## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ILLINOIS.[2]
SUPREME COURT OF IOWA.[3]
SUPREME COURT OF MISSOURI.[4]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[5]

### ABATEMENT.

*Proceeding on Guardian's death.*—A proceeding in the County Court against a guardian to compel him to account, is not a suit either at law or in equity, and abates on the death of the guardian: *Harvey* v. *Harvey*, 87 Ills.

### ASSUMPSIT.

*Payment when recoverable back*—When the assignee of a purchaser of land, who has contracted to sell the land to another, who demands to see his deed therefor, is compelled to pay the original vendor more than is due him, in order to get a deed to satisfy his vendee, and the payment is made under protest, it is a fair question of fact for the jury whether the payment is not involuntary, and made under a sort of moral duress, and if so the excess above the real sum due may be recovered back in assumpsit under the common counts: *Pemberton* v. *Williams*, 87 Ills.

ATTORNEY. See *Conflict of Laws*; *Damages*.

BANK. See *Corporation*; *Partnership*.

### BANKRUPTCY.

*Claim for Captured or Abandoned Property—Act of Congress of* 1853.—A claim against the government for the proceeds of cotton belonging to a bankrupt, captured by the military forces of the United States and sold, and the proceeds paid into the treasury, constitutes property, and passes to his assignee in bankruptcy, though from the bar of the statute, the claim be not enforceable in the Court of Claims or by any legal proceedings: *Erwin* v. *The United States*, S. C. U. S., Oct. Term 1878.

The Act of Congress of February 26th 1853, to prevent frauds upon the treasury of the United States, applies only to cases of voluntary assignment of demands against the government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees or assignees in bankruptcy is not within the evil at which the act aimed: *Id.*

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[2] From Hon. N. L. Freeman, Reporter; to appear in 87 Illinois Reports.

[3] From John S. Runnells, Esq., Reporter; to appear in 47 Iowa Reports.

[4] From T. K. Skinker, Esq., Reporter; to appear in 67 Missouri Reports.

[5] From John H. Stewart, Esq., Reporter; to appear in 30 N. J. Eq. Reports.

*Evidence—Assignee's Deed*—It is not required that a complete transcript of the record and files shall be given in evidence to support the deed of an assignee in bankruptcy. A certified copy of the order decreeing bankruptcy and appointing the assignee, is sufficient under the Act of Congress. All such deeds, reciting the decree in bankruptcy and the assignee's appointment, supported by a certified copy of such decree, are made full and complete evidence both of the bankruptcy and the assignment, and supersede the necessity of any other proof to validate such deeds: *Heath* v. *Hyde*, 87 Ills.

BILLS AND NOTES.

*Delivery of Note to Maker.*—The delivery of a note by the holder to the maker, with intent thereby to discharge the debt, does discharge it: *Vanderbeck* v. *Vanderbeck*, 30 N. J. Eq.

COMMON CARRIER.

*Passenger no right to sell Goods.*—A party cannot maintain an action against the captain of a boat for preventing her from selling her goods on his boat on an excursion, she having obtained no permission for that purpose; nor can she recover when the captain put her goods into the baggage-room, and could not deliver them to her, owing to the crowd getting off the boat until it was too late for her to get them conveyed to the grounds of a picnic where she expected to make sales: *Smallman* v. *Whilter*, 87 Ills.

CONFLICT OF LAWS. See *Interest.*

*Confession of Judgment by Attorney pertains to Remedy—Confession of cannot be made by Attorney.*—A confession of judgment pertains to the remedy, and is therefore governed by the law of Iowa. A contract made in another state authorizing a confession to be made by an attorney will not be enforced there: *Hamilton* v. *Shoenberger*, 47 Iowa.

CONFUSION OF GOODS.

*Party Causing it to bear Loss.*—If a party having charge of the property of others, so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it: *Jewett* v. *Dringer*, 30 N. J. Eq.

