the principal states of Continental Europe, and in the American courts the question has been more than once agitated, but with the same result. In the English courts the only case in which the point has been actually decided, is the recent case (above cited) before WESTBURY, L. C. With regard to the cases mentioned in Mr. Duer's book (*Naylor* v. *Naylor*, 9 B. & C. 718; *Mederas* v. *Hill*, 8 Bing. 231), it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in those two cases impossible to say with certainty what was the opinion of the judges at Nisi Prius. I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that to carry on trade with a blockaded port is, or ought to be, a municipal offence by the law of nations. I must direct the fourth article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis*, who seeks to benefit himself by it. As he has failed in every respect, he must pay the costs of his experiment.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF NEW YORK.[2]

SUPREME COURT OF PENNSYLVANIA.[3]

ACCOUNT RENDER.

Report of Auditor—Court may refer back Report for Error of Calculation—Power of Auditor as to rehearing.—In an action of account render, the adjudication of the auditor is final, and not subject to the revision of the court where no issue of fact or law is demanded, except in case of his misconduct: *Stewart* v. *Bowen et al.*, 13 Wright.

The court may however refer the report back to the auditor for an error of calculation: but he has no power to rehear the parties, and his report on such rehearing will be set aside, and the original report confirmed: *Id.*

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[1] From Charles Allen, Esq., Reporter; to appear in vol. 9 of his Reports.

[2] From Hon. O. L. Barbour, Reporter; to appear in vol. 43 of his Reports.

[3] From R. E. Wright, Esq., Reporter; to appear in vol. 13 of his Reports.

ASSUMPSIT.

Implied—Covenants to Repair Mill-Dam, contained in Agreement for Construction, how continued between subsequent Owners—Liability of Owners as Co-Tenants for Repairs.—Where by written agreement, the owners of land on opposite sides of a river agreed to build and keep in repair a dam, for the use of their respective mill properties, and the mill and interest of one of them was sold by execution on a judgment entered before the agreement was made, the assent of the sheriff's vendee, who used the dam as theretofore, and of the remaining co-tenant, was held sufficient to continue the covenants in the agreement, though, in strictness, not running with the land, because of the priority of the judgment: *Campbell* v. *Hand et al.*, 13 Wright.

As the use of the dam by the sheriff's vendee was by election, and adoption under the contract, he could not escape the burthen of maintaining and keeping it in repair and of consequent contribution for the expense necessary therefor: and the concession by the co-tenant to him of the benefits claimed by force of the contract, is a sufficient consideration under the circumstances, to raise an implied promise to pay his proportion of the repairs: *Id.*

Semble, that, under the Mill Dam Act of 23d March 1803, there may be a tenancy in common of a mill-dam erected by the owners of the land on the opposite sides of a navigable stream; and that the contribution for repairs made thereon by one tenant in common, is recoverable from the others, as in case of any other real estate: *Id.*

BANKS.

Deposits—Principal and Agent.—On the 1st of June 1857, the plaintiff had in deposit in the bank of which the defendant was the president, the sum of $8000 in cash. The bank also, at the same time, had in deposit and for collection, in behalf of the plaintiff, a note for $2000, made by G., the cashier. On that day the plaintiff, being then at the West, wrote to G., enclosing his check on the bank for $2000, for which he desired G. to remit to him two drafts on New York for $1000 each. He also requested G. to forward to B., at La Crosse, three drafts, in all amounting to $2000, and apply the same on his (G.'s) note, then held by the bank and past due. The two $1000 drafts were sent to the plaintiff accordingly, and on the 23d of June G. transmitted, by mail, to B the three drafts, amounting to $2000. G. however, instead of applying the $2000 upon the note made by him, charged that sum to the account of the plaintiff, on the books of the bank, notwithstanding he (G.) had to his credit in the bank a sum sufficient to make good the amount of the drafts, and he did this with the knowledge of the president, who was aware of the plaintiff's instructions, and cognisant of all the facts. The plaintiff was not informed by G. that the amount of the drafts sent to B. had been charged to the plaintiff's account, but received and parted with the drafts as so much money paid upon G.'s note; and when he learned that his instructions had been violated he repudiated the transaction and demanded the $2000 from the bank.

Held, that an action would lie, by the plaintiff, to recover from the bank the $2000 so charged to his account by G.: *Reynolds* v. *Kenyon*, 43 Barb.

