practice and one best securing all parties, that the obligation of such bonds be expressly limited to one year, and that upon the giving of a new bond by an officer re-elected, an examination be made sufficient to test his integrity at that time.

A decree will be entered dissolving the injunction so far as to allow the bank to collect the amount of the defalcations proved, with interest.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

COURT OF CHANCERY OF NEW JERSEY.[2]

SUPREME COURT OF NEW YORK.[3]

SUPREME COURT OF NORTH CAROLINA.[4]

ACCORD AND SATISFACTION.

Where a debtor settles the amount due from him to his creditors upon notes and drafts, by giving him, in full satisfaction of the claim, a draft on a third person for 50 per cent. of the amount payable in gold, which is subsequently paid, and the creditor accepts such draft and surrenders and cancels the evidences of the indebtedness, this is a good accord and satisfaction: *Stagg* v. *Alexander* 55 Barb.

AUCTION.

Forfeiture of Payment.—In sales by auction and other sales, when it is stipulated that the percentage or part paid in the contract shall be forfeited if the purchaser does not comply with his contract, such payment cannot be recovered at law or in equity: *Bullock* v. *Adam's Exr.*, 5 C. E. Green.

Puffers.—The employment of puffers by an owner of property offered for sale at auction, or in the case of a judicial sale by creditors in whose behalf property is offered, for the purpose of increasing the price by fictitious bids, is a fraud upon honest bidders, and a buyer at such a sale might be relieved from his purchase: *N Bank of Metropolis* v. *Sprague*, 5 C. E. Green.

It seems that the fact of a puffer having bid at the sale will not avoid the sale, if after the bid of the puffer there is a bid by a real purchaser, before the bid at which the property is knocked down:

1 From N. L. Freeman, Esq., Reporter; to appear in 48 and 49 Ills. Rep.

2 From C. E. Green, Esq.; to appear in vol. 5 of his Rep.

3 From Hon. O. L. Barbour; to appear in vol. 55 of his Rep.

4 From S. P. Phillips, Esq., Reporter; to appear in 64 N. C. Rep.

but that in all cases where the bid next preceding is that of a puffer, the sale is voidable by the purchaser.

Query.—Whether it would not be more just, in all cases where sham bidders are employed to enhance the price, to hold that this is a fraud upon purchasers, and that the sale is void? *Id.*

It is not unlawful for persons who wish to make a joint purchase of property about to be offered at auction to agree together that they will authorize one person to bid for it upon their joint account: *Id.*

It is illegal for persons intending to purchase at auction to combine not to bid against each other; but the sale is confined to cases where there is an agreement not to bid, and does not extend to cases where several persons join to make a purchase for their common benefit, without an agreement not to compete, or to a case where several creditors, no one of whom would be willing to purchase a property of a very large value, unite to purchase: *Id.*

The fact that an agreement to make a joint purchase may indirectly operate to prevent the parties from competing, is not enough to render the transaction unlawful; to have that effect it must appear that making the object of the agreement was to avoid competition: *Id.*

CONFEDERATE MONEY.—See *Slave.*

Contract—In what Payable.—A bond was given for $1,000, dated Nov. 18, 1862, and payable "one day after date," the consideration being a tract of land: *Held*, to be competent for the plaintiff to rebut the *presumption* as to the currency in which it was solvable under the ordinance of 1866, by proving that it was expressly agreed by the parties at the time that it was to be paid "in good money after the war," as such expression referred to the currency in which, and not to the time at which, it was payable, and was equivalent to, "in money good after the war." *Sowers* v. *Earnhart*, 64 N. C.

Presumption of Currency in which Note is Payable.—The presumption, under the ordinance of 1865, that a note given for purchases at an administrator's sale in March, 1864, payable at twelve months, is solvable in money of the value of Confederate currency, is not rebutted by evidence that at such sale the administrator gave notice that he would receive in payment only such currency as would pay the debts of his intestate, coupled with other evidence, that the creditors would not receive Confederate currency, and that the estate was largely insolvent. In such case the plaintiff is entitled to recover the value of the articles sold: *Laws* v. *Rycroft*. 64 N. C.

