if he had discounted it." These cases hold there is nothing in the fact that an acceptor or maker of an indorsed note has it in possession and offers it for discount before its maturity, to give notice to a purchaser of its payment or extinguishment. Their doctrine is that one who discounts such a note for the maker, before it is due according to its tenor, is an innocent holder for value, and is entitled to recover against any of the parties to it. They cover the present case, and they appear to be supported by sound reason. It follows that the plaintiff in error could not have been hurt by the admission of the contents of Shaner's letter.

And there is nothing else in the record of which he has any reason to complain.

The judgment is affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE STATE OF NEW JERSEY.[1]

Criminal Law—False Pretences.—An indictment for obtaining property by false pretences must show that the accused represented that certain facts existed, and that such representations caused the owner to part with his property, and must further show that the statements which induced the owner to part with his property are untrue: *State* vs. *Tomlin.*

A mere opinion or supposition that certain facts exist is not sufficient: *Id.*

A representation to a creditor that his debtor is insolvent, and is largely indebted, and that he is possessed of only small means, and is unable to pay the debt, thereby inducing the creditor to part with his claim at a sacrifice, when in fact such representations are untrue, and the debtor is able to pay, is obtaining property under false pretences, for which an indictment will lie: *Id.*

Vendor and Vendee—Deed in Escrow—Death of Vendor.—Where land is sold, a part of the purchase-money paid, and a deed executed and

[1] From Andrew Dutcher, Esq., State Reporter, to appear in the 5th volume of his Reports.

planced in the hands of a third person to be delivered to the grantee, and the balance of the purchase-money to be paid on the happening of a certain event, if the grantor die before the event happens the title to the land does not vest in the purchaser, but descends to the heirs of the vendor, subject to the equitable rights of the purchaser: *Teneick* vs. *Flagg*.

If the heirs of the vendor afterwards make a deed to the purchaser, and the purchase-money is paid over to the vendor's administrator, such administrator will not hold the money as a part of the estate of the vendor, but will hold it as an individual for the heirs as their property, and an action will lie against him to recover it: *Id.*

The deed given by the heirs is an absolute title for the land; it is not a deed of confirmation, because there had been no previous deed delivered nor estate created to be confirmed: *Id.*

Trustee—Presumption of Conveyance and Surrender to cestui que trust —Mortgage.—A deed was made to J. G. B., Trustee of the Lexington and Danville Railroad Company of Kentucky, of the second part, the *habendum* and *tenendum* clauses and the covenants being to said party of the second part, his heirs and assigns, *held*, that on the face of the deed it showed a grant to J. G. B., and not to him in trust for the company: *Brown* vs. *Combs et al.*

The railroad company executed a mortgage to J. G. B. and others, and J. G. B. made agreements for the culture of the lands, in which he styles himself as agent, and signs as such. *Held*, that these circumstances, together with the deed, being made to him as trustee, &c., were sufficient evidence that the property was conveyed to J. G. B. in trust for the company, and that it was a mere naked trust: *held*, also, that taking a mortgage from the company, and acting as agent as above stated, were inconsistent with his character as trustee, and were sufficient evidence from which to presume a surrender of the trust and conveyance of the land to the company: *Id.*

To establish a trust, no particular form of expression is necessary in a deed; it cannot be declared by parol, but may be created by any writing showing that a trust is intended: *Id.*

A *cestui que trust* cannot recover in ejectment against his trustee unless a surrender to him of the legal estate can be reasonably presumed. He has no alternative but to bring the action against a stranger in the name of his trustee: *Id.*

A trustee, as tenant of the legal estate, may recover in ejectment from his own *cestui que trust*, and the *cestui que trust* has no defence to the action at law; his only remedy is to sue out an injunction in a court of equity: *Id.*

A surrender of the trust, and a conveyance thereof by the trustee, may be presumed when the object of the trust has been accomplished: *Id.*

