ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY

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CARRIERS—SUFFICIENCY OF CAR.—A shipper of live stock is not estopped from setting up the defect of a railroad car by which his stock is injured, by a stipulation of the contract for carriage that he had examined the car provided for transportation of the stock and found it in good order and accepted it as suitable and sufficient for the purpose: Louisville and Nashville Railway Co. *v.* Dies, Supreme Court of Tennessee, January 30, 1892, Lurton, J. (18 S. W. Rep., 266).—*H. L. C.*

CONFLICT OF LAWS—STATUTE OF FRAUDS—LEX FORI.—Defendant made a parol agreement with plaintiff to lease him certain land situate in the State of Illinois, and on defendant's refusal to hold to the lease, plaintiff sued to recover damages for the breach of the contract, bringing the suit in the State of Indiana. The lease was within the Statute of Frauds of Illinois, but not within the statute of Indiana. Held: That the Statute of Frauds of Illinois was a matter of remedy incorporated into the contract as affecting its nature and obligatory character, and as the action would not lie in Illinois, it would not lie in Indiana: Cochran *v.* Ward, Appellate Court of Indiana, January 19, 1892, Crumpacker, J. (29 Northeast. Rep., 795).—*W. W. S.*

DISCRIMINATION BETWEEN A RESIDENT AND NON-RESIDENT—CONSTITUTIONAL LAW—FISHERIES—PLANTING AND GATHERING OYSTERS BY A NON-RESIDENT.—A statute of New York made it a misdemeanor for a non-resident of the State to plant or gather oysters in the waters of the State under certain conditions. Held: That the discrimination between residents and non-residents of the State was not unconstitutional, as it was a legitimate exercise of the power of the legislature over the common property of the citizens of the State: People *v.* Lowndes, Court of Appeals of New York, January 20, 1892, Bradley, J. (29 Northeast. Rep., 751).—*W. W. S.*

CONSTITUTIONAL LAW—EMINENT DOMAIN—EXERCISE OF POWER BY UNITED STATES—COMPENSATION.—Lands necessary for the improvement of a harbor cannot be acquired by the United States under the power of eminent domain, where the Act of Congress authorizing the improvements provides that the title to the lands acquired for such purpose shall be vested in the United States without charge to the latter: *In re* Montgomery, District Court of the United States, District of New Jersey, January 19, 1892, Green, J. (48 Fed. Rep., 896).—*H. L. C.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TAXATION OF TRADES.—A statute of North Carolina provided that those engaged in buying and selling certain goods should pay, in addition to an *ad valorem*

tax on their stock, a license tax on the total amount of their purchases in and out of the State. Held: That this statute, although imposing a tax on articles purchased outside of the State, was not a regulation of interstate commerce, because the license was to carry on a business strictly intra-state, and therefore the tax was not repugnant to the Constitution of the United States: State *v.* French, Supreme Court of North Carolina, February 16, 1892, Clark, J. (29 Northeast. Rep., 383).—*W. W.S.*

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURTS OF THE UNITED STATES.—The Constitution of the State of Nebraska provided that any one to hold office in the State must have been for two years previous to his election a citizen of the United States. The Supreme Court of the State held that one Boyd, who had received the highest number of votes for the office of Governor, had not been a citizen of the United States for two years previous to his election. Held: That the Supreme Court of the United States had a right to review the action of the State Court, for that Court's conclusion involved the denial of a right or privilege under the Constitution and laws of the United States: Boyd *v.* Thayer, February 1, 1892, Chief Justice Fuller (143 U. S., 135), Field dist.—*W. D. L.*

CONSTITUTIONAL LAW-POWER OF CONGRESS TO PROHIBIT THE USE OF THE MAILS TO DISTRIBUTE LOTTERY CIRCULARS.—The power to regulate the mails of the United States is completely and exclusively vested in Congress, that body having the absolute discretion to say what things shall or shall not be carried by the mail, and therefore the Act of Congress making it a misdemeanor, punishable with fine and imprisonment, to send advertisements of lotteries through the mails, is constitutional: *In re* Rapier, February 1, 1892, Chief Justice Fuller (143 U. S., 110).—*W. D. L.*

CONTRACT, DAMAGES FOR BREACH OF—RECOVERY OF COST OF ADVERTISING TO COUNTERACT EFFECT OF BREACH—REDUCTION OF PRICE—MEASURE OF DAMAGE.—A contract entered into between two persons provided that one of them should not sell a proprietary article within a certain district. In violation of this contract the prohibited party afterward made sales of the article within the specified territory. It was held that the amount spent in advertising to counteract the effect of the violation of the contract could not be recovered as damages. The proper remedy was an injunction to prevent its sale in the first instance. Nor could any recovery be had upon a bill for injunction and account of the damage suffered by a reduction in price of the article to meet a cut in price on the part of the party violating the contract; all that could be recovered was the defendant's profits: Fowle *v.* Parke, Circuit Court of the United States, Southern District of Ohio, January 22, 1892, Sage, J. (48 Fed. Rep., 789).—*H. L. C.*

