ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Marine Insurance—Freight in Advance—Recovery for.—The owner of a cargo, who has paid the freight in advance to the owners of the vessel, cannot recover on a policy of insurance by which prepaid freight is insured: *Minturn* vs. *Warren Insurance Company.*

Criminal Law—Larceny—Principal and Accessary.—One who, in pursuance of a preconcerted plan, devised by himself, remains below stairs in his own house, while his confederate above secretly and by night takes the pantaloons and money of a lodger there, and brings them down stairs, and there delivers the money to him, and he receives the same, is liable for the larceny as a principal: *Commonwealth* vs. *Lucas.*

Landlord and Tenant—Liability of Administrator of Lessee for Rent.—An administrator of a lessee, who does not quit and surrender the demised premises immediately after his appointment, or upon a notice to quit, until a judgment for the possession thereof has been obtained against him, but keeps the property of his intestate there for several weeks, and sells it by auction upon the premises, and claims of an under-tenant of a portion of the premises, rent which accrued after his intestate's death, must be held to have entered and taken possession of the premises, and is personally liable to the lessor for rent thereof, until his estate therein was terminated by the notice to quit, to the extent of the real value of the use of the premises: *Inches* vs. *Dickinson.*

Way—Location of Undefined—Loss by Non-user.—The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed: *Bannon* vs. *Angier.*

Proof of mere non-user of a way created by deed, for a period less than twenty years, without proof of adverse enjoyment by the owner of the land, is not sufficient proof of an abandonment of the right: *Id.*

Way—Right of Action of Tenant at Will for obstruction of.—A tenant at will of land may sustain an action for an interruption of a passage way appurtenant to the land occupied by him: *Foley* vs. *Wyeth, Executrix.*

[1] The following abstracts have been furnished by Charles Allen, Esq., the State Reporter.

Negligence—Injury to Adjoining Land by Excavation—Right of Tenant at Will to sue for.—If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away, he is responsible for all the injury thereby occasioned to the land, and also for the disturbance of a right of way over the land, without proof of carelessness, negligence, or want of skill in making the excavation, but not for injury to buildings which have been placed upon the land: *Foley* vs. *Wyeth.*

One who is in the occupation of land, which he has agreed to purchase by a written contract which contains no stipulation that he may have possession until the price is paid, is a mere tenant at will, and cannot sustain an action for an injury to the reversion, although he subsequently becomes the owner of the land in fee: *Id.*

In an action for an injury to the plaintiff's land, resulting from an excavation made by the defendant upon his adjoining land, by means of which the plaintiff's soil has broken away and fallen, it is no defence that the injury would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings upon their own land: *Id.*

Marine Insurance—Sale of Vessel at Port of Distress—Actual or Constructive Total Loss, Evidence of—Wrongful Sale by Consul.—No constructive total loss can be claimed by reason of a sale of a vessel at a port of distress, unless the sale is made by the master, if he is present and in charge of the vessel: *Paddock* vs. *Com. Ins. Co.*

No recovery can be had for an actual total loss occasioned by a storm by which a vessel and her outfits are destroyed in a port of distress into which she has put, and where, before the occurrence of the storm, she has been surveyed, condemned, and sold, under the direction of the consul of the United States, and her cargo transhipped, and her master has given up all attempt to prosecute the voyage in her: *Id.*

The wrongful seizure and sale of a cargo by a consul of the United States, is not a loss under a clause in a policy which insures against the acts of pirates and assailing thieves: *Id.*

In an action on a policy of insurance, the evidence proved that a seaworthy whaling vessel encountered a gale and sprung a leak, which made it necessary to take in sail and put all hands to the pumps, and throw the try-works overboard, in order to lighten her; that the leak was stopped to such an extent that the vessel did not leak except when sail was carried on the foremast, or, even in that case, so as to require more than one

hour in four at the pumps to free her; that the master was of opinion that the leak did not render her unseaworthy and unable to continue the voyage without putting into a port of distress, but was forced by the crew to do so, for reasons which were not distinctly shown; that, while in the port of distress, against his protest, the vessel was surveyed and condemned, but the survey was not put in evidence, although called for by the defendants, and the reasons for the condemnation were not fully disclosed: *Held*, that these facts were insufficient to allow the insured to claim for a constructive total loss of the vessel and outfits, by reason of a necessary sale at a port of distress, from perils of the sea; or, of the catchings which had replaced the outfits consumed, and which had been transhipped, in port, into a vessel, which was afterwards wrecked: *Id.*

