The profession of the law in this country, though from its inherent arduous character, and perhaps even yet somewhat from its traditional conservatism, more difficult of access than business of other kinds, is nevertheless practically free and open to all comers. So far there is perhaps no reason to complain of the results of the experiment, for the tone of the American Bar is still as high and as honorable as that of the English, and whether that were so or not, it would be neither possible nor desirable to give it those exclusive features which have always been its distinctive character in England. Moreover, the examination which is most strenuously advocated there, has in more or less public manner, and with greater or less stringency, long obtained in all the States of the Union; and it is perhaps to this, as much as to anything else, that we owe the learning and character of our Bar.

But it is matter of grave thought whether a more definite organization of the Bar, both State and National, could not be devised, which, without interfering with individual liberty of action, might yet be of service in increasing and perpetuating its reputation and character as an honorable profession. In this view the experience of our brethren in England is worthy of careful observation and discussion. J. T. M.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MICHIGAN.[1]

Release of Mortgaged Premises by Holder of first Incumbrance—Notice of subsequent Incumbrance.—Where a mortgagee, with knowledge of a subsequent mortgage on a part of the premises mortgaged to him, releases a part or the whole of the premises not covered by the subsequent mortgage, and the remaining property is not sufficient to pay both, equity will postpone the payment of the first mortgage out of the proceeds of a sale of the remaining property to the extent of the injury done the subsequent mortgagee by the release: *James* vs. *Brown*.

But the rule of notice in such case is different from the rule equity

[1] From Hon. T. M. Cooley, Reporter, to appear in 11 Michigan Reports.

acts on to protect *bonâ fide* purchasers. Where one purchases property which was subject to an equity in the seller's hands, it is enough that he have knowledge of such facts and circumstances indicating the equity as would have led a prudent man to inquire in regard to it, and that he omitted to do so; while in the case of mortgages, the existence of the second mortgage should be clearly brought home to the knowledge of the first mortgagee, in such a way that any act injuriously affecting the interests of the subsequent mortgagee will show an intentional disregard of the interests of such subsequent mortgagee: *Id.*

Assignment for benefit of Creditors.—A clause in a general assignment for the benefit of creditors, empowering the assignee to sell the assigned property on credit, renders it void: *Sutton* vs. *Cleveland.*

Constitutional Law—"Due Process of Law."—The provision in the Constitution that "No person shall be deprived of life, liberty, or property without due process of law," as applied to proceedings of a judicial character, was intended to secure to the citizen the right to a trial, according to the forms of law, of the questions of his liability and responsibility before his person or his property shall be condemned: *Parsons* vs. *Russell.*

The trial must be by an impartial tribunal, and judgment must precede the deprivation of property: *Id.*

Under the Boat and Vessel Law of this State, a vessel may be seized and sold upon the mere assertion of a debt or demand, without any proof to substantiate the claim being made before a judicial tribunal, and without any judgment or decree of any such tribunal allowing the sale. It is therefore in conflict with the constitutional provision above quoted, and void: *Id.*

Statute of Frauds—Promise to answer for the Debt, &c., of another.—A written undertaking to answer for the debt or default of another must show the terms of the contract without a resort to parol evidence, or it is invalid: *Hall* vs. *Soule.*

A parol promise to pay the debt of another, being void, cannot constitute a legal consideration for a subsequent promise in writing: *Id.*

False Assertion of Value may be the Subject of a Suit—Bill of Sale does not exclude Parol Evidence.—A mere assertion of value made by the seller, when no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion which does not imply knowledge, and in which men differ. Every person reposes at his peril in the

opinions of others, when he has equal opportunity to form and exercise his own judgment: *Picard* vs. *McCormick.*

But it cannot be laid down as a rule of law that value is never a material fact: *Id.*

And when the purchaser expressly relies upon the knowledge of the seller as to quality or value, the seller is bound to act honorably and deal fairly with the purchaser. When confidence is reposed in him he is bound not to abuse it, and the rule of *caveat emptor* does not apply: *Id.*

A jeweller, knowing the purchaser's ignorance, deliberately and designedly availed himself of it to defraud him by false statements of the value of articles in his trade which none but an expert could reasonably be expected to understand. *Held*, that an action would lie for the fraud: *Id.*

Value may be the subject of a warranty in a contract of sale: *Id.*

A simple bill of sale does not embody the preliminaries nor the essential terms of a contract in such a way as to exclude parol evidence. It is designed merely to show the transfer of title: *Id.*