CONTRACTS—PUBLIC POLICY—RESTRAINT OF TRADE.—Certain stenographers of Cook County formed an association, one of the purposes of which was to establish and maintain uniform rates of charges by restraining all competition between the members. Held: That the asso-

ciation was illegal as in restraint of trade and against public policy, and that one member could not maintain an action against another member for damage resulting from the underbidding of the former by the latter, in violation of the rules of the association: More *v.* Bennett, Supreme Court of Illinois, January 18, 1892, Bailey, J. (29 Northeast. Rep., 888). —*W. W. S.*

CRIMINAL LAW—CONDUCT OF ACCUSED AS EVIDENCE—WITNESS—DEFENDANT AS—CREDIBILITY OF.—Defendant in a murder trial testified on his own behalf. The trial judge instructed the jury that in determining the credibility of the defendant as a witness, they had a right to take into consideration the demeanor and conduct of the defendant during the trial. Held: That this instruction was erroneous: Purdy *v.* People, Supreme Court of Illinois, January 18, 1892, Baker, J. (29 Northeast. Rep., 700).—*W. W. S.*

EVIDENCE—PRIVILEGED COMMUNICATIONS.—A prisoner, charged with assault and battery with intent to commit rape, wrote a criminatory letter to his wife, which he gave unsealed to one of his daughters to hand to her. Before delivery it was taken from that daughter's pocket by another daughter, and offered in evidence at the trial by the prosecution. Upon exceptions to the decision of the trial judge admitting the evidence, held, that the evidence was competent, coming into the hands of the prosecution as it did, although the letter would have been a privileged communication in the hands of the wife or of the daughter to whom it was given. The Court can take no notice of the manner in which papers offered in evidence were obained: State *v.* Mathers, Supreme Court of Vermont, January 8, 1892, Rowell, J. (23 Atl. Rep., 590).—*H. N. S.*

EVIDENCE—PRIVILEGED COMMUNICATIONS.—The doctrine of privileged communications between counsel and client does not apply to a solicitor of patents, who is not an attorney at law: Brunger *v.* Smith, Circuit Court of the United States, District of Massachusetts, January 16, 1892, Colt, J. (49 Fed. Rep., 124).—*H. L. C.*

INSURANCE, POLICY OF—MORTGAGE—ARBITRATION.—A policy of insurance containing a provision that in case of loss, upon request of either party, the loss should be ascertained by arbitration, which should be a condition precedent to the right to sue for the loss, was, by request of the assured, made payable to a mortgagee by a memorandum indorsed thereon by an agent of the company. Held: That the mortgagee was bound by the provision in reference to arbitration by his acceptance of the policy, but that he was not bound by the result of an arbitration entered into between the insured and insurer: Bergman *v.* Commercial Union Assurance Company, Court of Appeals of Kentucky, January 21, 1892, Bennett, J. (18 Southwest Rep., 122).—*H. L. C.*

LEGISLATURE, POWER OF—GIFT OF PUBLIC MONEY.—Article four of the Constitution of California provides that the legislature shall have no power to make any gift of public money. An appropriation, therefore, to an individual in payment of a claim for damages for which the State was not liable either at law or otherwise, was invalid because a gift within the meaning of the Constitution. The doctrine of *Responde at*

Superior does not apply as between the sovereign and a subject employed to carry out a public work or office: Bourn *v.* Hart, Supreme Court of California, February 9, 1892, De Haven, J. (28 Pacific Rep., 951).—*J. A. McC.*

MALICIOUS PROSECUTION—PROBABLE CAUSE—INSTRUCTIONS.—In an action for malicious prosecution, the defendant having caused the arrest of the plaintiff upon a criminal charge, it was held to be error for the trial judge to leave the question of reasonable and probable cause to the jury. The question as to what constitutes reasonable and probable cause is a pure question of law to be decided by the Court after the controverted facts upon which that decision is based have been found by the jury. Neither is it competent for the Court to give to the jury a definition of probable cause, and instruct them to find for or against the plaintiff, according as they may determine, whether the facts are within or without the definition. Such an instruction is only to leave to them in another form, the function of determining whether there was probable cause: Ball *v.* Rawles, Supreme Court of California, February 4, 1892, Harrison, J. (28 Pacific Rep., 937).—*J. A. McC.*

