DIGEST OF IMPORTANT DECISIONS

REPORTED BETWEEN JANUARY 15 AND FEBRUARY 12, 1893.

CARRIERS AND TRANSPORTATION COMPANIES.

RAILROAD COMPANIES. See CONSTITUTIONAL LAW, 1.

COMMERCIAL LAW.

Cases selected by FRANCIS H. BOHLEN.

BILL OF LADING *as Collateral Security.* See *Infra*, 2.

CONTRACT.

1. *Release of Claim for Personal Injuries—Contract to give Plaintiff Employment—Damages for Breach.*

In settlement of a claim for damages against a railroad company by an employee, the railroad agreed to pay $100 and furnish him with permanent employment. In return he executed a written release of the company's liability in regard to his injury. The company discharged him without cause. *Held:* The action should be for breach of contract, not an action of tort for injuries sustained. The parol promise to employ plaintiff regularly was sufficient consideration for release. The company is bound to employ him as long as he is able, ready, and willing to perform such services as it may have for him to perform. The contract is not void for uncertainty nor against public policy, the company being a railroad company, and a quasi public servant, it not being shown that plaintiff was incompetent to perform such work as the company may give him. The employment is not at will of the company, the consideration having been paid in advance, nor is the contract void under section of statute of frauds relating to agreement not to be performed within one year, it being a contract for personal service which may be terminated by death of the party. Though the written release recites as the consideration as $100 paid by company, the plaintiff may show that the verbal promise to give steady employment formed part of consideration, and was collateral to release, and that the parties did not intend to embody therein the entire consideration. Plaintiff may recover, and the measure of damages is the amount he would have earned under the contract, less what sums he might have earned elsewhere: Penna. Co. *v.* Dolan, Appellate Court of Ind., December 14, 1892, per REINHARD, J., 32 N. E. Rep., 802.

LIENS FOR ADVANCES.

2. *Draft Secured by Bill of Lading—Consignor and Consignee.*

Advances for the purchase of certain cattle were made by a bank on the agreement by the parties to the sale that the bank should have a lien therefor on the cattle until they should be sold by consignees to whom they were to be shipped, and that a draft for the amount should be drawn on the consignees against the proceeds of the sale by them. Such draft

was made and delivered to the bank, with a bill of lading for four carloads of the cattle, but no bill of lading was issued for the two remaining car loads, they being shipped in the name of a third person to enable him to procure a pass to accompany the bank's agent in charge of the shipment. The consignees, before selling the cattle, had notice of the bank's advances and of the draft and bill of lading, and no money was paid nor any right relinquished by them on account of the shipment. *Held:* As to the four carloads included in the bill of lading, that instrument being transferred and delivered as collateral security, the rights of the pledgee are the same as those of an actual purchaser, so far as the exercise of those rights is necessary to protect the holder, and the consignee cannot appropriate the property to his own use in payment of a prior debt. As regards the other two carloads, the verbal mortgage and pledge being accompanied by delivery was good against the consignee even without notice; consignees occupying the position of factors, and not having parted with any legal right, or advanced any money on strength of shipment, stood in no better position than pledgor or mortgagor. Here, too, there was notice. They, therefore, cannot be held innocent purchasers for value. Following on first point: Bank *v.* Jones, 4 N. Y., 497; Holmes *v.* Bank, 87 Pa., 525; Dous *v.* Bank, 91 U. S., 618; Bank *v.* Dearborn, 115 Mass., 219; Emery *v.* Bank, 25 Ohio St., 360; Halsey *v.* Warden, 25 Kan., 128; Bank *v.* Homeyer, 45 Mo., 145; Means *v.* Bank of Randall, U. S. Supreme Court, December 19, 1892, BLATCHFORD, J., 13 S. C. Rep., 186.

PARTNERSHIP.

3. *Married Women — Right to Enter into Partnership with Stranger; With Husband.*

Under the Michigan constitution and statutes giving to married women the right to enjoy their property free from any control of their husbands, and to dispose of it by contract or otherwise as if unmarried, a married woman may become a partner in a firm of which her husband is not a member, but may not enter into partnership with her husband, for this would be to give him a control over her property inconsistent with the purpose of the statute: Vail *v.* Winterstein, Supreme Court of Michigan, December 22, 1892, LONG, J., 53 N. W. Rep., 932.

Under similar statute of Wisconsin, and for same reason, it was held that a married woman could not become member of a firm in which her husband was a partner: Fuller & Fuller Co. *v.* McHenry, Supreme Court of Wisconsin, December 6, 1892, PINNEY, J., 53 N. W. Rep., 896. Under similar statutes similar decisions have been given in Massachusetts: Bowker *v.* Bradford, 140 Massachusetts, 521; Ohio, Payne *v.* Thompson, 44 Ohio, 192; Indiana, Scarlett *v.* Snodgrass, 92 Indiana, 262; Michigan, Bassett *v.* Shepardson, 52 Michigan, 3; West Virginia, Corry *v.* Burgess, 20 West Virginia, 571; Texas, Cox *v.* Miller, 54 Texas, 16; Maryland, Bradstreet *v.* Baer, 41 Maryland, 19. *Contra*, Snow *v.* Caffe, 122 New York, 308, under a statute giving somewhat broader power to married women.

SALE.