A junk dealer, by fraudulent collusion with the employees of a railroad corporation, obtained large quantities of old iron, &c., at much less than the actual weight or value. On delivery it was thrown indiscriminately on other heaps of old iron, &c., belonging to him, so as to be indistinguishable. *Held*, that he must forfeit the whole mass to the company: *Id.*

CONTRACT. See *Equity.*

CORPORATION. See *Receiver.*

*Stockholder of Bank—Liability to Creditors.*—Under the charter of the bank of Chicago, which provided that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer, &c.," it was *held*, that a

stockholder assumed a primary liability to creditors of the bank, to an amount double his stock, and not a secondary one; and having incurred such liability, he was not released therefrom by his not being sued within three months after a transfer of his stock: *Fuller* v. *Ledden*, 87 Ills.

COVENANT. See *Vendor*.

CRIMINAL LAW.

*Defendant as Witness—Liability to Impeachment.*—When a defendant in a criminal case testifies in his own behalf, the state may impeach his character before he offers any evidence that it is good; his testimony is subject to the same rules and tests as that of any other witness: *State* v. *Cox*, 67 Mo.

In impeaching a witness, evidence of his reputation for general moral character, as well as of that for truth and veracity, is admissible; but before permitting witnesses to testify as to such reputation, they must show that they are acquainted with it: *Id.*

If a defendant in a criminal case becomes a witness in his own behalf, as permitted by the Act of April 18th 1877, he thereby subjects himself to the same rules as to cross-examination and impeachment as other witnesses: *State* v. *Clinton*, 67 Mo.

CUSTOM.

*Dealings with Reference to Particular Markets.*—A person who deals in a particular market must be taken to deal according to the known, general and uniform custom or usage of that market, and he who employs another to act for him at a particular place or market, must be taken as intending that the business will be done according to the custom and usage of that place or market, whether the principal in fact knew of the usage or custom, or not: *Bailey* v. *Bensley*, 87 Ills.

DAMAGES.

*Attorney's Fees*—In an action for breach of covenant of warranty the grantee may recover taxable costs, but before he can recover his attorney's fees he must show that he has paid, or is under obligation to pay, some specified sum. He cannot recover what he may show are reasonable fees without proof that he has incurred liability to that extent: *Swartz* v. *Ballou*, 47 Iowa.

*Contract for Personal Service—Breach*—If an employee who is under contract to serve his employer for a fixed period leaves the service before the expiration thereof, he is not entitled to recover what may be his due after deducting damages for the breach of contract until the time of payment fixed therein: *Powers* v. *Wilson*, 47 Iowa.

DEBTOR AND CREDITOR.

*Fraudulent Conveyance.*—An administrator of an estate, under an order of court, cannot sell and convey any interest in lands sold and conveyed by his intestate in his lifetime to defraud his creditors. If he does so sell and convey, his grantee cannot maintain a bill to avoid the fraudulent conveyance. because no title passes, for want of power in the administrator: *Beebe* v. *Saulter*, 87 Ills.

DEED.

*Mistake—Equity—Subsequent Grantee with Notice.*—A mortgagor intended to give, and the mortgagee expected to receive, a mortgage in fee, but, for want of words of inheritance, the mortgage, as executed, conveyed only an estate for life. A second mortgagee had such actual notice of the first mortgage as induced the belief that it was a mortgage of the fee, and, so believing, took the second mortgage. *Held*, that, as against the second mortgagee, the first mortgage should be regarded as a mortgage of the fee: *Gale* v. *Morris*, 30 N. J. Eq.

DURESS. See *Assumpsit.*

EQUITY.

*Fraud—Practice—Parties.*—A deed to purchasers under a judgment and sale made by an auditor in attachment, cannot be avoided on the ground of false claims by creditors, and an irregular, fraudulent and inadequate sale, without making the creditors and auditor parties: *Wilson* v. *Bellows*, 30 N. J. Eq

This defect, in not joining proper parties, is good ground for demurrer, where it appears on the face of the bill: *Id.*

When the purchasers are not charged with fraud, relief against them will only be granted on equitable terms; such as offering to refund the purchase-money. They will not be compelled to look to others who are not parties to the bill: *Id.*

