to determine that question, and the removal of the cause to that tribunal is not a denial of justice.

The judgment is reversed, with costs, and all proceedings subsequent to the filing of the petition are set aside, and the court is directed to pass upon the sufficiency of any bond that may be offered under the law of Congress, and if such bond be approved to proceed no further in the case.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF MAINE.[2]

SUPREME COURT OF MASSACHUSETTS.[3]

COURT OF CHANCERY OF NEW JERSEY.[4]

SUPREME COURT OF NEW YORK.[5]

SUPREME COURT OF VERMONT.[6]

Accord and Satisfaction.

Must be executed.—An agreement or accord which is to operate as a satisfaction of an existing liability, must, before it can have that effect, be fully *executed: Bragg* v. *Pierce*, 53 Me.

It is merely *executory*, so long as by its terms something remains to be done in the future: *Id.*

Admissions.

Of a Party—When conclusive against him.—The admissions of a party, whether of law or of fact, which have been acted upon by another, are conclusive against the party making them, as between him and the person whose conduct he has influenced. And this, whether the admissions are made in express language to the person himself, or are implied from the open and general conduct of the party: *Calanan* v. *McClure, Executor, &c.*, 47 Barb.

That a Claim is still open for Settlement.—In the winter or spring of 1861, a creditor presented an account against an estate to the executor, which was rejected by the latter, on the 15th of March. An offer

[1] From J. W. Wallace, Esq., Reporter; to appear in Vol. 4 of his Reports.

[2] From W. W. Virgin, Esq., Reporter; to appear in 53 Me. Rep.

[3] From Charles Allen, Esq.; to appear in Vol. 12 of his Reports.

[4] From T. N. McCarter, Esq., Reporter; to appear in Vol. 2 of his Reports.

[5] From Hon. O. L. Barbour, Reporter; to appear in Vol. 47 of his Reports.

[6] From W. G. Veazie, Esq., Reporter; to appear in 39 Vt. Rep.

of a given sum was made, by the attorneys of the executor, to compromise the claim, which was refused by the creditor. In April another account, embracing some additional items, was presented to the executor, and an offer made, by the creditor, to settle it for fifty cents on the dollar. The executor then promised to see his attorney, and to let the creditor know what he would do about it. The creditor called upon the executor repeatedly for his answer, and the usual excuse was that the executor had either forgotten to see his attorney, or that the latter was out of town. Finally, in October, after six months from the first rejection of the account had elapsed, the executor refused to pay the account, or to consent to refer it. *Held*, that the negotiations which were thus kept alive were an admission by the executor that the matter was still open for settlement, and that the first rejection was not considered as final and conclusive, but was waived and abandoned: *Id.*

Held, also, that, under the circumstances, the claim was not barred by the Statute of Limitations until six months after its final rejection, in October: *Id.*

Agent.

Personal Liability—Partnership.—The duty is upon the agent, if he would avoid personal liability, to disclose his agency—not upon others to discover it. If he fails to disclose it and deals with persons unaware of it, he must answer to them personally for the debts he contracts: *Baldwin* v. *Leonard*, 39 Vt.

Mere knowledge of the agency by one partner is not constructively knowledge by the firm; and if the agent, after communicating information of his agency to one partner, buys the goods in the absence of that partner, and without any participation in the transaction by that partner, of another member of the firm, who is unaware of the agency, such agent will be personally liable to the firm unless he discloses his agency to the partner with whom he trades: *Id.*

R., H., and E. were partners and owned some hay. L. asked R. if they had any hay to sell, and told him he was buying as an agent of K. R. said he was not prepared to contract for the hay then. In fact, it was not at that time all cut. L. said he would call again. Four weeks after this he called and bought the hay of H., in R.'s absence and without his knowledge. L. did not disclose his agency to H. *Held*, that the conversation between L. and R. was no part of any negotiation, and the agent was personally liable to the firm to pay for the hay he bought, although he, in fact, bought it for K.: *Id.*

Ratification of unauthorized Acts.—Ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding on the principal, must have been made with full knowledge of all material facts; and ignorance of such facts, whether it arises from want of inquiry by the principal, and neglect to ascertain the facts, or from other causes, will render an alleged ratification ineffectual and invalid: *Combs* v. *Scott*, 12 Allen.

