the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to the precedents, have pleaded it was delivered to them to be executed; and though it is not stated in the precedents they should have actual possession at the time of the arrest, it is to be presumed, from the allegation of delivery to them, that they continued to hold it. MacKalley's case, 9 Coke, 69 a, is distinguishable on the ground suggested by East in his treatise on Pleas of the Crown, vol. i. p. 318. See also in 1st Hale's Pleas of the Crown, 458. We are unable to find any case in which the precise point raised for our discussion has been decided. We are, therefore, of opinion that the officers making the arrest ought to have had the warrant with them, ready to be produced in case it should be required, and not having it they were not justified in making the arrest. As to the second point, we are clearly of opinion that the withdrawal of the information as to the rescue afforded no valid ground of objection to the proceeding under the information for the assault. Therefore the conviction will be quashed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

Warranty on a Sale of Chattels—Rule of Damages for Breach of.—Where a warranty of a thing has reference to a purpose for which it is to be used, the rule of indemnity on a breach of the warranty must include the damages which naturally followed, and might be expected to follow, its violation, when the thing warranted is put to the intended and understood use: provided such damages are in their nature certain, and it is also certain that they proceeded from the breach of warranty: *Passenger* vs. *Thorburn.*

The plaintiff, a market-gardener, applied to the defendant for seed of a particular kind of cabbage—the Bristol. The defendant being acquainted with the plaintiff's business, and the purpose for which the seed was

[1] From Hon. O. L. Barbour, Reporter.

wanted, professed to have that seed, and showed him a sample of the cabbage the seed would produce; said he knew the seed was Bristol cabbage seed, and warranted it as such. The seed being purchased and planted, proved not to be of the Bristol cabbage, and produced a crop of but little value. *Held,* that the rule of damages was such loss as the plaintiff had sustained by the crop not being what the warranty in substance said it should be—Bristol cabbage: *Id.*

Latent Ambiguity—Vendor and Purchaser: Tender of Deed—Liquidated Damages.—Where, in a contract for the sale and conveyance of land, there was no other description of the premises except what was contained in the words "his farm," it being clear, from the contract, that these words referred to the vendor's farm, it was *held* to be a case of latent ambiguity which was susceptible of explanation by parol evidence: *Brinkerhoff* vs. *Olp, Executor, &c.*

Where a purchaser dies before the period when, by the terms of the contract, the first payment is to be made, and possession of the land given, a separate tender of the deed to all the heirs or devisees of the purchaser is not necessary. It is sufficient if a deed, conveying the premises to the heirs and devisees, be tendered to the executor, who represents the testator's means of paying the purchase-money: *Id.*

By an executory contract for the sale and purchase of land, the parties bound themselves, each unto the other, "in the penal sum of $200, as fixed and settled damages to be paid by the failing party." *Held,* that the sum named was intended as liquidated damages, and not as a penalty: *Id.*

Fixtures; as between Mortgagor and Mortgagee; Action for their Removal; what are such.—In determining whether articles are or are not fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee, and this whether the mortgagee were or were not in possession of the premises: *Laflin* vs. *Griffiths, Sheriff.*

If articles, before being detached, were fixtures, the person having the title to the realty can, in case of their removal by another, sue for the specific recovery of the things themselves, or in trespass for the damages to the freehold: *Id.*

Though the mortgage debt has become satisfied by the mortgagee's purchasing the premises, at a foreclosure sale, this will not alter his rights in respect to fixtures attached to a building and wrongfully removed there-

from by another. If, at the time of such removal, the mortgagee had the title, even though it were a conditional one, that is sufficient to found an action against the wrongdoer: *Id.*

Where articles of machinery were attached to a building by braces and nails, having been so attached when the building was erected, and having always continued so attached, and the sole use of the building being the accommodation and employment of such machinery, it was *held* that the articles of machinery were to be deemed *fixtures: Id.*

Vendor and Purchaser—Rescinding of Contract.—Before a purchaser can rescind the contract of purchase, and claim to recover back moneys paid by him on account of the price, he is bound to restore to the vendor the possession of the premises. He cannot occupy under the contract, and thus enjoy the benefit of it, and at the same time treat it as rescinded, and reclaim the purchase-money: *Goelth* vs. *White.*

The money can only be recovered back when the contract has been rescinded *in toto*, and so long as the purchaser is reaping the fruits of it, it is not wholly rescinded: *Id.*

Married Woman; Her Capacity to make Executory Contracts.—The act of March 20, 1860, concerning the rights and liabilities of husband and wife, by exempting the husband from all liability upon or in respect to bargains or contracts made by the wife in or about the carrying on of her trade or business, recognises the ability of the wife to make executory contracts, which will be valid as against her, notwithstanding her coverture: *Barton* vs. *Beer.*

