ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ERRORS OF CONNECTICUT.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF MISSOURI.[4]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[5]
SUPREME COURT OF WISCONSIN.[6]

ACTION. See *Taxation.*

ARBITRATION AND AWARD.

Misconduct of Arbitrators—Evidence.—A question with regard to the damage to be allowed E. for land taken for a city street, was submitted by the city and E. to two arbitrators, who, if they could not agree, were to appoint a third to act with them, the award of two to be binding. There was also at the same time a parol agreement between the parties that the arbitrators might proceed informally, according to their own sense of propriety, with or without witnesses, and with or without notice. The two arbitrators being unable to agree, appointed G. as the third, and one of the two with G. awarded the sum of $1250 in favor of E. The city refusing to pay this sum, E. brought an action at law on the award and obtained judgment for the amount. Upon a bill in equity, brought by the city for an injunction against the enforcement of the judgment and to set aside the award on the ground of gross irregularity and unfairness in the proceedings, it was *held*—

1. That the judgment was not conclusive evidence that the arbitrators had conducted properly, but that parol evidence was admissible as to their misconduct.

2. That irregularities in their conduct, not of so serious a character as to show that they acted corruptly, were covered by the agreement of the parties as to the entire informality of the proceedings: *Bridgeport* v. *Eisenman*, 47 Conn.

It was found by a committee in the court below, that while it was very difficult to determine with exactness the amount of damage above incidental benefits done the respondents in taking their land for the street, yet that according to the evidence before the committee it did not exceed $600. The arbitrators had awarded $1250. *Held*, not sufficient ground for setting aside the award as made corruptly: *Id.*

---

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1880. The cases will probably be reported in 12 Otto.

[2] From John Hooker, Esq., Reporter; to appear in 47 Conn. Reports.

[3] From Henry A. Chaney, Esq., Reporter; to appear in 42 Mich. Reports.

[4] From T. K. Skinker, Esq., Reporter; to appear in 71 Mo. Reports.

[5] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 13 of his Reports

[6] From Hon. O. M. Conover, Reporter; to appear in 50 Wis. Reports.

ASSUMPSIT.

Voluntary Services—Waiving Tort.—No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward. So held where a man living in his father-in-law's family without paying board sued for work which he did on the latter's farm: *Coe* v. *Wager*, 42 Mich.

One may waive trover and sue in assumpsit for property which defendant has appropriated, but he must show just what property has been so used: *Id.*

ATTORNEY.

Disbarring.—Conviction of such crimes as the law regards as infamous is sufficient ground for disbarring an attorney: *Matter of McCarthy*, 42 Mich.

A bar association is not a recognised body, as such, in proceedings to disbar an attorney, and cannot control the prosecution; the proceeding is in the interest of public justice, and the Supreme Court will examine into and act on it as in other cases involving the position of its attorneys: *Id.*

BANKRUPTCY.

Discharge not affecting Debt due the United States.—A discharge in bankruptcy does not relieve the debtor from any debt or liability to the government of the United States: *Smith* v. *Hodson*, 50 Wis.

After a judgment in favor of the United States against both parties to this suit (as sureties on an undertaking in a federal court), plaintiff paid the whole judgment. Afterward defendant was discharged in bankruptcy, no claim against him being filed by the United States in the proceeding. *Held*, that defendant is liable to plaintiff in this suit for contribution, brought subsequent to such discharge: *Id.*

BILLS AND NOTES.

Accommodation Paper—Fraudulent use of.—Where an accommodation note is given with the understanding that the payee was to deposit it temporarily as collateral security for a loan to be made to him, and instead of obtaining a new loan and giving the note to the lender as collateral, he deposits it with a bank, as security for moneys already owing by him to that institution. *Held*, 1. That this was not a misappropriation, the accommodation paper effecting the substantial purpose for which it was designed, although the result was not produced in the precise mode contemplated; 2. In order to constitute a misappropriation of this kind of paper, the misuse must be tainted with fraud: *Jackson* v. *First National Bank of Jersey City*, 13 Vroom.

Duncan, Sherman & Co. v. *Gilbert*, 5 Dutcher 521, approved: *Id.*

Guaranty—Notice.—A guarantor of a promissory note is not entitled to notice before suit of demand upon the maker and refusal by him to pay: *Singer Man'g Co.* v. *Hester*, 71 Mo.

CONSTITUTIONAL LAW.

