ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF NEW YORK.[3]

SUPREME COURT OF VERMONT.[4]

ADMIRALTY.

Jurisdiction.—Where a damage done is done wholly upon land, the fact that the cause of the damage originated on water subject to the admiralty jurisdiction does not make the cause one for the admiralty: *The Plymouth*, 3 Wall.

Hence, where a vessel lying at a wharf, on waters subject to admiralty jurisdiction, took fire, and the fire, spreading itself to certain storehouses on the wharf, consumed these and their stores, it was held not to be a case for admiralty proceeding: *Id.*

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Establishment of Fraud.—Where an assignment, made by an insolvent debtor, in trust for the benefit of creditors, contains provisions which are calculated, *per se*, to hinder, delay, or defraud creditors, the fraud must be passed upon as a question of fact: *Kavanagh* v. *Beckwith*, 44 Barb.

But if the necessary consequence of a conceded transaction is the defrauding of another, the transaction itself is conclusive evidence of a fraudulent intent, inasmuch as a party must be presumed to have intended the necessary consequences of his own act. And if, in such a case, against such evidence, a jury or referee should find that there was no fraud, it would become the duty of the court to set aside the finding: *Id.*

And where an assignment on its face shows that it must *necessarily* have the effect of defrauding the creditors of the assignor, it is conclusive evidence of a fraudulent intent, and is void: *Id.*

The same rule should prevail in cases where *extrinsic* facts and circumstances, admitted by the parties, or established by the evidence without dispute or explanation, make the assignment *necessarily* fraudulent, according to the law of the case: *Id.*

An overstatement of the amount of certain preferred debts will not render an assignment *necessarily* fraudulent. The assignees are not bound to pay the debts at the amounts therein specified: *Id.*

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[1] To appear in vol. 3 of Wallace's Reports.

[2] From Charles Allen, Esq., Reporter; to appear in vol. 10 of his Reports.

[3] From Hon. O. L. Barbour, Reporter; to appear in vol. 44 of his Reports.

[4] From W. G. Veazey, Esq., Reporter; to appear in 37 Vermont Reports.

They are bound to pay the debts at their just amounts, and nothing more. They may require proof as to the amounts, and it is their duty to do so, if they have reason to believe the amounts are not correctly stated in the assignment: *Id.*

The fact that at the time when an assignment was executed, the assignor did not know the precise amount of his debts, for the reason that his books had not been posted in three months, is a circumstance tending to disprove a fraudulent intent in overstating the amount of the debts, in the assignment: *Id.*

And so in respect to the circumstance that the assignor was advised by his counsel, in regard to one of his debts, that it would answer to state its amount as nearly as he could in the assignment, leaving it to be adjusted when the books were written up: *Id.*

Associations.

Dissolution by non-user of Functions.—"The Mount Lebanon Royal Arch Chapter" of Free Masons, in 1836, disposed of all their real and personal property, consisting of their hall, furniture, and equipment, pursuant to a vote of the chapter, and for twenty-three years held no meetings, elected no officers, performed no acts required by its laws and rules, and ceased to have any visible sign of existence. *Held*, that the legal existence of the chapter was gone, and that it was beyond the power of the State Chapter to restore it to life so as to preserve for it a continued existence from 1836: *Strickland et al.* v. *Prichard et al.*, 37 Vt.

A rule of the association that officers elected should hold their offices till others were elected, could not operate in a case of this kind to preserve its legal existence: *Id.*

Attorney.

Retaining Fee.—A retainer to defend a suit does not extend to the employment of the attorney to defend a second suit brought upon the recognisance entered in the first suit: *Smith* v. *Dougherty*, 37 Vt.

Bills and Notes.

Transmission for Collection—Rights of Receiving Bank as Holder.—On the 29th of May 1861, the plaintiff being the owner of a promissory note made by W., payable in the city of New York, and to mature on the 1st and 4th of June, he deposited the same for collection, in the M. Bank, indorsed in blank. The M. Bank was then indebted to the defendant, its agent in the city of New York, for over-drafts, in a sum exceeding the amount of the note. The M. Bank forwarded the note to the defendant, with directions to collect the same, and credit the M. Bank with the proceeds. The note was collected, and the proceeds credited by the defendant to the account of the M. Bank, but the defendant had no notice or knowledge that the note belonged to the plaintiff. The M. Bank failed on the 4th of June. *Held*, that the defendant could not be regarded as a purchaser or holder *for value* of the note, or of its proceeds, according to the rule prevailing in New York, so as to exclude the claims of the plaintiff, who was the real owner: *West* v *The American Exchange Bank*, 44 Barb.

Held, also, that the facts that the defendant held the note as collateral security for the payment of any balance of account that might be owing by the M. Bank; that the M. Bank was largely indebted to the defendant before the note was received by the latter; and that the defendant credited said debtor, in account, with the proceeds of the note, when collected;—did not of themselves constitute a valuable consideration, within the rule referred to, notwithstanding the defendant so credited the proceeds in good faith, in the ordinary course of business, and without notice of the plaintiff's title: *Id.*

Action against Administrator—Consideration.—If an administrator has in his possession a note due from his intestate and refuses to pay it or deliver it to the owner, an action at law may be maintained upon it, to recover the amount from the assets of the estate of the intestate: *Prescott* v. *Ward*, 10 Allen.

