ABSTRACTS OF CASES

Selected from the current of American and English Decisions.

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BANKS—FORGED CHECKS—LACHES.

A banking corporation having allowed over three months to elapse before it returned to a depositor a forged check drawn on his account which it had paid, could not defend an action brought for the amount of the check upon the ground that the depositor was estopped by his laches in not giving the bank notice of the forgery immediately upon the return of the check, it having been shown that such notice would not have enabled it to relieve its loss: Jain *v.* London and San Francisco Bank, Supreme Court of California, Dec. 19, 1891 (27 Pac. Rep., 1100).

BANKS—REFUSAL TO PAY CHECKS.

Where a bank refuses to honor the check of a depositor engaged in business, who has sufficient funds on deposit to meet the check, it is liable therefor in substantial damages, even though the refusal was caused by a mistake, and there is no evidence of special damage or actual malice: Schaffner *et al. v.* Ehrman *et al.*, Supreme Court of Illinois, Oct. 31, 1891 (28 N. E. Rep., 917).

CHATTEL MORTGAGES—PRIORITIES OF.

An unrecorded mortgage upon chattels, though unaccompanied by any change of possession, will prevail over a subsequent recorded mortgage given to secure a prior indebtedness, provided the earlier mortgage was not kept from the records by the mortgagee for any fraudulent purpose.

The date of the chattel mortgage covering the machinery and most of the property in a mill is not affected by a subsequent agreement between mortgagor and mortgagee to substitute one article mentioned in the mortgage for another, and altering the wording of the mortgage to that effect: L. O., 78 Atky. Milton *v.* Boyd, Court of Chancery of New Jersey, Nov. 5, 1891 (22 Atl. Rep., 1078).

COMMON CARRIER—RECOVERY OF DAMAGES FOR NEGLIGENCE.

Damages may be recovered by a widow for mental suffering resulting from the negligence of a railroad company in failing to carry promptly the corpse of her husband: Hale *v.* Bonner, Supreme Court of Texas, Oct. 30, 1891 (17 S.W. Rep., 605).

CONSTITUTIONAL LAW—CONTRACT IN REFERENCE TO TAXATION.

A company, who owned a bridge over a navigable stream forming the boundary of two States, for certain concessions granted by a city situated at one of the termini, gave it the right to assess and tax as realty that part of the bridge which spanned the river. Held, that the collection of

such a tax on the part of the city was not a regulation of commerce between the States and (by inference) that a State had a right to enter into a contract, like the one in question, by which it secured the right to tax property beyond its jurisdiction: Henderson *v.* Bridge Co., 141 U. S., 679, December 7, 1891.

CONSTITUTIONAL LAW—TAXATION—TAKING OF PRIVATE PROPERTY.

A law providing that the cost of sewers in a certain district shall be assessed against each lot of ground within the district in the proportions which the area thereof bears to the area of the whole sewer district, exclusive of public highways, is constitutional: City of St. Joseph *v.* Farrell, Supreme Court of Missouri, Nov. 9, 1891 (17 S. W., 497).

CONVEYANCES—FRAUDULENT GIFTS.

Where a father makes a deed of gift of land to his son at a time when he believes his assets will cover his liabilities, though he is really insolvent, such a conveyance cannot be set aside on the ground that it is a fraud upon creditors: Second National Bank *v.* Merrill Co., Supreme Court of Wisconsin, Dec., 1891 (50 N. W. Rep., 503).

CONVEYANCE, FRAUDULENT—NOTICE TO AGENT OF FORECLOSURE.

When an agent for the purchase of real estate has sufficient notice before paying the consideration money that the conveyance to his principal is in fraud of the creditors of the grantor, the conveyance will be set aside on application of the creditors of the grantor, though the grantee personally had no knowledge of the fraud: Aultman & Co. *v.* Utsey, Supreme Court of South Carolina, Nov. 12, 1891 (13 S. E., 848).

ELECTION—EFFECT OF DEATH OF CANDIDATE ON DAY OF VOTING.

If one of two candidates for an office dies on election day, while the election is in progress, a certificate of election will not be awarded to the other candidate if the returns show that he did not receive a majority of the whole number of votes cast: Howes *v.* Court of Appeals of Kentucky, Nov. 17, 1891 (17 S. W. Rep., 575).

