ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Warranty on sale of Chattels—Parol Evidence to vary Written Contract—Damages for Breach of Contract—Construction of Contract.—In an action to recover damages for the breach of an implied warranty of reasonable fitness, the following contract was proved: the defendants wrote to H., who was then a partner of the plaintiff's, on March 29th, saying, "we propose to make you eighteen or twenty-two retorts in dry sand, with two heads each, like the one furnished you in February last, weighing about 3000 lbs. each, for $100 each;" H. replied, "you will please make for me eighteen retorts, as per memorandum and terms in yours of March 29, and directions given by myself and G." *Held*, that the contract contained no implied warranty that the retorts should be fit for any special purpose, and that no such warranty could be added to it by parol; that the words, "like the one furnished you in February last," should be construed to apply to the quality of workmanship, as well as to the size, shape, and exterior form; and that, under the clause referring to directions by H. and G., a compliance with the requirements of the contract as to the mode of casting and quality might be waived by them, and, if so waived, the plaintiffs would be bound thereby, and in the absence of fraud or bad faith on the part of the defendants, the amount of the knowledge of H. and G. as to the best method of casting was immaterial: *Whitmore* vs. *South Boston Iron Co.*

A written contract for the manufacture of retorts cannot be affected by proof of a custom that, in the absence of an express agreement, founders shall not be held to warrant their castings against latent defects; and that, in case of apparent defects, they shall be entitled to have castings returned to them within a reasonable time, and to replace them with new ones: *Id.*

The rule of damages in an action for a breach of warranty in articles which are manufactured under an agreement, but which are not furnished for any particular use, is the difference in value between the articles actually furnished, and such as should have been furnished: *Id.*

Criminal Law—Murder, in attempting Abortion—Existence—Pleading—Practice.—In an indictment for murder by poison, it is not necessary

[1] From Charles Allen, Esq., State Reporter.

to allege that the poison was administered by the defendant to the deceased with an intent to kill: *Commonwealth* vs. *Hersey.*

The court will not order an officer, having charge of witnesses who have been excluded from the court-room until they should severally be called to testify, to prohibit them from reading the newspaper accounts of the evidence in the case: *Id.*

On the trial of an indictment for murder by poison, in which one count alleges that the deceased was pregnant, and was induced to take the poison by assurance of the defendant that it was a medicinal preparation which would produce a miscarriage, evidence of a conversation two or three years before the time of the acts charged, in which the defendant applied to a witness for information upon the subject of procuring abortions, is inadmissible: *Id.*

If a medical witness, on cross-examination, has identified certain medical advertisements as his, they may be read to the jury as a portion of the cross-examination, for the purpose of affecting his credit, but the newspaper in which they are contained cannot be laid before the jury: *Id.*

Evidence that the defendant in an indictment refused to fly, when advised to do so, after suspicions against him were excited, is inadmissible in defence: *Id.*

Action—Liability of Magistrate for Issuing void Execution—Measure of Damages—Evidence in Mitigation.—A magistrate who has rendered judgment for the plaintiff in an action pending before him, and, on request for an execution, has issued one which is invalid on its face, is liable for such damages as are the natural, necessary and proximate consequences of his wrongful act; but not for the costs of levying the execution, or losses to which the plaintiff has been subjected by reason of attempting to enforce it: *Noxon* vs. *Hill.*

In an action against a magistrate to recover damages for his wrongful act in issuing an execution which was invalid on its face, he may show in mitigation that the condition and circumstances of the judgment debtor were such that nothing could have been collected upon a valid execution: *Id.*

Vendor and Vendee—Note for Purchase Money—When False Representations as Defence.—In an action upon a note given for the price of land, the defendant cannot be allowed to prove, by way of recoupment in damages, that the plaintiff made false representations as to the quality and productiveness of the soil, and the number of acres contained within boundaries which were truly pointed out, by which the defendant was deceived and thereby induced to make the purchase: *Gordon* vs. *Parmelee.*

COURT OF APPEALS OF NEW YORK.[1]

Charitable Use, Validity of—Trustee, Renunciation by, where Presumed —Will, Devise Invalid as Restraining Alienation—Aliens—Effect of Partial Invalidity in Residuary Bequests.—A gift to charity, which is void at law for want of an ascertained beneficiary, will be upheld by the courts of this State, if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite: *Beekman* vs. *Bonsor.*

In other respects charitable trusts are subject to the rules which appertain to trusts in general. The trust must be capable of execution by a judicial decree in affirmance of the gift as the donor made it. The *cy pres* power, as exercised in England in cases of charity, has no existence in the jurisprudence of this State: *Id.*

A charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, is void, and the next of kin are entitled to the fund. It seems that such a defect is incurable, even by the *cy-pres* power: *Id.*

An executor who renounces his office, the renunciation being followed by many years of total non-interference with the estate, is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary: *Id.*

A gift to executors of money, to be applied in their discretion to the use of societies for the support of indigent and respectable females, without further designation of the beneficiaries, the executors having renounced the trust, cannot be upheld: *Id.*

Where a residuum of personal estate is disposed of by a will, in two parts, and the first disposition is invalid, the sum does not go to the legatee of the other part, but goes to the next of kin: *Id.*

And where the sum devoted to the invalid prior purpose, cannot be ascertained by reason of the failure of that purpose or otherwise, the gift of the remainder is void for uncertainty in the amount: *Id.*

A bequest of a sum of money, to be invested in land, of which the rents and profits are to be applied to certain beneficiaries during fifteen years, the land then to be sold and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation: *Id.*

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[1] From E. P. Smith, Esq., State Reporter.

And where such a bequest leaves the sum not exceeding a certain limit, in the discretion of executors, and the executors have renounced, the gift cannot be sustained as a pecuniary legacy by disregarding the void directions to convert it into land, and then to re-convert it into money. The amount being unascertained, the bequest wholly fails: *Id.*

A bequest of money, to be laid out in lands for the benefit of aliens, who are to have the possession and enjoyment, contravenes the statute of wills, and is void: *Id.*

Vendor and Vendee—Title to Chattels derived through a Fraud—Husband and Wife—Ambiguous Possession—Purchaser without Notice—Mortgage for Future Advances.—The definition in the 2d Revised Statutes, page 702, section 30, of the term "*felony*" when used in a statute, has not so changed the common law as to prevent a purchaser in good faith and for value, obtaining title to goods, which the original vendee procured by false pretences: *Fassett* vs. *Smith.*

The case of *Andrew* vs. *Dieterich* (14 Wend., 36), in this respect overruled.

The possession by a husband of his wife's real estate is to be taken as her possession, so as not to put a purchaser upon inquiry as to the rights of a third person of whom the husband, to cover his own fraud, took a lease unknown to the purchaser: *Id.*

A creditor, who took from his debtor a mortgage declared to be a continuing security for an amount less than the debt, *held*, to have made subsequent advances on the faith of the mortgage, although the original indebtedness was never reduced, but was continually increasing: *Id.*

Municipal Corporation Tax—Payer or Loan Holder no right, as such, to Maintain an Action to Restrain Acts of Corporate Officers.—There is no distinction between a municipal corporation and towns or counties, which enables a taxable inhabitant of the former to maintain an action to restrain or avoid a corporate act not affecting his private interest, as distinct from that of other inhabitants: *Roosevelt* vs. *Draper.*

Nor can such a suit be maintained by an inhabitant who is also a creditor, holding the public stock of the corporation, to avoid an alienation of its property upon which he has no specific or general lien, and which is not shown to be essential to the security of the corporate creditors: *Id.*

A Governor of the Almshouse is one of the heads of departments, and an officer of the city of New York, prohibited, by chapter 187 of 1849,

section 19, from being interested in the purchase of any real estate belonging to the corporation: *Id.*

Will—Where Widow a Witness against Probate.—An order of the Supreme Court, reversing a Surrogate's decree, admitting a will to probate for error in law, and remitting the proceedings to the Surrogate, is a final determination in the Supreme Court, and is appealable to this court: *Talbot* vs. *Talbot.*

A widow, cited, but who does not appear or contest the probate of her husband's will, is a competent witness for the contestants, as against the objection that she is a party to the proceeding; and no formal order, dismissing her as a party, or otherwise providing for her examination, is necessary: *Id.*

Where, on the hearing before the Surrogate, there is general evidence of the execution by the husband of a previous will, under which the widow would take the same provision as under the will offered for probate, the validity of the first will is to be assumed in support of the competency of the widow as against the objection of interest: *Id.*

SUPREME COURT OF NEW YORK, GENERAL TERM, SECOND DISTRICT, May, 1861.[1]

Agreement—Statute of Frauds.—The plaintiff was employed by G. to build for one S. a machine for crushing ore; S. having previously arranged with D. & Co., to pay for the same, and the plaintiff looking to D. & Co. for payment, and commencing work upon the machine. Subsequently, D. & Co. refused to pay for the machine, and the plaintiff, on being informed of such refusal, declined proceeding under his contract; whereupon the defendant promised, verbally, that if the plaintiff would go on and complete the machinery, he, the defendant, would pay for it. *Held,* that this was not an agreement to pay the debt of another, nor within the statute of frauds. The first contract was rescinded, and the agreement of the defendant was not collateral, but was an independent and original agreement, and, as such, valid and binding: *Quintard* vs. *De Wolf.*

Powers and Jurisdiction of Supreme Court—Construction of Wills—Infants—Determination of Claims to Real Estate.—The Supreme Court possesses all the powers and exercises all the functions, both of the Supreme

[1] From Hon. O. L. Barbour, Reporter of the Court.

