They are not parties in a representative capacity—there was no cause of action in existence till the death of the testatrix. The controversy is between living parties. The testatrix is in no sense a party to the original cause of action. Her act was only the subject matter of investigation. The rule contended for would exclude parties on both sides in all cases where litigation should arise growing out of the act of another during life. We cannot construe the proviso of the statute so as to exclude as witnesses all those who may be parties on one side or the other in all probate appeals like this; and we find no error in the ruling. *Shailer* v. *Bumstead and others*, 99 Mass. 112.

With this reasoning we are satisfied. The real question in the case is whether there is a will or not, and upon that question all the parties have a right to testify.

We think the court also erred in excluding parts of the depositions of Steele and Eliza Garvin, offered by the plaintiffs. They were both upon questions concerning which the defendants gave testimony, and were properly explanatory of and connected with that testimony. The statement of Steele was material, and when he says the invitation of Williams was in a cool, formal and distant manner, I think the description was sufficiently particular.

That portion of Eliza Garvin's deposition which mentioned the kindness of Mrs. Garvin for Petticrew, the testator, was certainly competent. The whole theory of the defense, running throughout the trial, was, that she cared nothing for him. The plaintiffs were entitled to the evidence to show its falsity.

For the ruling of the court in rejecting testimony, the judgment must be reversed and the cause remanded.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW HAMPSHIRE.[1]

SUPREME COURT OF NEW YORK.[2]

AGENT.

Traveling Salesman.—A traveling merchant, who is authorized to sell all the goods of his principals that he can sell within his business circuit, on a commission of ten per cent., is to be regarded as the general agent of his principals, and clothed apparently with the power of fixing the price, and the time and mode of delivery of the goods and the payment of the price, unless a different usage in such trade is shown: *Day Light Burner Co.*, v. *Odlin*, 50 or 51 N. H.

And third persons will not be affected by a limitation on this authority which is not brought to their notice, or in relation to which they are not put upon inquiry: *Id.*

Therefore, when such agent has sold goods on credit, which are

1. From the judges; to appear in 50 and 51 N. H. reports.
2. From Hon. O. L. Barbour; to appear in Vol. 62 of his reports.

forwarded by his principal by express, and marked cash on delivery, the expressman having no notice of any limitation of the agent's authority, may, upon an order of the agent, deliver the goods without payment of the price: *Id.*

Whether the entry of cash on delivery put the expressman on inquiry, was a proper question for the jury: *Id.*

ARBITRATION AND AWARD.

Submission partly in Writing and partly Parol.—Where the terms of a submission to referees are partly in writing and partly by parol, an award properly made in pursuance of all said terms, will be good: *Steere* v. *Tenney*, 50 or 51 N. H.

Powers of Arbitrators.—Arbitrators who are not restricted by the terms of the submission have power to decide conclusively, all questions of law as well as of fact: *Sanborn* v. *Murphy*, 50 N. H.

If the reference is limited by a provision that the award shall be made in accordance with legal principles, the referees will be bound by the limitation: and if in such a case they disregard or mistake the law, their award will be set aside: *Id.*

If arbitrators, acting under a general and unrestricted submission, either do not undertake to govern their action and decision by the rules and principles of law, as applied in the courts, or, intending to decide in accordance with those rules and principles, but also intending, upon due consideration, to act and decide definitely upon the matters before them, without submitting their proceedings and judgment to the court for revision, their conclusions will not be disturbed and their award will be sustained: *Id.*

This general rule admits of but one exception, which is that where the arbitrators have manifestly fallen into such an error with regard to facts or law in the case before them as must have prevented the free and fair exercise of their judgment, the award will be set aside: *Id.*

This exception has reference not to an erroneous conclusion or judgment upon the application of the law—which will not avail to disturb the award—but to a manifest mistake, such as must have precluded the exercise of judgment: *Id.*

It is a settled rule in the courts of law and equity, that no presumption shall be raised for the sake of overturning an award, but every reasonable intendment shall be allowed to uphold it: *Id.*

ASSUMPSIT.