Held, also, that the plaintiff having received the money, or its equivalent, without any suspicion that it was not a lawful appropriation of funds belonging to G., or which he had applied with the full knowledge and approbation of the bank, if G. obtained such funds improperly and by an act which, as between him and the bank, could be esteemed and treated as fraudulent, the loss should fall upon the party who had put G. in a position to perpetrate a fraud, and constituted him the apparent owner of the money: *Id.*

Held, further, that G. being the financial officer of the bank, clothed with power, as to outside parties, to draw drafts, and to appropriate its funds, in all matters falling within the apparent scope of his authority, his principal was bound by his acts within that limit, as to all persons dealing with him in good faith: *Id.*

Such persons are not bound to inquire into facts *aliunde*: the apparent authority is the real authority: *Id.*

Bond.

Condition to devise future-acquired Estate—Breach—Uncertainty.—A bond by an heir apparent that he will devise an estate which may come to him by descent is valid, if entered into fairly, on an adequate consideration, with the assent of the ancestor, and if the bargain is not unconscionable, or obtained by oppression, or by taking unjust advantage of the necessities of the heir: *Jenkins* v. *Stetson*, 9 Allen.

It is not sufficient proof of a breach of a bond to support another during his natural life, to show that he left the house of the person bound to furnish such support and resided elsewhere for several years, without at any time requesting him to fulfil his agreement or in any way exhibiting to him an intention or desire to hold him to the performance thereof: *Id.*

A bond to bequeath to another "all my personal estate, of every description, as well what I now have in possession as what I may receive at the decease of my mother," is broken by the act of the obligor in leaving, at his death, a duly executed will, which is proved and allowed in the probate court, and by which the property is conveyed to a different person; and an action may be brought for the breach thereof before the executor has settled the estate in the probate court, and been charged with a balance in his hands: *Id.*

Such a bond is not void for uncertainty, although it contains a provision that the obligor may have the management and use of the property during life, and does not provide any means of ascertaining with accuracy what property is covered by its terms: *Id.*

An action at law lies upon such a bond: *Id.*

Uncertainty—Consideration.—Where the complaint in a foreclosure suit set out the indebtedness of the mortgagors upon notes indorsed by them, and discounted by the plaintiffs, and alleged that the mortgage was given to secure the payment of a bond, by which the time for the payment of such indebtedness was considerably extended; and that the obligors had failed to comply with the conditions of the bond; *Held*, that the facts constituted a sufficient cause of action: *Troy City Bank* v. *Bowman et al.*, 43 Barb.

A bond is not void for uncertainty if it can be made certain by extrinsic facts: *Id.*

A bond conditioned for the payment of a specified sum, or so much of said sum as shall remain unpaid on certain notes indorsed by the obligors and held by the obligees, after the application to the payment thereof of all net moneys received from the makers, or the collaterals accompanying the same, is not void for uncertainty: *Id.*

CONDITIONAL ESTATE.

Condition in restraint of Building—How and for whom enforced in Equity—Effect of partial Release—Complaint when entitled to Decree for abatement of Building.—H., being in 1814 the tenant *pur autre vie* of two city lots, one a corner property, and the other adjoining it, with remainder to his wife for life and after her death to all her children born and to be born, in equal shares as tenants in common in fee; joined with his wife in a conveyance of the corner lot to D. and R. in fee, reserving a perpetual ground-rent to himself in fee; upon the express condition that the grantees, their heirs and assigns, should not erect any building upon the back part of the lot higher than *ten* feet; and with a covenant by H. that he would procure releases and conveyances *to the grantees* from all his children, within one year after their respectively arriving at the age of twenty-one:

H. at the time, and for some years afterwards, occupied the adjoining property as his residence. By five several mesne conveyances, all made subject to the ground-rent, and to the condition, with a clause added as follows, "without the permission or license of said H., his heirs or assigns," the corner property became vested in 1858 in M. in fee; H. having some years prior to the conveyance to M. granted to the then owner permission to raise his back building to the height of *eleven* feet, expressly stipulating that such permission should not prejudice or impair the condition.

After D. and R. had sold the lot, the estates and interests in both lots, which had been vested in the children of his said wife, became vested by four several conveyances in H. in fee. The last of these conveyances was in 1845, from a grandchild, whose mother (a daughter of his wife) had died intestate without having made any conveyance of her interest.

