tendering as they did in depreciated notes not equal in value to the currency when the contract was made, unless making an allowance for that depreciation. But without giving any positive opinion upon that point, I think, for the reasons previously stated, that the tender was not in accordance with the contract, therefore not a legal one, and that judgment should be entered for the plaintiffs for the amount of their claim, payable in the metallic dollar and cent of the United States currency, or that which is equivalent thereto, with interest from the 15th November, 1862, and 15th day of May, 1863, upon the respective sums due at those dates, according to the terms of the lease, with costs of suit.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF VERMONT.[2]

AGREEMENT.

Execution—Replevin.—An agreement was made between B. and D., by which B. was to furnish the money to purchase, in his name, 15,000 or 20,000 feet of oak timber, the same to be selected in the woods, standing, by D., and to be cut, hewn, rafted, and delivered by him to B., at Troy, for which he was to receive 10½ cents per cubic foot. *Held*, that B. had the general property in timber got out under this contract, and which D. was engaged in transporting to Troy; but that he had no right to the possession thereof. That as between B. and D., the latter had a special property in the timber, accompanied by the right of possession, and that D.'s interest was the subject of levy and sale under execution against him: *Weaver* vs. *Darby*, 42 Barb.

Held, also, that to an action of replevin, brought against D. by the purchaser at a sale under execution, proof of a general property in B. at the time of the levy, was not a good defence: *Id.*

That the plaintiff in such suit was entitled to recover, he having the right of possession, as against D., and the right of property, united. But that as the title he had acquired was a mere special property, he was only entitled to a verdict finding the property in him, and to an assessment of the value of the timber at the amount of the value of D.'s special property therein, viz.: 10½ cents per cubic foot, deducting therefrom the expense of transporting the timber to Troy: *Id.*

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

[2] For these abstracts we are indebted to the courtesy of Chief Justice POLAND. The cases were decided at the General Term of November, 1864, and the volume of Reports in which they will appear cannot yet be indicated.

CERTIORARI.

Parties to—Husband and Wife.—If a husband is in fact the tenant of premises, and has been removed from the possession by summary proceedings under the statute, for the non-payment of rent, without due notice, he alone is entitled to judgment of restitution; and he alone should be the relator in a certiorari to review the proceedings and judgment. The court cannot order restitution in favor of the wife, or other person not a party to the proceedings: *The People ex rel. Lawson* vs. *McCaffrey*, 42 Barb.

DOWER.

Mortgage—Foreclosure.—Where S., previous to his marriage, mortgaged certain property to secure the payment of the purchase-money, a portion of the mortgage-money being agreed to be paid to extinguish a prior mortgage on the premises; and upon a foreclosure of the first mortgage, in chancery, the premises were sold by a master and conveyed to a purchaser, from whom the defendant derived title thereto; *Held*, that the circumstance that the wife of S. was not made a party to the foreclosure suit was not sufficient to enable her to maintain ejectment for her dower; her remedy, if any, being by an action to redeem: *Smith* vs. *Gardner*, 42 Barb.

If the mortgagee enters under a foreclosure, or after forfeiture of the estate, and by virtue of his rights as mortgagee, the right of dower of the mortgagor's wife must yield to the mortgagee's superior title; for, as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title: *Id.*

HUSBAND AND WIFE.

Sales to Wife by Husband.—A married woman, claiming the benefit of our statutes, passed in 1848 and 1849, for the more effectual protection of the property of married women, must show that she was a resident of this state, at a time and under circumstances to entitle her to such benefit: *Savage* vs. *O'Niel*, 42 Barb.

A person coming to this state, from a foreign country, six years ago, and who has since resided here, is entitled to the full benefit of all our local statutes governing the rights of citizens: *Id.*

The Acts of 1848 and 1849 did not, and could not, take away the right of a husband, married in 1847, in his wife's personal property and choses in action: *Id.*

The disability of coverture, which existed at common law, precluding husband and wife from contracting with each other, was not taken away by those statutes, but still exists: *Id.*

It was impossible at common law, and still is, for husband and wife to make any valid contract with each other. And the rule in respect to all grants, conveyances, gifts, or transfers from husband to wife remains as it was at common law. All such transfers of real or personal property are absolutely void: *Id.*

Accordingly *held*, that a pretended sale, by a husband to his wife, of a stock of goods in a store, being null and void, passed no title to the wife, but the property remained his, and might lawfully be levied on by his creditors, upon execution: *Id.*

Mortgage.

Title under.—While a mortgage is, in equity, a mere lien, it is still such a lien that on a foreclosure it ripens into a title, extinguishing that of the mortgagor. And this not only in favor of the mortgagee, but also of the purchaser at the foreclosure sale, and of all persons afterwards claiming under him: *Smith* vs. *Gardner*, 42 Barb.