When not implied by work and labor—Family relation.—The plaintiff, sister of the defendant's wife, lived and worked in his family thirty years. She had no property, except money and clothing occasionally delivered to her by the defendant or his wife. During these thirty years the defendant supported her, and no account was kept by any one, of her time, wages, expenses, or support. *Held*, that, in this condition of things, the law would not imply a promise by the defendant to pay the

plaintiff for her services, although the same might have been, upon the whole, valuable to the defendant; but the defendant could be charged only upon proof of an understanding between the plaintiff and the defendant that the former should receive payment for her services: *Bundy* v. *Hyde*, 50 N. H.

The instruction of the court to the jury, that if the parties understood that the plaintiff was not to be paid for her labor in money, but was to be supported during life by the defendant, and if after the plaintiff ceased to labor for the defendant he ceased to support her, the plaintiff could not recover in general *indebitatus assumpsit*, was *held* to be correct: *Id.*

BAILMENT.

Bill in Equity to Redeem.—A bill in equity may be maintained to redeem a pledge, if an account is wanted, or if there has been an assignment of the pledge: *White Mountains Rail Road* v. *Bay State Iron Co.*, 50 N. H.

The pledgors of bonds secured by mortgages may redeem the bonds after the lapse of fifteen years, notwithstanding the pledgee has foreclosed the mortgages: *Id.*

CONSTITUTIONAL LAW.

Judgment of another State.—If a State should go out of the Union so as to stand in the relation of a foreign government for a time, yet upon its return into the Union again, all judgments rendered, while it was a foreign government, must be authenticated in the same way as other State records: *Steere* v. *Tenney*, 50 or 51 N. H.

The records of a foreign government are to be authenticated as such, only during the existing of such foreign power: *Id.*

CORPORATIONS.

Liabilities of Trustees for Debts.—Claims of a portion of the trustees of a manufacturing corporation against the corporation, although they may be within the letter of the act of 1848 authorizing the formation of corporations for manufacturing and other purposes, which makes the trustees, in case of failure to make an annual report, jointly and severally liable "for all the debts of the company," &c., yet, not being within the mischief intended to be remedied or prevented by it, nor within its spirit and intention, they are not within its provisions: *Briggs* v. *Easterly et al.*, 62 Barb.

Thus, where, at the time a default in making the annual report required by the statute occurred, claims against the corporation were held by two of the trustees, who, with the others, were delinquent in making their report. *Held* that an assignee of such claims could not enforce the same against all the trustees under section 12 of the statute: *Id.*

CRIMINAL LAW.

False Pretences—Indictment—Proof.—To sustain an indictment for obtaining the signature of an individual to promissory notes given for the price of property sold to him by false pretenses, the

pretenses alleged to be false must be shown to be of some existing fact, and made for the purpose of inducing the purchaser to execute the notes. *Scott* v. *The People*, 62 Barb.

Both the inducement and the fraudulent purpose are facts to be proved, and are not to be presumed: *Id.*

An indictment for obtaining the signature of a purchaser to promissory notes given for the purchase price of property sold to him by false pretences and representations as to the price asked for the property by a third person, who was the owner, cannot be sustained where the proof shows that no representations were made by the defendant in regard to the price except that he told the purchaser in the course of the negotiations, that he did not think the seller would take less than a sum named, and that the only representations as to price, *at the time of the sale*, were made by the seller: *Id.*

Although the price asked for, and finally agreed to be paid by the purchaser be fixed by collusion between the owner of the property and the defendant, for the purpose of defrauding the purchaser, such collusion, though it may be an indictable offense, is not the offense charged: *Id.*

If, in fact, the price agreed to be paid by the purchaser was the price demanded by the seller at the time of the sale, the motive in asking that price is of no consequence so far as the offense charged is concerned: *Id.*

Declarations.—The declarations of one or several persons engaged in a concerted attack upon the dwelling and family of another, made while the attack is going on, are admissible against all; but if made after the attack has terminated, and merely in narrative of a past occurrence, they are not admissible: *State* v. *Pike, et al*, 50 or 51 N. H.