Employment of Public Officer by Contract—Repeal of Statute creating Office—Liability of State upon the Contract.—Although, as a general proposition, a state may abolish any public office created by a

public law; yet, where the legislature has by statute expressly authorized the governor to enter into a contract with a person to perform certain duties for a definite period, at a stipulated salary, and he has made such contract, it cannot, by a repeal of the statute, prevent a recovery against the state for the salary thereafter accruing under the contract: *Hall* v. *State of Wisconsin*, S. C. U. S., Oct. Term 1880.

CORPORATION.

Equity—Interference at Suit of Stockholders.—A court of equity will in many cases refuse to interfere with a corporation at the instance of a stockholder, in respect to an unauthorized contract which has been fully executed, when, if the same stockholder had applied in season for an order to restrain the execution of the contract, the court might have felt bound to grant the relief prayed for: *Terry* v. *Eagle Lock Co.*, 47 Conn.

Especially is this so where the petitioner has stood by and allowed the illegal transaction to be consummated, and has induced or allowed others to become interested in the corporation in the belief that the existing state of things was legal: *Id.*

CRIMINAL LAW. See *Verdict.*

Indictment—Joinder of Counts—Grand Jury—Challenge to Grand Juror—Evidence of what passes in Grand Jury room.—An indictment for murder charged in one count three defendants as principals, and in another two as principals, and the third as an accessory before the fact. *Held* to be no misjoinder of counts: *State* v. *Hamlin*, 47 Conn.

But if two such counts could not be properly joined, the misjoinder could not be taken advantage of by motion in arrest of judgment, or on error: *Id.*

It is not the right of a person against whom a charge of crime is pending before a grand jury to be present at the examination of the witnesses: *Id.*

Whether individual members of a grand jury may be challenged for favor before they are sworn, *quære*. *Id.*

The expression of an opinion that an accused person is guilty by a grand juror before he was sworn, appears never to have been a ground of challenge in the English courts. Some respectable authorities in this country hold that it is, but these generally hold that the exception must be taken before the grand juror is sworn: *Id.*

The common law requires grand jurors to be good and lawful freeholders and inhabitants of the county, and, where that law prevails, a disqualified grand juror may be challenged before indictment found: *Id.*

If a disqualification, discovered after indictment found, can be taken advantage of, it must be one that is pronounced such by the common law or by the statute (if it be a matter of statute), and one that absolutely disqualifies, as alienage or the want of a freehold: *Id.*

One of several defendants indicted by a grand jury pleaded in abatement that there were not twelve members of the grand jury who were in favor of finding a true bill against him, but that the foreman stated to them that they could not find a true bill against the others unless they included him, and that his name was included because the grand jurors thought it necessary in finding a true bill against the others. The

state's attorney demurred to this plea. *Held*, 1. That the court could not allow any evidence as to the proceedings within the grand jury room, which, by their oath, the jurors were to keep secret; 2. That the state's attorney had no right, by a demurrer or in any other mode, to admit the facts alleged in the plea: *Id.*

Divorce.

Cruel Treatment.—Any wilful misconduct of the husband which endangers the health or life of the wife, exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is "cruel and inhuman treatment" within the meaning of the statute of divorce; and even a single act of that character, where bodily harm has not only been threatened, but committed, with such precedent or attendant circumstances as to satisfy the court that such acts are likely to be repeated, may warrant a decree of divorce: *Beyer* v. *Beyer*, 50 Wis.

Equity. See *Former Adjudication; Taxation.*

Mesne Profits—When not Chargeable—Contest for Possession of Church—Use of Property for Religious Purposes.—Where litigation between two contending boards of trustees for the control of church property, results in a decree against the party in possession, the latter are not in equity chargeable personally with the value of the use and occupation of the property during the litigation, if it appears that they have not individually derived any pecuniary advantage therefrom, but have used the property exclusively for church purposes, and allowed every member of the congregation to worship therein: *Bouldin* v. *Alexander*, S. C. U. S. Oct. Term 1880.

Errors and Appeals.

Trial without Jury—Exceptions to Judgment of Court upon the Facts—Not considered by Appellate Court.—Exceptions to the judgment of the court upon the facts submitted to it under the provisions of the Act of Congress authorizing the submission of causes without a jury, cannot be considered by the appellate court: *Peoples' Bank of Belleville* v. *Winslow*, S. C. U. S. Oct. Term 1880.

Former Adjudication.

Equity—Previous bill for same Relief—Dismissal for want of Replication to Plea—Presumption that Plea went to the Merits.—Where from the allegations of a bill it appears that a previous bill by complainant for the same relief had been dismissed for want of a replication to a plea filed by defendant, the nature of the plea not being stated, the second bill must be dismissed. The presumption is that the plea went to the merits, and this presumption is not overthrown by a mere averment in the second bill that there had been no adjudication upon the merits: *Leary* v. *Long*, S. C. U. S. Oct. Term 1880.