If the mortgagee enters under a foreclosure, he is in under his mortgage: *Id.*

The interest remaining in the mortgagor is an equity, which the foreclosure cuts off; leaving the title conveyed by the mortgage absolute: *Id.*

Pleading.

Separate Counts.—It is a fundamental rule, in pleading, that where there are separate counts in a complaint, each must disclose a distinct right of action: *Simmons* vs. *Fairchild*, 42 Barb.

Another rule is that the complaint should consist of allegations or averments of *fact* stated positively, or upon information and belief: *Id.*

Principal and Agent.

Express Companies—Their Liability as Common Carriers of Money.—The plaintiffs, bankers in the country, sent by express, to the defendant, a bank in the city of New York, a sealed package of bank notes, directed to its cashier. The package was delivered by the express company, at the bank, to S., the assistant receiving-teller, while he was at the receiving-teller's desk, during the temporary absence of the latter therefrom, S. giving a receipt therefor. *Held*, that the bank, by placing S. behind the railing, and permitting him to act there as assistant receiving-teller, held him out to the express agent as authorized to receive the package, at least for the purpose of delivering it to the cashier; and that upon the money failing to come to the hands of the cashier, or into the possession of the bank, the loss must fall upon the bank, instead of the express company: *Hotchkiss* vs. *The Artisan's Bank*, 42 Barb.

Railroad.

Negligence—Blowing the Whistle.—Under a statute requiring a bell to be rung or a steam whistle blown on every locomotive engine, at least eighty rods from the place where the railroad crosses a highway or street, on the same grade, and continued until the engine shall have passed such crossing, and imposing a penalty upon the corporation for unreasonably neglecting or refusing thus to ring the bell or blow the whistle; in an action on the case for an injury alleged to have been caused to the plaintiff's horses and person, by reason of an omission to ring the bell or blow the whistle as prescribed by the statute; it was *held*, that the duty thus imposed was not confined to persons approaching, or in the act of passing such crossing, but existed in favor of all persons, who, being lawfully at or in the vicinity of such crossing, may be subjected to accident or injury in person or property by the passing of the train over such crossing. *Held*, also, that while the statute was not designed to subject the corporation to civil liability in every case of injury caused,

or contributed to, by the omission to ring the bell or blow the whistle, irrespective of the character and circumstances of the given case, still it imposed upon the corporation the burden of showing that such omission was prudent and reasonable, in the exercise of sound discretion and judgment by the engineer, in view of the existing condition of things at the time of, and inducing such omission; and this is to be determined by the jury upon all the evidence in the case bearing upon the subject: *Wakefield* vs. *Con. and Pas. River Railroad Co.*, Sup. Ct., Vt.

SECURITY.

Absolute Deed by Way of Security—Agreement—Equitable Defence—Statute of Frauds.—Where land is conveyed by an absolute deed, as security for money due, loaned, or advanced, the title of the grantee is that of a mere mortgagee: *McBurney* vs. *Wellman*, 42 Barb.

W. being in possession of land, under a contract with H. for the purchase thereof, applied to M. to advance for him the unpaid purchase-money due to H. M. accordingly advanced that amount, at the same time agreeing to give W. five years in which to repay it, to take a conveyance of the land from H. for his security, and to give W. a written contract to that effect. The land was thereupon conveyed to M. by an absolute deed. *Held*, that this was an application and an agreement for a loan for five years on the security of the land, and that M. must be deemed to have taken the title, as between him and W., as a mere security for the sum advanced to W., to pay the balance due to H. on the contract, and as a trustee of the title: *Id.*

Held, also, that if M.'s title was that of a mortgagee, he could not maintain ejectment against W.; and that although it is inadmissible at law to show by parol that a deed absolute on its face was intended to be, and is, a mere mortgage, yet that such a defence was always admissible in equity; and an equitable defence may now be made in a legal action, and is equally available as a legal defence: *Id.*

Held, further, that it would be a great perversion of the Statute of Frauds to hold, that the fraud of M. in getting the title to the land in himself, and then refusing to give W. the written conveyance he had promised, should deprive W. of the right to show, as a defence to an action of ejectment, what the real transaction was, and to have the appropriate redress: *Id.*

SHERIFF'S DEED.

Bonâ fide Purchasers.—Although a sheriff, who sells real estate upon execution, cannot execute a conveyance to the purchaser until after the expiration of fifteen months from the time of the sale, yet his conveyance, when made, is valid and effectual to convey all the right, title, and interest, which was sold by him. And however long after the time to redeem expires, it is executed, it relates back, so as to convey all such right, title, and interest: *Reynold's Administrators* vs. *Darling*, 42 Barb.

