ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF GEORGIA.[2]

SUPREME COURT OF IOWA.[3]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[4]

NEW JERSEY PREROGATIVE COURT.[5]

SUPREME COURT OF RHODE ISLAND.[6]

ADMIRALTY. See *Attachment; Errors and Appeals.*

APPLICATION OF PAYMENTS. See *Limitations, Statute of.*

ATTACHMENT.

Wages of Seamen—Payment under Process in Admiralty.—The owners of a coasting vessel who, after having been summoned as trustees in foreign attachment of a seaman, are compelled by subsequent process from a court of admiralty upon a libel filed by him against the vessel, and by the judgment of that court in his favor, after disclosure of all the facts relating to the trustee process, to pay to him the amount of his wages, will not be charged as trustees for the same sum: *Eddy* v. *O'Hara*, 132 Mass.

Quære, whether the wages of a seaman on a coasting voyage are subject to attachment by the trustee process: *Id.*

BANKRUPTCY.

Continuation of Suit by Bankrupt—Assignee not a Necessary Party.—It is no defence to an action that since its commencement the plaintiff has been adjudicated a bankrupt and an assignee appointed. It is not necessary that the assignee should make himself a party to the record, and if, after notice, he permits the suit to go on, in the name of the bankrupt, he is bound by the judgment, and the defendant is protected against any claim on his part: *Thatcher* v. *Rockwell*, S. C. U. S., Oct. Term, 1881.

Promise to Pay Debt Barred by Discharge.—Where a bankrupt, after the adjudication of bankruptcy and before his discharge, makes an express new promise to pay an original debt, such promise will be binding upon him after his discharge: *Knapp* v. *Hoyt*, 57 Iowa.

BILLS AND NOTES.

Note fraudulently procured—Defence against Endorser—Usually

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will be reported in 15 Otto.

[2] From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 66 Georgia Reports.

[3] From B. W. Hight, Reporter; to appear in 57 Iowa Reports.

[4] From John Lathrop, Esq., Reporter; to appear in 132 Mass. Reports.

[5] From Hon. John H. Stewart, Reporter; to appear in 35 N. J. Eq. Reports.

[6] From Arnold Green, Esq., Reporter, to appear in 13 Rhode Island Reports.

when the maker of a negotiable promissory note is not allowed to avail himself as against third parties holding the note, of defences valid against the payee, it is because negligence is imputable to the maker in the inception of the note. That a third party holds a negotiable note for a valuable consideration will not, of itself, in an action against the maker, deprive such maker of defences valid against the payee. Hence, when A. made a negotiable promissory note to B , which was fraudulently procured by B. and no negligence was imputable to A., and suit was brought on the note against A. by C., a purchaser for valuable consideration, but it did not appear that C. bought the note in the usual course of business or for its full face value, *Held*, that A. was entitled against C. to use the defences which he could have employed against B.: *Millard* v. *Barton*, 13 R. I.

CONTEMPT.

Sheriff—Necessity of Rule to show cause.—After a rule absolute against a sheriff has been obtained, before he can be attached for contempt, a rule *nisi* calling upon him to show cause why he should not be so attached must be sued out and served on him: *Mize* v. *Barsden*, 66 Ga.

Where a rule *nisi* against a sheriff was sued out, calling on him to show cause why he should not pay over certain funds alleged to be in his hands at the time such rule was made absolute, the court could not, without more, order that in default of payment the sheriff should be attached for contempt: *Id.*

CONTRACT.

Services by Relative—Evidence.—On the issue whether services were rendered gratuitously by a son-in-law to his father in-law, there was evidence that the parties lived together on the father-in-law's land; that the father-in-law said he expected to live there all his days; that the land was to be his daughter's when he died; and that the father-in-law intended to pay his way. *Held*, that this evidence would warrant a verdict in favor of the son-in-law: *James* v. *Cummings*, 132 Mass.

COSTS. See *Will.*

CRIMINAL LAW. See *Pledge.*

Alibi—Burden of Proof.—It is now the settled law of this State that where, in a criminal case, the defence of an alibi is relied upon, the burden of proof is on the defendant to establish such defence by a preponderance of the evidence: *State* v. *Hamilton*, 57 Iowa.

