ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF NEW HAMPSHIRE.[2]

COURT OF APPEALS OF NEW YORK.[3]

Corporation.

Bill in Equity to charge Stockholders individually.—When a bill in equity is brought against the stockholders of a corporation, for the purpose of charging them personally upon their individual liability, for the debt of the corporation, an equitable contribution is to be made by the court between all the stockholders as far as may be: *Erickson, Livermore & Co.* v. *John Nesmith et al.*, Sup. Ct. N. H.

Our statute makes the liability of stockholders in manufacturing and many other corporations, joint and several, for all such debts of the corporation as they are made personally liable to pay; thus making them liable as though they were partners, without any act of incorporation: *Id.*

The rule among partners is, if after applying the assets there are still outstanding liabilities, the partners must contribute in proportion to their shares; or if there is a surplus it will be distributed among them in like proportion: *Id.*

Where a bill in chancery is brought against any of the stockholders of a corporation, to compel them to pay a debt of the corporation, for which they are individually liable, the general rule is that all persons liable to contribute, should be made parties to the bill: *Id.*

But this is a rule of convenience and not of necessity, and when persons interested are out of the jurisdiction of the court, and it is so stated in the bill and admitted by the answer or proved, it is not necessary to make them parties, but a decree may be made against those over whom the court has acquired jurisdiction, where it can be done without injustice to those who are absent: *Id.*

And where certain of the stockholders within the jurisdiction are insolvent, the plaintiff may have his decree against such as are solvent for his whole debt, each paying such proportion of the whole debt as his stock bears to the whole amount of stock owned by the solvent stockholders, over whom the court has acquired jurisdiction: *Id.*

Criminal Law.

Convict not executed in accordance with Sentence—Warrant of Execution from Supreme Court.—Whenever, for any cause, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, the Supreme Court, having the convict before it, and, upon inquiry into the facts and circumstances of the case, find-

---

[1] From Charles Allen, Esq., Reporter; to appear in vol. 12 of his Reports.

[2] For these abstracts we are indebted to the courtesy of the judges of the court. The cases will appear in 46 or 47 N. H. Rep.

[3] From Joel Tiffany, Esq., Reporter; to appear in vol. 8 of his Reports (35 N. Y.).

ing no valid reason against the execution of the sentence, are required to issue their warrant to the sheriff of the proper county, commanding him to do execution of the sentence, at such time as shall be appointed in such warrant: *Application of Ferris for a Writ of Error*, 35 N. Y.

Should the court, at the time of the issuing of such warrant, recapitulate the sentence of the former court, as though it were the judgment of the Supreme Court, such informality would not be error: *Id.*

Damages.

Evidence in Aggravation and Mitigation.—In a case where the plaintiff may enhance the damages by showing circumstances of aggravation, the defendant may mitigate damages by showing circumstances of palliation: *Millard* v. *Brown*, 35 N. Y.

It is error for the judge to charge the jury that they may give exemplary damages against the defendant, and yet refuse to permit the defendant to give evidence tending to exculpation: *Id.*

It is not admissible to permit a medical witness to give an opinion in a case, where he has no means of ascertaining the facts in respect to which his opinion is asked: *Id.*

Debtor and Creditor.

Suit by Sheriff against Assignee in order to make Money on an Execution.—A judgment-creditor is not a necessary party to a creditor's suit, instituted to set aside a prior assignment made for the benefit of creditors, on the ground of fraud: *Lawrence* v. *Bank of the Republic*, 35 N. Y.

A sheriff cannot institute a creditor's suit to reach the proceeds of the assigned property, that they may be applied on an execution in his hands: *Id.*.

The proceeds of the sale by the assignees of such assigned property, are not subject to levy and sale on execution: *Id.*

Such proceeds may sometimes be pursued, and the holder thereof be turned into a trustee for the benefit of creditors: and proper parties may bring an action against the debtor and his assignees for such purpose; but the sheriff is not such a party: *Id.*

Deceit.

