ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

SUPREME COURT OF NEW HAMPSHIRE.[2]

SUPREME COURT OF NEW YORK.[3]

ATTORNEY.

Misconduct.—Where in the settlement of a suit pending in court, the plaintiff's attorney charged for cost more than could be legally taxed against a defendant, but not more than might be regarded as reasonable as against the plaintiff, and the attorney withhold the items from the defendant who pays the amount, and then obtains a bill charged to the plaintiff, the court will not interfere by summary proceedings, unless it is made to appear that the attorney fraudulently led the defendant to believe that he was bound to pay that bill: *Barker's case*, 48 or 49 N. H.

That, although the mere withholding from the defendant the items of charge, when requested to exhibit them, would not ordinarily be proof of a fraudulent representation, yet it must be regarded as inconsistent with that frankness that ought to distinguish the profession, and as calculated to bring into disrepute, and to lead to a suspicion that there was a purpose to mislead: *Id.*

BETTING.—See *Gaming.*

BILLS AND NOTES.

Assignment of Note in the Hands of the Payee.—Whatever assignment the payee of a note may make upon the same, he does not by such assignment pass the legal title to his assignee, while it still remains in the hands of the payee or assignor: *Richards v. Darst*, 51 Ills.

While the note so remains in the hands of the payee, it is under his control, and he may bring an action upon it in his own name, and he may erase or otherwise render the assignment inoperative: *Id.*

CHATTEL MORTGAGE.

Description of Property Mortgaged must Control.—A mortgagee of personal property must see to it that the property mortgaged is correctly and truly described, so that others may not be misled. The description given in the mortgage must control, otherwise great fraud and injury might result: *Hutton v. Arnett*, 51 Ills.

CONSTITUTIONAL LAW.—See *Corporation.*

Eminent Domain—Taking Private Property for Public Use—Of the Compensation Therefor.—Where the land of an individual

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1 From Hon. N. L. Freeman, Reporter, to appear in 51 Ills. Reports.
2 From the Judges of the Court, to appear in 48 or 49 N. H. Reports.
3 From Hon. O. L. Barbour, Report, to appear in vol. 57 of his Reports.

is condemned for public use, as for a public park in a city, and the damages assessed therefor, until the damages are paid the land cannot be occupied for the purpose for which it was condemned; but it has been held such damages may be paid by the benefits conferred upon the owner by the contemplated improvement: *People ex rel. South Park Commissioners* v. *Williams*, 51 Ills.

The Act of February 25, 1869, in reference to the South Park, in the city of Chicago, confers the power to condemn land for the purposes of the park, and, as soon as the park commissioners shall ascertain, with reasonable certainty, the amount required for the condemnation of the grounds selected for the park, it is made the duty of the Judge of the Circuit Court of Cook county to appoint assessors to assess the amount so ascertained, upon property subject thereto, in proportion to the benefits resulting to such property, and this duty of the circuit judge to appoint the assessors arises whenever the commissioners shall determine what amount, in their judgment, will be required, and shall apply to the judge to make the appointment: *Id.*

The act prescribes no particular mode in which the commissioners shall ascertain the amount required; they are sworn officers, and there is no guide in that respect but their own judgments. Nor is it necessary the precise amount should be ascertained, but an approximation only: *Id.*

The act provides the means of making compensation to owners of land condemned, by adopting the mode prescribed in the Act of June 22, 1852, in relation to condemning the right of way for the purpose of internal improvement, by which ample provision is made for the payment of the condemnation money: *Id.*

CORPORATION.

Private Corporation—What Constitutes.—"The St. Clair and Monroe Levee and Drainage Company," incorporated by the Act of February 16, 1865, for the purpose of leveeing and draining a certain district therein named, is under the exclusive control of the corporators themselves, and vacancies occurring among them to be filled at the discretion of the survivers; the Act was never submitted to a vote of the people to be affected by it, but the sole charter of the authority thereby conferred is the Act itself. Although the object of the corporation, when accomplished, would be a public benefit, yet the corporation itself, in its composition and management, is strictly private: *Harward* v. *St. Clair & Monroe Levee and Drainage Co.*, 51 Ills.