4. *Fraudulent Misrepresentation—Damages—Right to Rescind Being Lost.*

The plaintiff was induced to part with his property in exchange for certain mining lands by misrepresentations as to their value as a matter of fact. The plaintiff was entirely ignorant of the value of mining properties, and defendant knew of his ignorance and his reliance on defendant's representations. *Held*, that he had a right to rely upon the defendant's representations, the rule *caveat emptor* did not apply and he could recover in action on the warranty, though by remaining in employ of the mining company for several months in an attempt to make it valuable he has lost his right to rescind: Maxted *v.* Fowler, Supreme Court of Michigan, December 22, 1892, MONTGOMERY, J., 53 N. W. Rep., 924.

CONFLICT OF LAWS.

Cases selected by ALBERT B. RONEY.

TORTS.

1. *Actions for Death.*

Where one domiciled in Kentucky is killed by wrongful act in Tennessee, suit under the Tennessee statute may be brought by an administrator in Kentucky, where there is in force a similar statute: Wintuska's Adm'r *v.* R. R. Co., Court of Appeals of Kentucky, HOLT, C. J., December 17, 1892, 20 S. W. Rep., 819.

2. *Liability of Employer—Negligence of Fellow-servant.*

Under the common law, both in Alabama and Mississippi, a master is not liable for an injury inflicted on one servant through the negligence of a fellow-servant. In Alabama this rule is modified by the Employers' Liability Act, but no similar law is in force in Mississippi. Plaintiff was injured while employed on defendant's railroad as a brakeman, the injury being sustained in Mississippi, through the negligence of his fellow-servants. Plaintiff, a citizen of Alabama, was working for defendant under a contract made in that State, and defendant was a corporation organized under the laws of the same State. *Held*, that plaintiff could not recover in Alabama for the injuries, the action not being maintainable in Mississippi.

The fact that the negligence which produced the casualty transpired in Alabama will not take the case out of the general rule.

The fact that the contract between the parties was made in Alabama does not make the Employers' Liability Act a part of the contract, so that a failure to perform any of the duties prescribed by the Act would render defendant liable for any consequent injury, wherever received.

R. R. Co. *v.* Carroll, Supreme Court of Alabama, MCCLELLAN, J., November 22, 1892, 11 So. Rep., 803.

CONSTITUTIONAL LAW.

Cases selected by WILLIAM STRUTHERS ELLIS.[1]

FEDERAL.

DUE PROCESS OF LAW.

1. *Railroads—Enforcing Liability for Injuries.*

Gen. St. § 1511, makes every railroad liable in damages for the property of persons injured by fire from its locomotives, but allows it to insure any such property. *Held*, not a taking of property from a railroad without due process of law, or a denial of equal protection, within the Fourteenth Amendment of the Constitution of the United States, although the liability thus created is supposed to attach irrespective of negligence: McCandles *v.* Richmond, etc., R. R. Co., Supreme Court of South Carolina, December 17, 1892, POPE, J., 16 S. E. Rep., 429.

PRIVILEGES AND IMMUNITIES.

2. *Trustees.*

Rev. St. Ind. §2988, which provides that it shall be unlawful for any person, association or corporation to appoint a non-resident a "trustee in a deed, mortgage, or other instrument in writing, except wills, for any purpose whatever," is in conflict with Article IV, § 2, of the Constitution of the United States, which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States:" Sherk *v.* City of La., Fayette Circuit Court of Indiana, BAKER, J., October 24, 1892, 52 Fed. Rep., 857.

STATE.

APPROPRIATIONS.

3. *Scalp Bounty.*

The Bounty Law (Sess. Laws, 1889, p. 35), providing a premium for any person who shall kill any wolf, coyote, bear or mountain lion, which premium shall be paid by the county treasurer, and the amount credited to such officer in his settlement for State taxes with the State treasurer, is in conflict with Article V, § 3, of the Constitution, which provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof," and is void: Institute *v.* Henderson, Supreme Court of Colorado, HOYT, C. J., November 21, 1892, 31 Pac. Rep., 714.

JURY TRIAL, RIGHT TO.

4. *Punitive Damage.*

Code 1886, § 2589, allowing the personal representatives of one whose death is caused by wrongful act to recover "such damages as the jury may assess," is punitive in its nature, and requires the jury to assess, without regard to actual compensation, such damages as they may deem necessary to effect the punishment of defendant. Railroad Co. *v.* Shearer, 58 Ala., 672; and Railroad Co. *v.* Sullivan, 59 Ala., 272, followed.

[1] During the temporary absence of Mr. Ellis the cases are selected by one of the Editors.

Such statute is not void as interfering with the constitutional guaranties with reference to arrest, conviction, and punishment in criminal cases: Richmond, etc., R. R. Co. *v.* Freeman, Supreme Court of Alabama, November 21, 1892, McCLELLAN, J., 11 So. Rep., 800.

LEGISLATIVE APPORTIONMENT.

5. *Political Questions—Inequality of Apportionment—Legislative Discretion.*

Mandamus proceedings to test the validity of apportionment acts of the legislature present a judicial question of which the courts have jurisdiction, and not a political question, with which it will not interfere.