Per ADAMS, J., dissenting.—If the evidence to establish an alibi is such as to raise a reasonable doubt of the defendant's guilt, the jury would be justified in acquitting: *Id*

Evidence—Report made at the Inquest.—At the trial of an indictment for manslaughter, a witness for the defendant was allowed, in answer to a question put by the government, to refresh his memory from a report made by him of the defendant's statements at the inquest; and the defendant thereupon, without putting any question to the witness, asked to have so much of the report as related to the inquiry of the government read to the jury. The judge excluded it *Held*, that the defendant had no ground of exception: *Commonwealth* v. *Jeffs*, 132 Mass.

Possession of Stolen Property—Presumption.—The recent possession of stolen property will authorize a conviction, unless the presumption of guilt arising therefrom is overcome by other facts; and it is immaterial whether it be termed a presumption of law, or a presumption of fact, as both are identical in meaning: *The State* v. *Kelly*, 57 Iowa.

Where the instruction stated that the presumption arising from the recent possession of stolen goods was one of law, but left to the jury the power to say whether such a presumption warranted a verdict of guilty, the defendant was not prejudiced by calling it a presumption of law: *The State* v. *Richart*, 57 Iowa.

The defendant can only be required to introduce evidence which creates a reasonable doubt whether he honestly came into the possession of stolen goods. An instruction that he must overcome the presumption arising from such possession by a preponderance of evidence is erroneous: *Id.*

Damages.

Stipulated Sum payable in case of Breach—When Liquidated Damages—Whether a sum agreed upon by parties to a contract as the measure of damages shall be considered as liquidated damages, or only as a penalty, will depend upon the intent of the parties and the peculiar circumstances of the subject-matter of the contract. If the damages must necessarily be wholly uncertain and incapable of estimation, the party failing to perform will be held to pay the amount as liquidated damages: *Newman* v. *Wolfson*, 66 Ga.

The keeper of a saloon in the city of Columbus by written contract, for the sum of $1456.15, sold his stock of goods, bar-room fixtures, &c., together with the good will of the business to another, and covenanted not to engage in the same or a like business in that city for a period of five years, and the vendor bound himself to the purchaser, "his executors, &c., in the sum of $2000 as liquidated damages for the faithful performance of this his promise." The vendor opened a bar room shortly afterwards in the city. *Held*, that the amount stated in the contract is to be taken as liquidated damages and not as a mere penalty; nor is the contract unreasonable: *Id.*

Domicile.

Absence in Europe—Intention to return to new Domicile—Taxation.—A person, having his domicile in Boston, left that city in 1876 with his family to reside in Europe for an indefinite length of time, with the fixed purpose never to return to Boston as a place of residence, and to make some place other than Boston his residence when he should return; and, while in Europe, before May 1st 1877, fixed upon a place of residence in another state, but remained in Europe until 1879. *Held*, that he retained his domicile in Boston for the purposes of taxation on May 1st 1877: *Borland* v. *City of Boston*, 132 Mass.

Easement.

Abandonment of.—An easement may be lost by cesser of use for twenty years or by renunciation or abandonment as shown by decisive acts. Hence when a way had been laid out for the common use of lots

bounded on it and A., the owner of one of these lots, had appropriated to his own use the part of the way opposite his lot: *Held*, that A. had abandoned his easement in the way and could not maintain an action against the owner of another of the lots for obstructing a portion of the way: *Steere* v. *Tiffany*, 13 R. I.

The character of an easement created by implication or estoppel is determined by the circumstances in which the easement was created. Hence when it was clear that a way was to be used in common as a whole and a part of it was appropriated by an owner of one of the dominant tenements, *Held* that the act of appropriation was an abandonment of the easement in the whole way: *Id.*

EQUITY.

Proceedings against Equitable Assets—Absconding Debtor.—A. absconded, in debt, leaving no legal assets which could be attached, so that a judgment at law could be not obtained against him; *Held*, that his creditors could at once proceed in equity against his equitable assets to satisfy their legal claims. *Held further*, that if such claims appeared specially fit for legal cognisance or specially unfit for equitable, the Equity Court would submit them to a jury on issues framed for that purpose: *Merchant National Bank* v. *Paine*, 13 R. I.

