It may be said that this pavement is of a superior character, and that it is very desirable that cities should have authority to cause it to be laid. It may be so; but if so, I think the aid of the legislature will have to be invoked, and that there is no authority to contract for it, under charters which require the work to be let by contract to the lowest bidder.

It was suggested, that, even though this assessment should be held illegal, still there was nothing to show it to be inequitable, and, therefore, a court of equity ought not to interfere. But that principle has never been applied to these special assessments. And certainly it could not be applied where there is no legal authority to contract for the work at all, to pay for which the assessment was imposed.

The judgment must be reversed, and the cause remanded with directions to enter judgment for the plaintiff for a perpetual injunction, according to the prayer of the complaint.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF VERMONT.[2]

SUPREME COURT OF THE UNITED STATES.[3]

ACTION.

Assignability.—A right of action for wrongfully and without permission raising ores and minerals from land situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state, by one to whom the owner has assigned such ores and minerals and all claim for their wrongful conversion: *Hoy* v. *Smith et al.*, 49 Barb.

AGREEMENT.

Complaint on.—Although a complaint sets out an express agreement, it will be sustained by evidence of an implied: *Smith* v. *Lippincott et al.*, 49 Barb.

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[1] From Hon. O. L. Barbour; to appear in Vol. 49 of his Reports.

[2] From W. G. Veazie, Esq., Reporter; to appear in 40 Vt. Rep.

[3] From J. W. Wallace, Esq., Reporter; to appear in Vol. 6 of his Reports.

Evidence.—An implied agreement to pay for materials, &c., when not inconsistent with an existing written agreement between the parties, is admissible in evidence, and will sustain an action to recover the value of such materials: *Id.*

AGENT.

Insurance—Ratification.—Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium-note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E. P. D., general agent," &c., does not make the previous transaction a nullity until approved: *Ins. Co.* v. *Webster*, 6 Wall.

Hence, though the general agent sent back the application, directing the agent who had delivered the policy to return to the party insured his premium-note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor cancelled the policy: *Id.*

ATTORNEY AND CLIENT.

Authority of Counsel—Equity Practice.—An attorney at law having no power *virtute officii* to purchase for his client at judicial sale land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him: *Savery* v. *Sypher*, 6 Wall.

On an application to a court of equity to refuse confirmation of a master's sale and to order a resale—a case where speedy relief may be necessary—the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examination: *Id.*

AWARD.

Of Referee—Revision by Supreme Court.—It is well settled that the Supreme Court will not revise the proceedings of a referee unless it appears upon the face of the report that the referee, in deciding the questions raised before him, intended to decide them according to law, and that in making his decision he has clearly mistaken the law: *Smith* v. *Sprague*, 40 Vt.

It is not error for the County Court to allow the referee to amend his report by making a statement of the facts in full that appeared before him on the hearing: *Id.*

BASTARDY.

Pauper—Interest.—A town has only the same right to money received through its overseer in settlement of a prosecution for bastardy that it would have if it were paid under an order of affiliation: *Drake* v. *Town of Sharon*, 40 Vt.

This money, in either case, is to be applied, exclusive of all costs, "solely for the support of the child:" *Id.*

The order of affiliation is intended to provide for the support of the child only for such time as he is likely to be unable to support himself, and no longer. If, therefore, the mother supports the child for such time without charge to the town, she will then be entitled to the money received in settlement by the overseer, with interest, the town having applied the money to its own use from the time it was paid into its treasury: *Id.*

The town is trustee of money so received for the specific purpose of applying it to the support of the child and the benefit of the mother: *Id.*

Brokers.

Right to sell Stock.—Where a person employs brokers to purchase stocks for him, upon an agreement that he shall keep a margin of ten per cent. upon the par value above the market rate of the shares, in the hands of the brokers, and he fails to do so, whereupon the brokers notify him of a fall in the market price of the shares, and that they require him to furnish more money, to make his margin good, they may, upon his neglecting to comply, sell the stock, at the stock exchange without further notice to the owner: *Markham* v. *Jordan*, 49 Barb.

There is, under these circumstances, a clear breach of the principal's contract, which justifies the brokers in selling; and the notice of the time and place of sale, required in the case of a sale of pledged stock, need not be given: *Id.*

Constitutional Law.

Federal and State Jurisdiction—Mandamus to State Courts.—After a return unsatisfied of an execution on a judgment in the Circuit Court against a county for interest on railroad bonds, issued under a state statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a *mandamus* from the Circuit Court will lie against the county officers to levy a tax, *even although prior to the application for the mandamus a state court have perpetually enjoined the same officers against making such levy;* the *mandamus*, when so issued, being to be regarded as a writ necessary to the jurisdiction of the Circuit Court which had previously attached, and to enforce its judgment; and the state court therefore not being to be regarded as in prior possession of the case: *Riggs* v. *Johnson County*, 6 Wall.