In an action by the State, on the relation of a legal voter, against the clerk of the circuit court, sheriff, and auditor of a particular county, to compel them by writ of mandamus to take the necessary steps to hold the election of 1892 for senators and representatives under the apportionment act of March 8, 1879, and to enjoin them from proceeding under Act of March 5, 1891, on the ground that it is unconstitutional, the validity of the latter act must be determined, though it appears by the complaint that relator is not entitled to the relief demanded, because Act of March 8, 1879, is itself unconstitutional: Parker *v.* State, Supreme Court of Indiana, COFFEY, J., December 17, 1892, 32 N. E. Rep., 836. *Held*, that though exact equality in apportionment cannot be attained, the constitution requires the legislature, in apportioning the State into senatorial and legislative districts, to approximate as nearly thereto as may be, and it has no legislative discretion to do otherwise. Act of March 5, 1891, forms forty-three counties into twenty-two districts, to each of which one senator is allotted, eleven of which districts, composed of twenty-three counties, contained 148,496 legal voters, while the other eleven districts, composed of twenty counties, had only 99,609 such voters. *Held*, that such apportionment was not such approximation to equality as the Constitution required, since in voting a population of 248,105 there is a difference of eleven districts as against the other eleven of 48,887. Act of March 5, 1891, assigning a certain county, containing 8688 less voters than the senatorial unit, and another county, with 3716 less, each to two senatorial districts composed in part of other counties, thus enabling such small counties to vote for two senators, while many counties containing four times as many voters as the former county vote for one senator only, is unconstitutional and void, since it violates the rule requiring approximate equality in the apportionment. Such act, denying one county, having more voters than the representative unit, a representative, and giving certain counties, each having less voters than the representative unit, a representative each, and also assigning them to certain districts with other counties, the latter of which are not contiguous, is in violation of the Constitution, and void.

CORPORATIONS.

Cases selected by LEWIS LAWRENCE SMITH.

OFFICERS.

1. *Directors—Powers of—Fraud—Stockholder's Suit.*

The directors of a corporation have the right to execute a mortgage

to secure the corporate indebtedness, but that does not include the right to execute a mortgage to a confederate who is under obligations to carry the corporation paper, which will result in wrecking the corporation. This case was held to be an exception to the general rule that a stockholder's suit must be brought in a Court of Equity. Cites Kimmell *v.* Stoner, 18 Pa. St., 155; Hanley *v.* Balch, *et al.*, Supreme Court of Michigan, December 22, 1892, McGRATH, C. J., 53 N. W. Rep., 954.

2. *Authority—Execution of—Mortgage—Presumption.*

If a deed or contract purport to be sealed with the seal of a corporation, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation until evidence to the contrary has been introduced: Boyce *v.* Montana Gas Coal Co., *et al.*, Supreme Court of West Virginia, November 26, 1892, ENGLISH, J., 16 S. E. Rep., 501.

STOCKHOLDERS.

3. *Purchase at an Over-valuation—Liability for.*

H being indebted to P, agreed to extend and improve a railroad owned by him, organize a company and transfer the railroad to it and give the company's bonds in payment of his debt. He organized the company and transferred the railroad at a gross over-valuation. Bonds were issued and delivered to P. The company afterward showed its insolvency. P obtained judgment on the bonds. *Held*, that P could recover against H's assigned estate on account of stock held for H which he claimed had been paid up by his transfer of the railroad, but on which, in reality, nothing had been paid: Lloyd, *et al. v.* Preston, Supreme Court of the United States, December 19, 1892, SHIRAS, J., 13 S. C. Rep., 131.

See EQUITY, 2.

4. *Subscription—Enforcing Liability of Non-Resident.*

A creditor's bill founded on a judgment recovered in Connecticut against a corporation of that State cannot be maintained in a United States Circuit Court in New York against a citizen of that state to enforce his liability on an unpaid subscription to the stock of the corporation, when no judgment has been obtained or execution issued against the corporation within the latter State, and no allegations are made showing that it is impossible to obtain such judgment: National Tube Works *v.* Ballou, Supreme Court of the United States, December 19, 1802, BLATCHFORD, J., 13 S. C. Rep., 165.

ULTRA VIRES.

5. *Who May Make Defense.*

Where a bill is filed by a party representing himself to be a mortgagee of real estate, for the purpose of enforcing a mortgage which purports to have been regularly sealed, signed and acknowledged by the president and treasurer of a corporation chartered under the laws of the State of New York, which real estate is situated in this State, objection

to the validity of said mortgage cannot be made by the company on the ground that it is *ultra vires*, but must be made by a stockholder or by stockholders of said company: Boyce *v.* Montana Gas Coal Co., *et al.*, Supreme Court of West Virginia, November 26, 1892, ENGLISH, J., 16 S. E. Rep., 501.

CRIMINAL LAW.

Cases selected by C. PERCY WILLCOX.

HOMICIDE.

1. *Homicide in Hot Blood—Instructions.*

Where the evidence on a trial for murder does not show that there was any cause to create a "passion" in the defendant, and so reduce the killing to manslaughter, it is not error for the Court to refuse to instruct the jury as to the law of manslaughter, but if he does do so on a supposed state of facts the judgment will not be reversed: Wolffort *v.* State, 20 S. W., 741, Court of Criminal Appeals of Texas, December 17, 1892, DAVIDSON, J.

LARCENY.

2. *Failure to Return Lost Property.*

Where defendant found a lady's watch, which was marked with the family name of the owner, he knowing at the time that certain ladies had lost a watch at or near the same place, the jury were justified in finding that he intended to appropriate the property to his own use when he failed to return it: Stepp *v.* State, 20 S. W., 753, Court of Criminal Appeals of Texas, December 14, 1892, SIMKINS, J.