*Indispensable Party to Suit.*—K., a citizen of Tennessee, filed a bill in the Circuit Court against D., a citizen of Ohio. The controversy related to one hundred and eighty-four shares of the stock of the Memphis Gas-Light Company, which company was not made a party to the suit. The substance of the bill was, that plaintiff was the owner of the shares of the gas company stock already mentioned, and that while he so owned and held the stock, and during the late civil war, the defendant "obtained possession of the books and control of the offices of the company, and being so in possession and control, wrongfully and fraudulently procured and obtained to be made a transfer upon the books of the company to his own name as owner, and from the name of your orator, the said one hundred and eighty-four shares of stock, and the issuance to him of a certificate of said stock, and the cancellation of the certificate of his stock belonging to and in the name of your orator." The relief prayed was that the said capital stock might be restored to the plaintiff, and that said D. might be compelled to cause and authorize the transfer of said stock to be made on the books of the company to the plaintiff, and might be enjoined from making, or authorizing to be made, a transfer of any of the stock to any other person: *Held*, that the Circuit Court has no jurisdiction to try the case, because the gas-light company was an indispensable party to the relief sought in the bill, or to any relief which a court of equity could give: *Kendig* v. *Dean*, S. C. U. S., Oct. Term 1878.

*Mistake—Rectification of Contract.*—Where an oral contract is afterwards reduced to writing, and the writing fails to express in apt and proper terms the real intention of the parties through a mistake of the

draftsman, equity will permit the mistake to be corrected: *Nowlin* v. *Pyne*, 47 Iowa.

*Practice—Demurrer to Bill.*—When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the regular decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged bad, and to overrule the demurrer to the residue, and direct the defendant to answer thereto: *Giant Powder Co.* v. *California Powder Works*, S. C. U. S. Oct. Term 1878.

*Action by United States—Attorney General—Chancery Jurisdiction to grant Relief on the ground of Fraud.*—It is essential to a bill in chancery on behalf of the government to set aside a patent, or a confirmation of land title under a Mexican grant, after it has become final, that it shall appear in some way, without regard to the special form that the attorney general has brought it himself, or given such authority for it as will make him officially responsible, and show his control of the cause through all stages of its presentation: *The United States* v. *Throckmorton et al.*, S. C. U. S., Oct. Term 1878.

The frauds for which a bill in chancery will be sustained to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in that suit: *Id.*

The cases in which such relief has been granted are those in which, by fraud or deception practised on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit: *Id.*

EVIDENCE. See *Criminal Law.*

*Person not heard from for Seven Years—Presumption.*—A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death: *Davie et al.* v. *Briggs*, S. C. U. S., Oct. Term, 1878.

But that presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death in fact occurred within the seven years: *Id.*

If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years: *Id.*

Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead, there is none as to the time of his death: *Id.*

*Proof of Handwriting.*—When the genuineness of a written instrument is the subject of investigation, it is not competent to prove the execution of other papers having no connection with the case, and then, by the testimony of experts, who have compared them with the instru-

ment in question, to show that the latter is a forgery: *State* v. *Clinton*, 67 Mo.

EXECUTOR. See *Usury*.

FRAUD. See *Equity*.

*Sham Bid.*—If one, by fraud procures a sham bid on his property, when offered for sale, by an irresponsible person, and thereby succeeds in having the land of another sold to pay off a portion of the debt he is equitably bound to pay, such injured party may recover back the sum so lost by him in the sale of his property, or the sum realized by the other, with interest: *Darst* v. *Thomas*, 87 Ills.

FRAUDS, STATUTE OF.

*Original or Collateral Undertaking*—An original undertaking to retain attorneys to attend to a suit for a third person may be implied from circumstances, but one collateral to answer for the debt of another cannot, as it must be in writing. Whether a party's undertaking is original or merely collateral, is a question of fact for the jury: *Mashier* v. *Kitchell & Arnold*, 87 Ills.

FRAUDULENT CONVEYANCES.

*Sale of Goods— Change of Possession.*—The actual and continued change of possession, contemplated by the statute in relation to fraudulent conveyances (1 W. S. p. 281, § 10), must be open, notorious and unequivocal—such as to apprise the community, or those accustomed to deal with the vendor, that the goods sold have changed hands, and that the title has passed from the vendor to the vendee (following *Claflin* v. *Rosenburg*, 42 Mo. 439, and other cases): *Wright* v. *McCormick*, 67 Mo.

