ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK, GENERAL TERM, SEVENTH DISTRICT, December, 1860, and March, 1861.[1]

Statute of Limitations—Assignees for Benefit of Creditors—Their Authority.—Partial payments, in order to take a case out of the statute of limitations, must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognise, as subsisting, the debt in question, and that he was willing to pay it: *Pickett* vs. *King.*

A debtor, upon assigning his property in trust for the benefit of creditors, parts with all control of the property assigned, and appoints the assignees his trustees, to apply the proceeds as directed in the assignment; but they do not become his *agents* in such a sense as to have authority to make any new contract or promise binding upon him, or to make a *payment* upon any of his debts, which shall be equivalent to a new and express promise by him: *Id.*

Executory Contracts of Sale.—In every executory contract for the future sale and delivery of articles of merchandise, the law will imply an agreement that the property shall be of merchantable quality: *Hamilton* vs. *Ganyard.*

Where the defendant, by a written contract, agreed to sell and deliver to S. & M. his crop of corn then growing on about thirty acres of land, to be delivered "in merchantable order," at a specified price: *held,* that he was bound to deliver all the merchantable corn that grew on the land, and no more. And the defendant, claiming the right to deliver the whole crop, although three-fourths of it was of unmerchantable quality, having tendered the good and bad together, it was *held,* that this was not a proper tender or offer of performance, and that the purchasers were not bound to receive the corn tendered, but might treat the contract as broken, and bring their action for damages: *Id.*

That the measure of damages in such action was the difference between the contract price and the market value of the merchantable corn at the time it should have been delivered, together with the amount advanced on the contract, and interest: *Id.*

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1 From Hon. O. L. Barbour, Reporter.

GENERAL TERM, FIFTH DISTRICT, July 2, 1861.

Execution of Lease—Guaranty.—One who has, by an instrument indorsed upon a lease, guaranteed the fulfilment of the covenants in the lease by the lessees, is bound by his guaranty, although the lease is executed by only one of the lessees, where it appears that both lessees occupied the demised premises, and had possession of all the personal property mentioned in the lease, for the whole term: *McLaughlin* vs. *McGovern.*

Insurance—Application—Misstatements—Conditions of Policy.—An insurance company is chargeable with knowledge of all the facts stated by an applicant to the company's agent, respecting an applicant's title and interest in the premises; and if the applicant truly states to the agent the real condition of the property, he cannot be held to have made any misstatement, or practised any concealment, notwithstanding the written application varies from such statement: *Hodgkins* vs. *The Montgomery County Mutual Insurance Company.*

Among the conditions, &c., attached to a policy of insurance, were the following: All persons sustaining damage by fire were forthwith to give notice to the company, and within forty days they were to "*deliver in* a particular account" of such loss or damage. Losses were payable by the company within three months, &c. Then followed this clause: "*All communications and notices* to the company must be post-paid, and directed to the Secretary, at C." The statement of the loss was made out, sworn to, and deposited in the post-office, addressed to the secretary of the company at C." but was never received by the company. *Held*, that the condition requiring the insured to "deliver in" the statement of loss, was a positive requirement of the policy on that particular subject, not superseded or nullified by the general direction to forward communications and notices by mail, and that in sending such statement by mail, the insured had not complied with the condition.

GENERAL TERM, SEVENTH DISTRICT, Sept. 2, 1861.

Parol Evidence—Bond upon Attachments against Vessels—Power of Master—Record of Judgment.—Where there are several causes of action embraced in the same complaint, and the recovery appears to be general, parol evidence is competent to show upon which cause or causes of action specified the trial was had and judgment obtained: *Stedman* vs. *Pachin.*