3. *Return of Stolen Property.*

Where one unlawfully takes another's property and upon detection hands it back to the owner, it is not a voluntary restitution of the property: Boze *v.* State, 20 S. W., 752, Court of Criminal Appeals of Texas, December 10, 1892, DAVIDSON, J.

CRIMINAL PRACTICE.

Cases selected by C. PERCY WILLCOX.

INDICTMENT.

1. *Witnesses on Bill.*

Where an indictment is drawn against two defendants for an affray and their names marked on the back of bill as witnesses, who were sworn and examined, but a true bill is returned only as to one of the defendants, the indictment will not be quashed. The presumption is that they were examined as witnesses against each other and not each one against himself: State *v.* Frizell, 16 S. E., 409, Supreme Court of North Carolina, December 20, 1892, CLARK, J.

JURY.

2. *Secret Challenges.*

It is reversible error for a Federal judge to direct secret challenges

to be made from separate jury lists, each side being ignorant of the challenges the other side has made: Lewis *v.* U. S., 13 S. C. Rep., 136, Supreme Court of United States, December 5, 1892, SHIRAS, J.

EQUITY.

Cases selected by ROBERT P. BRADFORD.

ASSIGNMENTS.

1. *Fraud—When Within Revised Statutes, § 5021—Preferences.*

A judgment and execution against the makers of promissory notes were set aside in a suit, by the makers' assignee in bankruptcy, as constituting an unlawful preference within the purview of the bankrupt law; the attorneys who procured the judgment having been the makers' attorneys, and aware of their insolvent condition, and of their desire that the holder should be preferred. But it was held that the action of the holder of the notes in procuring such judgment, and issuing such execution, did not amount to actual fraud, within the meaning of § 5021, as amended in 1874, providing that, in cases of actual fraud on the part of the creditor, he shall not be allowed to prove for more than a moiety of his claim; and that the holder of the notes was not precluded by these acts from maintaining an action on the notes against the indorser, who was not a party to the original suit: 106 N. Y., 186, affirmed; Streeter *v.* Jefferson County National Bank, Supreme Court of the United States, SHIRAS, J., January 3, 1893, 13 Sup. Ct. Rep., 236.

CORPORATIONS.

2. *Bill by Stockholders—Laches.*

While a minority of the stockholders of a corporation may maintain a bill in equity, in behalf of themselves and other stockholders, for fraud, conspiracy or acts *ultra vires*, against a corporation, its officers or others who participated therein, when the minority stockholders have been injured by said act they must act promptly, and not wait an unreasonable time. If they postpone their complaint for an unreasonable time they forfeit their right to equitable relief. Nothing will call a court of equity into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive and does nothing. And where a stockholder has notice or the means at hand of becoming acquainted with the contracts made by the corporation in which he is such stockholder, a court of equity will not allow him to remain quiet an unreasonable length of time, with a view of ascertaining whether the contract will result in profit to him, and then repudiate the contract if it has resulted in loss: Boyce *v.* Montana Gas Coal Co, *et al.*, Supreme Court of West Virginia, November 26, 1892, ENGLISH, J., 16 S. E. Rep., 501.

INJUNCTIONS.

3. *Conspiracy—Coercing Employees to Leave Employment.*

An injunction will lie to restrain persons from attempting by force, menaces, or threats to prevent workmen from working on such terms as

they may agree on with any employer: Murdock, *et al. v.* Walker, *et al.*, Supreme Court of Pennsylvania, *per curiam*, 1892, 25 Atl. Rep., 492.

SET-OFF.

4. *Preferences—Balance at Banks.*

Revised Statutes, §§ 5234, 5236, 5242, which require a *pro rata* distribution of the assets of an insolvent national bank and forbid preferences, do not invalidate liens, equities and rights arising prior to and not in contemplation of insolvency. A promissory note was executed to a national bank in consideration of the amount being placed to the credit of the maker on the books of the bank. The maker thought, and had good reason for thinking, that the bank was solvent, but the managing officer of the bank knew it to be insolvent. Before the note matured the charter was forfeited for insolvency and a receiver appointed. *Held*, that the undrawn balance should be allowed as an equitable set-off to the note, and such allowance is not a "preference" forbidden by the National Banking Law: Rev. St., §§ 5234, 5236, 5242, 36 Fed. Rep., 63, reversed; Scott *v.* Armstrong; Farmers' and Merchants' State Bank, *et al. v.* Armstrong, Supreme Court of the United States, FULLER, C. J., December 12, 1892, 13 Sup. Ct. Rep., 148.

SPECIFIC PERFORMANCE.

5. *Agreement to Adopt.*

B agreed in writing to adopt E, and leave her his property at his death, and her parents, in consideration thereof, surrendered all control over her, and she lived with him as his child until her death. *Held*, that the surrender by the parents of all control of E was a valuable consideration for B's promise to adopt her, and that E's heirs would be entitled to a specific performance of the agreement by which B agreed that she should inherit his property at his death, though the instrument of agreement was not sufficient to constitute an adoption: Healey, *et al. v.* Simpson, *et al.*, Supreme Court of Missouri, THOMAS, J., December 19, 1892, 20 S. W. Rep., 881.