Taxation for "Corporate Purposes"—Upon Whom the Power may be Conferred–Constitutional Limitations.–The 5th section of the 9th article of our Constitution, which provides that "the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to asses and collect taxes for corporate purposes," not only limits local or corporate taxation to local or corporate purposes, but was also intended as a limitation upon the power of the legislature to grant the right of corporate or

local taxation to any other persons than the corporate or local authorities of the municipality or district to be taxed: *Id.*

Under our Constitution, the right of taxation cannot be granted either to private persons or private corporations: *Id.*

So much of the act incorporating "The St. Clair and Monroe Levee and Drainage Company," as undertakes to confer upon that company the power to levy a tax upon property within the designated district, to carry out the object of its incorporation, is in violation of the Constitution, the members of the company not being "corporate authorities" of the district to be affected by their action, the corporation being merely a private corporation: *Id.*

By the phrase "corporate authorities," as used in the Constitution, must be understood those municipal officers who are either directly elected by the population sought to be taxed by them, or appointed in some mode to which they have given their assent: *Id.*

Debtor and Creditor.

Fraudulent Assignment.—Where debtors, immediately before making an assignment for the benefit of creditors, bought merchandise which they did not intend to pay for, but which they sold on credit, and assigned the debt owing for the price to the assignee; and at the time of making the assignment, retained a large amount of money from the assignee, for their own use, and allowed moneys to be retained by clerks, fraudulently, either for their own use or for the benefit of the assignors: *Held*, that these facts, unexplained by the debtors, were amply sufficient to warrant a finding that the assignors were actuated by a fraudulent intent in making the assignment, and that it was the duty of the court below to have so found: *Waverly National Bank* v. *Halsey*, 57 Barb.

Deed.—See *Easement.*

Dower.—See *Husband and Wife.*

Easement.

Reservation by Grantor—Estoppel.—Where plaintiff by deed conveyed to the grantee a certain well and aqueduct leading therefrom, excepting a certain branch before conveyed, and the plaintiff's right of using all necessary water at certain places described, it was held that the rights so excepted always remained in the grantor, and would enure to the benefit of his heirs and assigns, although there were no words of limitation: *Emerson* v. *Mooney*, 48 or 49 N. H.

When in such deed it was stipulated that the grantee should guaranty to the grantor a sufficient quantity of water at the places described, and the deed was accepted by the grantee, it was *held* that he and his assigns were estopped to deny the grantee's title, although the instrument was a deed poll and not signed by the grantee: *Id.*

ESCAPE.

A person committed to jail on final process is to be kept in confinement in the jail until he performs what he is ordered to do, or is discharged in due course of law: *Riley* v. *Wittiker*, 48 or 49 N. H.

B, after a trial under the Bastardy Act, was ordered by the court to give a bond, etc., to the town of P. to save said town harmless, etc., and pay costs of prosecution, etc., and to stand committed until this order was performed; and not furnishing the bond, was committed to jail, and the defendants, citizens of said town, gave a bond to the jailer on behalf of the town, to pay the prison charges of said B. The jailer allowed said B to go outside of the rooms used as the jail, and take his meals in another part of the same building, with the jailer's family, and also to go outside of said building: *Held*, that these indulgences constituted a voluntary escape, and that after such escape, the jailer could not recover his prison charges of said town nor of these defendants: *Id.*

ESTOPPEL.—See *Easement.*

EVIDENCE.

Judicial Notice as to who are the Officers of a Court.—The Circuit Courts in this State will take judicial notice of who are their officers, as, for instance, the clerk: *Dyer* v. *Last*, 51 Ills.