False Affirmation as to Quantity of Land and Crop raised on it.—An action will lie for a false and fraudulent affirmation in respect to the quantity of hay usually cut upon a farm, which the defendant was about to sell to the plaintiffs: *Coon et al.* v. *Atwell*, Sup. Ct. N. H.

And also for the like affirmation as to the number of acres contained in such farm: *Id.*

Such affirmations are not to be regarded as mere expressions of opinion, in which it was folly to confide; nor as representations, the truth of which the vendee might with common prudence ascertain: *Id.*

In an action on the case for deceit, such affirmations may be proved by parol evidence, although the conveyance was by deed: *Id.*

Estrays.

Constitutionality of Laws for Seizure and Sale of.—Chapter 459 of the Laws of 1862 is unconstitutional, so far as it authorizes the seizure

and sale, without judicial process, of animals found trespassing within a private inclosure: *Rockwell, Executor,* v. *Nearing,* 35 N. Y.

The legislature transcends the limits of its authority when it enacts that one citizen may take, hold, and sell the property of another without notice to the owner, or without process or warrant, as a mere penalty for a private trespass: *Id.*

Such summary proceedings as the common law recognised, and such as were authorized by statute prior to the adoption of the bill of rights, may be regarded as "due process of law;" but no form of proceedings then existed which authorized the summary confiscation of private property as a punishment for a mere trespass: *Id.*

The proceedings in the case of strays, and of cattle taken *damage feasant,* are remedial in their nature; but those instituted by the act in question are purely penal, and to the extent above indicated they are clearly within the prohibition of the constitution: *Id.*

It seems that even when the animal is seized on the public highway, the captor would be liable if he omitted to give notice to a known owner, or if he procured the animal to be sold without producing it for the inspection of the bidders: *Id.*

Evidence.

Of Experts—Witness having Knowledge only by Sound.—A witness hearing the sound of a carriage as it started, may state from what point it appeared, from the sound, to start, although not seen by him: *State* v. *Shinborn et al.,* Sup. Ct. N. H.

An expert may testify that entries upon hotel registers, which he had seen and examined, were in the handwriting of the person who wrote certain other signatures, which were produced and proved, or admitted to be the respondents; although such entries were not before the jury—they having been destroyed by the respondent himself for the purpose of suppressing the evidence: *Id.*

The testimony of an expert may be received to prove a signature, by comparison, although there has been no evidence from any person acquainted with such signature: *Id.*

Entries upon books of third persons of their daily transactions, made by persons whose duty it was to make them, and who testify to their correctness when made, but who have now no remembrance of the transactions, are competent to be read in evidence: *Id.*

It is no objection to the admission of such entries, that they were first entered upon a slate by two persons during the day, and at night copied by one of them into the books; provided the original entries and copying are verified by the parties making them: *Id.*

Husband and Wife.

Arbitration on Damage to Wife's Land—Authority of Agent to submit to.—Where an agent submits to arbitration the question of damage done land owned by the wife of his principal, supposing it to be the land of the principal, for earth and stone removed from such land, but afterward, on learning that the title of such land was in the wife, he gave notice to the other party, and executed a new submission upon the same terms, and tendered it to the other party, who declined receiving it, saying that it would make no difference: *Held,* that such submission

was valid, and the wife was bound by the award made thereon: *Smith* v. *Sweeney*, 35 N. Y.

Where the award requires the execution of a release on the part of the wife, who is not strictly a party to the submission, and which cannot be enforced by suit, yet, if the release be tendered in due and proper form, that objection ceases; and the valid parts of the award may be enforced: *Id.*

Held, further, that when the wife permitted the arbitration to proceed in the name of her husband, knowing herself to be the party in interest, she would be bound by the award: *Id.*

Divorce—Parties as Witnesses—Unchastity.—In a libel for a sentence of nullity of marriage, the parties are competent witnesses: *Foss* v. *Foss*, 12 Allen.