How far these general rules are subject to qualification when the rights of third persons intervene: *Id.*

In case the purchaser dies previous to the execution and delivery of the deed by the sheriff, the same must be executed and delivered to the executors or administrators of the purchaser, who will hold the real estate

so conveyed in trust for the use of the heirs, and may maintain ejectment to recover the possession without joining the heirs with them: *Id.*

A sheriff's deed to the administrator of a deceased purchaser will convey to the grantee all the right, title, and interest in the land which the sheriff sold, unless some third person has acquired rights which prevent the deed having that effect: *Id.*

A purchaser of real estate from a judgment-debtor, more than ten years after the docketing of a judgment against him, is to be deemed a purchaser in good faith, unless he purchases with an actual fraudulent intent. Mere notice of the judgment, either actual or constructive, will not render the purchase *malâ fide: Id.*

Statute of Frauds.

Contract for Purchase of Land—Parol Guaranty of Quantity.—The defendant's father, owning a large and valuable real estate, told the defendant that if he could sell a certain portion of said property for $8000, to be paid to the father, he (the father) would let the defendant have the rest of his property for a certain sum, less by $2000 than its just value. In pursuance of said arrangement, the plaintiff bargained, by parol, with the defendant for the purchase of such portion of said property, consisting of two parcels and the right to a spring of water, for the sum of $8000, to be paid to the father; the defendant guaranteeing that one of said parcels contained one hundred and ninety-six acres. On a subsequent day fixed by plaintiff and defendant, they and the father met, and the father, by a proper deed in common form, conveyed to plaintiff the bargained property by description merely, and not by quantity, and the plaintiff made payment and security to the father of said $8000, and took possession of the property, and has ever since held it, making payments on time notes given for part of said sum as they fell due. The father conveyed the residue of his estate to the defendant, agreeably to the understanding between them. Some time after said conveyance to the plaintiff, he ascertained that said parcel contained about one hundred and seventy-three acres instead of one hundred and ninety-six, and thereupon brought this suit in assumpsit in a special count on the contract of guaranty, and in the common money counts, to recover the value of such deficiency: *Held*, that the contract of guaranty, being part of the contract for the sale of land for an aggregate and indivisible consideration, was within the Statute of Frauds, and, being by parol, could not be enforced by action: *Dyer* vs. *Graves*, Sup. Ct., Vt.

Voluntary Services.

Implied Promise to pay for Damages in consequence of a Flood.—Common justice requires that where one has incurred necessary expense, or suffered damage in securing, or caring for, or storing the property of another which is lost, afloat, or estray, and it is afterwards reclaimed, the owner should repay such expense, or pay such damage, and if refused that an action to recover therefor should be sustained. In such a case the law should imply a request, and a promise from the owner: *Sheldon* vs. *Sherman et al.*, 42 Barb.

The defendants having a large number of saw-logs, secured by a boom,

in the Hudson river, a public way for floating logs and rafts, an unusual freshet occurred, whereby said logs were carried away, floated down the river, and lodged upon the meadow lands of the plaintiff, where they remained several months, when they were taken away by the owners. The logs passed the boom, floated down the river, and lodged on the plaintiff's land, without any omission, negligence, fault, or wrongful act of the defendants; but the plaintiff sustained damage by reason of their remaining on his land. *Held*, that although a promise could not be implied to pay, nor a recovery had, for the damages occasioned by the mere *lodgment* of the logs on the plaintiff's premises, yet that for the damages caused by *suffering them to remain* there for an unreasonable length of time, when they were reclaimed, a promise to pay could be implied, and a recovery had thereon: *Id.*

WILL.

Execution in the presence of Witnesses.—The statute of Vermont requires all wills to be "in writing, and signed by the testator, or by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses, in the presence of the testator, and of each other." The testator's will having been written and read to him, he signed the same. Two witnesses were present in the room and saw the testator sign, and thereupon they signed the will as witnesses, in the presence of the testator and of each other. The person named as executor in the will was also present, and it had been intended by the scrivener that he should be the other witness; but a doubt being suggested as to his competency as a witness, another person was sent for, who came into the room, whereupon the testator acknowledged his signature to the will, and the two witnesses who had signed, acknowledged their signatures, and the third witness then, in the presence of the testator and the other two witnesses, wrote his name as a witness to the will. The County Court, POLAND, Ch. J., presiding, held the will well executed. On exceptions to this decision it was held that the judgment was erroneous, and that said will was not legally executed: *Heirs of Pope* vs. *Ex'rs of Pope*.[1]

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[1] The foregoing case, decided at the same term with the case of Warner, App., *vs.* Warner's Estate, reported in our present number, seems to have proceeded upon somewhat opposite grounds; the one carrying a merely formal requirement, which had been already practically dispensed with as to the signature of the testator, into an almost incomprehensible degree of nicety of legal refinement, so as to admit of no legal equivalent, however exact and perfect, and the other extending the construction of a familiar and unequivocal word so as to include almost every kind of revocation under that of "cancelling." We confess to some admiration of the abstract equity of the particular decision in Warner *vs.* Warner; but we cannot help feeling that the above case might have been affirmed without any departure from the soundest rules of construction, and thus have vindicated the consistency of the law, and at the same time not have violated the justice of the particular case. I. F. R.