A vessel, owned by the defendant, being seized by the sheriff at Cleve-

land, upon process issued at the suit of McE., upon a claim against the vessel under certain statutes of Ohio, the master, to effect the release of the vessel, executed a bond with the plaintiff and one P., as sureties conditioned for the return of the boat to satisfy any judgment upon the claim of McE., or, in default thereof, for its payment. The boat was thereupon released, and the defendant, being informed of the proceedings of the master, employed counsel, and defended the suit commenced by McE. *Held*, (1.) That it was the duty of the master, and within his authority, to execute the bond. (2.) That the defendant, having sanctioned the giving of the bond, and proceeded to contest and defend the action in which it was given, this was equivalent to an antecedent authority to the master. (3.) That if the statutes under which the vessel was seized were valid as to the citizens of Ohio, they were equally valid as to all parties litigating in the courts of Ohio, in proceedings founded upon them. (4.) That the proceedings and seizure appearing to be regular under the statutes of Ohio, the defendant, by appearing and defending the action, became bound by the judgment of the court in favor of the validity of the plaintiff's claim, and that the record of that judgment was conclusive against him, in an action by the plaintiff for the reimbursement of money he had been compelled to pay as one of the sureties in the bond: *Id.*

Bills of an Insolvent Bank—When a Set-off.—Where bills of a bank are obtained by one of its debtors after it becomes insolvent and stops payment, they cannot be used as a set-off or counter-claim in an action brought by the receiver of the bank upon a promissory note of the debtor, held by the bank at the time of its failure: *Divers Receivers, &c.* vs. *Phelps.*

Executors bound to pay Moneys Due upon a Contract for Purchase of Land—Agreement.—Heirs or devisees can compel an executor or administrator to pay the purchase-money remaining unpaid upon lands purchased by the testator or intestate, and held by him, under a contract, at the time of his death, out of the assets in the hands of such executor or administrator: *Lamfort et al.* vs. *Beeman et al.*

The contract debt for the purchase-money is not a mortgage, within the intent and meaning of the statute making mortgages given by an ancestor or testator a charge upon the land descending to an heir or passing to a devisee, to be paid by the heir or devisee, unless there be an express direction to the contrary in the will (1 Rev. St. 549, § 4): *Id.*

Where an executrix agreed to pay all the debts of the testator, if her

co-executor would give up the whole estate to her, to which they assented, and she therefore took the assets and paid the debts, it was *held*, that the agreement was founded on a good consideration, and was binding upon her, and that the same having been fully executed on her part, her administrator, after her death, could not gainsay it, or claim anything from it, as against any person interested in the remainder: *Id.*

Presentment of Drafts—Principal and Agent.—The neglect to present a draft, payable on demand, for four days, during which time the drawee fails, will discharge the drawer: *Brady* vs. *Little Miami Railroad Company.*

Where a person residing in New York, and acting as the authorized agent of another, requested a friend at Cincinnati to collect from a corporation there a dividend due to his principal, upon stock, and to transmit to him a draft for the amount, *held*, that if the agent left New York while expecting the draft, it was his duty to leave authority with some one to present the draft when received: *Id.*

And that for the negligence of the agent, in not presenting such draft for payment within the proper time, the principal was responsible: *Id.*

Deposits in Banks.—Where money is deposited in a bank, generally, to the credit of the depositor, and is not appropriated to the payment of a note of his, held by the bank, or to any other special purpose, the relation of debtor and creditor is created between the depositor and the bank; the latter becoming a debtor to the former for the amount deposited, and liable to pay on demand. The bank has the right, at any time, to apply the amount in payment of a note part due, but is under no obligation so to apply it: *Marsh* vs. *The Oneida Central Bank.*

If the bank omits to make the application, and postpones it until after the recovery of a judgment upon the note, this will not affect the right. It may apply the money after, as well as before the recovery of the judgment, in payment of the debt due from the depositor: *Id.*

Whether the application is made or not, is immaterial. If not made, the bank may, in an action by the depositor, or his assignee, to recover the money deposited, avail itself of its judgment as an equitable set-off: *Id.*

Vendor and Purchaser.—The refusal of a purchaser to complete his purchase because there is a lease on the premises, will not deprive him of the right to object that there are other incumbrances on the same property: *Morange* vs. *Morris.*

