upon the plaintiff from a turn-table, while turning upon it, in consequence of the want of a sufficient brake, evidence is competent on the part of the defendant to show that the person who had charge for him of all the engines on the road had given instructions to the engineers before the accident to have the wheels of their engines blocked while turning on the turn-table, and that the accident occurred from the failure of some servant of the defendant to obey such instructions; although such instruction was not known to the plaintiff: *Durgin* v. *Munson*, 9 Allen.

PARTITION.

When a Bill will not lie.—A bill for partition will not lie when the bill is denied, or depends on doubtful facts or questions of law: *Dewitt* v. *Ackerman*, N. J. Chancery.

PARTNERSHIP.

Agreement not amounting to.—B., L., and L., by an instrument dated July 1st 1860, reciting that they composed the firm of S. & Co., agreed that, as H. A. S. had loaned them $100,000, to be used as capital, for the term of two years, and subject to all the risks of their business, so far as the creditors of the firm were concerned, they would pay him interest at the rate of seven per cent., and that as a bonus for the good will of the business (in which he had formerly been a partner), they would allow him half-yearly, one per cent. upon the gross sales of the firm, "he having no interest in the commission, guarantee, or profit and loss, and in no wise a partner, or to be allowed to have any part or control in the business of the house:" *Held*, that H. A. S. was not a partner with S. & Co., nor liable as such to creditors of the firm: *Gibson et al.* v. *Stone et al.*, 43 Barb.

PARTY-WALL.

The charter of the city of Camden authorizes the Common Council to pass ordinances "for authorizing the erection and building of partitions or party-walls and fences, and to regulate and govern the same:" *Hunt* v. *Ambruster*, N. J. Chancery.

By an ordinance passed in pursuance of this authority, the right to compensation is given to the owner of the building first erected. The right accrues not to the owner of the building at the time of its erection, but to the owner at the time the party-wall is used for the purpose of building on the adjoining lot. It is not a personal claim, but a right annexed to, and which passes with the ownership of the building: *Id.*

The power to authorize the erection of said wall necessarily involves the power of authorizing its construction on the application of either owner, with or without the consent of the other. Without it the authority is nugatory. The grant of power to accomplish a specified object, includes by necessary implication all power requisite to effect that object: *Id.*

The ordinance is not repugnant to the Constitution of the United States, or of this state, because compensation is not provided for the land

occupied by the wall. The land is not taken for public use, nor is it taken from the owner in any sense. The proprietor of the land thus burdened, in contemplation of law receives an equivalent which he enjoys in the land of the adjoining proprietors: *Id.*

Similar laws have existed from a very early period in England and in this country, and they have been regarded, not as unauthorized violations of the property or rights of the citizen, but rather as reasonable and useful regulations, and as evidences of a vigilant and useful police: *Id.*

Practice.

Withdrawal of Appeal.—An appeal from a probate decree was taken by one of several heirs equally interested, under an arrangement with the other heirs by which the appeal was to be taken in his name, and they were to share the expenses of the litigation. After the appeal was taken, and when it was too late to take any other, the appellant settled with the principal appellee, the latter purchasing and taking a conveyance of his interest in the estate; but the settlement was made with no knowledge on the part of the appellee of the arrangement under which the appeal was taken. After the settlement, the appellant moved in the Superior Court to withdraw his appeal, which the other heirs opposed, on the ground of the arrangement under which it was taken. *Held*, that the appellee having acted in good faith in making the settlement, the court could not properly refuse to allow the withdrawal: *Lake's Appeal from Probate*, 32 Conn.

Recording Laws.

Bill to quiet Title—Sale of Partnership Lands by one Partner.—The Governor and Judges of Michigan being mere donees of a power to convey Government lands in Detroit, their conveyances stand upon the same footing as patents from the United States, and do not come within the purview of the ordinary recording laws: *Moran* v. *Palmer*, 13 Mich.

One who claims a *legal* title in fee simple to lands, is not entitled to file a bill to quiet his title against an adverse claimant, who is already proceeding at law, especially where no obstacle is suggested to making a full defence in the ejectment suit. And though the complainant at the hearing establishes a complete *equitable* title to the land, his bill must still be dismissed, as the case shown by the evidence differs from that alleged by the bill: *Id.*

Lands conveyed to the members of a partnership in satisfaction of a partnership debt, are to be regarded, for all the purposes of arranging balances between the partners, paying debts, and closing the partnership business, as personal property. And where one of the partners afterwards exchanged such lands for others, giving a deed in his own name alone, and the lands received in exchange were afterwards sold, and the proceeds received by the partnership, it was held that all the partners were bound by the transaction, and estopped from setting up any claim to the first-mentioned lands: *Id.*

SET-OFF.