Notice that Payment would not be Recieved in.—In an action upon a bond in the usual form, given at an administrator's sale in Jan., 1865, proof that at the sale proclamation was made, that "Confederate notes will not be taken," rebuts the *presumption* made by the ordinance of 1865 as to the currency in which notes, etc., are *solvable*; and the fact that on the same occasion, before sale made, the administrator, upon further inquiry by the bystanders, added

"that if he had to collect the notes he would collect gold and silver, that if he could pay the notes over to the heirs, etc., *they* could make any arrangement they were willing to, as to payment," is immaterial: *Cherry* v. *Savage*, 64 N. C.

Conflict of Laws.

Assets of Non-resident Decedent.—Upon the death of a non-resident, intestate, leaving assets in this State, they are to be applied to the payment of the claims of his resident creditors, if there be any such, in the order prescribed by our law, and not by that of his domicil: *Carson* v. *Oates*, 64 N. C.

Such assets are to be *collected* by an *administrator* appointed here, and not by the creditors: *Id.*

Contract.

Time of the Essence.—Courts of equity do not, in general, consider the time of performance as of the essence of a contract for the sale of lands, but hold that it may become of the essence by being expressly made so by the contract itself; or by notice from the other party insisting upon performance at a time fixed; or by the subject matter of the contract and its surrounding circumstances: *Bullock* v. *Adams' Executors*, 5 C. E. Green.

The rule which allows time to be disregarded often causes injustice, and ought not to be extended: *Id.*

Insurance

Right to Terminate Risks.—Under a condition in a policy of insurance, reserving to the insurers the right to terminate the insurance at any time, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term, the return of the premium is the essential part to the condition to be performed, and a pre-requisite to this right to terminate the risk: *Hathorn* v. *Germania Ins. Co.*, 55 Barb.

Notice, without a return of, or offer to return, the premium amounts to nothing. Whatever negotiations may take place, until a return or tender of the premium is made, the policy still remains in force: *Id.*

A promise by the insured, to bring the policy to the office of the agent to be canceled, when he is to receive the return premium, neither amounts to a valid agreement that the policy shall be held and deemed canceled, without a return of the premium, nor to a waiver of the performance of the condition on which the right to terminate the risk depends: *Id.*

Judgment.

Loss of Record.—In an action upon a former judgment, the record of the judgment is the proper evidence thereof; and its production cannot be dispensed with, or supplied by any other evidence: *Walton, Ex'r* v. *McKesson*, 64 N. C.

Where the record of a judgment has been destroyed, the first step

toward obtaining a remedy, is by proceeding in the court where it was given, to the end that the record may be supplied: *Id.*

MECHANIC'S LIEN.

What Essential thereto—What Constitutes a Discharge of.—In a petition to enforce a mechanic's lien for lumber purchases to improve a certain lot, it is essential to the creation of the lien that it shall appear to have been purchased for that purpose: *Croskey* v. *Morey*, 48 Ills.

Where one of the members of a firm owns a lot, and he purchases lumber to improve the same, and the firm note is given in payment—that would be such additional security as would discharge the lien: *Id.*

But if the firm orders the lumber to be placed on the premises, and it is used in the improvement of the same, and the firm afterward gave their note for the amount, it would not operate to discharge the lien: *Id.*

In Proceedings to enforce the Evidence must be Preserved in the Record—The Rule of Adjustment.—This court has repeatedly said, that in suits to enforce a mechanic's lien, the evidence must be preserved in the record, otherwise, this court will presume that the court below decreed properly as to the amount and the relative priority of the different liens: *Croskey* v. *Northwestern Manufacturing Co.*, 48 Ills.

The rule for adjusting the different rights of parties holding separate liens upon property, which is sought to be subjected to the payment of a mechanic's lien, is, that an incumbrance anterior to the mechanic's lien takes priority over it, to the extent of the value of the property at the time the mechanic's lien attached, and the mechanic's lien takes priority over the mortgage only to the extent of the additional value given to the property by the improvements: *Id.*

And in such suits the decree may direct a sale of the premises in fee, notwithstanding the mortgage may not then be due, and if such mortgage has the prior lien, it retains its priority to the extent of the value of the property at the time the mechanic's lien attached, this security being given by statute: *Id.*

The term "land," used in the 20th section of the act in relation to mechanic's liens, means, the land, with such improvements as there are upon it, at the time of the execution of the mortgage: *Id.*

And in such cases, it is not error for the court to decree a sale of the property, and then direct the master to take evidence and report to the court the comparative value of the land and improvements at the time of the sale, such value being determined in reference to the day of sale. Evidence after the sale would be more satisfactory: *Id.*

MORTGAGE.—See *Usury*.