Such refusal might relieve the vendor from the necessity of tendering performance on his part, but will not relieve him from the consequences of not being able to give a good title to the premises at the time agreed on: *Id.*

Where the vendor is unable to perform, performance on the part of the purchaser is not necessary, except in case the purchaser seeks to compel a performance, or to recover damages without rescinding the contract: *Id.*

If the vendor cannot give a good title at the time agreed on, the purchaser may refuse to take the property and rescind the contract: *Id.*

Statute of Limitations.—A temporary absence from the State, without a change of residence, is not the exception contained in the statute of limitations, and does not prevent the running of the statute during such absence: *Hickock & Starr* vs. *Bliss et al*

Where a referee finds that the defendant was absent from the State by *various journeys*, at least one year in the aggregate, during the six years, this is not such a finding of absence as will warrant a judgment against the defendant who has pleaded the statute of limitations: *Id.*

What amounts to Payment of a Note—Mistake of Bank Officers.—A note, made by W., and payable at the Irving Bank, was discounted by the Seventh Ward Bank. Subsequently, W. formed a partnership with D., under the firm name of W. & Co., whereupon the firm directed the Irving Bank to charge the notes of W., including the one in question, to the account of W. & Co. Prior to the maturity of the note, W. died, and D. directed the Irving Bank not to charge the individual notes of W. to the account of W. & Co. When the note matured, the Seventh Ward Bank, as the owner thereof, presented it to the paying teller of the Irving Bank, who certified it as paid, and charged the amount to W. & Co., who had not enough funds in the bank to pay it, and W. had none there. The Seventh Ward Bank stamped the note "paid." On discovering the mistake of its teller in certifying the note, and before 3 o'clock of the same day, the Irving Bank notified the Seventh Ward Bank of the mistake, and requested that the certificate be cancelled, which was refused. The Irving Bank then paid to the Seventh Ward Bank the full amount of the note, and received the same back, stamped "paid." On the same day, and before 3 o'clock P. M., the note was again presented at the Irving Bank, and payment demanded, and was protested for non-payment, and notice

given to the indorsers; *held*, that the note was not to be deemed paid, and that the Irving Bank could maintain an action thereon against the indorsers: *The Irving Bank* vs. *Wetherald & Young.*

Vendor and Purchaser.—If the purchaser of goods, which, by the terms of the contract of sale, are to be delivered and paid for at a specified time, does not tender the price and take the goods within the time agreed upon, the vendor may request him to pay for and take the goods, and in case of his refusal, may abandon and rescind the contract and dispose of the goods as if no contract had been made; or, he may, on due notice to the purchaser, re-sell the goods as the property of the latter, and recover of him the sum lost by the re-sale, together with the expense of keeping the goods: *McEachron* vs. *Randles.*

This right of the vendor to re-sell the goods, however, when the contract is not rescinded, and when there is no express stipulation authorizing it in the contract, can only be exercised after due notice to the purchaser, of the time when, and the place where, the re-sale will be made: *Id.*

Assignability of a Contract—Vendor and Vendee.—A contract upon which an action would lie by the personal representatives of a party thereto, in case of his death, for the enforcement of his rights, and remedies under the same, is legally assignable. So held in respect to a written agreement by the defendant to deliver to the plaintiff's assignor all the potatoes the defendant should raise the following season, delivered on the boat, at a specified price per barrel: *Sears* vs. *Conover.*

A notice, given by the assignee of such a contract, to the vendor, that he is ready to pay for the potatoes, on delivery, according to the terms of the contract, is a sufficient notification of readiness on his part: *Id.*

And if the vendor, at the time of receiving such notice, and with knowledge of the assignment of the contract, refuses to deliver the potatoes, stating that he has sold them to other persons, this will supersede the necessity of any demand after the potatoes are harvested: *Id.*

SUPREME COURT OF CONNECTICUT.[1]

Municipal Subscriptions to Railroads—Right of bona fide Holder of Bonds—Acquiescence of Citizens of Municipality in issue of Bonds, how

