

established, *first* that *everything* is within the Excise Act, whether therein named or not; and *second*, if not named, it is for that very reason subject to the highest duty to which anything therein named, of the same general character, is subject. On this basis the act can be read fluently, without trouble to lawyers or deputy commissioners.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

Corporation—Bill in Equity by Minority of Stockholders—Fraud—Laches.—A minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and the other stockholders, for conspiracy and fraud, whereby their interests have been sacrificed, against the corporation and its officers and others who participate therein. By unreasonable delay, however, in bringing their bill, they will forfeit their title to equitable relief: *Peabody vs. Flint et al.*

Promissory Note—Delivery to one Payee for both—Joint Action upon.—An indorsement of a negotiable promissory note to two persons, payable one half to each, accompanied by a delivery thereof to one of them for the benefit of both, vests a valid title in them both, although the other indorsee was absent at the time and did not accept a transfer till afterwards; and they may jointly maintain an action upon it against the payee: *Flint et al. vs. Flint.*

Oral Award—Evidence.—An oral award by referees, under an oral submission, is competent evidence upon a question of disputed boundary between the parties: *Byam vs. Robbins.*

Homestead—Mortgage—Conditional Judgment of Foreclosure—Formal Possession.—A conditional judgment may be rendered in an action to foreclose a mortgage of land which does not convey an existing estate of homestead therein, and a formal possession may be taken on the execution, sufficient to bar the right in equity to redeem, without actually dispossessing those who are in under the estate of homestead: *Doyle vs. Coburn.*

¹ From Charles Allen, Esq., reporter, to appear in Vol. VI. of his reports.

Covenants of warranty in a deed of land do not estop the grantor from availing himself of an estate of homestead therein, which existed at the time of the execution of the deed: *Id.*

An estate of homestead is not defeated by the removal of the wife and children of the householder from the premises, or by her obtaining a divorce from bed and board, and a decree giving to her custody of the children, if he continues to reside thereon; nor can she, by her own separate act, deprive him of such estate: *Id.*

Equity of Redemption—Conveyance of.—The conveyance of an equity of redemption of land which is subject to a mortgage containing a power of sale, gives to the grantee the right to the surplus which may remain to be accounted for by the mortgagee, upon a sale of the premises under the power of sale: *Buttrick vs. Wentworth et al.*

Mortgage—As Security for Note for Illegal Consideration—Purchaser without Notice.—The mortgagee in a mortgage made to secure a negotiable promissory note which was given for the price of intoxicating liquors sold in violation of law, may convey a good title thereto by assigning the same with the note, before the maturity of the note, to one who takes them for a valuable consideration without notice: *Taylor vs. Page.*

• *Tenants in Common—Erection of building by one—Ouster.*—Erecting a building upon a portion of land held in common, by one of the tenants in common, is such an exclusive appropriation thereof to his own use as to amount to an ouster of his co-tenant; and will entitle the latter to maintain an action for the trespass, or to remove the building: *Bennett vs. Clemence et al.*

Will—Perpetuity.—A testatrix whose daughter and children of the daughter survived her bequeathed the residue of her estate to trustees, with directions that they should invest and accumulate it until her youngest grandchild should, if living, attain the age of twenty-one years, and then pay over, annually, the income thereof to her grandchildren in shares during the lifetime of the longest liver of them, and afterwards distribute the principal among their heirs at law, with provisions in case of the previous death of any of the grandchildren. After the death of the testatrix, her daughter gave birth to another child. *Held*, that the disposition of the principal and income of the trust fund was void, as being too remote and tending to create a perpetuity; that the directions to invest and accumulate the estate fall with the disposition of the trust

fund; and that the whole residue must be treated as intestate property: *Fosdick vs. Fosdick et al.*

Landlord and Tenant—Possession by Landlord of part of Premises after lease expired—Forcible Possession of Residue.—If the owner of a tenement has gained peaceable possession of a portion thereof, upon the termination of his tenant's estate therein, he may use as much force as may be necessary to overcome the tenant's resistance to his taking possession of the residue: *Mugford and Wife vs. Richardson.*

SUPREME COURT OF NEW YORK.¹

Injunction to restrain Acts in Violation of an Agreement.—The plaintiffs, having erected a suspension bridge across the Niagara River, leased the railroad floor thereof, excepting the sidewalks and gates, to the defendant, at an annual rent. The defendant agreed not to afford the means to other persons, except railroad passengers, of crossing and evading the payment of tolls, and to adopt the necessary regulations to prevent evasions of tolls by all except railroad passengers. On a complaint alleging continual breaches of the contract, by the defendant in the use of its cars, in carrying passengers across the bridge, &c.: *Held*, that it was a proper case for a perpetual injunction, and that such injunction could be sustained on the ground that an action at law, for damages, would afford no adequate redress, and the injury to the plaintiffs would be irreparable: *The Niagara Falls International Bridge Co. & the Niagara Falls Suspension Bridge Co. vs. The Great Western Railway Co. et al.*