EQUITY—WHEN EXECUTION OF JUDGMENT IN PROCEEDINGS AT LAW WILL BE STAYED.

When one who is the plaintiff in an action of forcible entry and detainer, having been ejected by the defendants from property which he had a right to hold until a debt due by the defendants to him under contract was paid, before the trial enters into an agreement with the defendants stating the sum which is due him by the defendants under the contract, an offer to pay this sum of money by the defendants is an equitable ground for staying the suit at law for forcible entry or detainer, or staying the execution of a judgment in such suit delivered in plaintiff's favor. The equitable ground does not arise until after the offer to pay the sum of money agreed upon as a discharge of the contract, and, therefore, though, as in this case, the offer to pay the money was not made until after the decree in favor of the plaintiff in the suit for forcible

entry and detainer had been affirmed by the Supreme Court, it nevertheless constitutes a valid equitable ground for enjoining the plaintiff in ejectment from taking advantage of the decree: Johnson *v.* St. Louis Railway, 142 U. S., 602, Nov. 16, 1891.

EXECUTION—SALE.

A trunk purchased at an execution sale was afterward found to contain certain bonds and other choses in action belonging to the judgment debtor. Held, that the purchaser did not take title to the bonds, as at common law choses in action generally could not be taken in execution; and this rule still prevails except where changed by statute: Crawford *v.* Schmitz, Supreme Court of Illinois, Nov. 24, 1891 (29 N. E. Rep., 40.)

EXTRADITION—TRIAL FOR DIFFERENT OFFENCE—WAIVER OF PRIVILEGE—HABEAS CORPUS.

(1) The rule of law in cases of foreign extradition, that a person extradited under the provisions of a treaty cannot be prosecuted for a different crime than the one specified in the warrant of extradition, applies with equal force in cases of extradition between the States of the Union: and a person who has been surrendered under extradition proceedings by one State to another, cannot, unless he waives the privilege, be lawfully tried for a different crime from that for which his extradition was obtained, while he is in custody thereunder. (2) If the accused asserts his privilege before trial, and objects to the trial on the ground that his indictment is for a crime other than that for which he was extradited, he is entitled to its benefit, although he did not plead the privilege in abatement of the indictment, and although he entered a plea of not guilty. (3) A proceeding in error and not a habeas corpus is the appropriate remedy for the review and correction of errors committed by courts while acting within the sphere of their authority. But where a court has acted outside of its jurisdiction in enacting or issuing an order or process, habeas corpus is the appropriate remedy for obtaining a discharge from imprisonment under such order or process: *Ex parte* McKnight, Supreme Court of Ohio, Nov. 17, 1891 (28 N. E. Rep., 1034).

FEDERAL COURTS—REMOVAL OF CASES FROM STATE COURTS.

Whether in an action to annul a judgment in a State Court the cause can be removed to the Circuit Court of the United States, if the parties are citizens of different States, depends upon the question whether the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or to an appeal, on the one hand, or, on the other, to a bill in equity to set aside a decree for fraud in obtaining thereof. In the former case it cannot be removed, but in the latter case the proceeding is an original and independent one, and the cause may be removed to the Federal Courts.

If the bill in equity to set aside the decree on the ground of fraud does not allege that some of the necessary proof establishing the fraud was discovered after the judgment at law was rendered, and after the

legal period within which new trials could have been obtained had elapsed, and that the evidence could not have been obtained by diligence within such time, then, since on the face of the bill relief in equity could not be granted without breaking the rule of equity which requires diligence, and since the object of the suit is merely to obtain a review in the Circuit Court of the United States sitting in equity of issues that were or by proper diligence could have been fully determined in the suit at law in the State Court, it is proper for the State Court to refuse to recognize the right of removal.

But when, as in this, case it is distinctly alleged in the bill that the fraud was discovered after the judgment had been rendered, and the legal time for a new trial had expired, there existed a right of removal to the Circuit Court of the United States, the parties being citizens of different States, and it was not for the State Court to disregard the right of removal upon the ground simply that the amendments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, it was for that court to determine whether the judgment in the State Court had been obtained by fraud.