[1] From John Hooker, Esq., State Reporter.

far an Equitable Estoppel—Bond Payable to Bearer, how far Negotiable.— An act of the legislature, passed May, 1847, empowered the city of New London to issue bonds to the amount of $100,000, to be loaned, on proper security, to the New London, Willimantic and Springfield Railroad Company, a corporation chartered at the same session, to aid in the construction and completion of its road; the act containing a proviso that it should not take effect *until approved by two-thirds of the electors present at a city meeting held for that purpose, and a copy of its doings lodged in the office of the Secretary of the State.* A meeting of the city was holden for the purpose of acting on the subject, on the 2d day of March, 1850, another on the 12th of the same month, and another on the 10th day of March, 1852, at each of which a vote was taken upon the question of approval, and the vote in its favor was less than two-thirds. Another meeting was called and holden on the 14th day of April, 1852, at which a vote of more than two-thirds was obtained in favor of the approval. *Held*, that the power of the city on the subject was not exhausted by its first action, and that the action of the last meeting was a valid acceptance of the power to issue the bonds: *Society for Savings* vs. *The City of New London.*

Held, also, that the power to accept the act was not lost by the delay, the legislature having limited no time within which the city should act on the subject, and the railroad not being then completed (the legislature having extended the time for its completion), and the railroad company having therefore not been in a condition to give the security required by the act: *Id.*

The bonds, which were payable to bearer, were sold in the market by the railroad company, to whom they were delivered, and were purchased by the plaintiffs without any knowledge of the prior unfavorable action of the city. A copy of the proceedings of the last meeting had been duly lodged with the Secretary of the State. *Held*, that the plaintiffs were not bound to look beyond the certificate thus lodged, and as *bona fide* holders of the bonds, could not be affected by the prior action of the city, even if, against parties differently situated, it might have constituted a valid defence: *Id.*

The bonds were in the following form: "This certifies that the mayor, aldermen, common council, and freemen of the city of New London are indebted to the N. L., W. & P. R. R. Co. or bearer, in the principal sum of $1000, payable to said company or bearer, at the end of fifteen

years from the 1st day of July, 1852, with 6 per cent. interest thereon, payable semi-annually on presentation of the annexed interest warrants." (Signed by the mayor and treasurer of the city, and sealed with the corporate seal.) *Held*, that the bonds were negotiable, and that suit could be brought on them in the name of the holder: *Id.*

The bonds had been publicly sold, with the knowledge of all the inhabitants of the city; many of them had been deposited with the Treasurer of the State by sundry banks as security for their circulation—one of these banks, located in New London, having for several years published in a newspaper there a quarterly statement embracing this fact; and the city had paid the semi-annual interest on the bonds down to July, 1859, and the payments had been reported at the annual city meetings. During all this time no citizen had taken any measures to prevent the sale of the bonds or the payment of the interest, or had given notice of any doubt as to their validity. *Held*, that the city, in these circumstances, was equitably estopped from denying the validity of the bonds against parties who held them in good faith, and that individual citizens and tax payers, having thus acquiesced in the conduct of the city, were equally estopped from denying their validity, so far as their individual rights were concerned: *Id.*

The statute (Rev. Stat., tit. 3, § 165), which provides that whenever any amendment of the charter of any corporation shall be made, if not otherwise specially provided, it shall not become operative unless accepted within six months thereafter by the corporation, has no application to such an act as that empowering the city, in this case, to issue the bonds in question: *Id.*

The act empowered the city to issue the bonds in aid of the New London, Willimantic, and Springfield Railroad Company, and to deliver them to that company. By an act passed by the legislature at its next session, this railroad company was merged in a new corporation, named the New London, Willimantic, and Palmer Railroad Corporation, formed by the union of this company with another organized under an act of the legislature of Massachusetts, the new company taking all the rights and assuming the duties of the former ones. The court found that the new company was substantially the same as the old one. *Held*, that the city acted legally in voting to issue the bonds for the benefit of the new company, and that they were properly delivered to that company: *Id.*