Held, also, that by using the bridge in a manner prohibited by the agreement, and permitting persons to cross it free, the defendant was guilty of a continual *nuisance*, which might be restrained by injunction: *Id.*

Insurance—Assignment of Policy without Consent.—Where a purchaser agrees to insure for the benefit of his vendor, and to assign the policy for his security, and he subsequently procures the building to be insured, but does not assign the policy to the vendor, the agreement operates as an equitable assignment of the *money* payable upon the policy, in case of loss, but not as an assignment of the *policy*. Hence, the case does not come within the terms of a clause in the policy declaring that the interest of the insured, in the policy, is not assignable, unless with

¹ From Hon. O. L. Barbour, to appear in Vol. XXXIX. of his Reports.

the consent, in writing, of the insurers, and that the policy should become void if such interest is transferred or terminated without such consent : *Cromwell vs. The Brooklyn Fire Insurance Company.*

Trustee and Cestui que trust—Equitable Conversion.—A sale and conveyance by a trustee, of the trust property, so that he becomes the purchaser himself, is not void, but is capable of confirmation by the express act of the *cestui que trust*, by acquiescence, and lapse of time. And a title acquired by a subsequent purchaser in good faith, and without notice, of the subject conveyed, will be good : *Johnson vs. Bennett.*

Sales and conveyances of this character are voidable only. They are voidable in the equity Courts, at the instance of the *cestui que trust* alone, not because they are fraudulent, or for inadequacy of price, but upon a rule of morality and policy, having reference to human infirmity, which forbids that a man shall act as vendor, for others, and as purchaser, for himself, of the same subject-matter, and at the same time : *Id.*

The grounds upon which Courts of equity interfere between *cestui que trust* and trustees and their grantees with notice, affirm the validity and force of the title at law, otherwise such Courts would have no jurisdiction : *Id.*

Though the trustee may have acted from the best motives, and the sale may have been fairly conducted, and the price obtained full and ample, yet the Courts will open the sale, and order a resale, if the parties—the *cestuis que trust*—are not satisfied with it, and they make their claim within a reasonable time : *Id.*

A *cestui que trust*, after having assented to a rule made by the trustee, by accepting his share of the proceeds, cannot maintain ejectment, to recover possession of his share of the land, on the ground that the sale was void : *Id.*

Where a testator directed his executors to sell certain land, convert it into money, and invest it until the youngest child should become eighteen years of age, and then distribute the same among his children : *Held*, that this presented a case of *equitable conversion*, and the estate became impressed with the character of personal property : *Id.*

And, the land having been sold by the executors, and the share of one of the married daughters of the testator in the proceeds, paid over to her husband : *Held*, that the husband thereby extinguished all claim which he had upon the proceeds, as such husband, as well as all claim which his wife had upon the lands sold : *Id.*

False Imprisonment—Damages—Pleading.—If a private person takes

a part in an unlawful imprisonment of another, by an officer, he becomes a principal in the act, and is liable for the trespass. But if he merely communicates facts or circumstances of suspicion to the officer, leaving him to act on his own judgment, he is not liable at all, in an action either for malicious prosecution, or for false imprisonment: *Brown vs. Chadrey*.

Under the Code, in an action for false imprisonment, a justification on the ground that the defendant had reason to suspect that a criminal offence had been committed by the plaintiff, must be pleaded specially; and the answer must first show the actual commission of an offence, and then the cause to suspect the plaintiff of its commission. If less than this is pleaded, or if the evidence comes short of this, it can only go to the question of damages: *Id.*

Municipal Corporations—Proposals for Constructing Public Works.—

Where the trustees of a village, having determined to grade an avenue and build a bridge thereon, over a river, proceeded to establish the district of assessment, procured plans and specifications for the work, and advertised for proposals from contractors, and on opening the proposals awarded the contract; having first amended the specifications, so as to extend the time for the completion of the work: *Held*, that such extension of the time did not have the effect to vitiate all the proceedings: *The People ex rel. Knox vs. The Village of Yonkers*.