H. died in 1847 seised of the property adjoining the corner lot, and also of the rent reserved out of the latter.

By his will he devised said adjoining property without any mention of the restriction on the corner lot, in trust with power of sale; and also authorized his executors to assign, and convey his ground-rents in payment of legacies.

The testamentary trustees in 1851 granted and conveyed said adjoining property to C., no mention being made of the restriction imposed on the corner property. M. subsequently by sundry mesne conveyances became the owner of the ground-rent reserved out of the corner lot, which thus merged; and he then threatened to build in disregard of the restriction.

In 1860 C. filed a bill in equity against M. to restrain the violation of the restriction, and for a special injunction. The application was refused;

and M. went on and erected a three-story building covering nearly the whole of the back part of the corner lot: *Held*, upon appeal from the decree at Nisi Prius, refusing the injunction and dismissing the bill:

1. That although the clause imposing the restriction was a strict condition in law, yet equity would only inquire into the substantial elements of the agreement, and would enforce it for any party for whose benefit it appeared to be intended.

2. That the duty of the defendant not to build in violation of the condition was clear; and that this duty was not reserved as a mere personal obligation to H. the original grantor, his heirs and assigns; nor for the benefit of the ground-rent; but that it was for the benefit of the adjoining property then owned by H.; and created an obligation to the owner of that property, whoever he might be; and equity would interfere to enforce and protect his right. *Id.*

3. That a general plan of lots need not be shown: such a plan being only one means of proof of the existence of the right and duty; which may appear as well from a plan of two lots, as of any greater number.

4. That the release of a part of a condition only operates as a release of the whole, where forfeiture of the estate for a breach of the condition is demanded; and equity will enforce the condition in its modified form in favor of a party who asks only compliance with the agreement.

5. That the defendant having built in violation of the condition, after bill filed, the complainant was entitled to a decree of abatement without amending his bill: *Clark* v. *Martin*, 13 Wright.

CONTRACT.

Construction—"Expenses of carrying out Agreement," what included in—Joinder of Plaintiff.—Where an agreement was made by the holders of chattel bonds of an insolvent railroad company by their attorney, under which a new company was organized on the basis of a division of the stock in certain proportions among those interested in the old company, and it was agreed, among other things, that " the expenses of carrying out this agreement, printing new bonds, &c., be sustained by the new company;" in an action by certain of said bondholders against the new company to recover the amount paid by plaintiffs to the attorney above mentioned for his professional services, *Held*,

1. That the words " printing bonds, &c.," did not restrict the agreement to expenses of that character only, but covered all reasonable and necessary expenses in carrying out the arrangement; and

2. That the action was maintainable by the plaintiffs alone without joining the other parties to the written agreement, they being the only persons by whom the expenses were paid: *The Catawissa Railroad Co.* v. *Titus et al.*, 13 Wright.

CORPORATION.

Rights of Scripholders to annual Dividends.—A corporation, restricted to six per cent. dividends out of profits, to stockholders, on the basis of an increased business and enhanced value of the works and property, in accordance with a resolution of stockholders, issued scrip certificates from time to time entitling the holder to additional shares of stock, distributing them rateably among share and scrip holders in proportion to amount

held at the date of the issue, the resolution, embodied in the scrip, providing that the scrip should not be entitled to any *cash dividend*, *until* the funded debt of the company should be paid off, or adequate provision made for its discharge when due and payment demanded: nor until conversion of said scrip into stock. After conversion certain of the scripholders demanding by bill in equity, the back dividends which had been declared on the stock from the issue to the date of conversion, it was *Held:*

1. That the rights of the scripholders were measured by the contract under which it was issued, of which the scrip alone was the evidence; and,

2. That the contract was but an engagement that the holders of the scrip might become shareholders after payment of the funded debt or provision made therefor; and,

3. That therefore the scripholders were not entitled to dividends upon the scrip nor on the stock into which it had been converted, except on such as had been declared subsequent to said conversion: *Brown et al.* v. *Lehigh Coal and Nav. Co.*, 13 Wright.

CRIMINAL LAW.

Indictment for Poisoning.—An indictment for mingling poison with food or drink, under Gen. Sts. c. 160, § 32, need not contain an averment that the mixture was poisonous, or that the defendant knew it to be so: *Commonwealth* v. *Galavan*, 9 Allen.