Contract.

Consideration.—If part of a consideration be merely *void*, the contrac may be supported by the residue, if good *per se;* but if any part be *illegal* it vitiates the whole: *Cobb* v. *Cowdery*, 40 Vt.

A promise by a party to do what he is bound in law to do is an insufficient, but not an illegal, consideration: *Id.*

However strong may be one's moral obligation to do that which he agreed to do, it is only promises founded on the performance of duties imposed by law which are regarded in law as merely gratuitous and not binding: *Id.*

Services by one, not bound by law to render the services, in aiding a party in interest in the preparation for trial, by disclosing who are

informed upon material points, and what they would testify to, are sufficient consideration to support a contract: *Id.*

A parol agreement to deliver up a judgment with the execution thereon issued "to be satisfied" in consideration of the settlement of, and indemnification against, a claim which is being made by a third party, is binding, and is a complete defence to a suit on the judgment, although the promise was made to, and the consideration came from, but one of the defendants: *Id.*

COVENANT.

Damages—Warranty.—A party having been defeated in a suit against him for damages for having interfered with an easement on his land, may recover of his warrantor the damage he has sustained in consequence of the breach of the covenant against encumbrances, and such costs and expenses as he has fairly and in good faith incurred in attempting to maintain and defend his title: *Smith* v. *Sprague*, 40 Vt.

He was not bound to follow the advice of his warrantor by suing the party who claimed the easement and entered upon the premises: *Id.*

DEED.

Construction.—Where the purpose of the grant is clearly ascertained from the premises of the deed, this will prevail in the construction, and repugnant words will be rejected though they stand first in the grant: *Flagg, Administrator of Tyler*, v. *Eames*, 40 Vt.

And where the premises contain proper words of limitation, and the *habendum* is repugnant to the grant, the *habendum* yields to the manifest intent and terms of the grant: *Id.*

A deed conveyed in its granting part to the plaintiff's intestate "and her heirs and assigns for ever, a certain piece or parcel of land situated, lying, and being in Halifax, and is the same farm on which I" (the grantor) "now live; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, bounded," &c. (describing the boundaries); "always provided that, in the event of her decease, the same shall revert to me if living, if not, to my heirs—being the same farm which I purchased of Darius Plumb;"—*habendum* to the plaintiff's intestate "and her heirs and assigns, to her and their own proper use, benefit, and behoof for ever," with the usual covenants of seisin, warranty, and against encumbrances, and the following clause thereto annexed, viz.:—"Always reserving the reversion to myself and heirs as stipulated in the deed:"

Held, that the plain intent of the deed was to convey an estate for life, and not an estate in fee, and that the deed must have effect according to its intent: *Id.*

Delivery.—Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending on any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent: *Ernst* v *Reed*, 49 Barb.

ESTOPPEL.

Disclaimer of Property.—A party having disclaimed the ownership of property to an administrator, and the latter relying on such disclaimer

having proceeded to inventory and have the property appraised, and the appraisal duly returned and recorded, will not by these acts alone be estopped from asserting his ownership of it: *Turner* v. *Waldo*, 40 Vt.

Fraud.

Purchase by an Insolvent.—B., a merchant at S., in former good standing with the plaintiffs' firm in New York, gave the latter a verbal order for a bill of goods on credit, which were sent to him by railroad and left in a storehouse at S. B. was, in fact, insolvent, and became fully aware of it before he paid the freight and took the goods. *Held*, that the judge properly instructed the jury that it would be a fraud upon the plaintiffs, sufficient to avoid the sale, if they believed upon the evidence, that B. received the goods with a preconceived design not to pay for them, although he had no such design when he gave the order: *Pike et al.* v. *Wieting et al.*, 49 Barb.

Highway.

Pent Roads.—All pent roads are *public* highways, though called in the early statutes "private roads,"—that is to say, they may be used by all,—but they are not *open* highways: *Wolcott* v. *Whitcomb*, 40 Vt.

In the absence of any prescribed regulations by the proper authority, in respect to gates and bars across a pent road, the owner of the land through which the road is laid may erect gates and bars for the protection of his field and crops, if they do not interfere with the reasonable use of the road as a pent road: *Id.*

Insurance.

Marine.—Where temporary repairs are made upon a vessel, in a foreign port, by the insured, for the sole benefit of the insurers, and by their express consent and authority, to enable the vessel to be navigated to the port of destination, for the purpose of there making permanent repairs at less cost, the insurers must bear the whole expense of the temporary as well as the permanent repairs, although the amount, in the aggregate, exceeds the sum named in the policy: *Alexandre et al.* v. *The Sun Mutual Ins. Co.*, 49 Barb.