Agreement.

For the Sale of Lands, signed by Vendee only.—An agreement for the sale and purchase of lands, signed by the vendee only, is void by the Statute of Frauds: *De Beerski* v. *Paige*, 47 Barb.

Construction and Validity.—The defendant executed an instrument, by which, in consideration of one dollar, he agreed to purchase certain real estate of the plaintiff, stock, &c., if satisfied with its location and advantages, at a price specified, and in case no purchase should be made then he agreed to pay the plaintiff $2000 for painting certain portraits, and to pay him $50 per week for the board of himself and family during three months specified. *Held*, on demurrer, 1. That the contract was entire, and not severable; and that, being void as to the land, because not signed by the vendor, it was also void as to the other subjects embraced therein. 2. That it was inoperative for want of mutuality. 3. That the consideration of one dollar, expressed in the writing, was applicable to the sale of the real estate, and was vitiated by the provision of the statute which rendered that part of the instrument nugatory and void: *Id.*

Amendment.

Limitations—Pleading—Witnessed Note.—New counts by way of amendment or addition to the declaration relate back to the commencement of the suit, and operate as if they had been a part of the declaration at the outset: *Dana* v. *McClure*, 39 Vt.

A plea to a new count on a witnessed note that the cause of action did not accrue within fourteen years next before "*the filing of the new declaration*," is bad on demurrer: *Id.*

The county court has authority to allow the plaintiff to file new counts at any stage of the proceedings, even after his specifications have been filed and the defendant has pleaded, and so pleaded as to defeat the plaintiff, if limited to his original declaration. The exercise of this authority is, as to time, a matter of discretion not subject to revision by the Supreme Court: *Id.*

The new count must be for the same cause of action which the suit was originally brought to determine, but may set up that cause in such a manner as to bring it within the terms of a Statute of Limitations not applicable to the original declaration: *Id.*

The plea, *non accrevit infra sex annos*, is a good answer to an action of *indebitatus assumpsit*, and may not be avoided by a replication that the action is brought to collect a witnessed note: *Id.*

But a new count, declaring specially upon a witnessed note while the plaintiff had been seeking to collect under a general declaration, does not set up a new cause of action, although the statutory period of fourteen years had elapsed before the new count was filed; and the plaintiff may recover under his new count if fourteen years had not elapsed before the suit was commenced: *Id.*

Nor does the new count revive or create by relation a cause of action. The Statute of Limitations merely gives the debtor special matter of defence to the *remedy*, it does not extinguish nor affect the *indebtedness* which makes the *cause of action*: *Id.*

The fact that the plaintiff could never have collected the debt if not allowed to amend is a reason for granting, not for refusing him leave to file new counts: *Id.*

Assumpsit.

Book Account—Parol Evidence to vary.—In *assumpsit* for balance

for wagons alleged to have been sold to the defendant, the plaintiff may testify that he *intended* to give credit to the defendant when he parted with the wagons, although he charged them on his book to the defendant's son: *Folsom* v. *Skofield*, 53 Me.

Book Account—Offset—Payment.—One item of the plaintiff's account was for five days' work at $8.25. The defendant indorsed that sum as for that five days' work, soon after the work was done, on a note for $10, which he held against the plaintiff at the time the work was done, but without the knowledge or consent of the plaintiff, and the plaintiff charged said work on book, supposing that it would be adjusted in their mutual accounts. *Held*, that the defendant had no right to appropriate and apply that item of work *as payment* on said note, and by such application and indorsement defeat the right of the plaintiff to have it constitute an item of charge in his running account with the defendant, and to have it reckoned and embraced by the auditor in this suit on book: *Carr* v. *McDonald*, 39 Vt.