Under the general principles of equity, one who is threatened with a multiplicity of suits depending upon the same facts, can file a bill to compel the plaintiffs to bring one suit, in order finally to determine the matter in dispute in all the cases; therefore, when under an agreement of counsel, the result in each of the cases not tried is made to depend upon the result of the one tried, and all the cases go to judgment as the result of the trial of that one, a proceeding by petition for an injunction to restrain the plaintiffs from taking advantage of the judgments thus obtained can, on the filing of the proper bond, be removed into the Federal Courts, the aggregate amount of the judgments exceeding three thousand dollars, though each judgment is for less than five hundred.

While a Federal Court is by statute prohibited from granting a writ of injunction to stay proceedings in a State Court, it may, as between the parties before it, adjudge that the plaintiffs in a State Court shall not enjoy the inequitable advantage obtained by his judgments, for a decree to that effect would operate upon him and not upon the State Courts. Marshall *v.* Holmes, 142 U. S., 589, Nov. 9, 1891.

GARNISHMENT—PROPERTY IN HANDS OF BENEVOLENT ASSOCIATION SUBJECT TO.

Money paid to the treasurers of a benevolent association, upon assessments, who are bound to make monthly returns of such payments, is held by them as trustees for the association, and is subject to garnishment as its property: Supreme Court of Rhode Island, Aug. 1, 1891, Jepson *v.* Fraternal Alliance (23 Atl. Rep., 15).

GRANT OF COAL UNDER LAND—WHAT INCLUDED IN.

A conveyance of all the merchantable coal under a certain tract of land confers upon the lessee the right to dig a tunnel into an adjoining

mine owned by him and remove the coal therefrom. A grant of all coal in a mine is a grant of the space occupied by the coal—STERRETT, MCCOLLUM and MITCHELL, J. J., dissenting: Lillibridge *v.* Lackawanna Coal Co., Limited, Supreme Court of Pennsylvania, Oct. 5, 1891 (22 Atl. Rep., 1035).

INSOLVENT—STOCK OF, ISSUED FOR PATENT IN NAME OF WIFE.

One who has a patent cannot, if insolvent, sell the same to a company and have shares of stock issued in his wife's name when she paid nothing therefor, as such an arrangement is merely a scheme to deprive his creditors of his future earnings: Markham *v.* Whitehurst, Supreme Court of Georgia, Nov. 4, 1891 (13 S. E. Rep., 904).

INSURANCE—CANCELLATION OF POLICIES.

Where an act of the legislature declares the charters of insurance companies of a certain class forfeited unless the provisions of the act are complied with within a limited time, the outstanding policies of such companies, issued before the passage of the repealing act, are not cancelled, nor does the fact that an outstanding policy-holder has received notice of the dissolution of a company affect his rights: Manlove *v.* Commercial Ins. Co., Supreme Court of Kansas, December, 1891 (27 Pac. Rep., 979).

INSURANCE—POLICY IN FAVOR OF CHILDREN NON-COLLECTABLE BY ADMINISTRATOR WHERE THERE ARE NO CHILDREN BORN.

Where an insurance company by its policy agrees "to pay the sum of the insurance to the children of the insured," and the person so insured died before any children are born, her administrator cannot recover the amount of the insurance: McElwee *v.* New York Life Ins. Co., U. S. Ct. E. D. Mo., Oct. 28, 1891 (47 Fed. Rep., 798).

JURIES—COMPETENCY OF.

A person is not incompetent to sit as a juror in the trial of a defendant charged with maintaining a place for the sale of intoxicating liquors, because he is shown to be a member of an organization whose object is the "promotion of temperance among its members by moral suasion:" State *v.* Estlinbaum, Supreme Court of Kansas, November 7, 1891 (27 Pac. Rep., vol. 27, 996).

JURISDICTION—FEDERAL COURTS—SUITS BY RECEIVER OF NATIONAL BANK.

The Circuit Courts of the United States have jurisdiction of suits brought by a Receiver of a National Bank, to recover indebtedness due to the bank, without regard to the amount involved: Yardley *v.* Dickson, U. S. C. Ct. E. D. Pa., October 18, 1891 (47 Fed. Rep., 835).