NEGLIGENCE.

Liability of Railroad Company for Injuries to Passengers.—In an action against a railroad company, for injuries received by the

plaintiff, from the upsetting of one of the defendant's cars, when traveling upon its road, where the proof showed that the track where the accident occurred was in a wretched condition, the rails being badly worn and insecurely fastened, of various lengths, loose at the ends, and with spaces between the joints, which were filled with wooden plugs, and that some of the ties were broken in the middle: *held*, that this was such gross and wanton negligence on the part of the company as to render it liable for the injury resulting therefrom: *T. W. and W. Railway Co.* v. *Apperson*, 49 Ills.

Railroad companies are bound to keep themselves informed as to the condition of their tracks, and to know whether they are in fit condition for the safe passage of their trains or not: *Id.*

NEW TRIAL.

Bill for—When Granted.—A court of equity will not award a new trial at law, where the defense is a legal one and the party could have made it in a suit against him, unless he was prevented after means he could reasonably employ had failed, when he had been diligent and not guilty of *laches*: *Walker* v. *Kretsinger*, 48 Ills.

Where two partners were sued and one of them spoke to attorneys to defend the suit, but gave them no facts nor the names of witnesses by whom to establish a defense, they were not in a position to defend the suit, and when that partner died, and the other partner gave the matter no attention, and judgment was rendered against him by default: *held*, that there was such a want of diligence and such *laches* as would prevent a court of equity from decreeing a new trial in such a case: *Id.*

NUISANCE.

What constitutes—Slaughter House—Any trade or business, however lawful in itself, which, from the place or manner in which it is carried on, materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance which it is the duty of this court to restrain: *Attorney General* v. *Steward*, 5 C. E. Green.

A preliminary injunction will not be granted in behalf of the owners of building lots held for sale, to restrain the erection near them of a slaughter house, where it is not alleged that any one intends to erect any buildings upon them. Whether the erection of a slaughter house or other nuisance so near such lots as to retard or injure their sale is an injury for which the law will give dedress before buildings are erected, is a question proper to be retermined at law, and this court will not interfere by preliminary injuction until the question is so determined: *Id.*

An injunction will not be granted to restrain the erection of a slaughter house and place for keeping hogs, where by the answer and affidavits it appears the defendants intend to carry on the business so as not to be a nuisance.

If it should be carried on in such manner as that it becomes a nuisance, it then can be enjoined: *Id.*

No one has the right to pollute or corrupt the waters of a creek,

or if they are already partially polluted to render them more so: all whose lands border on a stream have the right to have its waters come to them pure and unpolluted: *Id.*

If the intended use of a slaughter house about to be erected will by the discharge of the blood of the slaughtered animals corrupt and pollute the stream for most of the purposes for which it may be used by the owners of lands which border on it below, and so affect it as to make its waters offensive to houses in the neighborhood, an injunction will be granted to prohibit the blood from being discharged into the stream: *Id.*

Smoke, Noise, etc..—Any business, however lawful in itself, which as to those residing in the neighborhood, where it is carried on, causes annoyances that materially interfere with the ordinary physical comfort of human existence, is a nuisance that should be restrained: *Cleveland* v. *Citizen's Gas Light Co.*, 5. C. E. Green.