Criminal Law—Arson—Pleading—New Trial.—Arson is a crime against the security of a dwelling-house, as such, and not against the building as property; and it is therefore proper, in an indictment for the crime, to describe the house burned as the house of the person dwelling in it, without reference to the question of ownership: *State* vs. *Tool.*

A house consisting of two distinct tenements, occupied in severalty, should not be described in such an indictment as the dwelling-house of both occupants, as such a description implies a joint occupancy: *Id.*

Where there is no interior communication between different parts of the same building, which are separately occupied, the parts are to be regarded as separate buildings: *Id.*

And it seems that if there is such interior communication, but it is not in actual use, and the occupation of the parts is strictly in severalty, the parts would still be regarded as separate buildings: *Id.*

Upon a motion for a new trial, the instructions of the court and the facts detailed in the motion will be considered solely in their relation to questions made on the trial below: *Id.*

Statute of Limitations—Adverse Possession—Party Wall.—The doctrine of adverse possession is to be taken strictly. Such a possession is not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner: *Huntington* vs. *Whaley.*

No title by such possession can be acquired unless the party has the actual use and occupation of the land, nor unless the owner has so lost his possession that he can maintain an action to recover it: *Id.*

Where the divisional fence between the lands of A. and B. was a stone wall three feet wide, set wholly on the land of A., and B. had for more than fifteen years held exclusive possession of his own land up to the wall, treating the centre of the wall as the dividing line, and believing it to be so, but with no knowledge of such claim on the part of A., and no other possession of the ground covered by the wall, it was *held,* that there was not a sufficient adverse possession to vest in B. a title to the centre of the wall: *Id.*

Bastardy Bond—Division of Township—Breach of Condition.—A bond was given by the father of an illegitimate child to the town of East Hartford, where the child was born and had its settlement, to save the town from expense for its support; the condition reciting the fact that the child

was chargeable to East Hartford, and providing that the bond should be void if the obligor should save *said town* harmless from all expense by reason of the child becoming chargeable *thereunto*. The town of East Hartford was afterwards divided by the act of the legislature, and the part on which the child was born and lived was set off as a new town by the name of Manchester, to which a portion of another town was afterwards annexed. The act incorporating the new town imposed upon it the burden of supporting all paupers having their ordinary residence on the territory constituting the town. The father afterwards neglected to support the child, and it became a charge upon the town of Manchester. *Held*, 1. That the benefit of the bond accrued to the town of Manchester on its incorporation. 2. That the neglect of the obligor to save that town from expense in the support of the child, was a breach of the bond. 3. That a suit could be maintained on the bond, in the name of the town of East Hartford, for the benefit of the town of Manchester: *East Hartford* vs. *Hunn*.

SUPREME COURT OF MASSACHUSETTS.[1]

Will—Widow Electing to claim Dower—Residuary Legatee Entitled to Income of Fund Bequeathed to her for Life, with remainder to Specific Legatees.—A testator, in his will, after various devises and bequests, directed a certain sum to be invested, and the income thereof to be paid to his wife during her life, and, after her death, to be distributed among various legatees, in certain specified sums, and gave the rest of his estate to his residuary legatees. He died without leaving issue, and his widow waived the provisions of the will in her behalf, and thereby became entitled to a larger share of his estate than the will gave her. *Held*, that the residuary legatees are entitled, during the life of the widow, to the income of the fund provided for her, and, after her death, the principal should go to the legatees named in the will, in like manner as if the widow had accepted the provision therein made for her: *Firth* vs. *Denny*.

