Nor has it been forgotten that it was one of the attributes of sovereignty, the taxing power of the state, which was to be passed upon. It is conceded that this prerogative is not only imperial in its character, but is absolutely necessary to the public welfare, and that a right at once so elevated and so essential, is not to be diminished or impaired in the slightest degree, even on constitutional considerations, except on the surest grounds. But it is also to be remembered, that even more valuable than the revenues of a state are those fundamental restrictions which prevent each member of this confederacy from the exercise of those powers, which in the grand scheme of our national polity have been prohibited. And being entirely satisfied, from the reasons above stated, that the legislative act now before this court, in imposing the tax in controversy, infringes one of those restrictions, it seems to me that so far as its operation in this particular is concerned, it should, without hesitation, be declared by this court to be void.

In my opinion, the judgment of the Supreme Court should be reversed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

SUPREME COURT OF VERMONT.[3]

ACTION.

Parol Evidence as to former Suit.—Where only a single cause of action, viz., assumpsit for the breach of a warranty, was set forth in the complaint in a former suit before a justice of the peace: *Held*, that the record of the judgment in that suit imported a judgment upon that cause of action; and that in a subsequent suit between the same parties, in the Supreme Court, it was erroneous to receive parol evidence to show the proofs and proceedings in the former suit, and that the judgment therein

[1] From Hon. O. L. Barbour, Reporter; to appear in Vol. 42 of his Reports.

[2] From R. E. Wright, Esq., Reporter; to appear in Vol. 11 of his Reports.

[3] We are indebted for these abstracts to J. A. Wing, Esq., of Montpelier. The cases were decided in November, 1864, and the volume of Reports in which they will appear cannot yet be indicated.

was in fact rendered upon proof of a different cause of action than that stated in the complaint, to wit, fraud in the sale of property: *Royce* vs. *Burt*, 42 Barb.

Affidavit of Defence.

Sufficiency of—Action on Foreign Judgment.—Judgment for want of a sufficient affidavit of defence may be taken in an action of debt in Pennsylvania upon a judgment obtained in the Supreme Court of New York: *Luchenbach* vs. *Anderson*, 11 Wright.

An affidavit of defence to such an action, which alleged that the defendant was fraudulently decoyed to the state in which he was sued, for the purpose of obtaining a service of the process upon him, but nothing against the debt for which the action was brought, is insufficient: *Id.*

Assignment for Benefit of Creditors.

Title of Purchaser from Assignee.—Though an assignment for the benefit of creditors be fraudulent, as against the creditors of the assignor, that will not affect the title of a purchaser from the assignees, if he is not connected with the fraud, and is in fact a purchaser in good faith, and for a valuable consideration, and without notice of the fraud: *Sheldon* vs. *Stryker*, 42 Barb.

Chattel Mortgage.

Lien of.—This was an action of trover against an officer for attaching certain property claimed by plaintiff. A debtor of the plaintiff, while the plaintiff was living in New Hampshire, where the debtor then lived, gave the plaintiff a chattel-mortgage of the property in suit, which was valid by the laws of New Hampshire, without change of possession. The debtor then brought the property into Vermont with the consent of plaintiff, and kept it and used it for some months, having the exclusive possession of the same, when it was attached by the defendant as an officer on a debt due in Vermont. *Held*, that the plaintiff's lien by virtue of his chattel-mortgage being good by the laws of New Hampshire, where the defendant then lived, it was equally valid in Vermont, and the plaintiff was entitled to recover: *Cobb* vs. *Buswell*, Sup. Ct. Vermont.

Contract.

Action by Stranger to—Evidence.—Where, upon the completion of a contract for hauling bark, the balance due the contractor was, at his request, placed to the credit of a third person, the latter cannot maintain an action for the amount credited in his own name, for he is a stranger to the contract and consideration: *Robertson & Co.* vs. *Reed*, 11 Wright.

But, as the defect would be amendable, it is not a ground for reversal of the judgment: *Id.*

In the action to recover the amount of the credit, evidence was admissible that part of the bark claimed to have been hauled, and for which credit was given, had been burned instead, with the knowledge, if not privity, of the contractor before the settlement; that in consequence nothing was due him by the firm with whom he had contracted,

and that the credit was taken on their books from the account of the plaintiff, who afterwards settled it and received the balance without objection: *Id.*

Corporation.

Interest on Corporate Loans— Where Payable.—Where the loans of a corporation are payable at a fixed place and time, the interest thereon ceases at that time, whether the bond or evidence of indebtedness be presented or not; it is not necessary, to escape after-accruing interest, that the amount of the loan, with accumulated interest, at the time of payment, be kept separate from the other funds of the company, if it can be shown that funds sufficient for payment were at all times in hand: *Emlen* vs. *Lehigh Co.*, 11 Wright.