A mortgagee by taking a mortgage assents to his mortgagor's right to execute it, and is estopped from denying the mortgagor's title: *Id.*

Where a mortgage is given to A. B. and C. to secure them as indorsers for the mortgagor, if C. is in possession of the premises, and A. and B. bring an action of ejectment against him to recover the land, if the plaintiffs are entitled to recover they will obtain the whole premises, unless the defendant can prove damage to him by payment of or liability on some of the bills of exchange or notes against which he was to be indemnified by the mortgage: *Id.*

Common Recovery—Presumption of Conveyance or Surrender to make a Tenant by the Precipe.—H. R., by his last will and testament, devised certain lands to I. R. "during his life, and then to the heirs of his body for ever." On the third day of June, 1799, I. R. conveyed the premises to I. H. and W. M. by deed of bargain and sale, with covenant of warranty and covenant for further assurance. He also executed to the grantees a bond conditioned that he would suffer a common recovery, whereby the entailment of the premises should be broken, and a good title in fee simple vested in the grantees. On the 12th of June, 1799, an act was passed abolishing fines and recoveries. H. and M. divided the land, and M. conveyed his share to W. H., April 29, 1806. On the 8th of June, 1806, a special act was passed to authorize I. R. to suffer a common recovery. He then executed a deed tripartite with J. M. W., as the recoverer, and C. E., as the tenant to the *precipe*, reciting that H. and M. had reconveyed the whole premises to him. Judgment of recovery was rendered September 2, 1806, and on the 13th I. R. conveyed the whole premises to H. and M. in fee simple. It did not appear that W. H. ever reconveyed to M., or that he had possession of the premises previous to the recovery. W. H. and those claiming under him occupied the premises from March, 1807, to the commencement of this suit, a period of over forty years:

Held, that the facts warranted the presumption of a surrender by W. H. to M., which enabled M. to make such surrender to I. R. as gave the

latter power to make a good tenant to the *precipe: held, also*, that the recovery was legal, and under the conveyances and proceedings a good title in fee simple was vested in W. H.: *Id.*

Deed-Reservation of Entry to Repair, &c., Dams.—A deed of conveyance to the Central Railroad Company contained the following reservation, viz.: excepting and reserving to the said M. S., his heirs and assigns for ever, the right and privilege to keep up and retain on said premises the small house and yard thereto attached, as the same is now located, for ever, and also the right and privilege to enter upon said premises from time to time to make, amend, and repair his mill-dams, and to remove from the pond the manure that may there accumulate from time to time. *Held*, that by that reservation the grantor, and those claiming under him, had the right to enter upon the premises not only to amend and repair the dam, but to keep up and maintain all dams upon the premises in the same condition in which they were at the time of making the deed of conveyance, and that the grantees had not the right to take down or remove the dams, or any part thereof: *Valentine* vs. *The Central Railroad Company of New Jersey.*

The grantor made an agreement with the company, granting to them the right and privilege to extend, widen, and strengthen their embankment by the use of his lands, and relinquishing to them all claim for damages that might arise from the use of the rights and privileges thus granted, and also relinquishing all claim for damages which he had previously sustained at their hands. *Held*, that this agreement did not give to the company any right to take down or remove any part of the dam: *Id.*

Ways—Right to erect Gates.—The statutory right to erect swinging gates across private and by-roads extends to all ways except such as come within the description of public roads: *Stevens* vs. *Allen.*

Municipal Corporations—Improvements, Assessments for.—Where the charter of a city provides that the expense of improvements, when completed, shall be ascertained and assessed by three impartial commissioners, to be appointed by the common council, the corporation has not the power to establish a board of commissioners of assessments who shall act in all cases. The commissioners must be appointed for each specific case: *The State* vs. *The Mayor and Common Council of the City of Hudson.*

