# BOOKS RECEIVED.

THE ROMAN LAW OF TESTAMENTS, CODICILS AND GIFTS IN THE EVENT OF DEATH. By MOSES A. DROPSIE. Philadelphia: T. & J. W. Johnson & Co., 1892.

THE LAW OF MANDAMUS. By S. S. MERRILL. Chicago: T. H. Flood & Co., 1892.

SELECT CASES ON EVIDENCE AT THE COMMON LAW, WITH NOTES. By JAMES BRADLEY THAYER, LL.D., Professor of Law at Harvard University. Cambridge: Charles W. Sever, 1892.

A TREATISE ON THE LAW REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LAW. By HENRY CAMPBELL BLACK, M.A. St. Paul, Minn.: West Publishing Co., 1892.

LEADING CASES UPON THE LAW OF TORTS. Selected by GEORGE CHASE, LL.B., Professor of Law in the New York Law School. St. Paul, Minn.: West Publishing Co., 1892.

# ABSTRACTS OF RECENT CASES.

[Selected from the current of American and English Decisions.]

BY

HORACE L. CHEYNEY, HENRY N. SMALTZ, JOHN A. MCCARTHY.

AGENCY—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT—MERCANTILE AGENCIES.—A bank entered into an agreement with a mercantile agency whereby the latter agreed to furnish to the former such information as they might possess concerning the mercantile standing and credit of merchants, etc., stipulating, however, that they should not be responsible for any loss caused by the negligence of any of their employees in procuring, collecting and communicating said information, and that the correctness of information was not guaranteed by them. The bank made application to the agency for information as to the standing of a certain merchant. In response to this call the agent of the mercantile agency knowingly made a false report for the purpose of deceiving the bank and benefiting the merchant. The bank relied upon this information, and sustaining loss in consequence, brought suit against the mercantile agency and a verdict against them was sustained, the Court holding that a principal is civilly liable for the fraud and deceit of his agent, which is committed for the principal, in the course of business and is a part of the agent's employment, and within the scope of his authority, though in fact the principal is ignorant of the act, and this liability is not changed if the agent makes the fraudulent representations not for his employer, but for his own interest and to serve his own private

ends: City National Bank of Birmingham *v.* Dud, Circuit Court of the United States, Southern District of New York, July 16, 1892, SHIPMAN, J. (51 Fed. Rep., 160).—*H. L. C.*

ARBITRATION—REVOCATION OF SUBMISSION.—Two railway companies agreed in writing to submit certain matters to arbitration. Before the award was signed and published, the defendant corporation delivered to the arbitrators a written revocation of their authority to proceed under the submission, signed by its president, and accompanied by the vote of the directors certifying his act. The award having been subsequently signed and published by the arbitrators, an action was brought on the award by the plaintiff corporation. *Held:* That the papers executed by the defendant corporation operated as an unconditional revocation of the authority of the arbitrators, as they had not then executed their powers by publication of the award; and this was negatived neither by the fact that it was agreed that the arbitration might proceed *ex parte* if either party failed to appear, nor by the fact that, before the revocation, the arbitrators had orally announced their decision in respect to certain items in the defendant's statement of claims, as an award must cover all claims submitted and must be mutual, certain and final: Boston and L. R. Corp. *v*, Nashua and L. C. Corp., Supreme Judicial Court of Massachusetts, June 27, 1885, per FIELD, J. (31 N. E. Rep., 752).—*H. N. S.*

ATTORNEY AND CLIENT—CHAMPERTY—WHAT CONSTITUTES.—An attorney entered into an agreement with his client whereby in considera- of the assignment of a judgment to him by his client, he agreed to render legal services in its prosecution and to advance the amount necessary for the expenses of the case, one half of said expenses to be paid by the client if the suit was unsuccessful, and if successful the net proceeds of the judgment to be equally divided. This assignment was attacked by the client's assignee for the benefit of creditors. *Held:* That the contract was not without consideration, nor unlawful on the ground of champerty: Reece *v.* Kyle, Supreme Court of Ohio, June 20, 1892, per SPEAR, C. J. (31 N. E. Rep., 747).—*H. N. S.*