An Order of Court held not res adjudicata.—A court of bankruptcy ordered the assignee of a railroad company, which had appropriated plaintiff's land to its own use, to pay him $200 for his damages upon receiving from him a deed to the land. Plaintiff was a party to the bankruptcy proceedings, but he declined to take the money or make the deed. In an action by him against one claiming under the company to

recover for the land; *Held*, that the order of the bankruptcy court was no judgment and no bar to his recovery: *Burnes* v. *St. Louis, K. C. & N. Railway Co.*, 71 Mo.

INFANT.

Joint obligation of Adult and Infant.—One who signs a note with an infant may be held as sole maker after discontinuance as against the infant; *Taylor* v. *Dansby*, 42 Mich.

JURY. See *Verdict.*

MASTER AND SERVANT.

Vice-principal.—To constitute a servant of a railroad company the vice-principal, so as to hold the company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard: *Rains* v. *St. Louis, I. M. & S. Railway Co.*, 71 Mo.

Respective duties touching Machinery furnished by Master to Servant—Defects, latent and patent.—A brakeman, while engaged in coupling cars at night, stepped into a hole under a tie, by which his foot was caught and he was thrown under the moving car which passed over his legs, causing serious and permanent injuries. The defect in the road was not patent, but required inspection to discover it, and he had never worked on this portion of the track before. His attention had been called to the generally unsafe and dangerous condition of the track, but not to the specific defect causing his injuries. He was ignorant of its existence, and the attention of the servants of the railroad company, whose duty it was to attend to the track, had more than once been called to its dangerous condition, but they had taken no steps to repair it. In an action brought by him to recover damages for the injuries sustained: *Held*, that the following rules are well settled:

1. A master is not an insurer of the safety of his servant, and is under no absolute obligation to provide for him safe machinery and implements, or to keep these in good order and condition; but it is his duty to use reasonable care and precaution for these purposes.

2. If there are defects in the machinery or implements, known to the servant, and he will, notwithstanding, enter into the master's service, he takes upon himself the risk incident to such defects.

3. It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without investigation, the right to assume that they are safe and sufficient for the purpose.

4. In case of a patent defect, or such as the servant, if ordinarily observant, would have discovered by his ordinary use of the machinery or implement, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not.

5. If the servant of a railroad company appointed to keep the track in repair, knows, or by the proper discharge of his duty might know of its condition, then his knowledge, or that which he might have acquired,

is imputable to the company: *Porter* v. *Hannibal & St. Joseph Railroad Co.*, 71 Mo.

Although a servant may have had equal means with his master, of ascertaining defects in machinery or implements provided by his master, this will not necessarily preclude him from recovering damages from his master for injuries received by him consequent upon such defects, if, in fact, he was ignorant of their existence, and they were not patent, or such as would have been disclosed to him, if ordinarily observant, by his actual and ordinary use of such machinery or implements. He has a right to assume that the machinery and implements furnished him by his master are safe and suitable for the business, and he is not, while the master is, required to examine them for that purpose: *Id*

Mechanics' Lien.

Binding Landlord's Estate by Repairs done at Tenant's direction—Consent.—The written consent which, under the Lien Law, will bind the land of the owner for repairs contracted for by the tenant, must be absolute in its terms: *Hervey* v. *Gay*, 13 Vroom.

Where the writing relied upon as the consent of the owner to the making of repairs by another, contains a clause that the repairs shall not be at the expense of the owner, it is not consent within the meaning of the 8th sect. of the Mechanics' Lien Law: *Id.*

Mortgage.

Record—Notice to Mortgagees of Subsequent Conveyances.—Mortgagees need not examine the records before releasing portions of the mortgaged premises, because the record of a later conveyance would not be notice to them; but if they have notice of facts enough to put a prudent man upon inquiry, they are bound to examine the records and act accordingly: *Dewey* v. *Ingersoll*, 42 Mich.

A purchaser of a portion of some mortgaged premises situated on one of the principal streets in the village where the mortgagee resided, promptly recorded the deed and went into actual possession, improving the premises and living on them. *Held*, that the mortgagee's knowledge of this was enough to put him on inquiry before releasing other parts of the premises from the mortgage lien: *Id.*

Municipal Corporation.

Liability for flooding Property by Construction of a Street.—A city is liable in damages for the flooding of private property caused by the construction of a street, in pursuance of a plan prescribed by ordinance, only when the injury is the result of negligent execution of the plan; not when it is the result of a defect in the plan itself: *Foster* v. *St. Louis*, 71 Mo.