The defendant borrowed of the plaintiff eleven pounds of nails, with the understanding that the defendant was to pay for them in nails again, which he never did, and the plaintiff never made any demand for them, but charged them on book at the time they were borrowed—which was about four years before this suit on book was brought, including said nails as one item. *Held*, that the plaintiff could recover for the nails: *Id.*

Bailments.

Innkeeper as Bailee.—In case against an innkeeper, the words, "being entertained as a guest therein in the inn of the said" defendant, constitute a sufficient allegation that the defendant was an innkeeper: *Norcross* v. *Norcross*, 53 Me.

The possession of a license does not make, nor the want of it prevent, a person from being an innholder at common law: *Id.*

Innkeepers are insurers of the property of their guests committed to their care, and are liable for its loss or injury, when not caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants: *Id.*

Upon proof of loss, the *onus* of bringing the case within the exceptions is upon the innkeeper: *Id.*

If a person goes to an inn as a wayfarer and traveller, and the innkeeper receives him as such, the relation of landlord and guest attaches at once with all of its rights and liabilities, and so continues so long as he sojourns there as a traveller: *Id.*

The liability of innkeeper attaches to goods when they are brought within the inn or otherwise placed within his custody in some customary and reasonable manner: *Id.*

If a guest, in the absence of the landlord and his servants, hang up his coat in the place in an inn allotted for that purpose, it is *infra hospitium*: *Id.*

Bills and Notes.

Nature of the Contract—Parol Evidence.—When a negotiable promissory note bears upon its back the names of the payee and another person, —the former above the latter,—the presumption is, in the absence of all

controlling proof, that the payee indorsed it to the one whose name is under his, and the latter to some third party: *Sturtevant* v. *Randall*, 53 Me.

The contract *implied*, from one's placing his name in blank upon the back of a negotiable promissory note, is not a *written* contract so far complete in itself as to exclude parol evidence to show his connection with such note: *Id.*

As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character: *Id.*

When a judgment has been rendered against a person upon the verdict of a jury finding him to be an original promissor of the note in that suit instead of an indorser, as he alleged himself to be in his specifications of defence, he is estopped to deny that relation in any litigation with any other party to the note: *Id.*

Under a count for money had and received and money paid, a note bearing on its back the defendant's name would be admissible under the general issue: *Id.*

Notice to Indorser—Damages on Dishonor of Bill of Exchange on London.—If the notice to the indorser of the dishonor of a bill of exchange is such that he must know what bill is referred to, it is sufficient to charge him: *Wood* v. *Watson*, 53 Me.

Mercantile usage in this state has established the damages on a dishonored bill of exchange on London at ten per cent.: *Id.*

The court cannot vary this rule, in a monetary crisis, on account of a depreciation of the currency of the country. (DAVIS, WALTON, and BARROWS, JJ., dissenting): *Id.*

CONDITION.

Grant with Condition that Grantor shall have a Homestead on the Premises.—If a grant of a homestead is made on condition "that the grantor and his wife shall be allowed to reside on said homestead during their respective natural lives, and so long as they thus reside thereon the grantee, his heirs and assigns, shall furnish them with a comfortable maintenance and support in sickness and in health, it being understood that the grantee, his heirs and assigns, with their families, may also in the mean time reside on said homestead," the grantee has no right to insist that the grantor or his wife shall become a part of his family or receive their support at the table and in the apartments occupied by him; and a refusal to furnish such support in a separate room will be a breach of the condition: *Hubbard* v. *Hubbard*, 12 Allen.

CONSTITUTIONAL LAW.

Habeas Corpus—Military Commissions.—Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of *habeas corpus* for the purpose of inquiring into the cause of commitment, and they have jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question whether the party is entitled to be discharged: *Ex parte Milligan*, 4 Wallace.