COMMON CARRIERS—DUTY TO STOP TRAIN.—Where a conductor on a train collected a fare to a particular station from one of the passengers, while the train was still within the corporate limits of the city where the passenger had boarded the train, it is his duty to stop the train at the particular station, and failing to do so is a breach of the carrier's public duty, and renders it liable to an action for tort as well as an action on the contract. The Court added: "It was his duty, if he did not intend to stop *at the station* to tell *the passenger so*, decline to take the money, stop the train at once, and allow *the passenger* to get off in the city:" Caldwell *v.* Richmond & D. R. Co., Supreme Court of Georgia, April 27, 1892, LUMPKIN, J. (15 Southeastern Rep., Vol. 15, p. 678).—*W. D. L.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ORIGINAL PACKAGE.—Removing the lid of an original package of oleomargarine, so that it may be examined, is not such a breaking of the package as will destroy its character as an original package: *In re* McAllister, Circuit

Court of the United States, District of Maryland, June 11, 1892, BOND, J. (57 Fed. Rep., 282).—*H. L. C.*

CONTRACT—FRAUD.—The suit was brought to recover damages for an injury. It was in evidence that the plaintiff signed a document releasing the defendants from further liability in consideration of the payment of a sum of money, which sum had been received by the plaintiff. The plaintiff, an illiterate person, testified that when he signed the document the contents was not read to him, and he thought it was an ordinary pay roll. The judge who presided at the trial held that as the plaintiff did not make a tender of the amount received the jury should find for the defendants. *Held:* Error. If the plaintiff had knowingly given a release, and had sought to set aside the same on the ground of fraudulent representation, a tender would have had to have been made of any benefit he had received under the contract containing the release; but as the contention of the plaintiff was that he did not know he was signing an instrument purporting to contain a contract in reference to his injury, a tender of the amount received was not necessary. New trial granted: Butler *v.* Richmond & D. R. Co., Supreme Court of Georgia, November 23, 1891, BLECKLEY, C. J. (15 Southeastern Rep., 669).—*W. D. L.*

COPYRIGHT—DRAMATIC COMPOSITION—STAGE DANCE.—A stage dance, popularly known as the "serpentine dance," and illustrated by a unique combination of lights, shadows and dress, is not a dramatic composition within the meaning of the Copyright Act: Fuller *v.* Bemis, Circuit Court S. D., New York, June 18, 1892, LACOMBE, J. (50 Fed. Rep., 926).—*J. A. McC.*

CORPORATIONS—CORPORATE NAME—INJUNCTION.—The fact that the word "Hygeia" was used by a water company prior to plaintiff's organization; will prevent it from restraining a third company's use of the same word in its corporate title: Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., Supreme Court of New York, June 29, 1892, O'BRIEN, J. (19 N. Y. S., 602).—*J. A. McC.*

DOWER—DIVESTMENT OF BY SUIT IN PARTITION.—A wife is divested of dower in land owned by her husband in common with others by partition thereof in a suit to which her husband is a party, though she is not joined; and such is the case also where before the suit he had conveyed his undivided interest, he and his grantee, but not his wife, being joined as parties: Holley *v.* Glover, Supreme Court of South Carolina, July 14, 1892, MCIVER, C. J. (15 Southeastern Rep., 605).