Smoke, noise and bad odors, even when not injurious to health, cause a discomfort against which the law will protect: *Id.*

To warrant enjoining a trade as a nuisance on the ground that it produces discomfort to those dwelling in the neighborhood, the discomfort must be physical, and not such as depends upon taste or imagination. Whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance: *Id.*

It is usual and proper where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain erection; but when it is not made to appear that the business for which the building is intended cannot possibly be carried on without becoming a nuisance, this court will deny the injunction and leave the defendant at liberty to proceed with the erection of the building at the risk of being restrained in the use of it, if a nuisance is ultimately created: *Id.*

The danger of explosion is not adequate cause for enjoining the erection of a gas manufactory where it is not made to appear that the danger is very great, or that the complainant's buildings are sufficiently near to be seriously endangered by one should it take place: *Id.*

The fact that a neighborhood to be affected by the odors and offensive smell that will be caused by a business which the defendant is about to establish, and which complainant seeks to enjoin as a nuisance, already contains establishments devoted to noxious or disagreeable trades, is not enough to defeat the right to an injunction, unless such neighborhood has been by their continuance for years so wholly given up to such establishments, that the addition of the one contemplated by the defendant will not add sensibly to the discomfort: *Id.*

PARTNERSHIP.

Dissolution—Receiver.—In suits between partners to dissolve a partnership, when the facts established are such as would upon the final hearing entitle the complainant to a decree of dissolution, a receiver will in general be appointed, and the defendant enjoined

from disposing of or meddling with the partnership property. The injunction follows the appointment of a receiver almost as a matter of course: *Seighortner* v *Weissenborn*, 5 C. E. Green.

Courts of equity will for sufficient cause dissolve a partnership before the expiration of the term for which it was entered into. And it is a sufficient cause for dissolution that it clearly appears that the business for which the partnership was formed is impracticable, or cannot be carried on except at a loss. The object of all commercial partnership is *profit*, and when that cannot be obtained, the object fails, and the partnership should be te minated: *Id.*

The partnership will also be dissolved where all confidence between the partners has been destroyed, so that they cannot proceed together in prosecuting the business for which it is formed; and this result follows not only when such want of confidence is occasioned by misconduct or gross mismanagement of the partner against whom the dissolution is sought, but when such want of confidence and distruct has arisen from other circumstances; provided it has become such as cannot probably be overcome, and was not occasioned by the willful misconduct of the complainant: *Id.*

Where one partner has advanced to the firm, by way of loan, moneys beyond the capital which he agreed to contribute, he is a creditor of the firm to the amount so advanced; and as he has no remedy at law, he is entitled to come into equity for relief, and to have his loan repaid; and if the firm is insolvent or in failing circumstances, to have a receiver appointed: *Id.*

Contributions of Stock to the Firm–Representations as to Value–Lien of Partner for Advances.—The mere fact that the vendor of personal property places an over valuation upon it, by which the buyer is led to give more than it proves to be worth, does not entitle the latter to relief. The vendor's statements as to value merely do not amount to a warranty or to fraud; although he knows them to be untrue. The same rule applies to an over valuation of property contributed to a partnership as part of the capital by one becoming a partner: *Uhler* v. *Semple*, 5 C. E. Green.

Where a new partnership is in course of negotiation between an existing firm and a stranger, and the firm propose to put in the old stock at a certain price, the maxim, "*caveat emptor*" applies: *Id.*

One partner cannot have relief against inequality in the terms upon which he entered the firm upon the ground that he was induced to accept the terms in question by statements of his copartners of an opinion that the capital or facilities possessed by the proposed firm would be sufficient, and that the business would be profitable. Such representations, though false, give no ground of action: *Id.*

One partner has a lien upon the partnership effects for moneys advanced by him to the partnership beyond his share of the capital, and can retain the amount due him before the other partners or their individual creditors or assignees are entitled to receive any of the assets: *Id.*

He has, however, no such lien for money advanced or lent to an

individual partner; though a mortgage or judgment against such partner, if property entered or recorded, will be a prior lien on his share: *Id.*

It seems that an agreement by the borrowing partner that the loan or debt should be a lien upon his share, and that he would execute a mortgage, would be considered as an equitable mortgage, and would give a preference over subsequent judgments and mortgages in favor of creditors with notice; though not over those creditors without notice. *Query*—Whether a promise to give a judgment bond which may be made a lien on real property will amount to an equitable mortgage: *Id.*

Participation in Profits.—A simple agreement by a firm to employ one at wages to be measured by a proportion of the profits does not constitute him a partner: *McMahon* v. *O'Donnell*, 5 C. E. Green.