JURISDICTION—FEDERAL COURTS—INQUIRY INTO CONSTITUTIONALITY OF STATE STATUTES UNDER WRIT OF HABEAS CORPUS.

The Courts of the United States have jurisdiction in the case of a person held in custody by virtue of a judgment of a State Court, under a

State statute, which is alleged to be in violation of the Constitution and of a treaty of the United States, to inquire upon *habeas corpus* into the validity of such statute: *In re* Wong Yung Quy, U. S. C. Ct. S. Cal., February 5, 1880 (47 Fed. Rep., 717).

LICENSE LAWS—SALE OF LIQUOR BY SOCIAL CLUB.

A social club which purchases liquors in large quantities at wholesale, and serves them by the drink or the bottle at retail to its members, who, upon receiving them, sign a ticket with the cost price marked thereon, which tickets are paid for monthly or in cash, is required to procure a licence under the provisions of a city ordinance requiring licences to be obtained by places where liquors are retailed: Kentucky Club *v.* City of Louisville, Ct. of Appeals of Kentucky, Dec. 3, 1891 (17 S. W. Rep., 743).

LIMITATIONS, STATUTE OF—FORECLOSURE OF MORTGAGE.

Where there is a legal and equitable remedy in respect to the same subject-matter, the latter is controlled by the same statutory bar as the former. Therefore, when recovery on a note is barred by the statute of limitations, foreclosure of a mortgage given to secure payment of the note is also barred: Harding *v.* Durand, Supreme Court of Illinois, Oct. 31, 1891 (28 N. E. Rep., 948).

NEGLIGENCE OF CONTRACTOR—LIABILITY OF EMPLOYER.

The employer is not responsible for the actions of his employee who carries on an independent business, and who is not subject to the direction and control of the employer.

A street railway company, having authority to construct a railway in the city of Atlanta, made a contract with the Thompson-Houston Electric Company to construct the road. Owing to the negligence of the servants of the latter company the plaintiff was injured. Held, in an action against the Street Railway Company and the Thompson-Houston Electric Company jointly, verdict having been found for plaintiff against both companies, that the verdict against the railway company should be set aside, and that against the Thompson-Houston Electric Company sustained: Fulton County St. R. Co. *et al. v.* McConnell, Supreme Court of Georgia, Oct. 19, 1891 (13 S. E. Rep., 828).

NEGOTIABLE SECURITIES—PLEDGES AS COLLATERAL.

While as a general rule a pledgee of negotiable securities as collateral security is not permitted in his dealings with the securities to accept from the parties bound in discharge of them anything less than their face value, yet where there is an agreement of all the parties to the securities, a compromise will be sustained. Therefore, where one of the two obligors, jointly indebted as principals, pledges certain choses in action as collateral security for the joint debt, the pledgee may, with the consent of the pledgor, accept less than the face value of such collateral in settlement of the same, without making himself liable to account to the other obligor for more than the sum actually received by him: Foltz *v.* Hardin, S. C. Ill., Oct. 31, 1891 (28 N. E. Rep., 786).

NOTE—RELEASE OF SURETY ON.

In a suit upon a promissory note, the surety claimed a discharge on the ground that the maker had paid $100 on account in consideration of extension of the time of payment, the surety's original obligation being thereby altered. Held, that as it requires an additional valuable consideration, something beyond part payment of the debt, to bind the promisee to the observance of even an express promise to indulge, the original obligation was not altered, as the holder could have brought suit at any time after the note had matured, and the surety was therefore not discharged. Hughes *et al. v.* Southern Warehouse Co., Supreme Court of Alabama, Nov. 5, 1891 (10 So. Rep., 133).

RAILROAD, CONSTRUCTION OF—CONSEQUENTIAL DAMAGES.

Where by reason of the construction of a railroad in proximity to lands, they are rendered less valuable, damages may be recovered for such depreciation in value, although no part of the land is taken, nor the ingress or egress of the owner thereof disturbed, nor his easement in a public highway interfered with: Fort Worth and Rio Grande Rly. Co. *v.* Downie, Supreme Court of Texas, Nov. 27, 1891 (17 S. W. Rep., 620).