Will—Trust for Maintenance of Beneficiary and his Family—Jurisdiction to enforce Trust, where Beneficiaries reside in another State.—Under a will creating a trust fund, with directions to pay the income yearly to the testator's son, "for the support of himself and his family, and the education of his children," the income, when received by the

[1] From Charles Allen, Esq., State Reporter.

son, is taken in trust, and his wife and children can enforce its due appropriation, in part for their benefit, in equity; and, if the will was made by a resident of this Commonwealth, and was proved in this Commonwealth, and the trustee, who by the terms of the will holds the principal trust fund, lives in this Commonwealth, this court has jurisdiction to regulate the proper administration of the trust, although the testator's son, and his wife and children, all live in another State: *Chase* vs. *Chase.*

Water-course—Grant of Conflicting Right by Owner—Change of User by Grantees—Right of Riparian Proprietors to Use of Water.—Under a deed of water privilege, conveying "the right to draw two hundred square inches of water, under fourteen feet head, out of the surplus water from the top of my grist-mill flume, at S., however, not intending by this deed to convey the water to the injury of the following privileges, viz.: to the building now occupied by A. S. as a rake shop; to the tannery now occupied by A. B.; and the scythe shop now occupied by J. H. M., having reference to the deeds of the above described privileges," the grantee's privilege is subject to the prior use of the quantity of water which, at the time of the conveyance, was reasonably necessary to carry on and operate, at all seasons of the year, and in the state and condition in which they then existed, the mills and works therein of the grantor, and also of the quantity belonging to the three privileges mentioned, reference being had to the deeds thereof for the amount. And the grantee's privilege is not increased by the subsequent removal of the rake shop, and the erection of a new and larger building on its site, which is used wholly for different purposes; or by the subsequent destruction of the scythe shop, and discontinuance of the use of water there, although the deed of the privilege for the scythe shop only conveyed the water to be used at that particular place, nor has he a right to complain of the place where, or the purposes for which, such prior use is made: *Pratt* vs. *Lamson.*

If a natural stream of water flows and forms the boundary between the lands of different proprietors, the fee of each owner includes one-half of the bed of the stream; but each is entitled to use one-half of the water which flows in the stream, without regard to the position and course of its principal channel and current: *Id.*

If a proprietor of land which is bounded upon a natural stream, appropriates to his own use so much of the passing water as he is enabled to control, by means of structures erected upon and within the limits of his own estate, even if it be the whole of it, he can thereby gain no prescriptive

right to appropriate and use more than one-half of the same, so long as the opposite proprietor neither uses, nor seeks to use, nor makes any provision, nor has any occasion, for the use of any part of the stream to which he is entitled: *Id.*

If the general owner of a mill privilege, in which others are interested, has, with their knowledge, acquiescence, and consent, built on his own land a new dam and works, by which the water is supplied to a common flume, they cannot recover compensation for any damage which they may thereby sustain: *Id.*

Infant—Action by Local against Foreign Guardian for Maintenance of Ward after Appointment.—One who has applied for or obtained an appointment in this Commonwealth, as guardian of minor children who have been under her care with the consent of their guardian appointed in another State, may, nevertheless, maintain an action against the latter for their support and education, after the time of her own appointment: *Spring* vs. *Woodworth.*

Water-course—Right to Dam non-navigable Streams—Damage by Back Water.—The owner of land lying upon both sides of a natural stream of water which is not navigable, may lawfully erect thereon a dam across the stream to such a height that in ordinary stages of the water it will not throw water back upon the wheels of an ancient mill above, although, in consequence of the erection of the dam, the ice, when it breaks up in the spring, becomes packed together above the dam, and the water is thereby set back so as to flood the wheels to a greater height, and for a longer time, than it has done before at that season: *Smith* vs. *The Agawam Canal Company.*

Trover—What not a Conversion—Receipt of Proceeds of a Tortious Sale.—One who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale, in pursuance of a previous arrangement to that effect, is not thereby guilty of a conversion: *Polley* vs. *Lenox Iron Works.*

Contract, Construction of—Liquidated Damages.—A. and B. made an agreement in writing, by which A. agreed, on or before a certain time, to sell and deliver up all his stock and trade, and tools used in manufacturing tinware, to B., at specified rates, which B. agreed to pay therefor. The agreement further contained the following clause: "It is also hereby agreed between the parties, that in case either party shall fail to comply with the terms of this agreement, the party so failing shall forfeit to the