The usual course of proceeding is for the court, on the application

of the prisoner for a writ of *habeas corpus*, to issue the writ, and on its return to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged: *Id.*

When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal: *Id.*

A petition for a writ of *habeas corpus*, duly presented, is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is matter of law, and not of discretion: *Id.*

A person arrested after the passage of the Act of March 3d 1863, "relating to *habeas corpus*, and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge, if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the district: *Id.*

The omission to furnish a list of the persons arrested to the judges of the Circuit or District Court, as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge: *Id.*

Military commissions organized during the late civil war, in a state not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence, for any criminal offence, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power: *Id.*

The guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people, at all times and under all circumstances: *Id.*

The Federal authority having been unopposed in the state of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life, not connected with the military or naval service, by a military tribunal for any offence whatever: *Id.*

Cases arising in the land or naval forces, or in the militia, in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury; and the right of trial by jury, in such cases, is subject to the same exceptions: *Id.*

Neither the President, nor Congress, nor the Judiciary, can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*: *Id.*

A citizen not connected with the military service and resident in a state where the courts are open and in the proper exercise of their

jurisdiction, cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law: *Id.*

Suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and, on its return, the court decides whether the applicant is denied the right of proceeding any further: *Id.*

A person who is a resident of a loyal state, where he was arrested; who was never resident in an state engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war: *Id.*

Contract.

Procuring Recruits for the United States Army a Legal Consideration.—Services rendered for hire in procuring recruits and enlisting them into the military service of the United States are not contrary to public policy, although the person rendering them has no interest, except under his contract, in filling the quota of the town towards which they are credited; and an action may be maintained to recover a sum agreed to be paid for such services: *Combs* v. *Scott*, 12 Allen.

Criminal Law.

Manslaughter—Evidence—Declarations of Deceased.—On the trial of an indictment for manslaughter, committed in an affray, declarations of the deceased made several hours after receiving the injuries from which he died, though not made in view of approaching death, are not admissible as evidence in favor of the defendants, for the purpose of showing the circumstances of the affray: *Commonwealth* v. *Densmore and Others*, 12 Allen.

On such trial, the widow of the deceased identified the prisoners as among the persons present at the affray. *Held*, that it was incompetent to contradict her by evidence that her husband, in her presence, two or three days after the affray, declared his ignorance who the parties were, and that she made no reply: *Id.*

If in such case it appears that the affray occurred late at night, and after the deceased had been called up out of bed, and the prisoners contend that they went to his house for the purpose of getting liquor to drink, evidence is incompetent, on their behalf, to show that the deceased had frequently sold liquors late at night, and had been called up for that purpose, without making objection: *Id.*

Deed.

Parol Evidence to explain Meaning of Ambiguous Words.—A deed conveys all the zinc and other ores, and excepts the ore called franklinite: the complainant claims a vein of ores as passing by the name of zinc; the defendants claim the same vein as excepted under the name of franklinite. *Held*, that what was meant by the word zinc might be explained by evidence dehors the deed, and that under such evidence the vein in dispute passed under the name of zinc: *N. J. Zinc Co.* v. *Boston Franklinite Co.*, 2 McCarter.

To arrive at the true construction of the word "premises," as used in this deed, it is competent for the court to resort to the previous written

agreement between the parties, in fulfilment of which the deed was made, to ascertain from that what the grantors intended to convey: *Id.*

EASEMENT.

Title to Ditch by adverse User.—The right to the use of a ditch through the land of another, for the purpose of drainage, may be established by adverse use: *White* v. *Chapin*, 12 Allen.

An actual use of such a ditch for that purpose for twenty years together, if unexplained, will be sufficient to establish the right; and if there is evidence of such actual use for that length of time, the question should not be withdrawn from the jury unless there is clear proof that it was not adverse: *Id.*

HABEAS CORPUS.—See *Constitutional Law.*

HIGHWAY.

Canal—Landowners along the Canal—Easement of Light and Air.—The Morris Canal is a public highway. It is not the less a highway because of the tolls, and by reason of its being subject to the regulations of the company: *Barnet* v. *Johnson*, 2 McCarter.