Action by Resolution as distinguished from Ordinance.—Where the charter of a municipal corporation commits the decision of a matter to the common council, and is silent as to the mode, such decision may be made by resolution, and need not be by ordinance: *Burlington* v. *Dennison*, 13 Vroom.

The appointment of a committee to make the purchase of a fire-engine, is plenary evidence of the determination of the council to

make the purchase; the passage of an ordinance or resolution is not required: *Id.*

A common council may delegate power to a committee to act for it, and a contract made by such committee will bind the corporation: *Id.*

Approval of the mayor of the proceedings of a city council is essential to their validity only by special requirement of the charter. Under the charter of the city of Burlington, the requiring such approval is restricted to ordinances, and does not include resolutions of the council: *Id.*

NEGLIGENCE. See *Master and Servant; Nuisance.*

Contributory.—It is settled law in this state that although the defendant may have been guilty of negligence contributing to produce the injury complained of, still if plaintiff was also guilty of negligence proximately contributing thereto, defendant is not liable, unless his negligent act occurred after he became aware of the danger to which the plaintiff, by his own neglect, had exposed himself. Hence, where the defendant's neglect consisted in the erection and maintenance of a dangerous structure, obvious to the senses long before the accident, *held*, that he was not liable, whether the structure could have been differently built or not: *Rains* v. *St. Louis, I., M. & S. Railway Co.*, 71 Mo.

NON-NEGOTIABLE PAPER.

Effect of Blank Endorsement.—A blank endorsement of a non-negotiable certificate of deposit by the payee thereof, accompanied by delivery, will enable the holder to make a valid pledge of the certificate to an innocent party, without reference to the equities between himself and the payee. The pledgee is authorized to infer absolute ownership and full right in the holder to pledge: but as against the true owner his recovery will be limited to the amount of his loan: *International Bank* v. *German Bank*, 71 Mo.

The certificate in question in this case had written across its face the following words: "This certificate is subject to any subsequent claim for collection or any other fees arising out of the disbursement of the legacy of which this money is part of proceeds." The bank which issued the certificate not asserting any rights under this stipulation, *held*, that as between the other parties, it did not affect the operation of the foregoing rule: *Id.*

NUISANCE.

Question of Negligence Irrelevant—Legislative Authority.—The D., L. & W. Railroad Co. having legislative authority to construct a tunnel through Bergen Hill, contracted with M. to do the work. The tunnel was driven through rock, was begun in 1873, and completed in 1877. M. constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for the explosive materials which he used in blasting. In 1876, at night, the materials exploded, doing great damage to property, and injuring among the property some houses belonging to C. In a suit brought to recover damages for the injury: *Held*:

1. That the legislative authority to a private corporation, or an individual, to do a work for its or his own profit, does not include authority to use, at whatever hazard to the persons or property of others, danger-

ous materials, even though they are necessary to the convenient prosecution of the work.

2. They will be liable for the injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner: *McAndrews* v. *Collerd*, 13 Vroom.

Where a nuisance complained of is a public nuisance, no degree of care will relieve a party from liability to respond for damages arising from it: *Id.*

OFFICE AND OFFICER. See *Constitutional Law.*

RAILROAD. See *Master and Servant.*

Contributory Negligence—Travellers crossing must Look and Listen.—It is a part of the rule of contributory negligence that the plaintiff's negligent act must proximately contribute to his injury; but if it so contribute, the comparative degrees of the plaintiff's and defendant's negligence will not be considered: *Pennsylvania Railroad Co.* v. *Righter*, 13 Vroom.

If the case presents a fairly debatable question whether the plaintiff's negligent conduct did so contribute, the solution of that question is for the jury; but if it clearly appears that such conduct did contribute, then the court should direct a nonsuit: *Id.*

It is a primary rule of legal caution that a person about to cross a railroad is bound to use his eyes and ears, to watch for sign-boards and signals, to listen for bell and whistle, and to guard against the approach of trains by looking each way before crossing: *Id.*

The failure of the company to provide or give a statutory signal will not relieve a person from making this observation, if he has an opportunity, by a view of the road, to avoid danger: *Id.*

A servant driving a carriage along a street crossing a railroad, and having, while yet at a point distant over thirty feet from the railroad track, a view of the same for a mile to the south, drove across the track, and the rear of his wagon was struck by a train coming from the south, and the wagon was demolished and the persons within it injured: *Held*: 1. That the negligent act of the servant contributed to the injury; 2. That the fact that a train was just starting from a station one-quarter of a mile north, and blowing a whistle, could not have distracted the servant's attention so as to relieve him from his duty to look south;

RECORDING ACTS. See *Mortgage.*

SALE.