SLAVE.

Bond for Price of.—A bond given for the price of a slave sold in 1859 is valid, notwithstanding the public events which have happened since; nor is it affected by the fact that the slave was warranted such *for life*: *West* v. *Hall*, 64 N. C.

Bond for hire of.—A bond for money for the hire of a slave for 1865, given Jan. 2, 1865, is subject to be *scaled* according to the value of the hire for a year, in lawful money, and not according to the legislative table of the values of Confederate currency (Acts of 1865–'66, c. 39): *Maxwell* v. *Hipp*, 64 N. C.

STREAM.—See *Nuisance.*

TIME.—See *Contract.*

Computation of.—When any matter of proceeding or practice is required by statute or rule of court to be within a certain number of days, the first day, or *terminus a quo* is excluded: *Thorne* v. *Mosher*, 5 C. E. Green.

The doctrine to be deduced from conflicting cases, in cases of forfeiture is, that the day of the event after which in a specified number of days the forfeiture occurs will be excluded. In applying this doctrine to quasi forfeiture (as when a mortgagor fails to pay interest on a day specified), a court of equity should lean against the construction which favors forfeiture: *Id.*

TRESPASS.—See *Vendor and Vendee.*

USURY.

Debt Contracted in another State.—A debt in good faith contracted in another State cannot be impeached for usury in this State, when it does not appear by any evidence that the interest taken was illegal in that State, or if it is, that the validity of the contract is affected by it: *Uhler* v. *Semple*, 5 C. E. Green.

The laws of other States can only be brought to the knowledge of this court by proof: *Id.*

Sale of Land with Agreement to Re-purchase.—One may convey lands for a certain price, and agree to re-purchase them at a fixed time. for a certain amount exceeding the price received and interest, without the sale being construed a mortgage, or the transaction being affected with usury: *Gleason* v. *Burk*, 5 C. E. Green.

But such transactions are suspicious, and will not be sustained unless there is clear proof of good faith, and that there was no intention to cover usury or to take away the right of redemption, upon what was in truth a mortgage to secure a loan: *Id.*

An agreement by a borrower upon mortgage to allow the lender to retain part of the land mortgaged after being repaid principal and interest of the loan, if it is a part of the mortgage transaction, is usurious, and will not be enforced either at law or in equity: *Id.*

But if such an arrangement is independent of the loan and mortgage, and not made in consideration of the loan, or the condition of its being made, and capable of being sustained without reference to them, either as a sale on consideration or as a gift, it may be enforced; and though the agreement was not in writing effect will be given to it, by limiting the quantity of land to be reconveyed, on ordering redemption: *Id.*

VENDOR AND VENDEE.—See *Partnership—Usury.*

Sales of Personal Property—Right of Purchasers.—In an action of trespass to personal property, the court instructed for the defendant, to the effect that unless the purchaser of a field of corn gathers it within a reasonable time after it matures, the owner of the field may turn in his cattle, without responding to his vendee for the damage suffered by the destruction of the ungathered crop: *Held*, that this was erroneous: *Ogden* v. *Lucas*, 48 Ills.

In such case the purchaser is not only entitled to a reasonable time after the crop matures, to gather it, but to a reasonable time after notice given by the vendor: *Id.*

It is equally erroneous in such case for the court to instruct the jury that they could not find for the plaintiff, unless they could determine from the evidence, with mathematical precision, the exact amount of damage done. Entire accuracy, in such cases, is impossible, and it is for the jury, upon the evidence adduced, to consider and arrive at as near an estimate of the damages sustained as the nature of the case will allow: *Id.*

Recission of Sale by Vendee for Defect of Quality.—A party who purchases and pays for a number of barrels of flour, warranted as "extra and superfine," having upon their receipt notified the vendor that a portion of them were of an inferior quality: *Held*, that as the vendor did not come forward and remove them and pay back the purchase-money, the purchaser had a right to sell them within a reasonable time, and recover from the vendor any loss upon re-sale, together with all proper expenses, such as would reimburse him for his money expended, but not for any loss of a good bargain: *Gifford* v. *Betts*, 64 N. C.