6. *Delivery—Statute of Frauds.*

Where an agreement for the sale of land, after being signed by the owners, is put into the custody of a person to be delivered to the purchasers on his being satisfied of their financial responsibility, and he refuses to deliver it, the purchasers cannot compel specific performance, though they are in fact financially responsible, and in such a case there is no delivery to satisfy the Statute of Frauds: Callanan, *et al. v.* Chapin, *et al.*, Supreme Judicial Court of Massachusetts, LATHROP, J., January 11, 1893, 32 N. E. Rep., 941.

TRUSTEES.

Non-Resident. See CONSTITUTIONAL LAW, 5.

7. *Ex-maleficio.*

Where the defendant (a stranger to the title) obtains a conveyance from the plaintiff's grantor of the same land by representing to her, or giving her to understand, that it is in support of her original defective or

invalid deed to the plaintiff, he will be considered a trustee of the title for the plaintiff. To render the defendant chargeable as trustee it is not necessary that he should have sustained a fiduciary relation to the plaintiff as respects the title, or that the plaintiff should have had some claim to the land which he could have enforced against the grantor in the deed. The rights of the third person, in such cases, depends not upon his having some legal or equitable claim to the property before the constructive trust was created, but upon the fact that he acquired such right by the trust, as being the party for whose benefit the property was intended by the owner: Rollins *v.* Mitchell, *et al.* (Marvin, Intervenor), Supreme Court of Minnesota, MITCHELL, J., December 23, 1892, 53 N. W. Rep., 1020.

EVIDENCE.

PAROL.

To Vary Written Agreement. See COMMERCIAL LAW, 1.

BILL OF LADING.

As Collateral Security. See COMMERCIAL LAW, 2.

MUNICIPAL CORPORATIONS AND PUBLIC LAW.

Cases selected by MAYNE R. LONGSTRETH.

CITY COUNCILS.

1. *Franchise—Power to Grant to Electric Railway.*

Where the charter of a city (New Orleans) provided that the common council shall have power to authorize the use of the streets for "horse and steam railroads," the words "horse and steam railroads" are not, *per se*, words of limitation, and the council is empowered to grant such franchise to electric railways; for the public good requires that the common council should be at liberty to place at the service of the public street railroads with all the valuable improvements in the means of propulsion which the ever-advancing spirit of invention and science should from time to time discover, the matter of the public safety and convenience being left to the consideration of council: Buckner *v.* Hart, United States Circuit Court, Eastern District of Louisiana, BILLINGS, D. J., November 18, 1892, 52 Fed. Rep., 835.

ELECTIONS.

2. *"Test Oath" Laws, Validity of.*

A statute requiring an elector, as a prerequisite to registration and the right to vote, to swear that he had not done certain acts, is valid if it does not add to, or alter, the qualifications prescribed in the Constitution; or even then if the power to prescribe the qualifications of voters has been conferred upon the legislature: Shepherd *v.* Grimmett, Supreme Court of Idaho, per Curiam, October 18, 1892, 31 Pac. Rep., 793.

HIGHWAYS.

3. *Plotting—Designation of Termini—Viewers' Report.*

A report of viewers, and draft accompanying the report, which simply indicate the proposed road as starting from an undesignated and undescribed place on the side or margin of a road, and ending at an undesignated and undescribed place on a street, are fatally defective. Designating a point in a public road a snear a borough or township line, or near the corner of a property owner is too indefinite: O'Hara Township Road, Supreme Court of Pennsylvania, GREEN, J., January 3, 1893, 152 Pa. St., 319.

MUNICIPAL CORPORATIONS.

4. *De Facto Liability for Salary of Officers.*

(1) Before the Act of Congress of May 2, 1892, which extended over Oklahoma the laws of Nebraska, the original government of Oklahoma City was not a *de facto* corporation, and had no authority to bind itself or its successors by any agreement. But from the time *de jure* corporations were authorized, Oklahoma City became a *de facto* corporation, and when this was subsequently changed to a *de jure* corporation, the latter became liable for the valid contracts of the former; and plaintiff, who acted as clerk of the common council for the city during its *de facto* existence, is entitled to recover his salary for such period from the *de jure* corporation.

(2) But if, during the same period, plaintiff acted as recorder for the city he cannot recover for such service, because the laws of Nebraska, under which the *de facto* city was acting, made no provision for such an officer in cities of that class: Blackburn *v.* Oklahoma City, Supreme Court of Oklahoma, BURFORD, J., January 6, 1893, 31 Pac. Rep., 782.

PUBLIC OFFICERS.

5. *Abandonment of Office.*

When a statute changing Logan County to Lincoln County is declared unconstitutional, the duly elected probate judge of Logan County, who has accepted the appointment to be probate judge of the new county of Lincoln, cannot oust from office a person who has in the meantime been appointed to be probate judge of Logan County; for a discontinuance of the exercise of official functions, in obedience to a statute which is afterward declared to be unconstitutional during the continuance of the term does not effect an abandonment, or an estoppel to claim the office: Hampton *v.* Dilley, Supreme Court of Idaho, HOUSTON, J., December 26, 1892, 21 Pac. Rep., 807.

6. *Removal by Governor.*

When a statute empowers a governor to suspend an elective officer for cause, and also to remove by and with the advice of the senate, the governor has the sole power to hear and decide as to the existence of the cause, and so long as his action in suspending is within his constitutional power, the courts cannot interfere to arrest his action. He is the exclusive judge, so far as the courts are concerned, of the sufficiency of the proof of the charge, not merely because the courts have been given no

power to review, but also because the senate has been granted such power: State *v.* Johnson, Supreme Court of Florida, RANEY, C. J., December 19, 1892, 11 So. Rep., 845.