Where a city charter requires property to be assessed to pay for improvements according to the benefits received, it is not sufficient to assess

each lot according to its frontage. The commissioners must exercise their judgment as to the amount of benefit each lot receives, and must assess the property accordingly, and the report must show that the assessment has been so made: *Id.*

Parent and Child—Right of Father to Wages—Emancipation.—A father may claim for services rendered by his son, a master by his apprentice or hired laborer, and may charge for it as done by himself: *Brown* vs. *Ramsay.*

Where a father sues for labor performed by his son, the plaintiff must prove that he is the principal in doing the work and the son the agent, either in fact or in law, and either that the son, being emancipated, was working under him as his servant, or that he was not emancipated or was incapable of emancipation: *Id.*

On a *certiorari* from the Court of Common Pleas this Court will not review the decision of the Court below on questions of fact; but where the question is a mixed one of law and fact, the only inquiry here is whether there was a mistake or misapplication of the law by the Court below: *Id.*

If there is legal evidence before the Court below, upon which they can reach the conclusion to which they arrive, this Court will not reverse the judgment because the evidence would bring them to a different conclusion: *Id.*

The right of the father to the services of his child ceases on the child's attaining the age of twenty-one years, and it is then the right of the child to receive its own wages; but arriving at the age of twenty-one is not *ipso facto* emancipation; the child may elect to remain with the parent or may be incapable of emancipation, and if it so remain, or such incapacity exists, the parent will be entitled to the child's wages: *Id.*

Whether a child has been emancipated or not, or is incapable of emancipation by imbecility or otherwise, are questions of fact to be decided by the peculiar circumstances of each case: *Id.*

A child may be emancipated by the act of the father and without the election of the child, as where the father turns the child from his house, and will not permit it to remain at home in his family: *Id.*

The law will not presume any change in the relation of parent and child from the mere fact that the child has arrived at the age of twenty-one *Id.*

COURT OF APPEALS OF NEW YORK.[1]

Evidence—Examination of Witness—Privilege.—On the cross-examination of a witness he cannot be asked whether he had been convicted of petit larceny, although he do not object. The party has a right to insist that the fact be proved, if at all, by the record: *Newcomb* vs. *Griswold.*

So also the party may object, though the witness do not, to a question whether the latter had made certain statements in an affidavit which was not produced: *Id.*

Married Woman—Separate Property, Liability for Husband's Debt.—A wife, by allowing chattels belonging to her, and which remain *in specie*, to be employed by her husband in the carrying on of a business for their common benefit, does not devote them to her husband so as to render them liable for his debts: *Sherman* vs. *Elder et al.*

Otherwise, *it seems*, as to articles used by the husband as merchandise, whether a part of the goods belonging to the wife before marriage, or purchased out of the earnings and accumulations of the business: Per ALLEN, J.: *Id.*

An assignment by the wife of the goods and chattels, "as well as all claims and demands for any portion of them," is valid, and carries the right of action for the taking by a creditor of that part of her property which remained *in specie* and was not made merchandise, though used by the husband in his business: *Id.*

Usury—Mortgage—Conveyance subject to a Mortgage Debt.—Where land is conveyed subject to a usurious mortgage, which the grantee assumes to pay, the mortgagee acquires a right to an appropriation of the land for that purpose, which cannot be divested without his assent: *Hartley* vs. *Harrison et al.*

Held, accordingly, that a subsequent arrangement between the parties to the deed, whereby, as between them, it became a mere quit-claim, was inoperative to open the defence of usury to the grantee: *Id.*

Quære, however, whether the personal liability assumed by the grantee is not discharged by the release of his grantor. So held in the Supreme Court, and the question not passed upon by this court: *Id.*

Judgment by Confession—Fraud.—A judgment by confession entered

[1] From E. P. Smith, Esq., State Reporter.

upon an insufficient statement, but not impeached for actual fraud, is good as between the parties: *Miller* vs. *Earle.*

Where the property of the defendant has been sold under an execution upon such a judgment, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy: *Id.*