The finding of the judge who tried the cause that the concerted attack was still in progress, is sufficient to authorize the admission of such declarations with proper instructions, unless it appear already from the evidence that it was otherwise: *Id.*

Insanity—Evidence of—Experts.—Opinions of witnesses, not experts, cannot be received on the question of sanity: *State* v. *Jones*, 50 N. H.

On trial of defendant for the murder of his wife, the defense was insanity. Evidence was introduced tending to show that he had believed his wife guilty of adultery with one F., and that he killed her for that reason; also, that during the trial defendant had said his belief in his wife's infidelity was founded not only on public rumor, but also on his own observation; and it was claimed for him that this belief was an insane delusion. *Held*, that evidence tending to show the existence of such a common rumor in the village where defendant and his wife lived, was properly received: *Id.*

Held, that as bearing upon the question of sanity, the State was properly allowed to prove to a large extent the history of defendant, including his treatment of his wife and children;

his health, intemperance, impulsive temperament, excitable nature, quarrels, wrangling, making preparations and threats to shoot a neighbor, and violent conduct at various times during a period of many years before the death of his wife: *Id.*

At the trial the court charged the jury that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be "not guilty, by reason of insanity," if the killing was the offspring or product of mental disease in the defendant. Neither delusion or knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or to transact business, or to manage affairs, is, as matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury. Insanity is mental disease—disease of the mind. An act produced by mental disease is not crime; if the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty. Insanity is not innocence, unless it produced the killing of his wife. If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse to kill is always irresistible, is a question of fact. Whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact. Whether an act may be produced by partial insanity, when no connection can be discovered between the act and the disease, is a question of fact. The defendant is to be acquitted on the ground of insanity, unless the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease." *Held*, that these instructions were correct. *Id.*

Debtor and Creditor.

Chattel Mortgage—Retention of Possession by the Mortgagor.—When on a mortgage of a stock of goods in a country store, it was agreed, verbally, that the mortgagor should continue in possession of the store and goods, and sell the goods as before for his own benefit, and he did so, it was held that such an arrangement was inconsistent with the avowed object of the mortgage, and rendered it fraudulent and void as to the mortgagor's creditors: *Putnam* v. *Osgood*, 50 or 51 N. H.

Where the mortgagee was indebted to the mortgagor on account, and it was agreed that the amount should be applied in part payment of the mortgage debt, and the accounts were thereupon discharged with the assent of both parties, it was held that this was equivalent to a payment in money on that debt: *Id.*

Under the law requiring an account of the amount due upon the debt or demand secured by the mortgage, an account of the liabilities so secured must be given: *Id.*

An account rendered by a mortgagor to an attacking creditor is not necessarily false within the meaning of the statutes, because by mistake it is made greater than the amount really due, provided the account is rendered in perfect good faith and with all reasonable efforts to make it just and correct: *Id.*

DESERTER.

The U. S. Act of March 3, 1865, does not contemplate the forfeiture of citizenship as a penalty for desertion, until after conviction of the crime of desertion before a court-martial: *Severance* v. *Healey*, 50 N. H.

DIVORCE.

Jurisdiction of Chancery.—The former Court of Chancery in this State had no jurisdiction to grant divorces independent of the statutes on that subject: *Crain* v. *Cavana*, 62 Barb.