Mutual Insurance—Neglect to pay Assessment where it avoids Policy—Mailing Notice sufficient.—A policy of insurance issued by a mutual insurance company, under the conditions and limitations expressed in the by-laws thereto annexed, one of which provides that the policy shall become void, "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," is rendered void by the neglect of the assured to pay the amount of an assessment upon his premium note, for thirty days after a written request for payment, prepaid, duly directed, and deposited by the company in the post-office, in due course of mail would reach the place of his residence, as set forth in the policy, whether he received such request or not: *Lothrop & Others* vs. *Greenfield Stock and Mutual Fire Insurance Company.*

NEW YORK COURT OF APPEALS.[1]

Banker—Deposit of Notes and Bills by Customer, how far Changes Property.—The property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor: *Scott* vs. *The Ocean Bank.*

Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing: *Id.*

It is not enough to warrant such an inference that the customer was a large depositor of money and bills, and constantly drawing drafts against

[1] From E. P. Smith, Esq., Reporter of the Court.

his remittances, under an arrangement by which he was allowed interest on his average balances; and that after the banker had transferred a bill remitted to him, after acceptance but before payment failed, and suspended business at the place where the remittance was received, the customer continued to draw upon him as before at an office in another State, where the banker did not suspend business: *Id.*

These facts create the relation of debtor and creditor in respect to money received by the banker, but are insufficient to charge him with responsibility for a bill previous to payment, and consequently to vest him or his assignee for a precedent debt, with the property in such bill: *Id.*

Marriage and Legitimacy—Presumption of Intercourse and Counter-Evidence.—The presumption that an intercourse, illicit in its origin, continued to be of that character, may be repelled by a contrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place: *Caujolle* vs. *Ferrie.*

Thus, in support of the legitimacy of a child, the facts that the father desired to marry the mother, and that, although he might have maintained a meretricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did contract a marriage in fact, prior to the birth of his child: *Id.*

The presumption is not overcome by the fact that, having declared and caused to be recorded his purpose to solemnize the marriage by the public acts prescribed by the municipal law of his domicil, such purpose was not shown to have been consummated, and there was an entry upon the record of such declaration importing that nothing came of it: *Id.*

Nor is it repelled by the omission in the record of the child's baptism, which took place on the day of its birth, of a statement of its legitimacy, though the usage of the time and place appeared to have been to designate as legitimate in similar documents, contracts, &c., those who were in fact such, and the father, mother, and other relatives were thus designated in the contemporaneous writings to which they were parties: *Id.*

The presumption of legitimacy, supported by some facts, sustained against many other circumstances tending to an opposite conclusion: *e. g.*, a reputation at the time of the child's birth that the parents were not married; a separation of the parents very shortly after the birth, and no correspondence between them for the remaining years of the father's life;

the abandonment of the child by both parents for twelve years; the use by the mother of her maiden name, and the designation by her of the child as her nephew: *Id.*

Perjury—Witness Indictable for, though Incompetent—Husband and Wife, Admissibility of, as Witness in Suits inter sese—Not to prove Non-Intercourse, but aliter, after Divorce.—A witness who testifies falsely as to a material fact, is guilty of perjury though he was not a competent witness in the case, and was especially inadmissible to prove the particular fact to which he testified: *Chamberlain* vs. *The People.*

So held, where, in an action for divorce, the husband—his wife having borne a child—testified that he had no sexual intercourse with her during marriage: *Id.*

It seems (per James, J.), that, in an action between husband and wife, either party is, since the amendment to the code in 1857, a competent witness against the other, in general, though inadmissible to prove the particular fact of non-intercourse: *Id.*

Upon an indictment of the husband for perjury, after divorce, the wife is a competent witness to prove that she has had no sexual intercourse with any other person: *Id.*

Vendor and Vendee—Conveyance Bounding on a Street.—As between grantor and grantee the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. There is no distinction in this respect between the streets of a city and country highways: *Bissell* vs. *The N. Y. Cent. R. R. Com.*

So held, where the conveyance contained no reference to the street, by name, but the lot was described by its number, "according to an allotment and survey made by E. J.," upon whose map the lot was represented as abutting upon a street, and the depth of the lot was stated by figures which would not include any part of the street: *Id.*

The grantor held to have dedicated such street as between him and his grantees, although his map represented it as continuing through the land of an adjoining proprietor, which closed it against any highway in one direction, and such adjoining proprietor never in any manner assented to the continuation of the proposed street, nor was any part of the street adopted as such by the public authorities: *Id.*

The grantee of all the lots on both sides of the street thus designated, held entitled to the exclusive possession of the proposed street against ejectment by the grantor: *Id.*