Owners of land adjacent upon the Morris Canal have the privilege of receiving from it light and air; provided, in so doing, they do not interfere with the most convenient use of the canal as a public highway, or with any of the regulations of the directors made *bonâ fide* for that purpose: *Id.*

The complainant owned a lot in the city of Newark, adjacent upon the line of the Morris Canal, and built a house touching the line, with windows facing the canal. *Held*, that this court will restrain the defendant, holding under the company, from erecting a building over the canal, so as to shut up the complainant's windows: *Id.*

Towns—Latent Defects.—Towns are not insurers against all accidents and injuries caused by defects in highways: *Prindle* v. *Town of Fletcher*, 39 Vt.

Towns are not liable for latent defects in highways, that could not have been avoided or discovered by the use of ordinary care and prudence on their part: *Id.*

While the plaintiff was travelling over the defendants' highway, the ground gave way under him through some latent defect under the ground, which was not known or discoverable, and the plaintiff's horse was injured. *Held*, that the defendant town was not liable for the injury: *Id.*

Evidence—Rebutting Testimony—Collateral Issue.—Where in an action for damages for an injury received on account of insufficiency in the highway, the defendants had introduced, as witnesses, two of the selectmen of the town, who testified that they passed over the highway in question, about twelve days after the injury was received, and that there was no such defect as the plaintiffs claimed: it was *held*, that the testimony, as to its condition, of one who passed over the road two days after the injury was received, was admissible to rebut the testimony of the selectmen, and could not then be excluded, even if it might

be regarded as not competent in the opening, upon the main issue: *Walker* v. *The Town of Westfield*, 39 Vt.

But it is *held*, that such evidence would not tend to open a collateral issue, but would be direct to the material issue in the case, and, therefore, if offered in the opening, it should be admitted by the court: *Id.*

A fact that illustrates, as by an experiment, the condition of the subject-matter of the issue in controversy, is not collateral to that issue, but is direct evidence bearing upon it: *Id.*

The test is not whether the accident would have occurred independently of such want of care, but whether such want of care and prudence contributed in any degree, *in point of fact*, to the happening of the accident: *Id.*

In order for a plaintiff to make a case upon which he may safely rest, it is necessary that he should submit a state and character of evidence upon which the jury would be authorized to find affirmatively, both that the defect in the road operated to produce the accident, and that no want of care on his part contributed to it: *Id.*

Where the plaintiff is chargeable with a want of the exercise of ordinary care, it is proper to submit it to the jury, to find whether such want contributed to the accident: *Id.*

Municipal Corporation—Negligence.—The mere fact that a highway is slippery from ice upon it, so that a person may be liable to slip and fall upon it while using ordinary care, if the way is properly and well constructed, and there is no such accumulation of ice or snow as to constitute an obstruction, and nothing in the construction or shape of the way which occasions any special liability to the formation or accumulation of ice upon it, is not a defect or want of repair which will authorize a jury to find that it is not safe or convenient for travellers, within the meaning of the statute imposing upon towns the duty to keep their ways safe and convenient for travellers at all seasons of the year: *Stanton* v. *Springfield*, 12 Allen.

INNKEEPER.—See *Bailment.*

JURISDICTION.

Controversy between Parties as to Land not in the Jurisdiction of the Court.—Complainants and defendants being joint owners of an island in the Caribbean Sea, said to contain large quantities of guano, entered into an agreement that complainants should conduct the business of collecting and selling the guano for the mutual benefit of all concerned, and that the profits and losses of the business should be divided among all the parties according to their respective interests; and that complainants should have a lien on the island and all the personal property used in their business for any advances made by them. The business generally proving unprofitable, the complainants filed their bill against the defendants (who are citizens of this state, and appeared regularly to the suit), praying an account and a decree against the defendants for their proportion of the losses, and for a sale of the island, its contents, and the personal property connected therewith. *Held*, that it is no objection to the court's taking an account and making a decree in the cause, that

the property is out of the jurisdiction of the court, so that the decree cannot be enforced *in rem: Wood* v. *Warner*, 2 McCarter.