TAXATION.

7. *Review of Assessment, Time for.*

Where a statute relating to the correction of erroneous assessment, provides that the board of review shall meet on a certain day and places the provision as to time and place of meeting is mandatory and a condition precedent to any further proceedings, and where a taxpayer appears and is deprived of a hearing by a previous adjournment of the board, it vitiates the tax against him even though the assessment is shown to be just: Township of Caledonia *v.* Rose, Supreme Court of Michigan, GRANT, J., December 22, 1892, 53 N. W. Rep., 522.

MUTUAL RELATIONS.

HUSBAND AND WIFE.

1. *Wife as Husband's Partner.* See COMMERCIAL LAW, 3.

PATENTS.

Cases selected by HECTOR T. FENTON.

CLAIM.

1. *Amendment by Requirement of Patent Office—Acquiescence—Estoppel.*

The patentee claimed "the treatment of the prepared rawhide in the manner and for the purpose set forth;" and *described* a treatment consisting of removing the hair by a sweating process, drying, moistening and pulling, and other processes common in the treatment of hides, together with the application of a certain mixture of tallow, wood tar, and resin, and a second pulling process. The specification also stated that the patentee avoids the use of lime, acid or alkali, and that the use of a preparation substantially like that described was essential to make the hide useful and durable for belting The patent office rejected claims solely for the pulling operation, and for the preserving mixture, on the ground of want of novelty, which rejections were acquiesced in by the patentee. *Held*, that the claim was to be construed as covering the whole process, and was not infringed by a process wherein the hair was removed by lime: Royer *v.* Coupe, *et al*, Supreme Court U. S., December 19, 1892. 13th Sup. Ct. Reporter, 166, affirming 38 Fed. Rep., 113.

CONSTRUCTION.

2. *Limiting Words in Claim.*

Where in a suit on a patent containing in its claims an unnecessary limitation inserted by requirement of the Patent Office without sufficient

reason, as afterward disclosed by the evidence of the state of the act, the expressed limitation cannot be eliminated by the Court by construction, and must be given its due effect accordingly: Syracuse Chilled Plow Co. *v.* Strait, N. D. New York, WALLACE, J., November 28, 1892, 52 Fed. Rep., 870.

INTERFERENCE.

3. *Presumption after Hearing by Patent Office—Aggregation.*

Where a later patent, in suit, was issued on an application, filed after issuance of a prior patent to another for the same invention, in pursuance of a decision by the patent office in interference proceedings with such prior patent, the legal presumptions are that the patentee was the first inventor of the device patented, and his patent *prima facie* evidence thereof. In the case at bar, the evidence of the state of the act disclosed that car brakes had been known similar to the patentee's, but with a single pair of toggle levers to one brake-shoe. *Held*, that by the employment of two pairs of such toggle levers a new and useful result was obtained, which was not a non-patentable aggregation of elements: Pacific Coke Ry. Co. *v.* Butte City Ry. Co., Dist. of Montana, KNOWLES, D. J., November 21, 1892, 52 Fed. Rep., 863.

LICENSE.

4. *Action for Infringement—Parties.*

A, a railroad company, having been licensed, under a patent, to "make and use" a certain improvement in railroad signals, accepted a proposal of defendant (not its employee) to make and set up a set of said signals. *Held*, that the manufacturer was guilty of infringement, and could not justify, as an employee of the railroad company, under its aforesaid license. *Held*, also, that the owner of a naked license to make and use is not a necessary party to a suit for infringements: Union Switch and Signal Co. *v.* Johnson Railroad Signal Co., District of New Jersey, GREEN, D. J., November 16, 1892, 52 Fed. Rep., 867.

5. *Rights of License Under—Assignment of License.*

Where a patentee granted an exclusive territorial license, authority to the licensee is implied to join the owner of the legal title, even against his will, as a party plaintiff in suits against infringers within the licensed territory. An assignment by the licensee of divisional portions of the licensed territory is not sufficient to convey all his rights under the license, and cannot be inferred from the use of the "assigns" in the original grant, unless a manifest intent to confer such power appears clearly therein. Where the invention and right to the patentee was assigned before its issue, and the assignee granted a territorial license under such assignment, and after issue of patent treated such grantee as having a valid license and allowed it to acquire a business thereunder, he is estopped from denying the validity of the license: Brush Electric Co. *v.* California Electric Light Co., Circ. Ct. Appeals, 9th Circ., MCKENNA and GILBERT, Circ. JJ., and KNOWLES, D. J., October 6, 1892, Fed. Rep., 945.

PRACTICE AND PLEADING.

Cases selected by ARDEMUS STEWART.

PRACTICE.

AFFIDAVITS.

1. *Bill of Exceptions—Contents.*

Affidavits used at the hearing of a motion in the District Court, to be available in the Supreme Court, must be brought into the record by a bill of exceptions: Wohlenberg *v.* Melchert, Supreme Court of Nebraska, NORVAL, J., December 16, 1892, 53 N. W. Rep., 982.

APPEAL.