The rule requiring the exhaustion of legal remedies before chancery will take jurisdiction of a legal debt rests on two reasons: first that a judgment and execution returned unsatisfied are the best evidences of the debt: second that legal tribunals should adjudicate legal claims. The first reason fails when legal process is impossible; the second is satisfied by a jury trial of issues from chancery: *Id.*

ERRORS AND APPEALS.

Admiralty—Appeals from District to Circuit Courts—Procedure—Cross-Appeals to Supreme Court—An appeal in admiralty from a District to a Circuit Court must be to the term of the Circuit Court held next after the decree, and it must be made while the District Court is sitting, or within the time required by the general rules or a special order. These requirements are jurisdictional. All other rules are mere matters of procedure and may be dispensed with by the court. Hence, it is not a valid objection to an appeal that the District Court allowed it without any writing, notwithstanding a rule of that court required it to be in writing: *Winslow* v. *Wilcox*, S. C. U. S., October Term, 1881.

A provision in the rule of the District Court that the clerk should prepare and deliver to the Circuit Court the appeal and record in twenty days cannot prevent the Circuit Court from entertaining the cause if, for any reason, this is not done: *Id.*

A cross appeal to the Supreme Court must be prosecuted like other appeals, and the appellant must comply with the rules as if no other appeal had been taken in the cause: *Id.*

Case Appealed from District to Circuit Court—Certificate of Division—Revenue Case.—At a hearing in the Circuit Court of an appeal from the District Court, the district judge who rendered the judgment appealed from cannot, under sect. 614 of the Revised Statutes, give a vote even by consent of parties when another judge is present, and the case cannot be brought to the Supreme Court upon a certificate of division of opinion

between him and the other judge: *United States* v. *Emholt*, S. C. U. S., October Term, 1881.

An information for a forfeiture under the internal revenue laws cannot be brought from the Circuit to the Supreme Court: *Id.*

EVIDENCE. See *Criminal Law; Witness.*

Competency of Witness—Religious Belief.—Upon cross-examination a witness was allowed to be questioned as to his belief in a Supreme Being and in a state of future rewards and punishments. *Held*, that the want of such religious belief could not be established from the examination of the witness upon the stand. It must be shown, if at all, by his previous declarations voluntarily made. He cannot be required to divulge his religious opinions: *Searey* v. *Miller*, 57 Iowa.

Office Paper—Fi. fa.—A *fi. fa.* is not an office paper which must be kept on file in the court where it originates. The original may be taken out of court and used in evidence. It is the best evidence of the right to seize and sell, in contests under sheriffs' sales; if lost or destroyed, a copy of it from the records may be used: *Thomas* v. *Parker*, 66 Ga.

An original *fi. fa.* from the Circuit Court of the United States will be recognised by the state courts without other than intrinsic proof, and is admissible in a contest arising thereunder: *Id.*

EXECUTORS AND ADMINISTRATORS.

When chargeable with Interest.—An administrator converted dividend-paying bank stock of the estate into money, and with it paid off a mortgage on lands in which he had an interest as heir of the intestate. On exceptions to his account credit for that payment was disallowed. *Held*, that he was chargeable with interest at the legal rate on that amount from the date of the payment, including the time during which litigation on the exceptions continued: *Mount* v. *Van Ness*, 35 N. J. Eq.

Mortgage of Executor held by Testator—Failure to Record.—An executor gave his testator, during the latter's lifetime, a mortgage for moneys loaned, but owing to the testator's illiteracy, the mortgage was never registered. *Held*, that the residuary legatees might require him to give security because he neglected to have the mortgage registered after it came into his hands as part of the estate, and also because he claimed certain credits for payments thereon, which appeared to be false: *Bird* v. *Wiggins*, 35 N. J. Eq.

FOREIGN ATTACHMENT. See *Attachment.*

FRAUDS, STATUTE OF.

Parol Trust.—Where the conveyance in trust was made voluntarily, without solicitation or undue influence, and no fraud is shown prior to or contemporaneous with the execution of the deed, but consists in denying and repudiating the agreement to reconvey, it will not remove the case from the operation of the Statute of Frauds: *McClain* v. *McClain*, 57 Iowa.