Debts accruing in different Rights.—Bill filed by one partner against his copartner for an account of the partnership transactions. Defendant by his answer claims that there are moneys due him from complainant and from complainant and a third party on various accounts; he asks also a settlement of these accounts, and that the amount found due him may be allowed by way of set-off to the demand of the complainant. On exceptions to this answer it was *held*, that these matters having no connection with the subject-matter of the bill, but being entirely distinct and unconnected, cannot be set off against complainant's demand: *Brewer* v. *Norcross*, N. J. Chancery.

The general rule in equity as well as at law is, that joint and separate debts and debts accruing in different rights cannot be set off against each other. Courts of equity, however, exercise a jurisdiction in matters of set-off independent of the statutes upon the subject. Whenever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed though the debts are not mutual: *Id.*

When the interference of the court is asked because the defendant believes that the business was of such a character that justice requires that all the accounts should be inquired into and settled at the same time, the answer must allege some fact, which shows such belief of the defendant to be well founded. Nor can defendant have such relief by way of answer. He must file a cross-bill: *Id.*

STAMP.

Legal Process—Precept for an Issue.—The precept of a Register of Wills to the Common Pleas, directing an issue as to the validity of a will, is not a writ or other original process under the Act of Congress of July 1st 1862, and does not require a revenue stamp; but if a stamp was required, the omission was cured by the proviso to the 16th section of Act of March 3d 1863, for the precept was neither admitted nor offered in evidence: *Shay* v. *Henk et al.*, 49 Penn.

On Legal Process.—The stat. of U. S. of 1862, c. 119, § 110, does not require a stamp to be affixed to the certificate of a magistrate attesting his record of a conviction in a criminal case, which is taken to the Superior Court on appeal: *Commonwealth* v. *Hardiman*, 9 Allen.

SURETY.

Duties of Creditor towards.—The plaintiff held a promissory note indorsed by the defendant for the accommodation of the makers, which had been protested for non-payment, the makers having become and still remaining insolvent. A firm of which the plaintiff was a member owed the makers a larger sum than the amount of the note, against which, if sued, they could by statute have set off the claim held by the plaintiff. Without requiring such application, the firm paid the makers the amount owed them, with full knowledge on the part of the plaintiff of all the facts. *Held*, in an action brought against the defendant on his indorsement, that he was not discharged by the neglect of the plaintiff to secure an application of the debt of the firm to the payment of the note: *Glazier* v. *Douglass*, 32 Conn.

A creditor is under no obligation, towards a surety, of *active diligence* to collect the debt of the principal: *Id.*

The security, the discharge of which by a creditor will release a surety, must be a mortgage, pledge, or lien,—some right to or interest in property which the creditor can hold in trust for the surety and to which the surety if he pay the debt can be subrogated; and the *right* to apply or hold must exist and be absolute: *Id.*

Tax Title.

Evidence to defeat.—Where the statute makes a tax-deed *primâ facie* evidence of the correctness of all the proceedings, and of title in the purchaser, the presumption of correctness must prevail in its favor until evidence is given of facts which are inconsistent with regularity. It is not sufficient to prove facts from which an inference of irregularity may be drawn, if such facts are consistent with the existence of others which would make the proceedings regular: *Wright* v. *Dunham*, 13 Mich.

Where, therefore, to show that a tax was erroneously assessed on a part instead of the whole of a parcel of land, the collector's return was put in evidence, which showed a tax against a part of the land only, but it was consistent with this return that the tax might have have been correctly levied on the whole, and a part of the land discharged by payment before the return; it was held that the court, in support of the deed, was bound to presume such payment: *Id.*

Held, also, that the mere allowance of illegal demands, by the board of supervisors the preceding year, was not sufficient to show that illegal taxes were levied, where there was no evidence to show that the amounts were included in the tax levy for the year, or that there was not money on hand to pay them at the time of their allowance: *Id.*

Vendor and Vendee.

Usual Covenants.—On a bill filed by a vendee to compel the specific performance of a contract for the sale of real estate, by the terms of which the conveyance was to be "by deed with usual covenants;" *Held*, that the usual covenants inserted in a conveyance in fee are: 1. That grantor is lawfully seised; 2. That he has a good right to convey; 3. That the land is free from incumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the grantee against all lawful claims: *Wilson* v. *Wood*, N. J. Chancery.

Witness.

Married Woman, Defendant.—When husband and wife are parties defendant in an action for a personal tort committed by the wife alone, she is competent to give evidence as a witness in her own behalf: *Hooper* v. *Hooper and Wife*, 43 Barb.

A married woman, made party to an action in connection with her husband, is within the spirit and reason, as well as within the letter, of section 399 of the Code of Procedure, as amended in 1857, which declares that "a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness," &c.: *Id.*