Sale—Purchase with Design not to Pay—Fraud.—Though the omission of a purchaser of goods for credit to disclose his insolvency is not necessarily fraudulent, yet if the purchase be made with a preconceived design not to pay, it is a fraud: *Hennequin et al.* vs. *Naylor.*

Such design may be inferred by the jury from the circumstances and conduct of the vendee, not only in respect to the sale in question but in other contemporaneous transactions: *Id.*

Evidence—Exemplification of Will.—The exemplification of the record of a will, in order to be evidence, under ch. 94 of 1850, must contain the proofs taken before the surrogate. A mere exemplification of the will, recorded as having been proved, is insufficient: *Hill et al.* vs. *Crockford.*

Account—Where it Lies.—The action of account, at common law, would only lie between *two* merchants. It was unavailable where the partnership consisted of a larger number: *Appleby* vs. *Brown.*

The Revised Statutes (2 R. S., p. 385, § 49), though implying a different understanding on the part of the legislature, did not change the law or enlarge the cases in which the action might be brought: *Id.*

Highway—When it may be laid out over Railroad Track or Property—Constitutional Law.—A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine-house, &c., necessary for its use at a station: *The Albany Northern R. R. Co.* vs. *Brownell et al.*

An injunction suit will lie to restrain highway commissioners from taking possession of such a site: *Id.*

It seems that an injunction suit will not lie in a case where the commissioners would have the right to lay out a highway, but fail to acquire jurisdiction, or where their proceedings were irregular: *Id.*

The statute (ch. 62 of 1853), in authorizing the construction of highways across railroad tracks without compensation, does not violate the constitutional provisions against taking private property for public use or impairing the obligation of contracts: *Id.*

The title which a railroad corporation acquires to its track is qualified

as being taken for public use, and is subject to the exercise by the legislature of all the powers to which the franchises of the corporation are subject: *Id.*

Judgment by Confession—Validity.—A judgment by confession is valid as between the parties, though the statement on which it is founded does not conform to the Code in setting forth the origin and particulars of the indebtedness: *Neusbaum* vs. *Keim et al.*

Such a judgment, therefore, upon proof of its *bona fides*, authorizes the creditor to impeach a fraudulent transfer by his debtor: *Id.*

A statement, it seems, is sufficient under the Code, which, after declaring that the plaintiff had sold and delivered to the debtor large quantities of meat in 1854 and 1855, averred that there was justly due him, upon such sales, a balance of $2114, with interest from January 18, 1855: *Id.*

Insurance—Warranty—"Free from Liens."—A marine policy of insurance "upon the whole tackle," &c., of a vessel, containing a warranty that "the property is free from all liens," parol evidence is admissible that the property insured was the owner's equity of redemption in the vessel which was subject to certain mortgages known to the insurer: *Bidwell* vs. *The North Western Ins. Co.*

The existence of such mortgages is no breach of the warranty: *Id.*

Sunday Law—Newspaper.—A contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday, is void: *Smith et al.* vs. *Wilcox et al.*

Habitual Drunkard—Promissory Note, what Payment of.—The jurisdiction given to the County Courts for the custody of habitual drunkards (Code, § 30, sub. 8) is general, not limited to those having estates of less than $250: *Davis* vs. *Spencer.*

The reference in subdivision eleven of the same section to the powers of the old Courts of Common Pleas in this matter does not limit the effect of subdivision eight, but was intended to continue in the County Court cases then pending in the Common Pleas: *Id.*

An agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of the note, operates *in presenti* as a satisfaction of the note *pro tanto*: *Id.*

Whether the assent of the partner was necessary or material: *Quære*: *Id.*

SUPREME COURT OF NEW YORK.