Usury.—Any security given in payment or discharge of an usurious security, is equally void with the original. The original taint of usury attaches to all consecutive obligations and securities growing out of the original vicious transaction: *Vickery* vs. *Dickson.*

A new security of the borrower for the same debt, secured by an usurious mortgage, would be vitiated by the usury; and the obligation of a third person stands upon no better foundation: *Id.*

Opinions of Witnesses.—Although, as a general rule, opinions of witnesses are to be excluded, except upon questions of science and skill as to which they have been specially instructed or educated, yet witnesses may give their opinion upon questions of *value*, and as to the amount of *damages* a party has sustained, where the damage consists in an injury to, or destruction of property: *Nellis* vs. *McCarn.*

Partnership.—Money originally borrowed by one partner, in his indidual capacity, and a third person, upon their joint note, and subsequently by the consent of such third person agreed to be appropriated to the borrowing partner's individual use, cannot be collected of the firm or the other partner, merely from the fact that they have had the benefit of it in their business, or that the account of it is entered on their books; especially where the evidence shows that neither the original loan, nor that from the third person to the borrowing partner, was made upon the credit or for the benefit of the firm: *Tallmadge* vs. *Panoyer.*

Guaranty.—The defendants purchased of the plaintiff his interest in a stock of goods, and in part payment therefor transferred to him the note of B., indorsing thereon a guaranty of *payment*, but which guaranty, on its face, expressed no consideration. *Held*, that the case was within the decisions which hold that where a guaranty is made for the purpose of paying the party's own debt, it is not a collateral, but an original undertaking, and so good without expressing the consideration: *Fowler* vs. *Clearwater.*

The taking of such a note, by a vendor, operates as a *giving of credit*, to its maturity, and will prevent the statute of limitations from being a bar: *Id.*

Deed; Parol Evidence of consideration—Parol Promise to pay Debt of Another.—Parol evidence is admissible to show for what consideration, and in what manner a grantee agreed to pay for the land conveyed to her by deed: *Seaman* vs. *Hersbrouck.*

A parol promise of a party, to whom a conveyance of lands is made, for the purpose to pay, on account of the consideration, certain debts owing by the grantor to third persons, is valid and obligatory upon the promissor without the concurrence or consent of the creditors having been given to the arrangement, and without any suspension or extinguishment of the claims of those creditors, as against the original debtor: *Id.*

If the grantee has already paid the debts of the grantor, so agreed to be paid by her as a part of the purchase-money, that will be a good defence to an action brought against her by other creditors of the grantor, to recover the balance claimed to be due on account of the purchase-money: *Id.*

Parol License to enter upon Land.—A parol license to enter into the possession of land is no defence to an action by the owner of the land to

recover the possession: *Eggleston* vs. *The New York and Harlem Railroad Company.*

Such a license is not irrevocable, so as to bar the grantor or his heirs from recovering the possession. It will be revoked by a conveyance of the land to another person, or by the death of the grantor: *Id.*

A mere agreement to sell does not, of itself, impart a license to enter into possession: *Id.*

Municipal Corporations; Liability for Acts of their Agents.—Where individuals, claiming to be the agents of a municipal corporation, and to act under resolutions of the Common Council directing the removal of all obstructions in a particular street, go beyond the limits of the street, upon premises in the rightful possession of another, and there commit unlawful acts to the owner's injury, they are personally liable to the owner of the property, but no action will lie against the corporation: *Harvey* vs. *The City of Rochester.*

The trespasses not being committed by the agents or servants of the corporation in the performance of the acts directed or authorized by the resolutions, the corporation cannot be made liable on the principle of *respondeat superior: Id.*

A Common Council has no authority, by its agents, servants, or otherwise, to enter summarily upon premises within the corporate bounds of the city, which are owned or lawfully possessed by an individual, and there commit unlawful acts to his injury: *Id.*

If it does so, its acts will be *ultra vires*, for which the corporation is not liable; even if the ordinance under the authority of which the wrongful acts are done specifically direct the doing of those particular acts: *Id.*

SUPREME COURT OF CONNECTICUT.[1]

Bill of Exchange—What sufficient Notice of Protest.—The defendant was indorser of a bill of exchange drawn by A. on B., and accepted by B. Notice of the non-payment of the bill by the acceptor was sent to him, which described the bill as "*drawn by you,*" and wholly omitted the name of the real drawer, but otherwise described the bill correctly and as indorsed by the defendant. *Held,* that the notice was sufficient to charge

[1] From John Hooker, Esq,, State Reporter.

the defendant, in the absence of proof on his part that he had drawn any such bill, or that he had indorsed any other paper of the same general description which could have been mistaken by him for the bill in question: *Gill* vs. *Palmer.*