DEBTOR AND CREDITOR.

Agreements to Compromise—Promissory Note.—It is well settled that an agreement by a creditor with a third person, to accept less than his demand, in satisfaction of it, is valid and may be enforced: *Babcock* v. *Dill*, 43 Barb.

Where the father of an insolvent entered into a composition agreement with creditors, to pay them forty cents on a dollar, which they respectively agreed to accept in satisfaction of their debts: *Held*, that the payment of the same by the father to one of the subscribing creditors, and its acceptance by the latter, was a satisfaction of the entire demand, and might be pleaded as such by the son, in an action by such creditor to recover the residue: *Id.*

The agreement contained a condition, that the same was to be void unless all the creditors signed it. It *seems* that a breach of the condition would not enable the creditor to maintain an action to recover the residue, without first restoring what he had obtained under it: *Id.*

Nor (*it seems*) could such creditor avoid the effect of the satisfaction, by showing that the principal debtor had been guilty of fraudulent representations to induce creditors to become parties to the compromise. But if the creditor desires to rescind, in such a case, and prosecute the principal debtor, he must rescind *in toto*, and restore to the father what he has obtained from him under the agreement. Per MORGAN, J.: *Id.*

Where a third person, without the knowledge of the father or son, gave his own note, on behalf of his son, to one of the creditors, to pay an additional ten per cent. to induce the latter to sign the agreement; *Held*, that the note was void, and did not impair the effect of the compromise: *Id.*

The voluntary payment of such note by the son, after the execution of the compromise agreement, although with knowledge of its character, is not such a ratification of the fraud as to avoid the compromise: *Id*

DEED.

Grant of Way—Base Fee.—A grant of "a way," or of "the privilege of a highway," carries an easement only: *Jamaica Pond Aqueduct Corporation* v. *Chandler et al.*, 9 Allen.

An instrument by which, for a consideration received all at one time, the grantors "lease" certain land to the grantee, mentioning no time during which the estate is to continue, and reserving, "so long as this lease shall continue, the right to any logs or pipes in the same leased premises," and certain other rights connected therewith, to have and to hold the same to the grantee, "his heirs and assigns, under the restrictions and reservations aforesaid, so long as said grantors shall keep pipes in his land, as aforesaid, and no longer," conveys a base fee: *Id.*

A release of all the grantor's property, estates, rights and privileges, without further description, will not include land previously conveyed by him, by an unrecorded deed, although the grantee had no knowledge of the existence thereof: *Id.*

By a grant of land, with full covenants of warranty, accompanied with a proviso that, whereas the grantee intends to flow some part of the premises, the grantee shall have the right to improve and cultivate the part of the premises which shall not be so flowed, a life estate only is excepted: *Id.*

Boundary of Land.—If a deed of land, in describing the granted premises, begins at a point a certain distance "due south of A.'s south-east corner bound," such point is to be found by measuring due south from the south-east corner of the land actually owned by A., although the bound at the corner of the land occupied by him is at a different place: *Wellfleet* v. *Truro*, 9 Allen.

Under Revised Statutes, c. 45, § 1, cl. 4, a person does not acquire a settlement in a town by living therein undisturbed for three years in a house built by mistake upon the land of another, adjacent to his own land, and having outbuildings upon his own land: *Id.*

DOWER.

Tenants in Common.—The widow of a tenant in common, whose interest was conveyed in his lifetime, without release of dower, to his co-tenant, may maintain a writ of dower against the latter, and have her dower set out to her by metes and bounds: *Blossom* v. *Blossom*, 9 Allen.

EXECUTION.

Levy on Land—Time of computing Interest.—Although the return of an officer upon an execution describes a levy upon land as having been made on the day when the land was taken, interest upon the judgment is to be computed to the time when the levy was completed; and the oath and certificate of the appraisers, annexed to the return, may be taken as evidence of the time when the levy was completed: *Bucknam* v. *Lothrop*, 9 Allen.

If there is a discrepancy between the statement, by appraisers of land

taken on execution, of their fees, and the statement thereof by the officer, the latter is to be taken as correct: *Id.*

Issue under Sheriff's Interpleader Act—Evidence of Equitable Ownership of Vessel taken in Execution—Act of Congress of July 29th 1850, *construed.*—An equitable interest in a vessel part of which was conveyed to an agent as collateral security for debts due and to become due on existing contracts with the principal, and part conveyed to the agent to hold in trust for his principal, may be set up and maintained as a defence against an execution-creditor of the original owner thereof, in an issue under the Sheriff's Interpleader Act, notwithstanding the provisions of the first section of the Act of Congress, approved July 29th 1850: *Richardson* v. *Montgomery*, 13 Wright.