Action for Specific Performance.—When it appears, or is conceded, on the trial at a special term of an action for the specific performance of an agreement to sell and convey real estate, that the defendant is not, and never has been, able specifically to perform, the judge should decline to proceed with the trial, and should send the action to the circuit, for trial: *Stevenson* vs. *Buxton.*

The defendant, in such a case, has a right to have the question of damages tried by a jury; of which the justice, at special term, cannot deprive him, by a compulsory reference to a referee; particularly where the fact that the defendant never had title, and was not and never had been able to specifically perform, is set up in the answer: *Id.*

Insurance—Transfer of Interest without Consent—Liability upon Premium Note.—A clause, in a policy of insurance, providing that the interest of the assured in the policy, or in the property insured, is not assignable without the written consent of the insurers; and that in case of any transfer or termination of such interest without such consent, the policy shall be void and of no effect, is to be regarded as a provision made for the exclusive benefit of the insurers, and to be practically exercised by them or not, at their option: *Hyatt, receiver, &c.*, vs. *Wait.*

If, after the assured has transferred his interest in the policy and in the property insured, without the written consent of the insurers, the latter choose to rectify the transfer, and to continue the insurance, the policy will not be absolutely void: *Id.*

And if, after notice of such transfer, they treat the assignee as a member of the company, they will be estopped from denying such ratification and approval: *Id.*

Whether a policy of insurance be regarded as originally void, or only voidable in consequence of an unauthorized transfer, it is nevertheless conditionally susceptible of ratification and confirmation: *Id.*

Notwithstanding a policy be regarded as absolutely void, by reason of an unauthorized transfer, so far as to prevent an action for a loss, by the assured, against the company, the former is not released from the obligations of his deposit or premium note until he has complied with a condition of the policy and charter, requiring "the payment of his proportion of all losses and expenses that may have occurred prior to the surrender" of the policy, or alienation of the property: *Id.*

The assured will remain liable upon his deposit note, as well for losses occurring after as before the alienation, until all assessments are paid: *Id.*

Notwithstanding a clause in the charter of a mutual insurance company, declaring that all persons who shall insure with the company, "*so long as they shall be insured* in said company, shall be and continue *members* thereof, and *no longer*," persons insured are still members of the company, and liable to contribute for losses sustained, although they have alienated the property without the written consent of the company: *Id.*

Husband and Wife—Wife when a witness against Husband—Parol Promise of Husband, and Settlement in consideration thereof.—When husband and wife are co-defendants, and their interests are not conflicting, she is a competent witness in her own behalf, and may be examined as to an agreement between them: *Scheffner* vs. *Reuter and others.*

Where a husband receives from his wife a sum of money belonging to her absolutely, upon a parol promise to repay the same, he not being indebted at the time, such parol promise, though void at law, is good in equity: and the receipt of the money forms an equitable consideration for the repayment thereof, or for a settlement of real estate of equivalent value, and for a post-nuptial contract carrying such an arrangement into effect: *Id.*

Where a conveyance, made by a husband to his wife, was no more than a joint equivalent for the money borrowed by him of her, and was apparently free from actual fraud, it was *held* that such conveyance, although executed after a debt had been incurred by the husband, was supported by the antecedent equitable obligation and consideration, and in legal effect related back to that period. *Id.*

Mortgage—Condition that all shall become due on Default.—A condition, in a mortgage, that upon default in the payment of interest for twenty days after due, the principal sum, together with all arrears of interest, shall, at the option of the mortgagee, become due and payable immediately, is not in the nature of a forfeiture, to be relieved against by a court of equity, or which a court of equity will not enforce. It is an agreement which the parties have a right to make, and the extension of credit is lawfully made dependent upon the punctual payment of interest: *Valentine* vs. *Van Wagner.*

Certificate of Deposit, payable in "Illinois Currency."—The plaintiffs deposited money with the defendants, who were bankers, at Chicago, receiving from them a certificate stating that the plaintiffs had "deposited

in their office $1781.42, Ills. Cy., payable to the order of themselves." *Held*, that the fair construction of the terms "Ills. Cy.," if applied to the payment of the certificate, was that the same might be paid in bills of banks which at the time of payment were received and passed as ordinary currency, in Illinois; but that payment could not be made in the same bills which were deposited. And that it was error to hold that the defendants were bound to pay in specie, or in bills which passed at par, in Chicago: *Hulbert and others* vs. *Carver and others.*