Deed, where Merger of previous Contract—Parol Evidence.—The defendant agreed to sell the plaintiffs a patent right for the making of sewing machines, within a certain district, for the sum of $400, for a part of which the plaintiffs were to give a note and let the defendant have a horse for the balance, the defendant reserving the right to manufacture machines within the district. The note was at once given and the horse delivered, and the defendant thereupon executed and delivered to the plaintiffs a deed conveying the patent right; the deed stating the amount of the consideration and reserving to the defendant the right of manufacturing machines in the district, but containing no stipulations as to the quality of the machines made under the patent. *Held*, that the plaintiffs could not prove by parol evidence that, at the time of the sale and prior to the execution of the deed, the defendant warranted the machines made under the patent "to work well, and not drop stitches, and to do the various sewing of a family:" *Galpin* vs. *Atwater.*

The deed was regarded upon the facts as the contract of the parties reduced to writing, and therefore as merging all the prior parol transaction, and not as a mere execution, in part, of a prior and complete parol contract: *Id.*

Builder's Lien—Proceedings to Enforce—Waiver by Acceptance of Note —For what given by Statute.—Where the owner of premises which a builder's lien has attached, has conveyed away his interest in the premises, it is not necessary to make him a party to a bill to foreclose the lien: *Rose* vs. *The Persse and Brooks Paper Works.*

The statute with regard to a builder's lien provides that the builder shall file in the office of the town clerk a certificate of his lien, which shall "describe the premises." A party having a lien on one of three paper mills, which were near each other, and belonged to the same owner, but were independent and susceptible of a separate description, described the premises on which the lien was claimed, as "two tracts of land situated in the town of W., one bounded [&c.], with two paper mills thereon, and the other bounded [&c.], with one paper mill thereon," and described the lien as "for materials furnished and services rendered in the erection and

repairs of said several paper mills." *Held,* that the certificate was void, as not containing a reasonably accurate description of the premises within the meaning of the statute: *Id.*

A party having a builder's lien took notes for the amount of his claim, and gave a receipt as follows—"Received of P. & B. two notes [describing them], in full."—Whether the lien was not discharged thereby: *Quere.* The court inclined to the opinion that, in the absence of proof that the receipt did not exceed the real understanding of the parties, it must be taken to mean that the notes were received in payment, and be regarded as discharging the lien: *Id.*

The statute gives a lien for materials furnished and services rendered in *construction, erection or repairs* of any *building.* Where the materials and labor furnished were in the equipping with fixed machinery for the manufacture of paper, a building intended in its erection as a paper mill, but which was in itself a complete and independent structure, it was held that they could not be regarded as furnished for the construction or reparation of a building, and that no lien attached to the premises in favor of the party furnishing the same: *Id.*

Assignment of Debt, where in Equity Transfer of Securities—Right of Creditor to Securities held by a Surety—Covenant not to Sue—Pleading in Equity.—Where a mortgage is given *to secure a debt,* whether the debt be in a negotiable form or not, a transfer of the debt transfers in equity the security, if the security has not previously been surrendered by the creditor: *Jones* vs. *The Quinnipiack Bank.*

But where a mortgage is given, not to secure a debt, but *to indemnify a surety,* there the security does not in the first instance attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the security, arises afterwards, and comes into existence only upon the insolvency of the parties holden for the debt: *Id.*

Until this equity arises, the surety has a right, in equity as well as law, to release the security: *Id.*

And the equity of the creditor in such a case not being an inherent one, growing out of the contract, but resulting merely from a state of facts which entitles him to equitable relief, and becoming fixed only by the interposition of a court of equity, it seems that the relief cannot be furnished, even though insolvency has intervened, unless the security is

still retained by the surety at the time of the application of the creditor for relief: *Id.*

J. mortgaged certain real estate to B., to secure him for accepting his drafts to the amount of $50,000. Most of the drafts were at once drawn and accepted. The condition of the mortgage was that J. should *pay at maturity all such acceptances and save* B. *harmless therefrom.* A few days after, J. desiring to procure a loan from Q., an arrangement was made under which B. mortgaged to Q. all his interest in the mortgaged premises for the security of the loan, and Q., upon the security, advanced $30,000 to J. Both J. and B. intended to give to Q., and Q. supposed that he was acquiring an interest that was equivalent to a first mortgage of the premises. J. and B. were both at this time solvent and in good credit, but afterwards failed. At the time of their failure the loan to Q. was unpaid, as were also the acceptances of B. under the original mortgage; which latter were then held by parties to whom they had been negotiated. Upon a bill in equity brought by certain holders of these acceptances, against Q., for the application of the mortgaged premises to the payment of the acceptances, it was *held*, 1. That the mortgage was to be regarded as a personal security to B. for his acceptances for J., and not as a security for the bills so accepted. 2. That while J. and B. were solvent, no equity arose with regard to the security in favor of the holders of the bills. 3. That while no such equities existed B. had a perfect right to surrender the security to J., or with his concurrence to make a transfer of it to Q., as security for the loan made by the latter to J. 4. That the right thus acquired by Q., was not affected by the equity in favor of the holders of the bills which arose afterwards upon the failure of J. and B.: *Id.*