Conditional Sale—Keeping Chattel for Trial.—Where A. takes to his own home a horse of B., intending to purchase it if satisfactory, with an understanding that he is to use it by way of trial until a specified time, and then, if not satisfied, bring it back to B., or if too busy for that, to let it stand *unused* until B. comes for it, and A. continues to use the horse after the time so fixed, and then refuses to buy and offers to return it, this is evidence *for the jury* on the question whether A., at the time so fixed, had determined to retain the horse, and is therefore liable for the price, but is *not conclusive* evidence; *Kahn* v *Klabrunde*, 50 Wis.

Specific Performance.

Matter of Discretion—Laches.—An action for the specific performance of a contract is an application to the sound discretion of the court, and such performance will not be decreed when for any reason it would be inequitable: *Williams* v. *Williams*, 50 Wis.

Action, commenced in 1875, to enforce a contract for the sale and purchase of land made in October 1863, in which the time for performing, limited by its terms, was three years Besides the lapse of time, various circumstances (for which see the opinion) create a strong presumption that the contract was abandoned, and there is no sufficient rebutting evidence. *Held*, that equity will not enforce specific performance of a claim so suspicious and stale, but will leave plaintiff to his remedy at law: *Id.*

Taxation.

Equity—Enjoining Collection of Taxes—Recovery of Taxes Paid.—While it is a general rule that a court of equity will not interfere to restrain the collection of taxes, yet it will not refuse to restrain a tax collector by injunction where the party against whose property he is proceeding is not the tax-debtor and the property is not that on which the tax was laid: *Seeley* v. *Westport*, 47 Conn.

A. occupied and claimed title to certain real estate and put it into her tax-list as her own, with other real estate belonging to her. It was afterwards adjudged that the title to the property in question was not in her, but in G., from whom the petitioners received the title. At the time the tax fell due and for a long time after, A. had property which might have been taken for the tax. The tax collector now threatened to levy on the property in question for the entire tax of A., that part which belonged exclusively to this property not being ascertainable. *Held*, that the collector should be enjoined against proceeding to sell the property: *Id.*

A man may protect his land from sale upon a tax-warrant or from a cloud on his title by a tax lien, by paying the tax and suing to recover it back. Such a payment is not to be regarded as a voluntary one: *Id.*

But this legal remedy is not such an adequate one as to debar a party from a remedy by injunction, where the case is otherwise one in which, upon the above principles, he would be entitled to such equitable remedy: *Id.*

The cases of *Sheldon* v. *South School District*, 24 Conn. 88, and *Waterbury Savings Bank* v. *Lawler*, 46 Conn. 243, commented on: *Id.*

Trade-mark.

Dissimilarity of alleged Infringement not determined by the Court on a Demurrer.—In an action to restrain defendant from using a trade-mark alleged to have been devised by him in imitation of that of plaintiffs, and to be in fact deceptive to purchasers, &c., if fac-similes of the two trade-marks are annexed to the complaint, it will not be held *on demurrer*, that the one is not sufficiently similar to the other to mislead, and to constitute an infringement, unless the dissimilarity is so marked as to leave no doubt in the mind of the court; but the question of infringement will be reserved until the coming in of the proofs; *Leidersdorf* v. *Flint*, 50 Wis

In such an action, plaintiff may, without misjoinder ask for an accounting as to profits, and for damages: *Id.*

United States Courts.

Jurisdiction—Federal Question—Constitutional Law.—Upon the authority of *Cohens* v. *Virginia*, 6 Wheat. 375; *Osborne* v. *Bank of United States*, 9 Id. 816; *Mayor* v. *Cooper*, 6 Wall. 250; *Gold-washing and Water Co.* v. *Keys*, 96 U. S. 201, and *Davis* v. *Tennessee*, 100 Id. 264, held to be settled law, that while the 11th amendment of the national Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, such power is extended by the Constitution to suits commenced or prosecuted by a state against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the state: *The New Orleans, Mobile and Texas Railroad Co.* v. *State of Mississippi*, S. C. U. S. Oct. Term 1880.

That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either: *Id.*

That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection or defence of the party, in whole or in part, by whom they are asserted: *Id.*

That except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct: *Id.*

And lastly, that it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the union is extended by the Constitution, forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it: *Id.*

Verdict.

Criminal Law—Presence of Officer in Jury-room.—A verdict in a criminal case may be set aside and a new trial granted if the officer who attended the jury remained in the jury-room during their deliberations. It is against public policy to allow the deliberations of a *petit* jury to be reported: *People* v. *Knapp*, 42 Mich.

Voluntary Payment. See *Taxation*.