If a man marries a woman whom he knows to be with child, and whom he himself has debauched, being induced to marry her by her assurances that the child is his, and not taking any further steps to ascertain its paternity, nor suspecting her of unchastity with any other man than himself, this court will not declare the marriage void, although it appears that the child must have been in fact begotten by another man: *Id.*

Competency of Wife as Witness.—In a suit where the interests of the husband are directly involved, and would be concluded by the judgment, the wife is not a competent witness, for or against the husband, although he be not a party: *Young, Administrator*, v. *Gilman*, Sup. Ct. N. H.

Landlord and Tenant.

Neglect of Landlord to keep in Repair—Set-off in Action for Rent.—In an action for rent, the defendant may, under a covenant of the landlord to keep the premises in repair, set up, as a counterclaim, an amount expended by him in the necessary repair of the premises, and also damages sustained by the loss of the use of certain parts of the premises rendered untenantable for want of repair: *Myers* v. *Burns*, 35 N. Y.

In such action defendant may recover for his expenses in repairs, even when they exceeded what it would have cost the landlord, had he employed his own mechanics: *Id.*

In the leasing of premises for a first-class hotel, a covenant to keep the same in repair is broken by permitting the flues to remain in such a condition that the rooms cannot be used with a fire, owing to the issuing of smoke from the grate into the room, whenever a fire is lighted therein: *Id.*

License.

To do Acts on Another's Land.—A parol license to do a certain act, or series, or succession of acts on the land of another, does not convey any interest in the land, but simply a privilege to be exercised upon the land, and hence the Statute of Frauds does not apply to such license: *Houston* v. *Saffee*, Sup. Ct. N. H.

But such a license is in all cases revocable, so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned, at the will of the licensor, even where the licensee has made an expendi-

ture of money upon the land of the licensor upon the faith of such license: *Id.*

In an action of trespass for cutting off lead pipe, which the plaintiff had laid upon the land of defendant under a parol license, for the purpose of conveying water to the plaintiff's house, plaintiff cannot recover the money expended in digging or deepening the well, or purchasing and laying the pipe, or any consequential damage suffered at his house or stable in consequence of the stopping of the water at that particular time. He can only recover for the actual injury to the pipe, and possibly exemplary damages, if the act was unnecessary and malicious: *Id.*

Master and Servant.

Liability of Master for Servant's Acts.—If a servant does a wrongful act without the authority and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible in damages therefor: but if the act be done in the execution of the authority given by the master, and for the purpose of performing what he has directed, he is responsible, whether the wrong done be occasioned by negligence or by a wanton and reckless purpose to accomplish his business in an unlawful manner: *Howe* v. *Newmarch*, 12 Allen.

Merger.

Mortgage of Chattels—Purchase of the Mortgage and the Equity of Redemption by same Person.—Where personal chattels are mortgaged, and subsequently attached to the freehold, under circumstances showing that, as between the parties, they are to be considered personal chattels still, a transfer of said mortgage, after the chattels have been thus attached, together with a purchase of the equity of redemption by the assignee, transfers the title to such mortgaged property: *Sheldon* v. *Edwards*, 35 N. Y.

In equity, merger never takes place, when the requirements of justice or the intentions of the parties demand that it should not: *Id.*

Where there is a general judgment on an issue in bar—though, under the Code, there is also an issue in abatement—the parties will be estopped from litigating further the merits of the former issue, while such judgment is in force: *Id.*

Mortgage.

Of Chattels—Right of Possession.—The execution of a chattel mortgage, in the usual form, vests the title in the mortgagee, subject to be defeated by subsequent performance of the condition: *Hall* v. *Sampson*, 35 N. Y.