And when a contract of sale is in writing, if the seller has been dishonest in the transaction, the purchaser may disregard the writing, and sue directly for the fraud: *Id.*

Right of a Married Woman to engage generally in Business.—D., a married woman, being the owner of a grist-mill, her husband, as her agent, entered into the business of buying, flouring, and selling wheat on a large scale, which was carried on mostly on the credit of the business, and with money derived therefrom. The husband being indebted, one of his creditors levied upon some of the personal property in the business as his. The wife having brought suit against the officer for this property, it was *held*, that the Statute of 1855, empowering a married woman to contract, sell, and dispose of her property the same as if she were unmarried, did not empower her to engage generally in a business of this character, so as to make the proceeds her own: *Glover* vs. *Alcott.*

License Fee not a Tax.—An ordinance of the city of Detroit prohibited the sale of meats at other places than the public market without first obtaining a license, for which a fee of five dollars was charged. This ordinance was attacked as void, because imposing a *tax* not apportioned as provided by the Constitution. *Held*, that the license fee was not a tax, but a reasonable compensation demanded by the city from those not selling in the public markets, for the additional labor of its officers, and expense thereby imposed: *Ash* vs. *People.*

Seduction of a Woman who had been seduced before.—An act of illicit intercourse to which the woman submits solely in consequence of a promise of marriage then made, constitutes the statutory crime of seduction, notwithstanding the woman had been before seduced on a similar promise: *People* vs. *Millspaugh.*

Stare decisis—Notice before Suit to one who continues a Nuisance.—The Court is not bound to follow as precedents adjudications outside the State—except the adjudications of the Federal Courts on questions arising under the Constitution and laws of the Federal Government—any further than appear to the Court to be warranted by the fundamental principles of the common law: *Caldwell* vs. *Gale.*

The question discussed, whether, where one erects a dam on his own land which causes the land of another to be flowed, and then conveys the land on which the dam is situated, a suit can be brought against his grantee for the nuisance before he has been served with notice of it and requested to remove it: *Id.*

If such notice be necessary, and has once been given by the owner of the land flowed, it will enure for the benefit of his grantee, or of any one claiming title under or through the person giving the notice: *Id.*

Reading Books of Reports to a Jury.—On a question whether a draft was presented for payment within a reasonable time, counsel was allowed to read to the jury, and comment upon, books of reports. *Held* to be erroneous: *Phœnix Ins. Co.* vs. *Allen.*

SUPREME COURT OF MASSACHUSETTS.[1]

Administrator—Relation to Heirs at Law.—The administrator of an estate, the personal property of which is more than sufficient for the payment of debts, stands in no fiduciary relation to the heirs at law; and they cannot maintain a bill in equity to compel him to give to them the benefit of a purchase of real estate by him from one who had orally agreed to sell the same to the intestate: *Gay and Others* vs. *Gay and Another.*

Estate of Husband—Claim of Widow—Ante-nuptial Agreement.—It is no answer to the claim of a widow to a distributive share in the personal estate left by her husband, to show that she made an ante-nuptial agreement with him, by which she covenanted to accept certain provisions therein undertaken to be made for her by him, in the place of and as a

[1] From Charles Allen, Esq., Reporter, to appear in Vol. 5 of his Reports.

substitute for dower in his estate, and as a bar and estoppel to any and every other claim by her upon his estate: *Sullings* vs. *Richmond and Another.*

Trust Estate—Continuance of Business by Trustees—All the Profits of Business not Income—Construction of Intention.—If, under a bequest of the residue of the testator's property to trustees, with a general direction to keep the same safely invested, and distribute the income to certain persons for life, with remainder over, an investment made by the testator in a limited partnership has been allowed by the trustees to continue, the profits arising therefrom after his death are not to be treated exclusively as income; but so much thereof is to be treated and invested as principal, as, if received and invested at the testator's death, would amount, with interest and making annual rests, to the profits actually received at the time they were received, and the residue is to be distributed as income: *Kinmonth* vs. *Brigham and Another.*

An intention on the part of a testator that an investment made by him in a limited partnership should be continued after his death, and the share of the profits belonging to his estate should be distributed as income, under a general direction that his property should be kept safely invested, and the income thereof distributed to certain persons for life, with remainder over, will not be inferred from a clause in his will directing his executors not to avail themselves, unless they should see fit, of a provision in the partnership articles, authorizing him or his representatives to assume the management of the business, in case of the death of either of the general partners: *Id.*