Court and the former Court of Chancery; but it has not acquired, by the blending of the two tribunals, any right or authority which did not belong to one or the other of their formerly separate jurisdictions: *Onderdonk* vs. *Mott and Others.*

The action and administration of the Court is perfectly distinct in affording legal or equitable remedies: *Id.*

Where there is no trust, and there is no personal estate in the distribution of which any trust can arise, devisees who claim merely legal estates in the real property, cannot bring a suit in equity to obtain a judicial construction of the will of the testator: *Id.*

If the question to be determined is a purely legal question concerning the nature of the estates created by a will in the lands devised, *it seems* the proper remedy is in court of *law* by an action of *ejectment: Id.*

The whole power of the court to order a sale of the lands of infants is derived from the statute. There is no such original jurisdiction in a Court of Equity: *Id.*

If such statutory jurisdiction can be exercised upon bill or complaint, as well as in the ordinary mode by petition, still there is no authority for uniting in such a suit parties who claim a legal title adverse to the infant, and compelling them to litigate that claim and have it passed upon; and there are insuperable objections to such a course: *Id.*

To authorize a proceeding under the statute for the determination of claims to real estate, the claim of the defendant must be adverse to the party in possession: *Id.*

Proceedings cannot be instituted by one having a life estate in premises under a will, against the devisees in remainder. Nor by one who is not in possession: *Id.*

GENERAL TERM, SIXTH DISTRICT, July, 1861.

Revocation of Will.—The intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence unless it be carried out by some act amounting, in judgment of law, to an actual cancellation or revocation: *Clark* vs. *Smith.*

A testator having an only son, James W. Smith, devised certain real estate to his "son, James W. Smith." After the execution of the will, he, with a pen, erased from the clauses of the will containing the devise,

the name "James W. Smith," leaving the word "son" uncancelled. *Held*, that neither the will nor the devises to James W. Smith were revoked by the erasures: *Id.*

GENERAL TERM, SEVENTH DISTRICT, December, 1860, and March, 1861.

Partnership.—The interest of a partner in the partnership property consists in his rateable proportion of the assets after the payment of all the debts of the partnership. In a suit in equity for a settlement of the copartnership affairs, no decree can rightfully be made for the payment by one partner of any sum to another except upon this basis: *Hayes* vs. *Reese.*

If the partner against whom a decree is obtained upon a final accounting between him and his copartners for the payment by him of an ascertained balance to another, is subsequently compelled by legal process to pay partnership debts to an amount equal to the sum remaining unpaid upon the judgment, this will not entitle him to maintain an action against his former copartners to have the amount of such partnership debts so paid by him ascertained, and for a decree directing that such amount be allowed to him as payment upon the decree: *Id.*

Usury.—When promissory notes of equal amounts are exchanged, one is equal in value to the other, and there is no usury in the transaction; but when either party makes an advantage in the arrangement, over and above seven per cent., then the case is one of usury, if the transaction was designed as, or was connected with, a loan of money: *Thomas* vs. *Murray et al.*

Money is equal to money in such a transaction, but nothing else is equivalent to money. Where, upon a loan of money, anything else is claimed to be equivalent to money, the lender must show the equality; and if any other thing than money is put upon a borrower in an exchange of notes, in connection with, and as a condition of, a loan of money, the transaction is presumptively usurious in law: *Id.*

The defendant applied to W. for the loan of $200. W. said he had a note made by M. for $150, payable in hemlock lumber, and if the defendant would take that note he, W., would let him have the $200, and take the defendant's note for $350. The defendant replied that he did not want the M. note, and did not consider it good. Subsequently the defendant told W. that if he would let him have the $200 that day he would take the M. note, provided W. would guarantee it. This W. agreed to do, and thereupon advanced $200 in cash to the defendant, and delivered the M.

note with a guaranty endorsed, guaranteeing the collection thereof, but without any consideration expressed, and took from the defendant a note for $356.97, which embraced the $200 and interest, and the $150 note and interest. *Held*, that even upon the assumption that W. was liable upon his guaranty of the M. note, and that he could not elect to avoid it, the transaction was usurious upon its face within the case of *Cleveland* vs. *Loder* (7 Paige, 559); but that the guaranty was of no validity for want of a consideration being expressed therein; and that the note for $150 being turned out by the lender, upon a void agreement of guaranty, as part of the consideration for a loan, the transaction presented a bold case of usury: *Id.*