EQUITY—LACHES.—In an action to vacate a voluntary deed, conveying in trust for the grantor and others property received absolutely under her grandfather's will, evidence that the grantor a few months after its execution was advised by legal counsel, that, while unusual in its provisions, it was unimpeachable; that some years later her father told her that he also had taken and received similar advice thereon; that upon a second opinion, taken more than twelve years after, favorable to its impeachment, she promptly brought action, negatives her laches and

acquiescence: Whitridge *v.* Whitridge, Supreme Court of Maryland, June 7, 1892, McSHERRY, J., (O'BRIEN, J., diss.) (24 At. Rep., 645).—*J. A. McC.*

HABEAS CORPUS—REMOVAL OF PRISONER—JURISDICTION OF CIRCUIT COURT.—A Federal Court has jurisdiction on *habeas corpus* where a person who has been arrested upon a warrant based upon an indictment found in another circuit and is awaiting removal, to look into the indictment, so far as to be satisfied that an offence against the United States is charged and that it is such an offence as may be lawfully tried in the forum to which it is claimed the accused should be removed: *In re* Terrell, Supreme Court of the United States, Southern District of New York, June 28, 1892, LACOMBE, J. (51 Fed. Rep., 213).—*H. L. C.*

INJUNCTION—LABOR UNIONS—INTIMIDATION OF EMPLOYEES.[1]—Where the members of a labor union are interfering with the working of the complainant's mine, and by force, threats and intimidation are preventing employees from working therein, a court of equity will restrain by injunction such labor union and the members thereof from committing such acts if the defendants are insolvent and the threatened acts are such that their frequent occurrence may be expected. The rule that a trespass cannot be enjoined unless upon realty and when the damage is irreparable, and the right at law must have been established, has no application, as no title to realty is involved, and the acts complained of are not a direct trespass upon realty, but only such as indirectly affect the enjoyment of property and other rights. Nor has the rule that equity will not interfere for the prevention of crime any application, the acts complained of not being criminal *per se*, but unlawful only, but which may lead to the commission of other acts purely criminal: Cœur Dalene Consolidated and Mining Co. *v.* Miners' Union of Wander, *et al.*, Circuit Court of the United States, District of Idaho, July 11, 1892, BEATTY, J. (51 Fed. Rep., 260).—*H. L. C.*

INTOXICATING LIQUORS—ORIGINAL PACKAGE.—On the trial of an indictment for selling liquor in violation of law, the defendant's testimony tended to show that he was the agent of a principal who carried on business in another State, and the latter delivered the liquor to a railway company for transportation in bottles, each bottle being enclosed in a paper bag. The company without defendant's knowledge placed the bottles in boxes, and defendant so received them. *Held:* that the bottles and not the boxes were original packages, as they had been received by the carrier as such, and the packing into boxes was without the knowledge of the consignor: Tinker *v.* State, Supreme Court of Alabama, June 21, 1892, per THORINGTON, J. (11 So. Rep., 383).—*H. N. S.*

MECHANICS' LIENS—RIGHTS OF SUB-CONTRACTOR.—A sub-contractor does not lose his right to file a lien on a building by the failure of the principal contractor to keep his agreement with the owner to deliver the building free of all liens, which was entered into after the sub-

[1] For a criticism of this class of cases, see AMERICAN LAW REGISTER AND REVIEW, January, 1892. (1) "Equity Jurisdiction as applied to Crimes and Misdemeanors," by R. C. McMurtrie, Esq.

contractor began work, and of which he had no notice: Cook, *et al. v.* Williams, *et al.*, Supreme Court of Pennsylvania, July 13, 1892, per STERRETT, J. (24 Atl. Rep., 746).—*H. N. S.*

NEGLIGENCE, CONTRIBUTORY—PASSENGER IN PRIVATE VEHICLE.—One who while riding in the private carriage of another at his invitation, is injured by the negligence of a third person, may recover against the latter, notwithstanding the negligence of the owner of the carriage in driving his team may have contributed to the injury, where the person injured is without fault and has no authority over the driver: Union Pacific Railway Co. *v.* Lapsby, Circuit Court of Appeals of the United States, Eighth Circuit, June 13, 1892, SANBORN, J. (51 Fed. Rep., 174).—*H. L. C.*