Sheriff—Liability for Acts of his Deputy—Authority of Deputy, how proved—Impeaching Witnesses.—To render a sheriff liable for the acts of his deputy, it is not necessary that he should be sued in his official capacity as sheriff and facts sufficient to charge him as such be set out in the complaint: *Curtis* vs. *Fay.*

The sheriff's liability for the acts of his deputy, in the execution of process, rests upon the doctrine of principal and agent; and in all such cases it is essential to prove the agency, upon the trial, if the fact is denied by the answer: *Id.*

The authority of the deputy to act as the agent of the sheriff, and to bind him by his acts, can only be proved by the production of his appointment as deputy. It cannot be proved by a certified copy of such appointment; nor by evidence that the deputy acted as such: *Id.*

One having no personal knowledge of the character of a witness, but deriving his information solely from others whom he does not know, is not qualified to testify in relation to the witness's character or reputation: *Id.*

An impeaching or sustaining witness is not to speak of the reputation of the witness whose veracity is in question, unless he knows it; and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintance of the witness, sufficient to enable him to gather the general estimation in which such witness is held in the community where he resides: *Id.*

SUPREME COURT OF MASSACHUSETTS.[1]

Promissory Note—Failure of Consideration—Patent.—The sale of the right to make, use, and vend a patented invention which cannot be applied to any beneficial purpose, but is wholly worthless, is not a valid consideration for a promissory note, although the parties acted in good faith and both then believed the patent to be valuable: *Lester* vs. *Palmer.*

[1] From Charles Allen, Esq., Reporter of the Court.

Shipping—Charter-Party—Deviation from Voyage.—Charterers of a vessel for an entire voyage, who by themselves or their authorized agent waive the terms of the charter-party and consent to and order a deviation from the voyage agreed upon, are liable to pay the stipulated price, in like manner as if the voyage originally contemplated had been performed; and the fact that a memorandum of such consent and order is afterwards written upon the charter-party and signed by such agent with his own name alone is immaterial: *Baker* vs. *Pratt*.

If A., being the authorized agent of the charterers of a vessel for an entire voyage, instead of pursuing the voyage agreed upon, to I., consents to abandon it, and signs a memorandum reciting that he has given orders to the captain to keep the ship away for G., the captain deeming it inexpedient from the lateness of the season to visit I., but saying that he held himself in readiness to make further effort to do so if required, the legal effect of the memorandum and of the arrangement of which it is the evidence is, an agreement to deviate from the original course of the voyage, and not an abandonment of the charter-party; and the charterers are liable for the stipulated price, although the prosecution of the original course of the voyage had become impracticable by the perils of the seas, and the voyage was in fact broken up; and although, after reaching G., a new agreement was made respecting the homeward voyage, in which the questions affecting the rights of the parties under the charter-party were reserved for future adjustment: *Id.*

Dower—Vendor and Vendee.—A widow is not entitled to dower in land in the possession of her husband at the time of his death, under an executory contract for the purchase thereof, the terms of which were not complied with in his lifetime: *Lobdell* vs. *Hayes*.

Case—Liability of Occupier of Real Estate for Negligence of Workman.—The lessee of a building who has employed a carpenter to repair an awning which extends from the building over a public way, with no special contract as to the terms, price, or time of doing the work, is liable for an injury sustained by one who is lawfully using the way, by reason of the carelessness of the carpenter in making the repairs: *Brackett* vs. *Lubke*.

Shipping—Liability for Supplies.—One who has taken and caused to be recorded a bill of sale of an undivided share of a vessel, absolute in terms, but intended only as collateral security for a debt, and has never