So, where the jurat attached to an affidavit of non-residence was signed in the name of a person, by another, as deputy, without any designation of the official character of the principal or of the deputy, the court in which the proceeding is pending may take judicial notice that the person whose name was signed to the jurat was the clerk of that court: *Id.*

And upon such case being brought to the appellate court, it appearing from the record that the same person whose name was signed to the jurat, without any official designation, had issued the summons in the case as clerk, and had also signed the notice of publication in the same capacity, this court, upon an objection being made that the jurat to the affidavit was not signed by an officer, will presume that the court below took judicial notice of the official character of such person: *Id.*

This case differs from the case of *McDermaid* v. *Russell*, 41 Ills. 489, in the fact, that the record discloses that the affidavit was sworn to before an officer of the court. In that case, so far as the record disclosed, the affidavit was not sworn to before *any* officer: *Id.*

Of Vendor as to Title of Vendee.—The statements and declarations of a vendor in reference to ownership of the property sold, made before the sale, are admissible on an issue of ownership, where the vendee is a party; such declarations bind parties and privies, and the vendee is a privy: *Randegger* v. *Ehrhardt et al.*, 51 Ills.

But declarations of the vendor in reference to the ownership of the property, made after the sale, are not admissible in evidence to

defeat the title of his vendee, unless the vendee is present at the time such declarations are made, and either expressly or tacitly assents to their truth: *Id.*

GAMING.

Services for Training a Horse for a Race.—Where a party brought his action to recover for services rendered in fitting a horse for a race, on which money was bet, *it was held*, that the services rendered, whether the race was run or not, being in aid of an offense prohibited by statute, were in violation of law, and he could not recover: *Mosher* v. *Griffin*, 51 Ills.

But, for money laid out and expended for the shoeing and feed of the horse, while under training, it not necessarily being a part of a gaming transaction, he was entitled to recover: *Id.*

Betting.—Gambling, being against public morals, is declared a crime; while a bet or wager, being against public policy, is void: *Johnson* v. *Ferris*, 48 or 49 N. H.

The legislature intended to discourage and discountenance betting as improper, though the act is not made criminal: *Id.*

Money paid to hire or procure another to make a bet or wager cannot be recovered back: *Id.*

HUSBAND AND WIFE.

Joint Liability for Libel—At common law, an action lay against husband and wife jointly, for a libel written and published by the wife alone; and a general judgment could be rendered against them both, if the charge were established. This rule has not been changed by statute in New York: *Tait* v. *Culbertson and Wife*, 57 Barb.

Marriage under Duress.—A marriage brought about by fraud or force or fear, so as to be void *ab initio* without ratification, may be ratified by the injured and innocent party after the fraud is known, and the duress or cause of fear is removed, and the marriage thereby rendered valid: *Hampstead* v. *Plaistow*, 48 or 49 N. H.

A voluntary cohabitation after full knowledge of the fraud, and after the force or cause of fear is removed, will cure the defect: *Id.* Whether the fraud or duress of third persons, not participated in by either of the parties, will avoid a marriage, *quære? Id.*

Dower—What Considered a Valid Relinquishment of.—On the 26th of January, 1853, J, a resident of the State of Ohio, executed, in that State, a deed conveying certain lands in this State to I. J's wife signed the deed with her husband, and duly acknowledged the same before a proper officer. The certificate was in proper form, in all respects conforming to the requirements of the statute, but the body of the deed did not describe her as a grantor, nor name her or her dower in any mode whatever: *Held*, in a suit by J's widow, to obtain dower in the premises so conveyed, that this deed amounted to a complete and valid relin-

quishment of her dower, under the Act of 1845, and that independently of the Act of 1847: *Johnson* v. *Montgomery*, 51 Ills.

It is said that the law favors dower; but it is not to be understood, by such remark, that the law favors a claim of dower which claimant has once sought, in good faith, and for a valuable consideration, to relinquish, and has done whatever at the time was deemed necessary to make such relinquishment complete: *Id.*

Under our statute it is not necessary that the wife, joining her husband in a conveyance of his property, should use apt words of grant in her own name, and apply them in the body of the deed, for the purpose of relinquishing her dower: *Id.*

In order to make a complete and valid relinquishment of dower, the statute only requires that the wife shall sign the deed with her husband, and properly acknowledge it. She must undergo the separate examination which the law requires, of which fact the officer before whom such examination is had must properly certify: *Id*

The question as to the mode in which a deed must be executed in order to bar dower is purely a matter of local law, resting on the construction of our own statutes, upon which the decisions of courts in other States can have little weight: *Id.*

A married woman, by signing her husband's deed, "joins" in it; and, if she is properly examined before an officer, and causes his certificate of that fact to be placed upon the deed, her dower in the premises is barred, notwithstanding her name nowhere appears in the body of the deed: *Id.*

JUDGMENT.