Landlord and Tenant.

Right of Landlord to maintain Possession.—Where the landlord and owner of premises in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands and attempt to dislodge the former by force. The landlord being in the actual possession, has a right to maintain it, and to use force, if necessary, for that purpose: *Sage* v. *Harpending*, 49 Barb.

Lease—Liability of Assignee for Rent.—A lease taken by A. in trust for a corporation thereafter to be formed, creates, on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed, and received from the lessor by A., a liability, in equity, on the part of such corporation, to pay the rent to the lessor; and such liability cannot be avoided

by a transfer of the lease by the corporation to B.: *Van Schick* v. *The Third Avenue Railroad Co.*, 49 Barb.

Office.

Profits of Office on Quo Warranto—Measure of Damages.—Where an intruder, ousted by judgment on *quo warranto* from an office having a fixed salary—and of personal confidence as distinguished from one ministerial purely—takes a writ of error, giving a bond to prosecute the same with effect and to answer all costs and damages if he shall fail to make his plea good—thus, by the force of a *supersedeas*, remaining in office and enjoying its salaries—does not prosecute his writ with effect, and is, after his failure to do so, sued on his bond by the party who had the judgment of ouster in his favor—the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the *supersedeas*: *United States* v. *Addison*, 6 Wall.

The rule which measures damages upon a breach of contract for wages or for freight, or for the lease of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where the damages which he is entitled to recover is the difference between the amount stipulated and the amount actually received or paid, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical: *Id.*

Partnership.

Promissory Note—Payment.—If a note is in fact a partnership debt, all the partners are under the same obligation to pay it as between themselves, if signed by one partner only, as though signed by all; and if a partner pay it with his private funds it will extinguish the note and leave it of no binding force as a note; and the paper would constitute the basis of a claim in his favor against the partnership, and such claim would be a proper subject of adjustment in the settlement of the company business: *Sprague* v. *Ainsworth*, 40 Vt.

But a naked promise afterwards made by the signer, to the partner who paid it, to pay the note, would not revive it as a note so as to enable said partner, or one to whom he negotiated it, to recover thereon in an action against the signer: *Id.*

Ships and Shipping.

River Navigation—Collision—Damages—Practice—Where the usage in navigating a river is that both ascending and descending vessels shall keep to the right of the centre of the channel—which is the usage in the river Hudson—the omission to comply, seasonably with that regulation, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible: *The Vanderbilt*, 6 Wall.

Compliance with such a usage is required in all cases where the course of a vessel is such that, if continued, there would be danger of collision with other vessels navigating in the opposite direction: *Id.*

Unless precautions are seasonable, they constitute no defence against

a charge of collision, although they may be in form such as the rules of navigation require: *Id.*

Objections to the amount of damages, as reported by a commissioner and awarded by the Admiralty Court, will not be entertained in this court in a case of collision where it appears that neither party excepted to the report of the commissioner: *Id.*

Power of Master.—Where a vessel is run by the master on shares, it is not a chartering, nor does the master become owner, for the time being; and parties dealing with him are justified in considering him clothed with the usual authority of a master; especially where one of the owners indorsed the action of the master, in dealing with such parties, before they gave him credit: *McCready* v. *Thorne et al.*, 49 Barb.

Under such circumstances, the master can bind the vessel and her owners for supplies and necessaries furnished: *Id.*

TAXATION.

School District—Vote.—A vote to sustain a school for a definite period is not equivalent to a vote to defray the expenses of that school by a tax on the grand list: *Adams* v. *Crowell*, 40 Vt.

The warning for an annual school meeting contained, among other things, two articles as follows, viz.: "3d. To see if the district will vote to have a school during the ensuing year, and if so, how long, and when to begin;" and "4th. To see how to support said school." The district "voted to sustain a school during four months the ensuing year, in summer and fall." *Held*, that this furnished no authority for the making of a rate bill assessing a tax upon the grand list of the district to support a school: *Id.*

The legal effect of the vote cannot be enlarged, restricted, or controlled by what the voters at the meeting intended to do, or by what they supposed that they had done: *Id.*

TROVER.

Special Plea—Lessor and Lessee owning Joint Stock.—In trover the gist of the action is the conversion. A special plea denying the conversion amounts to the general issue, and, therefore, is bad on demurrer: *Turner* v. *Waldo*, 40 Vt.

The administrator of a lessee who had died pending the lease, would at best have no more right to sell and dispose of stock on the farm owned jointly by the lessor and lessee, and to be divided at the expiration of the lease, than the lessee had—and if he so sell such property the lessor may recover in trover the value of his undivided interest: *Id*