A provision, in a village charter, that the proposals for constructing a public work shall be opened on the day named in the notice, "or upon such other day as the trustees may adjourn to, for that purpose," is directory merely. It is not essential that the time for opening and looking at the proposals shall be continued by regular adjournment from time to time: *Id.*

The power of commissioners, in a street assessment, extends only to known, ascertained, and fixed expenses; all others are illegal and void: *Id.*

Accordingly, where the estimate of the expenses of an improvement, after enumerating, specifically, various items, amounting in the aggregate to \$1216.74, contained a charge of \$460.05 for *contingencies*: *Held*, that the insertion of the item rendered the assessment illegal and void: *Id.*

*Vendor and Purchaser—Rule of Caveat.—*In New York, the rule of *caveat emptor*, which obtains in the common law, is subject to the exception that a warranty of title in the vendor is implied in a contract of sale. But this exception is limited to cases where the vendor is, at the time, in the possession of the thing sold: *Scranton vs. Clark*.

The possession of the vendor is the foundation of the implied warranty :
Id.

Where J. made a contract to sell the promissory note of C. to L. when he was not the owner, and it was not in his possession : *Held*, that the purchase was at the risk of L., and the law implied no warranty by J. that he had the title to the note ; and that a subsequent acquisition of the title by J. did not enure to the benefit of L. and render a payment by C. to L. good and effectual, and an extinguishment of the note : *Id.*

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.¹

Chancery—Rehearing—Newly discovered Evidence—On a petition for a rehearing in Chancery, on the ground of newly discovered evidence, tending to show the incapacity of a grantor to execute a deed, it is not enough to show new evidence of medical experts, tending to show that the grantor's health had been much impaired for several years by apoplectic or other fits. That he probably was affected by disease of the brain, which is usually accompanied by an impaired state of mind. Mere weakness of mind does not disable a man to convey property, if the capacity remains to see things in their true relations, and to form correct conclusions. If the mind is so impaired that the memory cannot recall the necessary facts, nor the judgment be exercised in drawing just conclusions, the power of disposing of property is gone. The evidence must show the degree in which the mind is impaired to be inconsistent with the rational transaction of business : *Dennett vs. Dennett.*

Municipal Corporation—Bounty to Volunteers—Foreign Attachment by Creditors of Volunteers.—Where a town voted to pay \$100 to each man who had enlisted, or who might enlist, as a volunteer, under the call of the President of the United States for six hundred thousand men, and instructed the selectmen to pay the same at the time of his being mustered into the service : *Held*, That the town was not liable in foreign attachment as the trustee of one H., who had enlisted before, but had been mustered in after the passage of such vote : *Brown vs. Heath & Clarksville.*

Municipal Corporation—Election of Clerk—Duties of Officers to be Present at the Election.—Where by the charter the day of meeting of the mayor, aldermen, and common council, for the election of a city clerk, is appointed to be the same day on which the city officers elect are required

¹ The following decisions, made within the last few months, we have received through the courtesy of the Judges.

to assemble and take the oath of office, one-half of the aldermen cannot defeat a legal election by absenting themselves for the purpose of leaving that board without a quorum: *Kimball vs. Marshall*.

They are bound to be present at all times, when the board is in session, till the election is made; and if a recess or adjournment to a later hour is voted, they are bound to take notice of the time of meeting: *Id.*

Dower—Deed—Mortgage.—Where H. received a deed of certain land, and at the same time, and as part of the same transaction, reconveyed the land in mortgage to his grantor: *Held*, That the wife of H. was not entitled to dower as against such mortgage: *Hinds vs. Ballou*.

Where one having a right of redemption redeems the mortgaged premises by the payment of money, the transaction will be treated as an assignment of the mortgage, if this is manifestly for the interest of the party so redeeming, and is not inconsistent with the justice of the case, where no contrary intent is expressed or necessarily implied: *Id.*

The quit claim deed of a mortgagee in possession is sufficient to transfer his interest under the mortgage: *Id.*

Where L., having acquired the right of H., the mortgagor redeemed the land with his own money, and then conveyed it for a valuable consideration by deed of quit claim to B.: *Held*, That the widow of A. was not entitled to dower as against B., until she had offered to contribute her reasonable proportion of the money paid by L. to redeem the mortgaged premises: *Id.*

Trustee—Set-Off—Fraudulent Arrangement.—A trustee has the right to set off all *bonâ fide* claims, which he holds against the principal debtor at the service of the process, though the property in his hands may have come into his possession by an arrangement with his debtor, which was clearly fraudulent as against creditors: *Kelly vs. Ellison and Trustee*.

Devise of Use and Occupancy—Levy upon such Interest—Appraisal.—A wife devised to her husband the use and occupancy of certain land during his natural life. A creditor levied upon his estate, and had it set off by appraisal of his whole interest. It was *held* that the devise was of the land itself; the levy by appraisal of the whole life estate was good; and that it was not necessary to set it off by an appraisal of the annual income to hold till the debt was paid: *McClure vs. Melendy*.

Passenger's Baggage—Liability of Carrier—Evidence—Husband and Wife.—The ticket of a passenger includes also the ordinary baggage re-