2. *Appealable Orders—Removal of Causes—Remand.*

An order remanding a cause to the State Court from which it has been removed is not a final decree, and no appeal will lie therefrom to the Supreme Court: Railroad Co. *v.* Thouron, 10 Sup. Ct. Rep., 517, 134 U. S., 45; Gurnu *v.* Patrick Co., 11 Sup. Ct. Rep., 34, 137 U. S., 141; McLish *v.* Roff, 12 Sup. Ct. Rep., 118, 141, U. S., 661; Railroad Co. *v.* Roberts, 12 Sup. Ct. Rep., 123, 141, U. S., 690, followed; Joy, *et al. v.* Adelbert College of Western Reserve University, *et al.*, Supreme Court of the United States, FULLER, C. J., February 6, 1892, 13 Sup. Ct. Rep., 186.

3. *Jurisdictional Amount.*

In a proceeding brought by the United States in a territorial court to abate a wire fence under the act of February 25, 1885 (23 St. at Large, p. 321), which forbids the inclosure of public lands by one having no "claim or color of title," etc., defendant justified under a Mexican grant; and the issue, therefore, was as to whether he had color of title. The Court rendered judgment for the United States, which was affirmed by the Territorial Supreme Court, and an appeal was taken. The only evidence as to the amount in dispute consisted of the affidavits of certain persons, and the finding of the chief justice that the property in controversy exceeded $5,000, but these evidently referred to the value of the land inclosed. *Held*, that the jurisdiction was to be determined by the value of the color of title to the property, and, as there was no evidence of its value, the appeal must be dismissed: Cameron *v.* United States, Supreme Court of the United States, BROWN, J., December 19, 1892, 13 Sup. Ct. Rep., 184.

4. *Running of Time.*

Where an appeal is a matter of right, the running of the time within which it may be taken is stopped by the filing of the appeal bond, but where the appeal depends upon discretion or allowance, the time of limitation runs until the application or petition for appeal is presented: Womer *v.* Ravenswood, S. & G. Ry. Co., Supreme Court of Appeals of West Virginia, LUCAS, J., December 10, 1892, 16 S. E. Rep., 488.

ARBITRATION.

5. *Common Law Award—Enforcement.*

Plaintiff and defendant agreed upon an arbitration, stipulating that two arbitrators, without being sworn, might make an award, without set

times or an appointed place for their proceedings; that they might obtain such information as they deemed best, anything in the code of civil procedure to the contrary notwithstanding; that, if they failed to agree, they should choose a third, and the decision of a majority should be final; that the submission should be filed with the clerk, and entered as an order of the superior court; that after entry neither party should ask for any reduction, exception, new trial, or appeal therefrom, but it should have all the force of a final judgment of the court of last resort. *Held*, that since the parties intentionally ignored the material provisions of the statute on arbitrations, the submission, as a statutory submission, was void, and the award cannot be enforced as a judgment, though it is good as a common-law award, and the basis of an action: Kreiss *v.* Hotaling, Supreme Court of California, PATERSON, J., December 2, 1892, 31 Pac. Rep., 740.

JUDGMENT.

6. *Against "Defendants" — Construction — Examination of Record.*

Where, in an action against several defendants, judgment is rendered against the "defendants," the Court will look into the entire record, and if it is apparent that the judgment was intended to be against only a part of the defendants it will be so construed: City Nat. Bank of Denver *v.* Hager, *et al.*, Supreme Court of Minnesota, MITCHELL, J., December 23, 1892, 53 N. W. Rep., 867.

MANDAMUS.

7. *To Canvassers of Elections to Compel Recount.*

After the board of canvassers has declared a candidate elected, and on recount the former declaration was affirmed and the board adjourned, mandamus will not lie to compel the board to reassemble and make a full and detailed report of the ballots objected to by the petitioner, and to count or reject certain specified ballots, since, having recounted and declared the result and adjourned, the board becomes *functus officio*, and the remedy of a party claiming to be aggrieved is by a *quo warranto* to test the validity of the election: Packard *v.* Board of Canvassers of Menominee County, Supreme Court of Michigan, per *Curiam*, December 24, 1892, 53 N. W. Rep., 934.

REMOVAL OF CAUSES.

8. *Time of Application.*

Under Act of Congress, August 13, 1888, § 3 (25 St. at Large, p. 433), which provides that a defendant may remove a cause at the time or before he is required by the State law or rule of Court to plead or answer, a petition for removal filed after the statutory period for answering has expired comes too late, even though filed within the time allowed for answering by order of Court, where such order is based on a stipulation entered into after expiration of the statutory period: Rock Island Nat. Bank *v.* J. S. Keator Lumber Co., *et al.*, Circuit Court N. D. Illinois, S D. BLODGETT, D. J., October 31, 1892, 52 Fed. Rep., 897.

PLEADING.

AFFIDAVIT.

9. *Sufficiency Attachment.*

In attachment for a debt evidenced by two notes, a motion to quash cannot be sustained on the ground that the affidavit on which it was obtained does not show when the second note sued on, which is not yet due, will become due; for it is sufficient if the affidavit contains a plain statement of what the indebtedness consists of, and what portion is not due: Hinzie *v.* Moody, *et al.*, Court of Civil Appeals of Texas, GARRETT, C. J., October 14, 1892, 20 S. W. Rep., 789.

GENERAL ISSUE.