Depositions.

Depositions before a different Person from the one named in the Notice to the opposite Party.—The defendant cited plaintiff to appear before Judge Brockway, at a place named in Kansas, to be present at the taking of the deposition of one Blush, before said Brockway. But the defendant took said deposition before another magistrate, at the time and place named in said citation. The court below admitted the deposition. *Held*, that the defendant having notified the plaintiff to appear before a certain magistrate, could not take the deposition before any other magistrate, and the admission of the deposition was an error. Whether it was necessary to name the person in all cases before whom the deposition is to be taken the court left undecided: *Henry* vs. *Huntley*, Sup. Ct. Vermont.

Evidence.

Declarations of Deceased Persons as to Boundaries.—When a person that had the means of knowledge as to ancient boundaries, who is now deceased and had no interest in making the declarations, had, when near the line, pointed out the line or any marks or monuments showing where the same was, his declaration may be given in evidence to establish said lines. And what a tenant in possession of lands, after he has parted with his title and has no interest in the matter, says when near the line, as to where the line is, may after his decease be given in evidence: *Wood et al.* vs. *Willard et al.*, Sup. Ct. Vermont.

This hearsay evidence was first confined in England to the boundaries of municipal corporations, but in America we extend it to private individuals. In Massachusetts and Connecticut it is law that when a person had knowledge and pointed out the boundaries when near the same, and is dead, and had no interest in the line at the time, his declarations can be given in evidence: *Id.*

Certificate of Acknowledgment.—Assignments of property, bills of sale, or agreements, may be admitted in evidence, on the acknowledgment and proof thereof before a commissioner of deeds, accompanied by the certificate of the county clerk of the commissioner's appointment and authority to act as such: *Sheldon* vs. *Stryker*, 42 Barb.

If a certificate of the acknowledgment of an instrument by a subscribing witness states that the witness is known to the officer, that is a substantial compliance with the law. It is not necessary that the precise language of the statute should be used: *Id.*

To render an instrument, properly acknowledged, admissible in evidence, it is not necessary that the acknowledgment or proof should be taken before the commencement of the action. It is sufficient if the certificate of the officer be indorsed on the instrument when it is offered in evidence: *Id.*

EXECUTION.

Stay-law—When Unconstitutional.—The proviso to section first of Act 21st May, 1861, granting a stay of execution on a judgment due by a soldier, notwithstanding a waiver, is unconstitutional: *Lewis* vs. *Lewis et al.*, 11 Wright.

Where a judgment-note contained a waiver of stay of execution, and when due an attachment in execution was issued thereon, it was error to stay the writ on the ground that the defendant was at the time a soldier in military service: *Id.*

EXECUTOR.

Liability of Commissions to Attachment.—The commissions of an executor are not attachable at the suit of his judgment-creditors, in his own hands or those of his co-executors: *Adams's Appeal, Mahlon Hutchinson's Estate*, 11 Wright.

HUSBAND AND WIFE.

Judgment of Married Woman.—A judgment given by a married woman for a debt contracted for the improvement of her real estate, is void in Pennsylvania: *Bruner's Appeal*, 11 Wright.

But a wife may agree to revive a judgment which was entered on a bond executed by her before marriage: *Id.*

Acts of 1848 *and* 1849, *relative to Married Women—Creditors of Wife.*—The New York Acts of 1848 and 1849, for the more effectual protection of the property of married women, are remedial statutes, and must receive a liberal and beneficent construction, so as to give effect to the intention of the legislature, notwithstanding some of the results may seem to proceed beyond the letter of the acts: *Goss* vs. *Cahill and Wife et al.*, 42 Barb.

The manifest intention was to enable married women to take, hold, and use and enjoy real and personal property obtained in the way prescribed in the statute, and also to grant, devise, and convey the same, to the same extent, and with the like effect, as if they were sole and unmarried: *Id*

Incidental to the right of property and the power of disposition, is the power to improve it and increase its value. A like incident to the use of real property is the right to the increased value, whether it proceeds from improvements put upon it by the owner, or from a rise in value: *Id.*

A married woman, who borrows money upon the separate estate, makes valuable improvements upon it, and thus enhances its value beyond the

cost of the expenditure, does not derive the enhanced value by any of the methods mentioned in the statute, but takes it as an incident, and as a part of the property itself: *Id.*

Such improvement and enhanced value, although it be deemed to be the fruits and results of the wife's skill and labor, ought not to enure to the benefit of the husband and his creditors, for the reason that the improvements are blended with and have become a part of the property itself, and no new property has been created or acquired. The residue, or the eqvivalent in money, has been enlarged, but the lands—the property—is still the same: *Id.*

A husband and wife being in destitute circumstances, the wife purchased land, borrowed money, and built upon it, managed it with skill and good fortune, without the interference or assistance of her husband, and all the value it had, over and above the incumbrances, was due to her good management, and the rise in the value of land in that vicinity, together with the use of her real and personal property. *Held*, that there was no measure by which the value of the wife's services could be separated and estimated, and therefore they did not constitute property as to which the husband, or his creditors, could have any legal or equitable rights: *Id.*

Insurance.