HUSBAND AND WIFE.

Divorce—Evidence.—In a petition for a sentence of nullity of marriage into which a man was induced to enter by confiding in representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man, evidence of express representations of the woman of her chastity before the marriage is not necessary to sustain the petition: *Donavan* v. *Donavan*, 9 Allen.

Ante-nuptial Agreement.—By an ante-nuptial agreement, a man agreed to procure and convey certain bank shares, and, in the event of the marriage and the continuance in life of the parties for five years thereafter, to pay two hundred dollars a year, all to be held in trust for the benefit of his intended wife, provided he should die in her lifetime; and she agreed to accept the provisions so "undertaken to be made for her comfortable maintenance and support, when the same are duly and legally made, so as to become valid and obligatory," in lieu of dower, and as a bar to every other claim by her upon his estate after his death. The parties married and lived together over fifteen years, when the man died. The bank stock was not transferred to the trustee until nearly four years after the marriage, and none of the payments of money were made during his life, and no reason was shown for the delay. Under these circumstances, the court refused to compel the widow specifically to perform her agreement. *Sullings* v. *Sullings*, 9 Allen.

Rights of Married Women under the Act of 1848.—Where a married woman acquires property by purchase she must clearly show that the purchase-money was her own, in some way within the recognition and protection of the Act of 1848: for the law presumes it to have belonged to the husband: *Hoffman et al.* v. *Toner*, 13 Wright.

Thus, where a testator, having directed his executors to sell his stock of goods and real estate, and after payment of his debts and specific legacies, to divide the residue between his brother and sister, a married woman, who took the goods at the appraisement from the administrator, agreeing therefor to pay the testator's debts, in amount greater than the value of the goods, and kept store, the husband living in the house and assisting in the business; in a feigned issue under the Sheriff's Interpleader Act, to determine the ownership of the goods levied on as the property of the husband, it was *held*, that as the goods were purchased on credit, and the stock kept up by the wife with the assent of the husband,

this did not in effect constitute her a separate owner, and make the pro perty hers under the provisions of the Married Woman's Act: *Id.*

Divorce—Voluntary Separation not Desertion.—Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, wilfully and maliciously persisted in without cause for two years. The guilty intent is manifested when, without cause or consent, either party withdraws from the residence of the other: *Ingersoll* v. *Ingersoll*, 13 Wright.

Thus where, on the inability of a husband to support his wife they separate voluntarily, and she returns to her relatives, the separation is not a wilful and malicious desertion on his part, such as will entitle her to a divorce, though he had not visited her, and for a length of time had ceased to write to her, or answer her letters: *Id.*

INSOLVENT.

Fraudulent Sale.—A sale, by an insolvent debtor, of his whole stock in trade, upon credit, is not necessarily fraudulent against creditors: *Scheitlin* v. *Stone et al.*, 43 Barb.

INSURANCE.

Warranties by Insured—Barratry.—A warranty by the insured in a policy of insurance that the vessel shall be free from capture, seizure, or detention, does not include a mutinous taking possession of the vessel by the mariners: *Greene* v. *Pacific Mutual Ins. Co.*, 9 Allen.

If a whaling vessel has been barratrously taken from the possession of the master by the crew, and possession of her has subsequently been regained, and she has been brought into a foreign port with the loss of all her whaling gear and a portion of her other equipments and stores, and damaged in some places by fire, and the funds necessary to pay for refitting and repairing her, and procuring officers or men suitable for the further prosecution of her voyage, cannot be obtained by the exercise of due diligence, and communication cannot be had with the owners for many months, and in consequence of these facts her intended voyage is wholly broken up, and she is taken possession of by the United States consul and sent home for the benefit of whom it may concern, it is competent for a jury to find a verdict against the insurers for a constructive total loss, under a policy of insurance "against a total loss only," barratry being one of the perils insured against: *Id.*

LIEN.