The strict primary decree of a court of equity is *in personam*, and not *in rem*, and the authority of this court to deal with contracts in relation to land not within the jurisdiction of the court is fully established: *Id.*

The contract between the parties, and the circumstances of the case, held to be such as to entitle the complainants to close their operations, and seek an account and settlement in this court: *Id.*

Limitations, Statute of.

While the Statute of Limitations is a valid defence, yet when it is apparent that neither of the parties considered that it had commenced running, and both acted entirely upon a contrary hypothesis, there should be some hesitation in allowing it to prevail: *Calanan* v. *McClure, Executor*, 47 Barb.

This rule should especially apply to the short Statute of Limitations, which, unlike the other, is not a statute of repose, but is highly penal and should be construed strictly: *Id.*

Malicious Prosecution.

Declaration—Pleading.—The essential ground of the action on the case for a malicious prosecution, is the institution of proceedings against the plaintiff in some court of law, and without probable cause: *Drew* v. *Potter*, 39 Vt.

That a legal prosecution has been commenced should appear affirmatively in the declaration: *Id.*

An averment of a charge and an arrest upon the charge, and an acquittal after ten days' imprisonment, without any mention of any court, justice, or prosecuting officer, any process, precept, or warrant, and without profert of the record of any judicial tribunal, does not amount to an averment of a prosecution or judicial proceeding, and a declaration in case for a malicious prosecution containing no more is insufficient: *Id.*

The precedent for a second count given in 2 Chit. Pl. 611 is *held* defective in substance: *Id.*

To make his pleading concise, simple, and accurate, the pleader should allege with clearness and certainty all that is material, and should omit to allege anything else: *Id.*

Mistake.

Incorrect Description of Premises in a Mortgage—Foreclosure and Purchase by Person under the Impression that he was buying the whole Tract—Remedy.—When a parcel of land is sold under a decree of foreclosure, and is struck off and conveyed to the purchaser under an erroneous impression that the mortgage covers the entire tract, the price for the entire tract being bid and paid, and the purchaser put into possession; and it is afterwards discovered that, from a mistake in the description, the mortgage does not cover the entire premises intended to be mortgaged, by reason whereof the legal title fails, the purchaser is entitled to be protected in the peaceable possession of the land purchased: *Waldron* v. *Letson*, 2 McCarter.

Had an application been made on behalf of the mortgagee to reform the mortgage prior to the date of foreclosure, there could have been no doubt of his equitable title to relief. And if a mistake in a mortgage may be corrected, it is just and equitable that the mortgagor should abstain from availing himself of the mistake to the prejudice of the purchaser: *Id.*

It is not gross carelessness in a purchaser at a sheriff's sale not to know that a description in a sheriff's deed does not include the entire premises, which are understood to be offered for sale: *Id.*

In this case the devisee of the mortgagor was restrained from proceeding by ejectment, to recover the possession of that part of the premises accidentally omitted from the mortgage, and was decreed to release the same to the purchaser: *Id.*

Mortgage.

How affected by an illegal Sale.—A sale of real estate under a proceeding which is afterwards pronounced to be illegal and invalid, cannot operate to extinguish a valid mortgage, to satisfy which the sale was made: *Stackpole* v. *Robbins et al.*, 47 Barb.

The power of the mortgage is not exhausted by any such illegal sale; and upon the sale being vacated, the mortgage becomes as effective as if no proceedings to set aside the sale had been had: *Id.*

The legal effect of a judgment setting aside a foreclosure and sale is to vacate and annul all the proceedings, and to restore the mortgage to its original position. The judgment does not destroy the lien of the mortgage, which still remains in force; and new proceedings for foreclosure and sale may be commenced by the mortgagee: *Id.*

Such new proceedings will not be restrained by injunction, at the suit of a junior mortgagee, on the ground that the lien of the prior mortgage is destroyed: *Id.*

Municipal Corporation.—See *Highway.*

Payment.