GUARDIAN AND WARD.

Maintenance of Ward—Surety—Laches.—A ward, whose estate was small, lived with his father, who was the guardian. The father never, during his lifetime, made any charge against the ward for his maintenance. *Held*, that sureties of the guardian cannot obtain an allowance therefor in a suit on their bond: *In re John L. Walling, Guardian*, 35 N. J. Eq.

A guardian was appointed in 1860; his youngest ward came of age in 1871, and the guardian became insolvent in 1872 or 1873. *Held*, that the ward's omission to sue the surety or his administrator, until 1880, did not prevent his recovery: *Id.*

HABEAS CORPUS.

Jurisdiction—Return.—The allegation of the petition for a writ of *habeas corpus*, that minor children were concealed by the respondent in Polk or Dallas counties, was sufficient to give the court of Polk county jurisdiction, and authorized the issuance of the writ: and the fact set up in the answer, that the children were in a foreign jurisdiction did not deprive the court of jurisdiction, or excuse the respondent for not producing the children in court in obedience to the writ: *Rivers* v. *Mitchell*, 57 Iowa.

The return to the writ of *habeas corpus*, should have shown that the respondent did not have the power to produce the children in court, in obedience to the writ: *Id.*

Prisoner sentenced by Court Martial—United States Supreme Court.—Even if the United States Supreme Court can issue a writ of habeas corpus for a prisoner under sentence by a court martial (a question not decided) there can be no discharge under such writ if the court martial had jurisdiction to try the offender, and the sentence was one which the court could under the law pronounce: *Ex parte Mason*, S. C. U. S., Oct. Term, 1881.

HOMESTEAD.

Lien on Crop for Supplies—When superior to Homestead Right.—Where a factor furnishes supplies and provisions to a planter to make a crop and takes a lien on the growing crop therefor, such advances are in the nature of purchase-money or materials furnished for the crop so raised, and the landlord's debt therefor is superior to the homestead right of the debtor's wife: *Cook* v. *Roberts*, 66 Ga.

HUSBAND AND WIFE.

Loan by Wife to Husband—Payment for Joint Benefit.—A widow may reclaim from her husband's estate moneys of her separate estate which she loaned him during his lifetime, and which he applied to the payment of a mortgage on lands, the title to which stood in the names of her and her husband, as husband and wife: *Greiner* v. *Greiner*, 35 N. J. Eq.

INJUNCTION. See *Waters and Watercourses.*

LARCENY. See *Pledge.*

Limitations, Statute of.

Application of Payments—Proceeds of Collateral.—In an action upon four promissory notes, the defence to three of which was the statute of limitations, it appeared that, upon payment of the notes being demanded, the defendant assigned to the plaintiff certain choses in action, the proceeds of which were to be applied, as far as such moneys went, upon the defendant's indebtedness to him upon the notes, and that there was no agreement, or understanding between the parties, and no direction by the defendant, as to how any money received by the plaintiff through said assignments should be specially applied. *Held*, that the money received by the plaintiff under the assignments should be applied as a partial payment upon each of the notes: and that the whole debt was taken out of the statute of limitations: *Taylor* v. *Foster*, 132 Mass.

Lis Pendens.

Constructive Notice.—A party purchasing land will be charged with notice of the pendency of an action affecting the same, from the time the petition is filed; and the facts that the action was not properly indexed in the appearance docket, and that the notice was not served until after the purchase, are immaterial: *Haverly* v. *Alcott*, 57 Iowa.

Malicious Prosecution.

Guilty Plaintiff cannot Recover—Previous Verdict in his favor not conclusive—Advice of Counsel.—The action for malicious prosecution is given in favor of an innocent plaintiff, not of a guilty one. Hence, when A. brought trover against B. and B., after a verdict in his favor, sued A for malicious prosecution, *Held*, that evidence of facts tending to show B's guilt, which facts were not known to A. when he brought the action of trover, although inadmissible to show probable cause on the part of A., should be admitted as bearing on the actual guilt of B.: *Newton* v. *Weaver*, 13 R. I.