Held, also, that the fact that the agreement of W. to guarantee the note meant a *valid* guaranty, did not alter the case. That the contract being executed, at the time, must be held to express the agreement between the parties, and to furnish, upon its face, the only evidence of the contract actually made: *Id.*

Held, further, that in an action upon the note given by the defendant to W., the judge should have left it to the jury to say whether it was part and parcel of the bargain, and the intention of the parties that the borrower should take the $150 note at his own risk in regard to the solvency of the parties thereto: *Id.*

One who makes a contract which the law declares usurious cannot escape the penalty of the offence upon the plea of ignorance of the law, or of the absence of an intention to evade the statute: *Id.*

SUPREME COURT OF MICHIGAN.[1]

Gift from Husband to Wife—Evidence.—A husband, acting as the agent of his wife in making settlement of demand in her favor, took a deed of certain lands in satisfaction, which was made to him instead of to her. After her death, the heir at law (who was also the administrator) of the wife, sought in equity an account with respect to these lands, and the husband defended, claiming them as a gift from the wife. *Held*, that the burden of proof was upon the husband to establish the gift; and that the fact that the deed was made to him, in the absence of proof that it was so made by the wife's direction, consent, or knowledge, was no evidence of the gift, and authorized no presumption against the wife's interest: *Wales* vs. *Newbold.*

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[1] From T. W. Cooley, Esq., State Reporter.

Tender on Condition.—Where a tender sufficient in amount to discharge a mechanic's lien upon personal property, was made on condition that the property be delivered up, and the only objection made to the tender was that the amount was insufficient; *held*, that the tender was not vitiated by the condition: *Moynahan* vs. *Moore.*

Record of an Instrument referring to another Instrument.—Where a writing is recorded as a separate paper, which refers to "the within mortgage," but does not in any way describe or identify the mortgage, the record is no evidence or notice that the writing recorded was indorsed upon any particular mortgage not recorded with it, as that is an extrinsic fact not within the purview of the registry laws: *Bassett* vs. *Hathaway.*

Common Law Certiorari, what it brings up—Power of the Court upon it.—The return to a common law writ of certiorari should set out the evidence upon which the conviction or other judicial act complained of was founded: *Jackson* vs. *People.*

The office of a certiorari is not, however, to review questions of fact, but questions of law. And, in examining into the evidence, the appellate court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal: *Id.*

But the appellate court will review the rulings of law upon the admission or exclusion of evidence, or other rulings in the proceedings having a bearing upon the result: *Id.*

On certiorari to the Recorder's Court of Detroit, to remove the proceedings on conviction for a violation of a city ordinance, the evidence was embodied in the return by the clerk. *Held*, to be properly before the court: *Id.*

Carnal Knowledge and Abuse of a Female Child—Assault—Evidence.—Under an indictment for carnal knowledge and abuse of a female child under ten years of age, the defendant may be convicted of a simple assault, notwithstanding the child consented. The offence charged is rape, and the child has no capacity to consent: *People* vs. *McDonald.*

Liability of Municipal Corporations for Injuries caused by its Streets being out of repair.—The city of Detroit let to the lowest bidder, as

required by its charter, a contract for the construction of a sewer through one of its public streets. The contract bound the contractor at all times to keep the excavation fenced in, and carefully guarded to prevent accidents, and provided that the contractor should be liable for all damages that might arise from accident occasioned by his neglect. For want of proper guards to the excavation, an injury occurred to a person driving along the street. *Held*, that the city was liable: *City of Detroit* vs. *Corey*.

SUPREME COURT OF CONNECTICUT.[1]

Constitutional Law—Obligation of Contract—Taking Franchise for Public Use, what—Construction of Statute—Ferries.—The Hartford Bridge Company was incorporated in 1808, with power to erect and maintain a toll bridge across the Connecticut River, between Hartford and East Hartford. There were, at this time, two legally established ferries between these towns, and belonging to the towns, located below the proposed site of the bridge, and within a quarter of a mile of it. In 1818, the bridge which had been erected soon after the incorporation of the company, having been greatly damaged by a flood, and requiring to be rebuilt, and the company being unwilling to incur the expense of rebuilding it without the grant of further privileges, the Legislature passed a resolution that, upon the bridge being rebuilt to the acceptance of a committee appointed for the purpose, *the ferries, by law, established between the towns of Hartford and East Hartford, should be discontinued, and said towns should never thereafter be permitted to transport passengers across said river;* with a provision that if the company should neglect to maintain the bridge, the towns might open the ferries. In 1857, the Legislature incorporated the Union Ferry Company, with power to establish a ferry across the Connecticut River, between the towns of Hartford and East Hartford, at a point not less than a mile below the bridge, but made no provision in the charter for compensation to the bridge company for the injury to its franchise. The Ferry Company immediately after established the ferry at a point a mile and a half below the bridge, and were using it for the conveyance of passengers, and a considerable amount of tolls was thereby diverted from the bridge. The line of travel was not the same with that