The right of possession ordinarily follows that of property; and both would pass under such an instrument, in the absence of any express or implied agreement for the retention of the chattels by the mortgagor: *Id.*

But when the instrument specifically defines the circumstances under which the right of possession is to vest in the mortgagee, the law implies an intent that it is to remain meantime in the mortgagor: *Id.*

Until the possessory right of the mortgagor ceases, his interest is subject to seizure and sale, under legal process, at the instance of his creditors: *Id.*

When the mortgagee, in good faith, takes possession of the bulk of

the property, under a clause in the instrument authorizing him to do so whenever he deems himself unsafe, the possessory right of the mortgagor terminates; and he has no remaining interest in the mortgaged property, subject to levy and sale on execution: *Id.*

Fraudulent Alteration.—A mortgage of land is not rendered invalid by the fraudulent addition, by the grantee, of the name of the grantor's wife, as a party signing the same for the purpose of releasing dower: *Kendall* v. *Kendall and Another*, 12 Allen.

Bill in Equity to Redeem.—A bill in equity to redeem is a general remedy in New Hampshire for a party who claims the right to redeem a mortgage, and is not superseded by the statute, which in certain cases gives a remedy by petition: *Hall* v. *Hall*, Sup. Ct. N. H.

The owner of an equity of redemption, who is out of possession, may maintain a bill in equity to redeem against the mortgagee and the tenant in possession, notwithstanding the pendency of a writ of entry by the mortgagee against the tenant in possession: *Id.*

But in such case the suit at law will not be enjoined upon an allegation in the bill that the mortgagee claims a larger sum, and proposes to take a conditional judgment for a larger sum, than is legally and equitably due: *Id.*

Negligence.

Injury by Defect in a Street laid out by Corporation for Special Use.—A manufacturing corporation which owns land contiguous to its mill and lays out and maintains a street and builds boarding-houses thereon for the use of its operatives, is not liable in damages for an injury sustained by one of these operatives by reason of a defect in such street: *Palmer* v. *Lawrence Manufacturing Co.*, 12 Allen.

Elevator worked by Servant of Landlord—Injury to Servant of Tenant.—If the owner of a building puts into it an elevator for the purpose of raising and letting down merchandise, under a contract with his tenant to furnish and operate one for that purpose, and nothing is said in respect to using it for the purpose of raising and letting down men with the merchandise, and a servant of the tenant is injured while upon the elevator with goods, through the negligence of the servant of the owner of the building in his management of the engine by which the elevator is operated, it cannot be held as a matter of law that such owner is not liable for the injury, but it should be left to the jury to determine whether it was properly incident to the business of raising and letting down merchandise that a man should go up and down with the same on the elevator: *Stewart* v. *Harvard College*, 12 Allen.

In an action by a servant of the tenant against the owner of such building to recover for such injury, it is immaterial whether or not he knew in what way the business of raising and letting down merchandise was to be managed, or whether the elevator was constructed with a view to be used to raise or let down men, or what was the custom in that respect in using a similar elevator operated by the same engine in another store; and evidence is inadmissible to show that it was the custom in that store for a man to go up and down upon the elevator with the goods, and that the engineer employed by the defendant had done so; and no privity of contract between the plaintiff and the defendant need be shown; nor is the principle that a servant cannot

recover against his master for damages sustained by reason of the negligence of a fellow-servant applicable to such a case: *Id.*

NONSUIT.

Of one Co-Plaintiff.—In personal actions the nonsuit of one of several co-plaintiffs is the nonsuit of all: *Brown et al.* v. *Wentworth et al.*, Sup. Ct. N. H.

In such an action where one of several co-plaintiffs, each having equally an interest in the cause of action and maintaining the suit, if at all, in his own right and for his own benefit, and having an equal right to control the suit, shows the court that the suit is brought without his knowledge, consent, or authority, and by petition duly presented requests to be nonsuited, and no fraud appears, ordinarily a nonsuit will be entered as to all the plaintiffs: *Id.*

In such a case an offer of indemnity by the other co-plaintiffs to the plaintiff thus petitioning, not made till after the presentation of such petition, will not ordinarily be sufficient to prevent the entry of a nonsuit: *Id.*

PARTITION.