RAILWAYS—ACTION AGAINST BY PASSENGER.

Where the agent of a railroad company delivers to a passenger a ticket which is incorrect in that it does not properly describe the trip, which ticket the conductor refuses to accept, and the passenger, being without means to pay his cash fare, is ejected, he is not restricted to an action of assumpsit for breach of contract, but may bring an action of tort for damages: Pouilino *v.* Can. Pac. Rwy. Co., U. S. Ct. E.D. Mich., Oct. 13, 1891 (47 Fed. Rep., 85).

STOPPAGE IN TRANSITU—LOSS OF RIGHT BY CONSIGNMENT OF BILL OF LADING AS COLLATERAL SECURITY.

The assignment of a bill of lading as collateral security for the payment of a loan prevents the consignor from exercising his right of stoppage in transitu, until he has discharged the debt secured by such transfer: Mo. Pac. Rwy. Co. *v.* Heidensheimer, Supreme Court of Texas, Nov. 10, 1891 (17 S. W. Rep., 708).

TAXATION—STOCK IN UNINCORPORATED FOREIGN EXPRESS COMPANIES.

The stock of a foreign express company, which is in the nature of a partnership, not being incorporated, but whose stock is divided into shares which are transferable, liable to assessment, and considered as stock by the commercial world, is taxable under a statute which includes all stocks except those issued by the United States: Lockwood *v.* Town of Weston, Supreme Court of Errors of Connecticut, Nov. 1, 1891 (23 Atl. Rep., 9).

TRADE-MARKS—USE IN A DIFFERENT CONNECTION NOT RESTRAINED.

The word "Celluloid," being originally a fancy and arbitrary name, is a valid trade-mark, although it has since been adopted by the public as the common appellation of the substance manufactured. But its use to designate a particular brand of starch is not calculated to deceive the public as to create the impression that it is in any way connected with the substance commonly designated by that name, and its use in that manner will not be enjoined: Celluloid Mfg. Co. *v.* Read, U. S. C. Ct. D. Conn., October 7, 1891 (47 Fed. Rep., 712).

TRUST—DISSOLUTION OF.

Where a woman created a trust to secure her property from the control of her husband, from whom she was afterward divorced, and sought a dissolution of the trust on the ground that the purpose of its creation no longer existed, and it appeared that her children had a beneficial interest in the trust fund, and had not assented to the termination of the trust, the Court refused to decree a dissolution: *In re* Thurston, Supreme Jud. Court of Mass., November 19, 1891 (29 N. E. Rep., 53).

VENDOR'S LIEN.

Owners of real estate conveyed in fee, taking two promissory notes to secure a balance of unpaid purchase money. Each bore the indorsement of a security. On non-payment of the notes at maturity, the appellees filed two bills to enforce a vendor's lien upon the land. Held, that a vendor who has conveyed the property and accepted a distinct security for the purchase money, as a bond or note with security, must be presumed to have waived the vendor's lien upon the land: Kinney *et al. v.* Ensminger, Supreme Court of Alabama, November 6, 1891 (10 Los. Rep., 143).

WILL—CONSTRUCTION OF.

A testator in the first clause of his will devised certain real estate to his wife, her heirs and her assigns, and in the second clause devised the residue of his estate to her for life with a power of disposal. He then directed that if any of his estate should remain undisposed of by his wife at her death, it should be equally divided among his children, and declared "This proviso is to apply to all my estate." Held: The second clause reduced the estate granted by the first clause from a fee to a life estate with power of disposal. A power of sale superadded to a life estate does not enlarge it to a fee: Walfor *v.* Hemmer *et al.*, Supreme Court of Illinois, Oct. 31, 1891 (28 N. E. Rep., 806).

WRITS—SUMMONS—SERVICE OF NON-RESIDENT SUITOR, WHO IS ALSO A WITNESS, NOT EXEMPT.

An ordinary non-resident suitor who is personally interested in the result of the suit, though he may also testify in the trial as a witness, is not exempt from the service of a summons in another suit: Supreme Court of Rhode Island, Aug. 1, 1891, Copewell *v.* Sipe (23 Atl. Rep., 14).