In the suit for malicious prosecution A. requested the presiding judge to charge the jury that if in the action of trover the question of fact whether B. had been guilty of acts amounting to trover and conversion was submitted to the jury and deliberated upon, then a verdict for the defendant should be given in the suit for malicious prosecution. *Held*, that this request was properly refused: *Id.*

A plaintiff who, after consulting legal counsel in good standing and fully disclosing the facts of his case within his knowledge, brings an action relying in good faith on the advice of such counsel, is not liable in a suit for malicious prosecution for bringing such action: *Id.*

Proof of Guilt—Damages.—In an action for malicious prosecution, if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty, no recovery can be had; and in view of the evidence of actual guilt in this case, the instruction as to belief and probable cause should have been so qualified: *Parkhurst* v. *Masteller*, 57 Iowa.

In an action for malicious prosecution, mental suffering, not arising directly from bodily suffering, and injury to the feelings, constitute elements of actual or compensatory damages: *Id.*

In addition to damages for injury to the feelings, exemplary damages may be allowed in a proper case, strictly by way of punishment: *Id.*

Mortgage.

Fraudulent as to Third Party— Validity as between Parties.—A. executed and delivered to B. a mortgage of certain specified chattels with covenants of ownership and warranty. Among the enumerated chattels were some which A. and B. both knew belonged to a third party. After condition broken B. demanded the chattels, and on A.'s refusal to deliver them brought trover against A. *Held*, that A. was estopped by his covenants from denying his ownership of the chattels. *Held, further*, that as the action in trover affected only A., and as the mortgage was valid between A. and B., the fact that A. and B. were both cognisant of and participants in the fraud actual or attempted on the third party was immaterial: *Harvey* v. *Harvey*, 13 R. I.

Agreement for Return of Property.—A litigant desiring the services of an attorney, gave him the following instrument in consideration of services to be rendered in a pending case: "Received of J. J. Findley and W. F. Findley $25 in full payment for one black cow, about six years old, and one calf now belonging to said cow, about two months old, said cow being the cow I bought of Bob Reed. It is agreed by the purchasers of the above property and Austin Hughes, the signer of this receipt, that said Hughes shall retain the property and use the same from this date to the first day of October next, at which time should the said Hughes pay to said Findleys $25, then the property to remain said Hughes's but if the money be not paid that day the property to be delivered up to the said Findleys" *Held*, that this paper was a mortgage, and did not pass title to the property described therein: *Findley* v. *Deal*, 66 Ga.

Purchase of by Owner of Land— When kept Alive—A mortgage lien purchased by the owner of the equity of redemption will, in the absence of a contrary intention manifest to the court, be kept alive in equity for the purchaser's protection against an intervening encumbrance and will not merge: the rule being the same whether the purchaser takes an assignment of the whole mortgage lien or a release or quitclaim of the mortgagee's interest in the estate held by the purchaser: *Duffy* v. *McGuiness*, 13 R. I.

Municipal Bonds.

Signature of Judge de facto but not de jure—Validity.—County bonds issued by a de facto county court, sealed with the seal of the court, and signed by the de facto president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not de jure one of the justices of the court: *Ralls Co.* v. *Douglass*, S. C. U. S., Oct. Term, 1881.

Pledge.

Larceny of the Thing Pledged by the Pledgor.—Property was pledged as security for a debt. Afterward the pledgor obtained possession thereof for a special purpose, with the consent of the pledgee, and thereupon took the property out of the county, and there was evidence tending to show that the pledgor obtained possession of the thing pledged with the felonious design of depriving the pledgee of his security. *Held*, that the pledgee had a special property in the thing

pledged; that if the pledgor obtained possession of the thing pledged by deception and false pretence, the pledgee could not be deemed to have released his lien or special property therein; that where the taking was with the felonious design to deprive the pledgee of his security, the pledgor would be guilty of larceny of the thing pledged: *Bruley* v. *Rose*, 57 Iowa.