Partners—Guarantee of Private Debt.—The guarantee by a firm of a private debt of one of the partners, if made in contemplation of insolvency, is not a debt which can be proved against the joint estate, by a creditor who knew that the firm was insolvent: *Phillips* vs. *Ames and Another.*

Note—Whether of Company or of Officer signing it.—A note in this form,—"$631.46. Boston, Nov. 12, 1860. Six months after date, we promise to pay to the order of A. B. six hundred and thirty-one dollars, value received. Mass. Steam Heating Co. L. L. F., Treasurer,"—is the note of the company, and does not bind L. L. F. personally: *Draper and Another* vs. *Mass. Steam Heating Co. and Another.*

Draft—Husband and Wife—Personal Liability.—An indorsement of

a draft by a husband to his wife, and her subsequent indorsement of it, with his assent, to a third person, are sufficient to vest in the latter a valid title: *Slawson* vs. *Loring*.

A draft in this form,—"Office of the P. L. Manuf. Co., Hancock, Mich., June 5th, 1861. E. T. L., agent. At four months' sight, pay, &c., and charge the same to account of this company," signed "I. R. J., agent," and accepted by "E. T. L., agent,"—binds the acceptor personally: *Id.*.

Note payable by Instalments — Grace — Mortgage — When Condition broken.—The maker of a note which is payable by instalments, at future times certain, with interest, is entitled to grace both on the principal and interest; and the condition of a mortgage given to secure the payment of the same sums and interest at the same times, is not broken until the expiration of the grace which is allowed upon the note: *Coffin* vs. *Loring*.

Trespass—Erection of Bay-Window—Highway.—An owner of land may maintain an action for the erection of a bay-window which extends over his line, by the adjoining owner, although that portion of his land which is covered by the bay-window has been laid out and is used as a highway; and evidence of a custom so to erect bay-windows is inadmissible: *Codman and Others* vs. *Evans*.

Equity Jurisdiction—General Statutes, c. 145, § 16—*Discretion in Location of Road—What may be included in Authority to Construct a Road.*—The remedy under Gen. Sts., c. 145, § 16, by an application for leave to file an information in the nature of a *quo warranto* to redress an injury to private rights or interests by the exercise by a private corporation of a franchise or privilege not conferred by law, does not deprive this Court of its jurisdiction in equity in case of a private nuisance: *Fall River Iron Works Co.* vs. *Old Colony and Fall River Railroad*.

Under a charter which fixes one terminus of a railroad at or near a certain point, a large discretion is conferred upon the railroad company in locating their road, the exercise of which will not be revised by this Court unless they have clearly exceeded its just limits or acted in bad faith; and where a charter authorized a railroad company to extend, locate, construct, and maintain a railroad "from a point at or near the present terminus of its track in Fall River, in a southerly direction, to the line of the State of Rhode Island," a location starting at a point 2475 feet, by

the line of the railroad, northerly from the termination of the old track, is authorized: *Id.*

An unrestricted grant of authority to construct a railroad from one designated point to another carries with it the authority to cross a navigable stream, if the railroad cannot reasonably be constructed without doing so: *Id.*

Corporation — Stockholder — Equity — Statute of 1861, *c.* 156.—A stockholder in a corporation, the charter of which, by Stat. 1831, c. 81, is subject to alteration, amendment, or repeal, at the pleasure of the Legislature, cannot maintain a bill in equity to restrain the corporation from engaging in a new enterprise, in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of the majority of the stockholders: *Durfee* vs. *Old Colony and Fall River Railroad Co.*

A lease by the Newport and Fall River Railroad Company, a corporation established under the laws of Rhode Island, to the Old Colony and Fall River Railroad Company, a corporation established under the laws of this Commonwealth, of the unfinished railroad of the former corporation, situated in Rhode Island, for a term of years, at an annual rent, after the same shall have been completed, with a stipulation for the payment in advance of the rent for the whole term, to be used for the purpose of building the road and putting it in order for use, is not a violation of Stat. 1861, c. 156, which authorizes the latter corporation to extend their railroad to the line of Rhode Island, to connect with a railroad to be constructed from Newport, Rhode Island, to the line of Massachusetts, and provides that no part of their present reserved funds shall be appropriated to build any portion of the road in Rhode Island: *Id.*