If the purchaser of a stock of goods permits them to remain at the vendor's place of business, without removing his business sign, the change of possession is not unequivocal within the meaning of the foregoing rule, notwithstanding it may appear that when the sale was made, the purchaser, in the presence and with the consent of the vendor, notified the vendor's clerks of the fact and told them that in dealing with the goods in the future they were to act for him, and that the vendor was to have no further control over them, and that he did not, in fact, exercise any further control with the purchaser's consent.

HIGHWAY.

*Dedication—Proof of Intent.*—To show that title is acquired to land for a public road by dedication, the proof should be very satisfactory, either of an actual intention to dedicate, or of such acts and declarations, as should equitably stop the owner from denying such intention: *Kyle* v. *Town of Logan*, 87 Ills.

HUSBAND AND WIFE.

*Residence—Divorce.*—In law the domicile of the husband is that of his wife, and her residence follows that of the husband. When a husband acquires a new home it is the duty of his wife to go with him, and if she refuses, without justification, for two years, the husband will be entitled to a divorce: *Kennedy* v. *Kennedy*, 87 Ills.

INSOLVENT.

*Preference of Debt to State.*—New Jersey does not possess the crown's common law prerogative to have its debts paid in preference to the debts of other creditors: *Board of Freeholders of Middlesex Co.* v. *State Bank*, 30 N. J. Eq.

INSURANCE.

*Statements of Soliciting Agent—Notice to Agent—Such Agent acts for Company, not for insured.*—Parol evidence is admissible to show that the assured stated to the solicitor of the insurance company who received the application the fact that there was an encumbrance upon the property insured: *Boetcher* v. *Hawkeye Ins. Co.*, 47 Iowa.

Notice to a soliciting agent, who is authorized to fill up applications for the assured, to receive premiums and forward the same with the application to the company, and whose agency thereupon ceases, is notice to the company: *Id.*

A policy of insurance expressly stipulated that the soliciting agent who took the application was the agent of the assured; the latter was not advised of the fact at the time of the negotiation, when the application was signed and the premium paid; the policy further provided that the insurance might be terminated at the option of the company: *Held*, that the assured had the right to believe the soliciting agent was the agent of the company, and the insertion of the clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage: *Id.*

*Notice of Loss.*—Where a policy of insurance required immediate notice to be given by the assured in case of a loss, and in the great fire in Chicago on October 9th 1871, the plaintiff's property insured was burned, notice of the loss given November 13th 1871, was held to have been given in sufficient time, in view of the great derangement in all kinds of business caused by the fire: *Knickerbocker Ins. Co.* v. *McGinnis*, 87 Ills.

INTEREST.

*Conflict of Laws—Lex Loci—Different Rates of Interest.*—Where bonds were executed in New York and made payable there, it was held that delinquent interest thereon drew interest at the rate of six per cent. Following *Preston* v. *Walker*, 26 Iowa 205: *Burrows* v. *Stryker*, 47 Iowa.

A decree will draw only the rate of interest of the debt, and if a part of the debts drew one rate of interest and a part another, the decree will in like manner draw different rates of interest: *Id.*

JUDGMENT.

*Judgment by Confession.*—When a judgment by confession under a warrant of attorney is opened, and the defendant allowed to plead a defence, the court has no right to require the defendant to bring into court the sum supposed to be due, as a condition to opening the case. The judgment may be allowed to stand as a security for the condition, till after the trial of the issues tendered on the defence: *Puge* v. *Wallace*, 87 Ills.

LIMITATIONS, STATUTE OF.

*New Parties—Subrogation.*—The administrator of a deceased sheriff having sued upon a note given to his intestate for the purchase-money of land sold by him under a decree of court, the sureties of the deceased, who had been compelled to pay to the parties entitled the amount for which the land sold, claiming the right to be subrogated in place of the administrator, caused themselves to be substituted as plaintiffs in the action more than ten years after the maturity of the note. *Held*, that as they virtually commenced a new action—one in equity, instead of the action at law upon the note—they were barred by the Statute of Limitations, although the action, as originally brought, was not barred: *Sweet* v. *Jeffries*, 67 Mo.

MORTGAGE. See *Deed.*

NEW TRIAL.