Allowance for Support, etc.—The provisions of the revised statutes relating to separation and limited divorces, do not authorize the court, by the decree in a suit for separation *a mensa et thoro*, to allow a gross sum to the wife for her support and direct it to be paid by the husband in lieu of her dower and distributive share in his estate: *Id.*

Such a provision in the decree being void, the wife's right of power in her husband's estate, after his death, is unaffected by it: *Id.*

The statute does not, in terms, authorize the court to make any decree affecting the right of dower. The legislature contemplated a reconciliation of the parties as probable, hence the provision it authorizes to be made for the wife is a temporary one: *Id.*

ENTRY.

Writ of Disclaimer.—In a writ of entry, if the tenant disclaims a part or all of the land demanded, he is held thereby to admit the demandant's title to the land disclaimed, and is estopped afterward to deny it. But such admission and estoppel is not rendered final and absolutely conclusive until after judgment: *Wells* v. *Jackson Iron Co.*, 50 N. H.

Therefore in such case, if the tenant disclaims part of the land demanded and pleads the general issue as to the residue, and the plaintiff accepts the disclaimer, and joins the issue, the tenant may, at any time before judgment, for cause shown, have leave to amend his disclaimer so as to cover a greater or less amount of land than that originally disclaimed: *Id.*

EVIDENCE.

Experts.—The rules prescribing the qualifications of experts are established by law; but whether a witness offered as an expert has the legal qualifications which entitle him to testify in that capacity, is a question of fact to be decided by the court, in the exercise of its discretion, at the trial of the cause; and the decision of the presiding judge, in such a case, is not subject to exception or revision: *Dole* v. *Johnson*, 50 N. H.

A consideration of the essential qualifications which a person should possess in order to be admitted to testify as an expert: *Id.*

LIEN.

Laborer's Lien for Work on Property.—By the principle of the common law, a man who has the lawful possession of a thing and has expended his money or labor upon it, at the request of the owner, has a lien upon the property, and a right to retain possession of it until his demand is satisfied: *Jacobs* v. *Knapp*, 50 N. H.

This lien is in the nature of a pledge by the owner of the property to the party with whom he contracts for labor to be bestowed upon it; but it is a personal right and interest, which can only be created by the owner or by his authority. A sub-contractor, or any servant of the person entitled to the lien, acquires no interest in the property by reason of the qualified rights or interest of his employer: *Id.*

Under § 14, Ch. 125, Gen. Stat., which provides that "any person who labors at cutting, hauling or drawing wood, bark, logs, or lumber, shall have a lien thereon for his personal services * * * to continue sixty days after the services are performed, and may be secured by attachment," such lien is limited to the party, alone, who contracts with the owner of the property upon which the labor of the contractor and all his sub-contractors or servants is expended: *Id.*

A statute providing for the enforcement of a laborer's lien by an action against the person or property of a party between whom and the plaintiff no privity of contract ever existed, is unconstitutional: *Id.*

PRACTICE.

Trial—Direction as to Verdict—Questions for the Jury.—It is not only the right but the duty of the court to direct the verdict which the jury shall give, when the evidence in the case is so preponderating in favor of one of the parties that if a verdict should be found one way, the court would set it aside as against the evidence: *Fish et. al* v. *Davis*, 62 Barb.

The converse of the rule, to wit: that when the evidence is not so preponderating in favor of one of the parties as that the court would set aside a verdict found against the evidence, the case must go to the jury, is equally well settled: *Id.*

Upon the question whether promissory notes, given by the plaintiffs to the defendant, were given in payment of a debt, as claimed by the defendant, or as a loan to him, as claimed by the plaintiffs, the fact that the plaintiffs have made payments upon such notes to the defendant as the *owner and holder*, upon demand of payment as a matter of right, is a circumstance of such force and significance that the jury should be allowed to say what weight it should have on the issue between the parties: *Id.*

And, in an action to recover back the amount advanced, as being a *loan*, there being strong evidence that the notes were delivered as part payment for property purchased by the plaintiffs of the defendant, and not by way of loan, it is erroneous for the judge to direct a verdict for the plaintiffs: *Id.*