Equitable Assignment.—On the 29th of December 1860 S. & Co., merchants at Manchester, wrote to G., H. & Co., of the same place, stating that they had instructed their New York house to hold the proceeds of the sales of certain goods for account of G., H. & Co. as security for the payment of their acceptances of B. & Co.'s two drafts for £5000 each, drawn as an advance against the above-mentioned shipments. On the 11th of January 1861, G., H. & Co. wrote to S. & Co., of New York, stating that they hand the latter the two acceptances for £5000 each, as advances on the goods, and which, according to an agreement with the house of S. & Co., in Manchester, were to be held in trust for the payment of the said acceptances. On the 29th of Jan-

nary 1861, S. & Co., of New York, wrote to G., H. & Co., acknowledging receipt of their letter of the 11th, which, they say, advises them of the acceptances, and indicates the goods to be held in trust for the payment thereof; adding, "all of which is in order." *Held*, that these letters did not create any specific lien upon, or equitable assignment of, the goods mentioned therein, in favor of G., H. & Co., but amounted simply to a promise on the part of S. & Co. to hold the proceeds of the goods for their benefit: *Gibson et al.* v. *Stone et al.*, 43 Barb.

Held, also, that if S. & Co., instead of selling the goods for cash and remitting the proceeds to G., H. & Co., appropriated them to the payment of their own debts, the latter had no right to follow them into the possession of the creditors; it being merely a violation of a promise, for which S. & Co. were personally responsible: *Id.*

MILITARY SERVICE.

Indictment for soliciting a Person to Enlist.—An indictment may be sustained under St. 1863, c. 252, for soliciting a person to leave the commonwealth for the purpose of enlisting in military service elsewhere, although such person was not fit to become a soldier: *Commonwealth* v. *Jacobs*, 9 Allen.

MORTGAGE.

Mortgage of Mortgage—Satisfaction.—If a mortgagee of land executes upon the mortgage an assignment thereof, absolute in form, and the assignee afterwards writes under the assignment an acknowledgment that he has received "full satisfaction for the debt secured by the above assignment of the within mortgage," and this acknowledgment is recorded, this will constitute sufficient evidence that, as between the parties, the transaction was simply a mortgage of the mortgage; and the mortgagee of the land may maintain an action against the mortgagor to foreclose the mortgage: *Coffin* v. *Loring*, 9 Allen.

Reciprocal Rights and Duties of Holders and Assignees.—The assignee of a mortgage, though allowed to sue in his own name, takes it subject to all the equities in favor of the mortgagor, existing at the time of the assignment: *Horstman* v. *Gerker*, 13 Wright.

Where a mortgage "payable in five years" was subsequently assigned as collateral security for the payment of certain promissory notes held by the assignee, who afterwards assigned it to another, of which last transfer no notice was given to the mortgagor, nor call made on him, nor record made for over two years nor interest demanded of him, until after the mortgagee had delivered up the notes for the security of which the first assignment had been made; *Held*,

(1). That the mortgage was by its terms payable at any time within five years fixed for payment.

(2). That the mortgagor having, without notice of the assignment, satisfied the mortgagee by taking up the notes to which it was collateral, it was a valid payment against the assignee, who had neither inquired of the mortgagor of the state of his indebtedness nor given him notice of the transfer: *Id.*

Agreement.—An agreement by the holder of a second mortgage that if he should buy "in his own name or otherwise," at the sale under the

foreclosure of his mortgage, then he will reduce the principal sum secured by the first mortgage, by paying, on account of the same, $3000, on condition that the holder of the first mortgage will waive a default which gives him a right to foreclose it immediately, is a lawful and valid agreement, for a sufficient consideration. And if the default is waived accordingly, and upon a sale of the premises under the second mortgage, a third person bids off the premises and takes a deed from the sheriff in his own name, at the instance and for the benefit of the second mortgagee, to enable the latter to evade his agreement, the first mortgagee can sustain an action against the holder of the second mortgage and the purchaser, for the purpose of having the sale set aside, so far as it prevents a specific performance of the agreement, and to have the holder of the second mortgage adjudged to pay the plaintiff $3000 on account of the first mortgage: *Livingston* v. *Painter*, *adm'x.*, 43 Barb.

Recording; Priority.—Where there are several mortgages upon the same premises, the one first recorded is presumptively the prior lien, and entitled to the surplus moneys on a foreclosure and sale: *Freeman* v. *Schroeder et al.*, 43 Barb.