*When Chancery will grant a New Trial at Law.*—Where a plaintiff's attorney brings a case on for trial in the absence and without the knowledge of the defendant and his attorney, in violation of a written stipulation to give ten days' previous notice of an intention to try the case, a court of equity will grant a new trial, if it appears that the judgment is unjust, and this though relief may be had at law by motion to set aside the judgment: *Foote* v. *Despain*, 87 Ills.

PARTNERSHIP.

*Improper Payment of Partnership Funds.*—If a bank pays out the money of a partnership, to one of the partners upon his check, in fraud of the rights of the other partners, an action at law cannot be maintained in the firm name against the bank, but a resort must be had to a court of equity for the relief of those partners claiming to be injured: *Church* v. *First Nat. Bank of Chicago*, 87 Ills.

PAYMENT. See *Assumpsit.*

*Mistake in.*—In the case of the sale of milk by the can, if by mistake of the parties the milk delivered is short of the quantity intended, owing to the cans not holding the amount supposed, and the vendor receives more money on that account than he is entitled to, he must account for the same, even though the purchaser was negligent in discovering the mistake: *Devine* v. *Edwards*, 87 Ills.

PATENT.

*Re-issue—Must be for same Invention.*—A re-issued patent must be for the same invention as that which formed the subject of the original patent, or for a part thereof, when divisional re-issues are granted. It must not contain anything substantially new or different: *Giant Powder Co.* v. *California Powder Works*, S. C. U. S., Oct. Term 1878.

An original patent for a process will not support a re-issued patent for a composition, unless the composition is the result of the process, and the invention of the one involves the invention of the other: *Id.*

A patent granted for certain processes of exploding nitro-glycerine will not support a re-issue for a composition of nitro-glycerine and gun-

powder or other substances, even though the original application claimed the invention of both process and compound. They are distinct inventions: *Id.*

PRESUMPTION. See *Evidence.*

PROHIBITION.

*Writ does not lie* to arrest a proceeding at law for defect of parties, as when a suit which should be brought in the name of the state is brought in the name of private persons: *Bowman's Case*, 67 Mo.

RAILROADS.

*Rights of Passengers as to Tickets—Payment of Fare—Putting Passengers off for Non-payment.*—The purchase of a ticket constitutes a contract between the company and passenger, in accordance with which the former undertakes to carry the latter to his destination on the particular train he takes and no other, unless he is permitted by some regulation of the company, upon compliance with some condition, to stop over at an intervening station and resume his journey by another train. The contract for the transportation of the passenger is an entirety, and if without the consent of the company he stops before reaching his destination, he cannot again impose the obligation of the contract upon the company by insisting that he shall be carried the remainder of the journey: *Stone* v. *C. & N. W. Railroad Co.*, 47 Iowa.

A passenger who refuses to pay his fare becomes a trespasser, not entitled to the rights and privileges of a passenger, and may rightfully be ejected from the train by an employee of the company: *Id.*

By refusal to pay his fare the passenger deprives himself of the right to insist upon courteous treatment from the company's employees and cannot complain of their misconduct: *Id.*

The cause of action being a breach of contract to carry, the passenger cannot be permitted to show that he was ejected from the train with insult and abuse, or that the conductor was intoxicated: *Id.*

Testimony to the effect that the plaintiff had been permitted at other times to stop over at intervening stations, and ride upon subsequent trains, with the same ticket, and without "stop-over" checks, was *held* inadmissible: *Id.*

Where a passenger has been ejected from a train for non-payment of fare, he must pay the fare from the station where he first entered the train before he can insist upon being carried forward upon the same train, and if he purchase a ticket at the point where he was ejected, the conductor may nevertheless exclude him from the train: *Id.*

That the passenger attempted to re-enter the train with good intent and without a purpose to defraud the company would not aid him to a recovery: *Id.*

RECEIVER.

*Title.*—On the appointment of a receiver of an insolvent corporation, its title to its property is divested by force of law: *Board of Chosen Freeholders of Middlesex County* v. *State Bank*, 30 N. J. Eq.

*When his Title Accrues*—The title of a receiver to the property

which is the subject of the receivership, attaches from the date of the order of court appointing him; it is not deferred until he gives bond in compliance with the order: *Maynard* v. *Bond*, 67 Mo.

SERVANT. See *Damages.*

SMUGGLING. See *Statute.*

STATUTE.