C., one of the petitioners, had received certain of the bills from J., as collateral security for a temporary loan, with an agreement that after the loan was paid C. might, at his option, return the bills, or retain them in the place of certain other paper of J. held by C. C. knew, at the time, of the mortgage to B., but had no knowledge of the transaction with Q. The temporary loan was soon after paid, but C. did not exercise his right of option until some weeks after, when he had heard of the conveyance of the security to Q. and of the loan of Q. upon it, and he then elected to retain the bills and give up the other paper, and in doing so had it in view to secure the benefit of the mortgage. *Held*, that he must be regarded as having taken the bills at the time when he elected to retain them, and not

at the time when they were delivered to him, and to have taken them, therefore, with notice of the rights of Q.: *Id.*

A covenant not to sue, is in equity a release: *Id.*

Where two persons unite as petitioners in a bill of equity, if either is not entitled to relief, the bill must be dismissed as to both: *Id.*

SUPREME COURT OF MASSACHUSETTS.[1]

Conveyance in Fraud of Creditors—Evidence—Interest on Judgment.—For the purpose of proving a fraudulent intent on the part of a grantor of real estate, evidence is competent to show that, on the same day of making the conveyance in question, he conveyed to near relatives all his other real and personal estate not exempt from seizure on execution; but evidence of his subsequent acts and declarations is incompetent: *Taylor* vs. *Robinson.*

In levying an execution upon land, interest on the judgment may be computed to the time when the levy is completed: *Id.*

Fire Insurance—Representations in Application, when Warranty.—One who accepts a policy of insurance in which it is expressly provided that it is agreed and declared that the policy is made and accepted upon and in reference to the application filed in the office, is thereby concluded from denying that the application is his, and cannot set up that it was made by an agent employed by him to procure insurance upon his property, but without authority to bind him by representations in the application: *Draper* vs. *Charter Oak Fire Insurance Company.*

A denial in the application that incumbrances exist upon property to be insured, in reply to a direct inquiry upon that subject, when in fact mortgages thereon do exist, and are known to exist by the applicant, will avoid a policy issued on such application by a stock insurance company, for a premium fully prepaid, if the policy states upon its face that it is agreed and declared that it is made and accepted upon and in reference to the application, and to terms and conditions of insurance annexed, one of which provides that such application shall be taken and deemed to be a part of the policy, and a warranty on the part of the assured; although the application contains also a provision, at the end of it, that the applicant covenants that "the foregoing is a full, just and true exposition of

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

all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk:" *Id.*

Easement—Equitable Jurisdiction.—The right to use land for a mill-yard may exist as an easement, for the disturbance of which a bill in equity may be sustained: *Gurney* vs. *Ford.*

A bill in equity, seeking relief for an obstruction of a way to the plaintiff's mill, and alleging it to be a public way, is not sustained by proof of the existence of a private way: *Id.*

Assumpsit—Tender—Contract—Action.—One who has paid a portion of the price for a piece of land, under an oral contract for the purchase thereof, and is ready and able to pay the residue upon delivery to him of a deed of the land, according to the terms of the contract, may recover back the money so paid by him without proving a formal tender of the residue of the money, if the vendor, upon request by the vendee, has refused to perform his part of the contract: *Cook* vs. *Doggett.*

If one enters into possession of land under a verbal contract for the purchase of the same, and cuts the grass thereon, and puts it into the owner's barn without being requested by the owner to do so, and the owner afterwards refuses to fulfil the contract, no action lies to recover for the expense of cutting the grass: *Id.*

Mill—Right to Erect Dam—Prescription.—The owner of land through which a stream of water passes, may lawfully build and maintain upon his own land a dam across the stream, for a fish-pond, although he thereby prevents the flowing back of water upon his land from the dam of a mill-owner below, which has not been maintained long enough to give a right by prescription: *Wood* vs. *Edes.*

Husband and Wife—Presumption of Legitimacy.—The presumption of the legitimacy of the child of a married woman can only be rebutted by evidence which proves beyond all reasonable doubt that her husband could not have been the father: *Phillips* vs. *Allen.*

A child born in eight months after marriage will be presumed to be legitimate, although, when born, it has all the physical appearances of a full grown and natural child; and proof of a statement by the mother that she had no connection with her husband before marriage, and that her reputation for chastity was bad at the time of her marriage, and that