Lien—Its Territorial Extent.—The lien of a judgment upon real estate is only co-extensive with the limits of the county in which it is rendered: *Kinney* v. *Knoebel*, 51 Ills.

So, where the State recovered a judgment against a party, in the Circuit Court of Sangamon county, the lien of the judgment attached only to the lands of the defendant in that county: *Id.*

Setting Aside for Irregularity.—For defects or irregularities not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy is given to the party alone; and another judgment-creditor is not entitled to have such proceedings or judgment set aside: *Gere* v. *Gundlach*, 57 Barb.

JUSTICE OF THE PEACE.

Liability for Official Acts.—Where a justice of the peace, after rendering a judgment for the plaintiff, by mistake entered the same in his docket as a judgment in favor of the *defendant*, and a transcript of such judgment being filed and docketed in the county clerk's office, the plaintiff was compelled to pay the judgment: *Held*, that an action could be maintained by the latter against the justice, as for an act of ministerial negligence and carelessness by which the plaintiff had been directly injured: *Christopher* v. *Van Liew*, 57 Barb.

Such a case does not fall within the rule of judicial impunity for acts done by a judicial officer in the trial of causes and rendition of judgments, it being settled that the act of entering the judgment in the docket by a justice is a ministerial act, and is no part of the judicial function of rendering the judgment: *Id.*

Where a justice swore that, from the evidence before him in a case, he "*found his judgment* against the defendant and in favor of the plaintiff, for the sum of, etc, but upon entering *said judgment* in his docket, he by mistake inserted the name of the defendant in the place of that of the plaintiff:" *Held*, that this was to be understood as an averrment that the justice had reduced his judgment to form by his official act, and then made the mistake in entering the judgment so formed upon his docket, and that the error was ministerial, and *Held*, also, that the justice had the right to correct such a mistake in his docket the moment he discovered it, the error being merely clerical: *Id.*

Liability upon his Promise.—A promise by a justice of the peace, who has, by his own negligence and carelessness, entered an erroneous judgment upon his docket in favor of the defendant instead of the plaintiff, that if the latter will make a motion in the county court to set aside the erroneous judgment, or the execution issued thereon, he will pay all the damages growing out of his mistake, in case the execution shall not be set aside, is not against public policy, and action will lie upon it: *Id.*

LIBEL.—See *Husband and Wife.*

MANDAMUS.

Whether it will be awarded Pending another Proceeding involving the same Question.—It has been held, that where parties have commenced proceedings other than by mandamus, to obtain the adjudication of a question, the court will not, except in extraordinary cases, interfere by mandamus. But as the granting of a mandamus is a matter of discretion, the pendency of another proceeding will not prevent its being awarded, if it seems to the court to be proper to do so: *People ex rel.* v. *Salomon*, 51 Ills.

So, upon the application of the commissioners of the South Park, in Chicago, for a mandamus to compel the county clerk of Cook county to receive and file an estimate made by the commissioners of the amount of money required for park purposes, and to place that amount in the proper tax warrants to be collected from the tax-payers of the district, as provided in an act of the legislature on that subject, it was held, the writ of mandamus ought to be awarded, notwithstanding the pendency of a suit in chancery, by which the county clerk and the commissioners were sought to be enjoined, at the instance of a property owner interested, from doing the same act which it was sought by the writ of mandamus to have done. The chancery suit would be final only as between the immediate parties to it, and a decree would not bar a suit of the same nature by each property owner, and thus the commissioners might

be delayed indefinitely in the performance of their duties, so it was considered that more complete justice could be done by means of the writ of mandamus, and it was awarded: *Id.*

MARRIAGE.—See *Husband and Wife.*

MECHANIC'S LIEN.

Is a Proceeding in Chancery and Governed by its Rules.—A proceeding by petition, to enforce a mechanic's lien, is a chancery proceeding, and governed by the rules of chancery practice: and when the petition waives the sworn answer, although the answer be sworn to, it cannot be received in evidence, and has no other or greater weight than an answer not sworn to: *Clarke et al.* v. *Boyle*, 51 Ills.