*In Derogation of Common Law.*—Statutes in derogation of the common law are to be so construed as not to infringe upon the rules or principles of the common law to any greater extent than is plainly expressed: *State* v. *Clinton*, 67 Mo.

*Repeal by subsequent Act is Judicial not Legislative Question—Acts of Congress against Smuggling.*—An action of debt cannot be maintained at the suit of the United States to recover the penalties prescribed by the fourth section of the Act of Congress, approved July 18th 1866, entitled "An Act to prevent smuggling, and for other purposes." That act contemplated a criminal proceeding, and not a civil remedy: *The United States* v. *Claflin et al.*, S. C. U. S., Oct. Term, 1878.

Nor does section 3082 of the Revised Statutes authorize a civil action: *Id.*

A recital in a statute that a former statute had been repealed or superseded by subsequent acts, is not conclusive that such a repeal or supersedure had been made. Whether a statute was repealed by a later one is a judicial not a legislative question: *Id.*

When a new statute covers the whole subject-matter of an old one, adds offences, varying the procedure, the latter operates by way of substitution, and not cumulatively. The former is, therefore, impliedly repealed. It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they refer to the same subject: *Id.*

TROVER.

*Effect of Judgment on Title—Former Application—Damages.*—A judgment in trover, without satisfaction, does not pass the title of the property to the defendant: *Atwater* v. *Tupper*, 45 Conn.

The plaintiff brought two actions of trover at the same time against A. and B., who had severally converted the same property, the conversion by B. being after that by A. He obtained judgment against A., when B. pleaded that fact in bar of the further maintenance of the action, the judgment not having been satisfied. *Held* to be no bar: *Id.*

And *held*, that the judgment was to be for the full value of the property: *Id.*

The value of the property had been found upon a hearing on the general issue before the filing of the plea in bar of the further maintenance of the action. The plaintiff demurred to that plea and the court sustained the demurrer. The defendant then claimed the right to be heard upon the question of damages. *Held*, that, as the value of the

property had been already found, and was the rule of damages, the defendant was not entitled to a further hearing on the subject: *Id.*

### Trust and Trustee.

*Breach of Trust by Settlement of Individual Debt—Acceptance by Cestui que Trust.*—Although a trustee has no right to settle a debt due to him as trustee by merely cancelling one due from himself in his individual capacity to the debtor, yet if the *cestui que trust* adopts the settlement and compels the sureties of the trustee to make good the amount to him, they cannot afterward recover it of the original debtor: *Sweet* v. *Jeffries*, 67 Mo.

A sheriff sold land under a decree for partition and received a note for the purchase-money. Becoming indebted to the purchaser, he agreed that his debt should be set off against the note, and accordingly executed a deed for the land without collecting the note. The parties entitled to the proceeds of the partition sale sued him and his sureties, alleging that the note had been paid. There was a recovery in this action and the sureties paid the judgment. In an action by them against the maker of the note. *Held*, that the settlement made by the sheriff, though originally unauthorized, had been adopted by the parties in interest and had thereby become binding upon the sureties.

### Usury.

*By one of two Executors is Good Defence.*—One of two executors loaned moneys of the estate on bond and mortgage, reserving usury thereon and appropriating it to his own use. On foreclosure by the executors on behalf of the estate,—*Held*, that such usury could be set up as a defence: *O Neil* v. *Cleveland*, 30 N. J. Eq.

### Vendor and Vendee.

*Lien for Purchase-money—Warranty—Eviction.*—Upon a bill to enforce a lien for the purchase-money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor, and no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties: *Peters* v. *Bowman*, S. C. U. S., Oct. Term 1878.

In such cases, the vendee and those claiming under him must rely upon the covenants of title in the deed of the vendor. They measure the right and the remedy of the vendee, and if there are no such covenants, in the absence of fraud he can have no redress: *Id.*

Where at the time of the conveyance with warranty, there is adverse possession under a paramount title, such possession is regarded as eviction and involves a breach of this covenant. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction, actual or constructive, and no action will lie: *Id.*

The covenant of good right to convey is synonymous with the covenant of seizin. The actual seizin of the grantor will support both, irrespective of his having an indefeasible title: *Id.*

These covenants, if broken at all, are broken when they are made. They are personal, and do not run with the land: *Id.*