Agreement between Tenants in Common to refer to Arbitrators.—Partition between tenants in common is not accomplished by a written agreement not under seal, to refer the partition to certain arbitrators, and to abide by their award, followed by a division, marked with metes and bounds upon the land by the arbitrators, and by them reduced to writing and signed, and agreed to by the parties: *Wilder* v. *Russell*, Sup. Ct. N. H.

Setting off of Part only.—Upon a petition for partition of real estate under our statute, the requirement that the committee shall "set off the share of the several persons interested, according to their respective titles," will be answered by their setting off to the petitioner his share, or if there are several petitioners, their shares, either to each in severalty, or to them all together in common, as they elect, and leaving the residue undivided, to be held by the petitioners, where there are several of them: *Abbott* v. *Berry et al.*, Sup. Ct. N. H.

PARTNERSHIP.

Special Partner as a Creditor of his Insolvent Firm.—In case of the insolvency or bankruptcy of a partnership, no special partner can, under any circumstances, be allowed to claim as creditor, until all claims of other creditors of the partnership are satisfied: *Hayes* v. *Heyer*, 35 N. Y.

But where, in such case, the special partner is a general partner in another firm, to which the insolvent partnership is indebted, the debts due to such firm are not to be postponed, on account of the (former) special partner's interest therein: *Id.*

PAYMENT.

After Commencement of Suit, should be pleaded.—Payment since the commencement of the suit must be pleaded in bar of its further maintenance, otherwise it is admissible only in mitigation of damages: *Dana* v. *Sessions*, Sup. Ct. N. H.

Where a specification of a general count was ordered at the first term,

but not filed until the trial at a subsequent term, and plaintiff had judgment for nominal damages upon the ground that the debt had been paid since the suit was brought, it was held that plaintiff's costs were properly limited to the first term: *Id.*

Replevin.

Detention of Goods by Common Carrier.—Replevin will not lie for the mere detention by a common carrier of goods that came lawfully into his possession: *Woodward* v. *Grand Trunk Railway Co.*, Sup. Ct. N. H.

Stamp.

Officer's Return of Mesne Process.—An officer's return of mesne process is not a certificate within the meaning of the revenue laws, which require certificates to be stamped: *Graves* v. *Clay*, Sup. Ct. N. H.

Taxation.

On Corporations—Gas Companies.—The legislature have power, by a general law, to require corporations organized here to pay to the treasurer of the commonwealth a tax upon the excess of the market value of all the capital stock thereof over the value of their real estate and machinery taxable in the city or town where they are situated: *Commonwealth* v. *Lowell Gas Light Co.*, 12 Allen.

A gas light company, incorporated under a charter which does not authorize it to take private property, not already appropriated to public use, or impose upon it any public duty, is not a public corporation in such sense as to exempt its property from taxation in the city or town where it is situated: *Id.*

Gas pipes owned by a gas light company and used for the purpose of distributing gas through the streets, and the meters used for measuring out the gas to the consumers, are to be regarded as "machinery" of the corporation, and their value is accordingly to be deducted from the market value of the capital stock of the corporation, in ascertaining the state tax to be assessed upon the corporation under St. 1864, c. 208: *Id.*

Vendor and Vendee.

Sale of one kind of Property and Delivery of Another.—No property passes to a vendee, as against attaching-creditors of the vendor, where the contract of sale relates to and includes one kind of property, and a delivery is made to the vendee of a wholly different kind, without the knowledge of the vendee or any assent on his part, either express or implied, to take and receive the substituted article in place of the one which he agreed to purchase: *Gardner* v. *Lane*, 12 Allen.

Will.

Probate of Codicil subsequently to Probate of Will.—The probate court, after admitting a will to probate, and after the time for appealing from the decree has passed, may admit to probate a codicil to the same will, written upon the back of the same leaf upon which the will was written, if such codicil escaped attention and was not passed upon at the time of the probate of the original will: *Waters* v. *Stickney*, 12 Allen.