NEGOTIABLE INSTRUMENT—NOTICE OF PROTEST—RELEASE.—In an action by a holder against the endorser of a promissory note, it was *held:* (1) That the fact that the holder enclosed a notice of protest in an envelope, with a direction to return to the sender, if not called for in so many days, printed thereon, and addressed the envelope to the indorser by street and number, and deposited it in the mail box; and that the letter was never returned to him is sufficient to charge the indorser; (2) part payment by the maker of an overdue note was insufficient consideration to support a promise to extend the time of payment, and the indorser is not thereby discharged: Manchester *v.* Van Brunt, City Court of New York, July 1, 1892, O'BRIEN, J. (19 N. Y. S., 685).—*J. A. McC.*

SALVAGE—PILOT-BOAT—PUBLIC POLICY REGULATING COMPENSATION.—Where a steamship went ashore, through fault of her pilot, and salvage service, in pulling her afloat, was rendered by the pilot boat attending to take off the pilot. *Held:* That it was against public policy that a liberal salvage award should be made to the pilot boat under the circumstances: The Relief, District Court of the United States, District of Maryland, July 2, 1892, MORRIS, J. (51 Fed. Rep., 252).—*H. L. C.*

TRUSTS—MINGLING TRUST FUNDS—ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES.—A trustee who had been directed by the Court to invest the trust fund in real estate mortgages, allowed a firm, of which he was a member, to use these funds without furnishing the security upon which he was authorized to lend them. Shortly after, the firm became insolvent, and executed a mortgage to secure these funds, on the same day that they executed an assignment for the benefit of creditors. A bill was filed, the object of which was to declare the execution of the mortgage part and parcel of the general assignment. *Held:* That in the absence of an agreement in writing, given by the firm at the time the loan was made, to secure repayment of the money by a lien on particular property, which can be identified, the *cestui que* trust, has no more than the rights of a simple contract creditor, and the firm cannot prefer him in an assignment. While the law permits an insolvent to prefer one or more creditors by sale of property in satisfaction of debts, yet a preference in a general assignment, or a mortgage, in which cases

some interest to the debtor remains in the property, is void: Ellison, *et. al., v.* Moses. *et. al.*, Supreme Court of Alabama, May 17, 1892, Per WALKER, J. (11 So. Rep., 347).—*H. L. C.*

WILLS—POWERS IN EXECUTION REVOKED REVIVES PRIOR EXECUTION.—A life tenant, with power to dispose of the land by deed or will, first made a will disposing of the land, and then executed a deed retaining a bond and mortgage. Subsequently, the land was reconveyed to the grantee in satisfaction of the bond and mortgage. *Held:* That the deed was rescinded by the reconveyance, that the power of the life tenant to dispose of the property, was not exhausted thereby; and, therefore, the prior execution of the power by will remained in full force and effect: Burkett *v.* Whittemore, Supreme Court of South Carolina, July 30, 1892, MCIVER, C. J. (15 Southeastern Rep., 616).—*W. D. L.*

---

## ADDENDUM.

INTERSTATE COMMERCE COMMISSION—DISCRIMINATION IN RATES.—Since the above went to press we have received the following important decision relative to the powers of the Interstate Commerce Commission in Circuit Court for the Southern District of New York. The decision is as follows: Upon the petition of the Interstate Commerce Commission was filed in the court under the sixteenth section of the Act to regulate commerce, for the enforcement of its order requiring the defendant to cease and desist from carrying any article of imported traffic shipped from any foreign port upon through bills of lading to any place within the United States at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic, *Held,*

(1) That the proceeding is not defective because the Southern Pacific Company, a connecting carrier participating with defendant in the carriage between certain points, was not made a party defendant herein. If the defendant is violating a proper order of the Commission it should be restrained from doing so and it cannot escape upon the objection that another wrong-doer is also violating it.

(2) The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation. The order prayed for in the petition is granted: Interstate Commerce Com. *v.* Texas & Pacific, October 5, 1892, per WALLACE, J.