10. *Assumpsit—Set-Off—Special Notice.*

In assumpsit, under the general issue with notice of a specific claim of set-off, defendant cannot set up an additional claim: Cleveland *v.* Miller, Supreme Court of Michigan, MONTGOMERY, J., December 22, 1892, 53 N. W. Rep., 961.

JOINDER OF CAUSES.

11. *Action in Different Rights.*

A cause of action by an administrator, in the right of his decedent, for suffering an expense caused by defendant's negligence, may be joined to a count in the right of decedent's wife and children for the wrongful death, caused by the same negligence: Ranney *v.* Railroad Co. (Vt.), 24 Atl. Rep., 1053, followed, Preston *v.* St. Johnsbury and L. C. R. Co., Supreme Court of Vermont, General Term, TAFT, J., September 11, 1892, 25 Atl. Rep., 486.

TORTS.

Cases selected by ALEXANDER DURBIN LAUER.

ACTION.

1. *Distinction Between in Tort and in Contract.*

A complaint against a railroad company alleged that defendant's servants failed to stop the train at a certain flag station, the destination named in plaintiff's ticket, but ran over two miles beyond, where it came to a halt; that such servants wilfully deceived him as to the distance it was from that point to the flag station and caused him to get off the train at a late hour of night, when it was dark, cold and rainy; that in making his way back to the flag station he slipped and fell, thereby sustaining injuries, physical and mental. *Held*, that as the gravamen of the action was breach of duty it was an action in tort: Galveston, H. & S. A. Ry. Co. *v.* Roemer, Texas Court of Appeals, October 26, 1892, FISHER, C. J., 20 S. W. Rep., 843.

DECEIT.

2. *Representations by Executor.*

The plaintiff paid out certain moneys for the benefit of the estate of her father, on the representation of defendant, the executor, that the

estate was solvent and would repay the same. The estate proved insolvent. *Held*, that the payment did not create a debt allowable and payable out of the estate, and, therefore, the representation is in an action of deceit immaterial: Winshon *v.* Young, Supreme Court of Minnesota, December 16, 1892, per GILFILLAN, C. J., 53 N. W. Rep., 1015.

LIBEL.

3. *Privileged Communication.*

Alleged slanderous statements, uttered in the course of a judicial proceeding in the Recorder's Court of the city of Galveston, Texas, if reasonably pertinent to such proceeding, are privileged in a criminal action: Hix *v.* The State, Court of Criminal Appeals, Texas, December 31, 1892. per SIMKINS, J., 20 S. W. Rep., 832.

NEGLIGENCE OF FELLOW SERVANT. See CONFLICT OF LAWS, 2.

PROPERTY.

4. *Use of—R. R. Co.'s Liability for Escaping Steam.*

A railway company, in the legitimate transaction of its business, has the right to use steam, and is not liable for the proper and necessary use of the same, even if it result in injury to others, as by frightening horses and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine, and frightens such horses and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence: Omaha & R. V. Ry. Co. *v.* Clarke, Supreme Court of Nebraska, January 3, 1893, per MAXWELL, C. J., 53 N. W. Rep., 970.

STREET RAILWAY COMPANIES.

5. *Responsibility of, for Defective Street Repair.*

A street railway company, which has contracted with a city as a consideration for its franchise to keep a portion of its streets in good order and repair, is responsible in direct action by any person who suffers special damage resulting from its unlawful failure to do so: Ober *v.* Crescent City R. Co., Supreme Court of Louisiana, December 5, 1892, per FENNER, J., 11 So. Rep., 818.

WILLS, EXECUTORS AND ADMINISTRATORS.

Cases selected by MAURICE G. BELKNAP.

WILLS.

PRECATORY WORDS.

1. *Construction—Estate in Fee.*

A will containing the provision, "I give and bequeath to my loving wife, Rhoda, all my property, real and personal, for her support during her natural lifetime; any remainder at her decease to be disposed of by

her as she may think just and right among my children," gives the widow a fee with all its incidents, including the power to sell and to devise. The words referring to "any remainder" do not limit the wife's estate or the preceding words of the gift, but are precatory. Nor do the words of confidence used destroy the wife's estate, and make her a trustee for all the children, so that she could not change their relative rights, or interfere with the estate, further than to use its income during her natural life; because the intention of the testator to create a trust must be apparent apart from the mere existence of words of trust and confidence, or none will be held to exist: Boyle *v.* Boyle, Supreme Court of Pennsylvania, WILLIAMS, J., 25 Atl. Rep., 494.

2. *Construction—Relation of the Parties.*

The relation of the testator to the legatee should be regarded in considering whether a precatory trust has been created. Where the legatee is the wife of the testator, the language is construed more forcible than if they were strangers: Murphy *v.* Carlin, Supreme Court of Missouri, BRACE, J., December 22, 1892, 20 S. W. Rep., 786.

3. *Reasonable Provision.*

Where a will, after directing the payment of debts and a few legacies, devised all the estate absolutely to the testator's wife, but, further, provided that "It is my wish and desire that my wife continue to provide for the care and education of T. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue a dutiful child to her, and shows himself worthy of such consideration," it was *held*, that a precatory trust was created, and that an allowance by the Court of $10,000 out of a personal estate of $85,000 was not excessive, the child always having been treated as a son, and reared in luxury: Murphy *v.* Carlin, Supreme Court of Missouri, BRACE, J., December 22, 1892, 20 S. W. Rep., 786.