Contract.—The rule recognised that a payment made upon an existing debt cannot be recovered back by suit by the party making it, even though judgment be taken and collected for the debt, without applying and deducting said payment: *Bronson* v. *Rugg*, 39 Vt.

The defendant sold a lot of pelts for the plaintiff, and before the defendant received the pay for them, the plaintiff told him that he, the plaintiff, did not want the money for them, but wanted it applied on a note which the defendant held against him, and the defendant said "very well, or all right," but did not so apply it, and afterwards took a judgment on the note and collected it in full, and the plaintiff then brought this action for the pelt money. *Held*, that if the defendant, on receiving the money, had actually applied it as requested, it would have become payment on the note; but having given it a different direction, the understanding between the parties was not binding as an agreement so as to make the money a payment on the note in spite of the defendant's misappropriation of it: therefore the plaintiff was entitled to recover: *Id.*

Pleading.

Service of Writ.—Where a person serving a writ signed his return as first constable, and the defendant pleaded in abatement, averring that he was not first constable at the time of service, but did not aver that he did not serve it in any other capacity than as first constable, the plea was held defective: *Smith* v. *Chase*, 39 Vt.

An addition to his name of the office and capacity in which he made the service, would not be conclusive as to the official capacity in which he made it: *Id.*

Presumption of Death.

Time the Presumption begins.—The statute which raises a presumption of the death of a person absenting himself for seven years without being heard from, was designed to furnish a legal presumption of the time of the death, as well as of the fact of the death: *Executors of Clarke* v. *Canfield*, 2 McCarter.

In the absence of the statute, the presumption would be that the absent person is still alive. This presumption of the continuance of life only ceases when it is overcome by the countervailing presumption of death afforded by the statute, which is not until the end of seven years: *Id.*

The presumption of death which arises at the expiration of seven years cannot operate retrospectively: *Id.*

Railroad Company.

Responsibility for Acts of Conductor.—A railroad corporation which instructs its conductors not to allow any person to ride in any freight car attached to their train, is responsible for the act of one of its conductors in improperly putting a person off from a freight car while the train is in motion: *Holmes* v. *Wakefield et al.*, 12 Allen.

Transportation of Live Animals.—It is the duty of a railroad company which undertakes to carry live animals for hire, to provide cars of sufficient strength to prevent the animals from breaking through the same; and they will be responsible for a loss occurring through their failure to do so, although the animals were unruly and vicious; but they will not be responsible for an injury to the animals occurring simply from their own viciousness or unruliness, while being carried in a proper car: *Smith* v. *N. H. & N. Railroad Co.*, 12 Allen.

The rule of damages, in an action against a common carrier for a failure to transport live animals to market and deliver them there in good condition on a certain day, in accordance with his undertaking, is the difference between their market value there in good condition on the day when they ought to have been delivered, and their market value there in their actual condition on the day when they were delivered: *Id.*

Land Damages—Title.—Where the owner of land across which a railroad has been surveyed and located, consents that the contractors of the road may proceed on the land before his damages are paid, and under an agreement that they shall be subsequently ascertained and paid, and the land is thereupon taken possession of by the railroad company, and the road constructed over it, the title to the land passes, and the owner retains no lien upon it for his damages; but must look for payment to the party to whom he gave credit: *Knapp et al.* v. *McAuley*, 39 Vt.

SHIPPING.

Bill of Lading—Demurrage.—If a bill of lading contains no provision for the payment of demurrage by the consignee, he is not liable therefor, even upon his acceptance of the cargo; and certainly not, if he assigns the bill of lading before any of the cargo has been delivered: *Gage* v. *Morse*, 12 Allen.

SLANDER.

Damages.—Although slanderous words, charging theft, were spoken in the presence of only a single witness, who testifies that they did not affect his opinion of the plaintiff, and that he still believed the plaintiff to be honest, yet, if the words were spoken maliciously, the jury are not restricted to nominal damages: *Markham* v. *Russell*, 12 Allen.

STAMPS.