The burden is upon the holder of the junior mortgage, to overcome this presumption of law: *Id.*

The date of the acknowledgment is not, standing by itself, evidence of a delivery of the mortgage; nor is even the record conclusive evidence of a delivery: *Id.*

The presumption of priority between mortgages, arising from the record, may be overcome by proof that the mortgage first recorded was, by verbal agreement between the mortgagor and mortgagee, not to become operative until the whole consideration was paid, and that the second mortgage was delivered and recorded before such payment was made: *Id.*

An agreement between a second mortgagee, and the mortgagor, that the mortgage shall be second in order, as a lien, to another mortgage on the same premises, is valid between the parties, if made prior to the delivery of the mortgage; and the assignee of such second mortgage will have no greater right than his assignor possessed, to disturb the lien of the prior mortgage: *Id.*

Of Chattels—Right of Mortgagee to sell.—Where a mortgage of chattels contains a power to the mortgagee, in case of default in payment, to take the property, and "to *sell* the same," and apply the avails in payment of the debt, and in case he shall at any time deem himself unsafe, that he may take possession of the property, and "sell the same at *public* or *private* sale," previous to the day of payment, the mortgagee may, in case of default in payment at the day, sell the property at *private* sale, without notice to the mortgagor; and if such sale is fair and *bonâ fide*, the right of the mortgagor to redeem will be foreclosed: *Chamberlain* v. *Martin*, 43 Barb.

Foreclosure Suit; Conclusiveness of Judgment.—Where a person, made a party to a foreclosure suit as having, or claiming to have, some interest in, or lien upon, the mortgaged premises accruing subsequently to the lien of the mortgage, appears and answers, setting up as a defence that the mortgagor was not the owner, or seised of the premises at the

date of the mortgage, but that he, the defendant, was owner and in possession of the premises, and had so continued ever since; which claim is not tried before the referee, but by stipulation a judgment is entered, containing a provision that such judgment shall be without prejudice to any adverse title in such defendant, superior to the mortgage; the judgment of foreclosure and the sale thereunder will not be conclusive upon such defendant, as to the title of the mortgagor: *Lee* v. *Parker*, 43 Barb.

But in an action of ejectment brought by the purchaser at the sale under the decree of foreclosure, to recover the possession, such adverse claimant may set up as a defence any right he had to the mortgaged premises, existing prior to the execution of the mortgage: *Id.*

PRACTICE.

Promissory Note—Evidence in Defence.—In an action upon a promissory note, by the payees against indorsers, the court refused to allow the defendants to show that the note was given for goods to be delivered, and that such goods had never been delivered: *Held* erroneous: *Sawyer et al.* v. *Chambers et al.*, 43 Barb.

Exceptions to Judge's Charge.—The rule that exceptions to a charge must be specific does not apply to a case where the judge excludes the defence on the opening of the defendant's counsel: *Sawyer et al.* v. *Chambers et al.*, 43 Barb.

Where the judge excludes the whole defence, one exception to the decision is sufficient: *Id.*

Supplemental Complaint.—The filing of a supplemental complaint, for the purpose of reviving an action, is a matter of right. A motion for leave to file such a complaint is unnecessary and improper: *Roach* v. *La Farge*, 43 Barb.

SHIPPING.

Liability of Owners.—If the owners of a vessel, which is employed in the transportation of merchandise generally, enter into a contract of affreightment for the carriage of goods, for a certain price, without inserting therein any special clause enlarging or limiting their liability, and afterwards, in order to furnish the usual shipping documents for transmission, in the usual course of business in shipping transactions, and without any new consideration, sign bills of lading providing for the delivery thereof, "the dangers of the seas only excepted," the insertion of this exception in the bills of lading does not enlarge their liability, so as to make them responsible to the shipper for a loss arising from the act of public enemies: *Gage et al.* v. *Tirrell et al.*, 9 Allen.

SLANDER.

Evidence of Plaintiff's general Character.—In an action on the case to recover damages for saying that plaintiff had committed perjury, evidence of the plaintiff's general character for truth and veracity is admissible on the part of the defendant in mitigation of damages: *Moyer* v. *Moyer*, 13 Wright.

STAY LAW.

Unconstitutional when Remedy is suspended for an uncertain Period.—The 4th section of the Stay Law of 18th April 1861 is unconstitu-