SUPREME COURT OF NEW YORK.[1]

Lease and Sub-lease—Right to Re-enter.—An under lease, by the lessee of premises, for the whole unexpired term, reserving the right to re-enter, is a sub-lease, and not an assignment; and the party giving the sub-lease can re-enter for a breach of the condition, although there is no reversion remaining in him: *People ex rel. Elston* vs. *Robertson.*

A lease was for the term of ten years, to commence on the 1st day of May, 1852, and to end *on the 1st day of May*, 1862. W., the assignee of the lessee, underlet the premises to E., from the 1st day of May, 1856,

[1] From Hon. O. L. Barbour, to be reported in Vol. 39 of his Reports

:o the 1st day of May, 1862. W. then assigned the original to R. *Held,* that the original lease was to be construed as expiring at 12 o'clock M. of the 1st of May, 1862, and the sub-lease as expiring at 12 o'clock at night of the 30th of April, 1862. And that consequently there was a period of time between the end of the 30th of April and 12 M. of the 1st of May, during which R. had the right of re-entry and of possession of the premises: *Id.*

Jurisdiction — Costs on Dismissal — Injunction-Undertaking.—The want of jurisdiction in the Court over the subject-matter of the action will not prevent the defendant from recovering costs, on the dismissal of the complaint; nor will it deprive the defendant of the right to damages upon the injunction-undertaking, when the injunction is dissolved: *The Cumberland Coal and Iron Co.* vs. *The Hoffman Steam Coal Co.*

The undertaking given on the issuing of an injunction is for the benefit of all the defendants that are enjoined, whether served or not. Hence, if a party, without any service of the summons or injunction upon him, obeys the injunction, he may, without any appearance, have a reference to ascertain the amount of damages sustained by him, by reason of the injunction: *Id.*

Guardians—Their Commissions.—It is not an inflexible rule that the commissions of a guardian cover everything which can be allowed to him for his services respecting the estate of his ward: *Morgan* vs. *Morgan.*

The rule is not so narrow and restricted that it denies all compensation to a guardian for services of a personal or professional nature, rendered by him for the benefit of the ward, and in doing which he has bestowed personal labor and incurred actual expenses, and which have been useful and serviceable to the estate: *Id.*

Promissory Notes.—Where, after two persons had signed a promissory note, not negotiable, a third person wrote his name across the back, and it was thereupon transferred to the payee, who paid value for it: *Held,* that the person so writing his name upon the back of the note was not an indorser, nor a guarantor, but was a joint promissor with the other signers; the precise locality of his signature upon the note being immaterial: *Richards* vs. *Warring.*

Landlord and Tenant—Eviction—Apportionment of Rent—Recoupment.—Where a lessee has been evicted from a portion of the privileges granted by the lease, by a paramount title in a stranger, he is discharged

from the rent *pro tanto*, and is entitled to an apportionment, by which rent shall be paid only in respect to the residue: *Carter* vs. *Burr*.

But in an action for rent, the lessee is not entitled to recoup the value of the lease over and above the rent, nor for rents he might have received, or for special damages incurred by reason of being evicted from a portion of the privileges granted: *Id.*

A lease in fee or in perpetuity is a "conveyance of real estate," within the provisions of the statute forbidding the implication of covenants; and if it contains no covenants of seisin, warranty, or quiet enjoyment, none can be implied: *Id.*

Sheriff—Liability for neglecting to return an Execution—Measure of Damages.—Where a sheriff neglects to collect and return an execution within the time prescribed by law, he is liable to the plaintiff for the damages sustained by his neglect; unless he can show that the defendant in the execution had no property out of which he could have collected the debt: *Bowman* vs. *Cornell, Sheriff, &c.*

The action against the sheriff, in such a case, is founded upon his neglect to return the execution, and the amount of the execution is the measure of damages: *Id.*

When a right of action has accrued against a sheriff, for neglecting to return an execution, such right cannot be divested by an appeal being taken from the judgment by the defendant therein, even though the appeal be brought prior to the commencement of the action: *Id.*

Recognisance in a Criminal Case.—A recognisance, taken in a criminal case, conditioned that the prisoner shall appear at the next Court of Oyer and Terminer, to answer to an indictment; that he shall "not depart without leave of the Court;" and that he shall "abide its order and decision;" by its terms requires his appearance on the first day of term, and *de die in diem* during its continuance, unless discharged by the Court: *The People* vs. *McCoy*.