Omission to affix—Validity of Instrument.—Under the Act of Congress, passed June 30th 1864, "To provide internal revenue to support the government," &c., which enacts that any person who shall make, sign, or issue any instrument, &c., or shall accept or pay any commercial paper, without the same being duly stamped, or having thereon an adhesive stamp to denote the duty chargeable thereon, *with intent to evade the provisions of that act,* shall forfeit the sum of $200, and such instrument, &c., shall be deemed invalid and of no effect; the penalty is not incurred unless the neglect duly to stamp be wilful and fraudulent; nor is the instrument invalidated, unless the omission to affix a stamp be "with intent to evade the provisions of the act;" in other words, to defraud the government of the stamp duty, in whole or in part: *Beebe* v. *Hutton*, 47 Barb.

It is "*such*" instrument, to wit, one that has been attempted to be put in circulation by a fraudulent non-compliance with the terms of the act, which is to be deemed invalid and of no effect, and not one which, through haste, or inadvertence, or ignorance, has been mistakenly, though honestly, issued without a compliance with the law: *Id.*

When unstamped Instrument may be read in Evidence.—When the question arises in a court of justice, and the point is distinctly presented, whether an instrument defectively stamped without any intent to evade the provisions of the revenue law, may be read in evidence upon proof of those facts, accompanied by a distinct offer to comply with the provisions of that act, and an actual compliance therewith, the Act of Congress has not declared the instrument void; and it is receivable in evidence: *Id.*

Where a chattel mortgage, upon being offered in evidence, is objected to on the ground of its having a defective stamp, it is competent for the party offering the instrument to show that the insufficiency of the stamp arose from inadvertence or mistake, and without any intent to evade the provisions of the revenue law, and thereupon to read the mortgage in evidence: *Id.*

Power of Deputy Collector.—The duty of affixing a stamp to an instrument when produced in court, and remitting the penalty, in the contingency mentioned in the statute, was designed to be confided to the *collector in person;* and he cannot devolve it upon a *deputy*, except in the event of sickness or temporary disability: *Id.*

STATUTES.

Revision of Law—Breaking up of a Statute into Two—Effect upon the Construction.—Where a statute, originally one, has its provisions broken up by a revision of the law, and incorporated in two different acts, the construction of these provisions cannot be affected by their change of collocation: *Clement* v. *Kaighn*, 2 McCarter.

They are *in pari materia*, and their construction must be the same as if they remained as originally enacted, parts of the same statute: *Id.*

SURETY.

Liability of Surety of a Public Officer for Money stolen from his Principal.—The loss of public money by a receiver and disburser of it, through felonious taking away, though without fault on his part, does not discharge him or his sureties from obligation on his official bond: *United States* v. *Dashiel*, 4 Wallace.

Judgment against.—If a judgment is obtained against a surety, the amount of it being fixed by a judgment previously obtained against his principal, the former judgment cannot be reversed on error as for an amount too small, though the latter should be afterwards reversed as having so been: *United States* v. *Allsbury*, 4 Wallace.

Conditional Signing of Bond apparently Complete.—A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed, and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice: *State* v. *Peck*, 53 Me.

VENDOR AND VENDEE.

Fraudulent Purchase—Right of Vendor to specific Lien on Goods sold.—On a bill filed by a judgment-creditor against the debtor and other prior judgment-creditors of the same debtor, alleging that the debt for which complainant's judgment was entered was fraudulently contracted by the debtor, in purchasing goods of complainant with intent to subject them to the lien of execution of the complainant's relatives having claims against him, and claiming that complainant is entitled to have the articles so purchased specifically applied to the satisfaction of his judgment, it was *held*, that complainant's case must rest upon the ground of fraud in the purchase of articles from complainant which vitiated the contract and prevented any change in the ownership of the chattels; and that to sustain the case upon this ground, the articles must have been purchased with the purpose of defrauding the complainant, or the credit must have been obtained by false and fraudulent representations of material facts calculated to mislead the complainant, and upon which he acted in the sale of the goods: *Stoutenburgh* v. *Konkle*, 2 McCarter.