NEW TRIAL—COMMENT BY NEWSPAPER DURING PROGRESS OF TRIAL.—A new trial was granted, where, during the progress of a trial, which extended over several days, statements which were highly prejudicial to one of the parties and calculated to mislead the jury and prevent them from rendering an impartial verdict, appeared from time to time in newspapers of large circulation and influence at the place of trial: Meyer *v.* Cadwalader, Circuit Court of the United States, Eastern District of Pennsylvania, December 8, 1891, Acheson, J. (49 Fed. Rep., 32).—*H. L. C.*

NUNCUPATIVE WILL—REQUISITES AND VALIDITY.—Six days before his death, the testator, in the presence of his wife and children, declared that he was about to make his will by word of mouth; that he desired them to witness that he left everything to his wife. Immediately before he had written the word "nuncupative" on a paper and had added the words "by word of mouth," in order to explain the meaning of the word to a very deaf son. After his death this paper was found in his desk and read: "Nuncupative by word of mouth my will was made on the above date, everything left to my dear wife, Mary W. Fouche, all my real and personal estate and everything I own at the time of my death, William W. Fouche." This was offered as a will of decedent, but probate was refused on the ground that it was not a valid testament. Held: That it was valid, though written in past tense and called "nuncupative" by testator, and though it was not signed below figures which formed no part of the will: *In re* Fouche's Estate, Atkinson's Appeal, Supreme Court of Pennsylvania, February 8, 1892, *Curiam* (23 Atl. Rep., 547).—*H. N. S.*

PARTNERSHIP—WHAT IS.—Persons who jointly buy land to hold for a rise are not partners, and therefore either party can sue the other for reimbursements of allowances made by him on joint account, without there first being a final settlement and striking off a balance: Clarke *v.* Lidway, Mr. Justice Blatchford, January 26, 1892 (142 W. S., 682).—*W. D. L.*

PRACTICE—AMOUNT INVOLVED TO PERMIT AN APPEAL TO THE SUPREME COURT—RAILROAD MORTGAGE—WHAT INCLUDED UNDER.—Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, though separate decrees have been given in favor of each plaintiff, the Supreme Court of the United States has jurisdiction as to all such plaintiffs, though the individual claims of none of the plaintiffs exceed the limit prescribed for an appeal. A railroad mortgage concerning the roadbed and "also all other property real and personal of every kind and description whatsoever and wherever situated, etc., . . . now owned or which shall hereafter be acquired and which shall be appurtenant to or necessary or used for the operation of said road," does not cover land granted by Congress to aid in the construction of the railroad: New Orleans Pacific Railway *v.* Parker, February, 1892, Mr. Justice Brown (143 U.S., 42).—*W. D. L.*

PRACTICE—REMOVAL OF CASE TO FEDERAL COURTS—NO NECESSARY STAY OF PROCEEDINGS UNTIL PAYMENT OF COSTS IN STATE COURTS.—Before a trial in the State Court the defendant petitioned for removal of the case to the Federal Courts. The petition was denied, and on verdict for the plaintiff the defendant took the case through all the courts of the State, and finally appealed to the Supreme Court of the United States, where the judgment in favor of the plaintiff was reversed on the ground that the petition for removal to the Federal Courts should have been complied with. The State Court in consequence taxed the plaintiff over $1,000 costs, and entered a judgment in favor of the defendant for this sum. A transcript having been filed in the Circuit Court of the United States, and the case coming on for trial, the defendant moved for a stay of proceedings until costs in the State Courts were paid. The Court ordered a stay only until the costs ($108.34) in the Supreme Court of the United States were paid. Held: That it was competent in the Circuit Court to exercise its sound discretion to refuse the stay asked for by the defendant. Judgment in favor of defendant affirmed: National Steamship Co. *v.* Tugman, February 1, 1892, Mr. Justice Brown (143 U. S., 29).—*W. D. L.*

RAILROAD COMPANIES—RESPONSIBILITY FOR STATEMENTS OF EMPLOYEES CONCERNING REGULATIONS OF THE ROAD.—A conductor stated to a passenger when he punched his ticket that he had a right to stop over at a certain station. The passenger in consequence stopped over, but, on boarding another train and offering his ticket, was told that the rules of the company did not permit him to stop over on that ticket, and that he must pay his fare in cash. On his refusal he was ejected from the train. In an action against the railroad company, held, under the above state of facts, that the company being responsible for the statements of regulations concerning tickets made by the conductor on the first train, that the plaintiff was rightfully on the second train at the time of his expulsion, and that the company was liable for the act of its conductor in ejecting the plaintiff: Erie Railroad Co. *v.* Winter, February 1, 1892, Mr. Justice Lamar (143 U. S., 60).—*W. D. L.*