If the prisoner appears in Court, answers when called, and, without having been surrendered by his bail or ordered into the custody of the sheriff, enters upon his trial, but before the same is finished he departs from the Court without leave, and does not return again to abide the order and decision of the Court, his recognisance is forfeited: *Id.*

A recognisance returnable "at the next Court of Oyer and Terminer," is not void for uncertainty. The next Court of Oyer and Terminer in the county where the indictment was found and is triable, and in which the recognisance was taken, will be deemed the one intended: *Id.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF ILLINOIS, at April Term, 1862. By E. PECK, Counsellor at Law. Volume XXVIII. Chicago: E. B. Myers. 1863.

We have had occasion to state the merits of these reports so frequently, of late, that it will not be necessary to repeat what we have before said. This volume has a less number of pages than most of the preceding volumes of Mr. Peck, but it contains, if we have not been misled by our hasty examination, an unusual proportion of important questions, most of which are decided, as we should judge, in conformity with established precedents. To this, however, there are some few marked exceptions.

In the case of *Harris* vs. *Mills*, p. 44, it is decided that where a promissory note is secured by mortgage, and has become barred by the Statute of Limitations, that no foreclosure of the equity of redemption will be allowed in a court of equity, unless the mortgage contains a covenant for the repayment of the money. This is at variance with several decisions of the highest respectability in different states, and is not, so far as we now recollect, supported by any authority, except the dictum of Mr. Justice SUTHERLAND in *Jackson* vs. *Sackett*, 7 Wendell R. 94, which was never followed in that state. The cases where the contrary doctrine is maintained, so far as now in mind, are *Belknapp* vs. *Gleason*, 11 Conn. R. 160, 166; *Aegex* vs. *Pruyn*, 7 Paige 465; *Reid* vs. *Shepley*, 6 Vt. Rep. 602.

We should, without examination, have said that the rate of interest allowable, for the non-payment of money at the time it fell due, was the legal rate of interest of the place of payment, independent of all special contract, as to the rate of interest before the time of payment, where the law allows the parties to stipulate for a higher rate of interest than the common rate. But in *Angre* vs. *McDaniel*, p. 201, it was decided that the stipulated rate will continue until judgment.

The decision in *Stone* vs. *Atwood*, p. 30, that a court of equity will correct a mistake in an award of arbitrators so as to make it what the arbitrators intended it should be, strikes us as stating the general principle too broadly. In the case before the court the real meaning of the award was apparent from the papers in the case, so that the result was matter of construction merely. But we should hesitate about applying that principle to cases where the intent of the arbitrators was to be made

out by extraneous evidence. In such cases we should not be willing to allow that a court of equity could reform the award and make it conform to the alleged, or proved, intent of the arbitrators. The chief ground of the jurisdiction for reforming contracts, in courts of equity, is not the mistake in making such contracts, but the fraud in the party in attempting to enforce them; and that seems in a measure to be wanting in the case of awards of arbitrators. It is unquestionable that a mistaken award may be set aside in a court of equity; but, without examining precedents, we could not subscribe to the doctrine of the dictum of this case, that after setting aside the mistaken award, a court of equity might set up the award *intended to have been made.* The arbitrators must make their own award, and not a court of equity, as it seems to us.

This volume contains many important decisions in regard to the duties and liabilities of railway companies, the powers and duties of courts of equity, and as to the duties arising from commercial guarantees and other commercial paper. It would be impossible to refer to even the most important of the questions here determined. I. F. R.

THE STATUTES AT LARGE, TREATIES, AND PROCLAMATIONS OF THE UNITED STATES OF AMERICA, from December 5, 1859, to March 3, 1863, arranged in chronological order, and carefully collated with the originals at Washington. With references to the matter of each act and to the subsequent acts on the same subject. Edited by GEORGE P. SANGER, Counsellor at Law. Volume XII. Boston: Little, Brown & Co. 1863.

This volume, just issued by this well-known law-publishing house, and done up in their usual neat and thorough style of law-book making, is before us. It will be found indispensable to those who have availed themselves of the former volumes of the work, which is regarded as the only reliable source of learning the true state of the statute law of Congress, with convenient references to the decisions of the courts in regard to them. This edition of the Acts of Congress has been made authoritative in all the courts of the country by special act, and has become nearly indispensable in all well-ordered law libraries. I. F. R.