MUNICIPAL CORPORATIONS.

Power to Compel them to Incur Debts against their Will.—The legislature has no power to compel a city to incur a debt against its will, and although the city, by its charter, may have power to establish and maintain a park, and the authorities of the city have power to issue bonds for that purpose, yet the legislature cannot compel them to do so. Nor does the fact that the city authorities have voluntarily incurred a debt or appropriated money for one park, give the legislature power to compel them to incur a debt or appropriate money for another park: *People ex rel. South Park Commissioners* v. *Common Council of Chicago*, 51 Ills.

So that act, by which it was sought to compel the city of Chicago, without the consent of the people thereof, or of its corporate authorities, to issue the bonds of the city for the purpose of equalizing the amount which the city had voluntarily expended, and was about to expend, for Lincoln Park, with that which the act required the city to appropriate for certain other parks, is invalid and cannot be enforced: *Id.*

PARTNERSHIP.

Action between Partners.—When one partner becomes liable to his copartner, in an action at law, for the portion of partnership funds in his hands belonging to such copartner, the form of such action is properly for money had and received by the defendant to the use of the plaintiff: *Rainsford* v. *Rainsford*, 57 Barb.

The cases in New York are quite uniform in holding that there must be not only a settlement, but an express promise to pay, before an action at law, by one partner to recover his share of the partnership moneys against another partner, can be maintained: *Id.*

TAXATION.—See *Corporation.*

Eminent Domain.—The doctrine of eminent domain is strictly applicable only to the condemnation of property, and not to the levy and collection of a tax: *Harward* v. *St Clair Drain. Co.*, 51 Ills

Where the legislature incorporated a company whose object was to levee and drain a certain district of overflowed lands, the attempt to give to such a corporation, which was a mere private corporation, the power to levy a tax upon the lands deemed by the corporators to be benefited by the proposed improvement, could not properly be referred to the doctrine of eminent domain, because the just compensation required to be made, in the exercise of that right, must be determined by some impartial agency, and not by those interested thereby in replenishing their own treasury. That would be merely the taking of the property of one man to give it to another.

Where a tax is sought to be levied without authority, several property owners, having a common interest in the subject, and asking relief against the same injury, on the same ground, may join in a bill to enjoin its collection.

Vendor and Vendee.

Notice of a Vendor's Lien upon Real Estate.—L conveyed by deed to W certain real estate, taking W's note for the purchase money. Soon after, W executed a mortgage on the premises to his brother A, to secure the sum of $10,000, and afterward satisfaction was entered on the mortgage, and an absolute conveyance of the premises made by W to A. Subsequently, L recovered judgment on the note against W: *Held*, in a suit brought by L against W and A, to enforce his lien as vendor, that A had sufficient notice of L's lien, it appearing from the evidence, that A, prior to his purchase from W, was fully informed by L of the conveyance to W, of the consideration therefor, and the terms of payment, and that no security had been taken: *Wilson* v. *Lyon*, 51 Ills.

And in this case it cannot be said that L, by taking an assignment of a policy of insurance on the life of W, after his conveyance to A, thereby waived his lien, as the proof clearly shows that L did not take such policy as independent security: *Id.*

And this lien attaches against the vendee, and all persons claiming as volunteers, or with notice under him. And if it is even doubtful whether other and independent security has been taken, the lien of the vendor still attaches: *Id.*

So vigilant are courts of equity to protect a vendor of real estate, that, although an absolute conveyance is made, and no mortgage or other security taken, still, in the hands of the vendee, or a subsequent purchaser with notice, the vendor has a lien on the land for his money: *Dyer* v. *Martin*, 4 Scam 147: *Id.*

Sale of Growing Trees—Statute of Frauds.—A sale of growing trees, with a right at a future time, whether fixed or indefinite, to enter upon the land and remove them, conveys an interest in the land within the statute of frauds, and must be in writing: *Howe* v. *Batchelder*, 48 or 49 N. H.

Where the sale is of the trees simply, without fixing any time for their removal, the law will imply that it is to be done in a reasonable time.