Receipted Bill of Chattels as Security for Debt—Possession by Pledgor—Subsequent Conversion by Pledgee.—A receipted bill of parcels of chattels, purporting on its face to be as security for a debt, is a pledge and not a mortgage; and if the pledgee, after receiving possession of the chattels, permits the pledgor to resume possession of them and to hold them until his death, he cannot by then taking possession of them, defeat the right of the administrator to maintain against him an action for their conversion: *Thompson* v. *Dolliver*, 132 Mass.

SHERIFF. See *Contempt.*

TAXATION. See *Domicile.*

UNDUE INFLUENCE. See *Will.*

UNITED STATES COURTS. See *Errors and Appeals.*

VENDOR AND VENDEE.

Part Payment—Purchase of Title of Vendor at Sheriff's Sale.—Where a vendor of land in possession thereof under contract of purchase from his vendor, but with only part of the purchase-money paid, bought the property to protect himself at a sheriff's sale under a fi. fa. against his vendor, he was not thereby relieved from complying with his contract of purchase, but could set off the amount so expended by him against the balance of purchase-money due the vendor.—*English* v. *English*, 66 Geo.

WARRANTY.

Covenant of—Outstanding Equitable Title.—The mere fact of the existence of an equitable title in a third person, cannot be set up in an action of law, as a breach of any of the usual covenants in a deed conveying the legal title: *Wilson* v. *Irish*, 57 Iowa.

Where the covenantee takes, or has power to take, possession under his deed, he cannot complain of an outstanding equitable title, until it is successfully asserted: *Id.*

WATERS AND WATERCOURSES

Right of Riparian Owner—Injunction—Reservoirs.—The right of a riparian owner to have the water of the stream flow through or by his land in its natural purity and without appreciable pollution caused by owners above him, is well settled, is a part of his property, and will be protected by injunction. Nor is the right modified by the fact that the flow of the stream has been increased by reservoirs built along its upper course: *Silver Spring Bleaching and Dyeing Co.* v. *The Wanskuck Co.*, 13 R. I.

Right to take Driftwood—Wreck floated Ashore not Within.—By a deed of partition A. received the right to have to himself and his heirs

"exclusively all the sea manure and drift stuff which lands on the West Shore," also to have the right of tipping the same and carting away at their pleasure by a road or way leading on the bank of said West Shore clear of the gullies." *Held*, that this right did not embrace goods floated ashore from a wrecked vessel so as to entitle A. to the salvage as against the riparian owner. *Held, further*, that the right was confined to such stuff as A. could collect and legally appropriate, not such as A. must hold for or deliver to a known owner: *Watson* v. *Knowles*, 13 R. I.

WILL.

Costs—Services of Detective.—A claim for services rendered by a detective employed by the counsel of the principal legatee, such services being valuable in establishing the will, may be allowed and paid out of the estate: *In re Will of Joseph L. Lewis*, 35 N. J. Eq.

Undue Influence—Evidence.—That the draughtsman of a will was made the executor, and his relations received a considerable portion of the estate devised, does not raise any presumption of undue influence over the testator, which must be rebutted by proof: *Carter* v. *Dixon*, 66 Ga.

A testator may have his preferences, dislikes and animosities toward his heirs and may be guided by them in the disposition of his estate; still if he is competent in mind, and makes a will freely and voluntarily, these conditions of mind will not *per se* destroy his testamentary capacity. And though prejudices may be unfounded, still if they are not used to coerce and control his will or impose a fraud upon him, they will not avoid his will: *Id.*

Where the only relevancy of a difficulty is to show the state of feeling between parties, the fact of the difficulty may be admissible, but its particulars are not: *Id.*

Undue influence over a testator must be satisfactorily established by other evidence than his declarations, although they are admissible to show the extent and effect of such influence: *Rusling* v. *Rusling*, 35 N. J. Eq.

WITNESS. See *Evidence.*

Expert—Who is—How Competency Decided.—Whether a witness is qualified to testify as an expert is a preliminary question for the presiding judge, whose decision is conclusive, unless it appears upon the evidence to have been erroneous or to have been founded upon some error in law: *Perkins* v. *Stickney*, 132 Mass.

A treasurer of a mill corporation, whose only knowledge of the quality of the coal burned in his mill is derived from the weekly reports of his engineer, is not qualified as an expert to testify as to such quality, although he has bought all the coal used in his mill for several years: *Id.*