Capture by Rebel Cruiser.—The capture by a privateer in commission under the government of the so-called Confederate States, of an insured vessel, does not render the insurers liable upon the policy, where liability for "loss by seizure, *capture*, or detention, or the consequences of any attempt thereat," was excepted therein: *Fifield* vs. *The Ins. Co. of Penna.*, 11 Wright.

Judgment.

Against Partners—Lien—Notice.—Where the Christian names of the partners of a firm, who had given a judgment signed with the firm's name, were not set out upon the judgment-docket on entry of the judgment, it is without effect as a lien against subsequent purchasers or lien creditors without notice: *Smith's Appeal*, 11 Wright.

Actual notice of the judgment would have supplied the defective or omitted index of the registry: but to be actual notice the subsequent incumbrancer must be personally informed of the specific prior lien before his right as a lien-creditor attach; notice to his counsel is not sufficient: *Id.*

Mortgage.

Fraudulent Intent—Right of Debtor to prefer Creditors.—To avoid a mortgage on account of a fraudulent intent on the part of the mortgagor to hinder and delay his creditors, a fraudulent intent on the part of the mortgagee, also, must be shown. It is not enough to show that the mortgagor made it with the purpose of hindering and delaying his creditors; but the mortgagee must have participated in that purpose, and received the mortgage with that intent: *Carpenter* vs. *Muren et al.*, 42 Barb.

Including in a mortgage debts due, or alleged to be due, to others, the mortgagee, at the same time giving his parol undertaking to pay those debts, will not of itself make the mortgage fraudulent *per se*. In

connection with other circumstances, that fact might be some evidence of a fraudulent intention, but nothing more: *Id.*

So, including in a mortgage a debt to become due from the mortgagor at a future day, is not a fraudulent act in itself: *Id.*

When a creditor has two debts, one already due and payable, and the other payable at a distant day, he may take security for the payment of both, from his debtor in failing circumstances, without the inference or imputation of fraud: *Id.*

A debtor in failing circumstances has a perfect right to prefer one of his creditors to another, in the disposition of his estate. And a diligent creditor who secures his claim by legal proceedings, or by a voluntary arrangement with his debtor, is entitled to enjoy all the benefits of his superior activity and diligence: *Id.*

Negligence.

Blowing Whistle on Railroad Train.—The plaintiff, with four horses for market, had crossed the railroad track and was passing along on the road parallel with the railroad, when he met a freight train. The engineer saw the horses, when he was about to blow the whistle, about ninety rods from the crossing, and seeing they appeared frightened and fearing that if he blew the whistle it would increase the fright of the horses, in good faith refrained from blowing the whistle. Two of the horses broke away from plaintiff, and ran towards the crossing; they reached the crossing and struck against the sixth car from the engine and were injured. The jury found that the injury was caused by the defendants not blowing the whistle or ringing the bells as required by law. *Held*, that there might be cases that would excuse the company from complying with the statute; that if the engineer acted in good faith, that alone was not sufficient to discharge the company from liability. It was a question of fact for the jury, taking into consideration all the facts and circumstances in the case: *Wakefield* vs. *Conn. & Pass. R. R. Co.*, Sup. Ct., Vermont.

New Trial.

Grantable by Supreme Court.—This court has authority to grant a new trial when the court are clearly satisfied that the verdict is against the weight of evidence. But it should be a clear case. The proper tribunal is the county court, who have heard the witnesses and can better judge in the premises: *Northfield Bank* vs. *Brown*, Sup. Ct., Vermont.

Cumulative Evidence—Laches.—A new trial will not be granted, on the ground of newly-discovered evidence, where the evidence would be cumulative in its nature; or where a party has been guilty of laches in making his motion; or after judgment has been entered: *Sheldon* vs. *Stryker*, 42 Barb.

Quo Warranto.

Against Borough Officers.—A bill in equity for an injunction to restrain borough officers from entering upon official duties under an alleged illegal appointment of town councils, will not lie, though they had not exercised or attempted to exercise the duties of their offices; the remedy is at law by *quo warranto* and to be invoked *after* entry into or exercise of authority under their appointments: *Updegraph et al.* vs. *Crans*, 11 Wright.