[1] We are indebted to John Hooker, Esq., the Reporter of the Court, for the points decided in the following cases, which will be reported in the 29th volume of the Connecticut Reports, and for which he will accept our thanks.—*Eds. Am. Law Reg.*

accommodated by the bridge, and the growth of the city of Hartford in that direction had been such as to require the accommodation. On a bill in equity brought by the bridge company, to restrain the ferry company from the use of the ferry, it was *held*, that the resolution of 1818 was to be construed as a contract on the part of the Legislature, only that the then existing ferries should be discontinued, and that the towns should not be allowed to revive them; and that the resolution of 1857, establishing the Union Ferry, was not a violation of the contract, and was not unconstitutional. Storrs, C. J., dissenting: *Hartford Bridge Company* vs. *Union Ferry Company.*

The same general rules of construction are to be applied to both public and private grants. The intent of the contract is to be ascertained by a fair and rational interpretation of the language used, and, when the intent is ascertained, it is to be carried out against the State as fully as against an individual: *Id.*

Where, however, the language of a public grant will equally admit of two constructions, so that the intent cannot be ascertained, then that construction is to be adopted which is most favorable to the State. This is but the application of the ordinary rule that the language of a contract shall be taken most strongly against the party using it, the language of a public grant being regarded as the language of the party obtaining it: *Id.*

In the present case, the contract of the State that the ferries then existing should be discontinued and never afterwards revived, should be construed as meaning that no ferries substantially the same, and accommodating the same line of travel, should be established: *Id.*

Remarks on the history of legislation in this State on the subject of ferries: *Id.*

Assumpsit—Pleading—Previous Liability as Consideration—Action for Contribution.—Although an existing liability is a good consideration for a promise, whether expressed or implied, to pay money on request, yet it is not sufficient that a declaration on such a promise should merely state that there existed such a liability. It must state the facts on which it arose, and in such a manner that the court can see that there was such a liability: *Bailey* vs. *Bussing.*

The statement of the liability without the facts on which it arose, is a statement of a mere legal inference, which it is never necessary to allege in pleading, and which, if alleged, is never traversable: *Id.*

A declaration in an action of assumpsit for a contribution, alleged that a joint judgment had been recovered against the plaintiff, the defendant and another, which the plaintiff had been compelled to pay, and that the defendant was in duty bound and liable to pay to the plaintiff one-third of the amount, and being so liable promised, &c., but contained no allegation as to the cause of action upon which the judgment had been rendered. *Held*, that the court could not infer, as a matter of law, that the cause of action was one which imposed upon the defendant the duty to contribute, and therefore that no sufficient consideration for the promise was alleged: *Id.*

Held, also, that the defect of the declaration was not cured by verdict. One judge dissenting: *Id.*

Trespass, Damages in—Illegal Possession—Liquor Law.—In trespass for taking personal property, where the property has been taken without malice and under a claim of right, and the controversy relates only to the title, the rule of damages is the value of the property at the time of the taking, and interest from that time to the time of the judgment: *Oviatt* vs. *Pond.*

Where, in such a case, the plaintiff claimed that, by the taking of the property, he had been broken up in his business, and the judge charged the jury that the defendant must make the plaintiff good for all the actual damage sustained by him at the defendant's hands, resulting directly and naturally from the injury, a new trial was granted on motion of the defendant: *Id.*

Under the 27th section of the statute with regard to intemperance, which provides that "no action shall be maintained for the recovery or possession of spirituous liquors, or the value thereof, except in cases where persons owning or possessing such liquors, with lawful intent, may have been illegally deprived of the same," there can be no recovery in an action of trespass for the value of liquors taken, where the same were kept for illegal sale: *Id.*

And this rule was applied where the liquors of the plaintiff had been attached and taken away by the defendant, an officer, as the property of another party against whom he held a writ of attachment: *Id.*

Liquors kept for sale contrary to law, are regarded by the law as having no lawful value, or value for lawful purposes: *Id.*

This provision of the statute is constitutional and valid: *Id.*