Delay by a man to fulfil a promise to marry, and services rendered to him by the woman during the continuance of the engagement, in procuring and taking care of his clothing, are a sufficient consideration for a promissory note given by him to her; and the fact that other motives entered into his mind and induced him to give it is immaterial: *Id.*

Trover.—The plaintiff gave the note in question for accommodation to the defendant, who was to pay and take care of it, and save the defendant from liability upon it. The defendant paid and took up the note after having used it for the purpose designed, and then claimed to hold it as a valid instrument still in force against the plaintiff, and refused to give it up on demand. *Held*, that in the character thus assumed for the note by the defendant, the plaintiff had a right to it and might maintain trover for it: *Park* v. *McDaniels*, 37 Vt.

Bond of Indemnity.

A bond to a constable, conditioned to keep him harmless and indemnified of, from, and against all damages, costs, *charges*, trouble, and expense that he may be put to, sustain, or suffer, by reason of a levy upon and sale of property on execution, is broken and an action may be maintained upon it, as soon as a *liability* is incurred by the officer in consequence of such levy and sale: *Bancroft* v. *Winspear*, 44 Barb.

The obligee is not bound first to advance his own money, to discharge a liability, before he can seek indemnity by an action upon the bond: *Id.*

In an action brought upon such a bond, the plaintiff may recover not only the amount he has actually expended in the defence of an action brought against him by one claiming to be the owner of the property levied on, but the costs and counsel fees of his attorney and counsel in defending such suit, although the latter have not been actually paid by the obligee: *Id.*

Contract.

By Married Woman to give up control of Children.—If a married woman who has been compelled to live separate from her husband by reason of his intemperance and crime is unable to provide for her children, and thereupon voluntarily gives them up to a charitable institution established for the purpose of furnishing homes to destitute children,

under a written contract by which the children are to be placed out or adopted in a good family, and she is not to seek to discover them or deprive such family of them, the contract is valid; but this court, on a *habeas corpus* afterwards brought by the parents to recover their children, will inquire whether the welfare of the children is properly attended to, and in so doing will not be restricted to the ordinary modes of trial, nor require the children to be brought into open court, or their residence disclosed to their parents: *Dumain and Wife* v. *Gwynne*, 10 Allen.

Time of Performance.—A written contract for the purchase and sale of land within ten days is to be performed within ten days from its date, and not from its delivery, unless so much time has passed before the delivery as to make the performance within that time impossible or unreasonable: *Goldsmith* v. *Guild*, 10 Allen.

The doctrine that time is not of the essence of a contract in equity should not be applied, as a general rule, to a sale of land in this country: *Id.*

Damages.—If a written contract by which the master of a whaling-ship is employed provides that he shall have a certain "lay" on the proceeds and also an additional compensation depending upon the amount of the cargo, and he is wrongfully discharged by the owners before the expiration of the contract, he may recover, as a part of his damages, his share of the earnings of the ship both before and after his removal: *Dennis* v. *Maxfield et al.*, 10 Allen.

A party cannot except to an erroneous instruction which is given to the jury at his request: *Id.*

Corporation.

Seal.—A fac-simile of the seal of a corporation printed upon blank forms of obligations prepared to be executed by the corporation at the same time when the blank is printed and by the same agency, is not a seal, at common law, nor will such forms, when executed by the corporation, be contracts under seal, although the language of them calls for a seal: *Bates* v. *Boston and New York Central Railroad Co.*, 10 Allen.

County Officer.

Subscriptions by Counties to Railroads.—A county "officer" is one by whom the county performs its usual political functions or offices of government; who exercises continuously, and as a part of the regular and permanent administration of government, its public powers, trusts, or duties. A fixed number of persons, specially and by name appointed by the Legislature to act as a board of commissioners, in a matter about which, though relating immediately to the county, county officers, in the exercise of their general powers as such, and without special authority from the Legislature, have not authority to act, are not county "officers:" *Sheboygan County* v. *Parker*, 3 Wall.

Hence, when special authority was given by the Legislature to the people of a county, to say whether or not they would subscribe to a railroad and bind themselves to pay for it, that body, in giving the authority, may properly direct the mode in which such subscription shall be made and paid for;—may, *ex. gr.*, appoint special persons to make the

subscription, and to issue bonds in behalf of the county therefor—even though the constitution of the state in which the county is provides that "all *county officers* shall be elected by the electors of the county," and though there may be a regular board of county supervisors elected accordingly, then administering the ordinary county affairs. Bonds so executed and issued bind the county: *Id.*

Note.—In this case, the statute enacted that any bonds issued under its provisions should be "of full and complete evidence both in law and equity to establish the indebtedness of the county:" *Id.*

Custom Duties.

Onus Probandi in Revenue Cases—"Knowingly" entering Goods—Prices-Current.—The provision in the Revenue Act of March 3d 1863—that when foreign goods brought or sent into the United States are obtained otherwise than by purchase, they shall be invoiced at the "actual *market value* thereof at the time and *place* when and where the same were procured or manufactured"—does not mean any locality more limited than the *country* where the goods are bought or manufactured. The standard to be applied is the principal markets in that country. Hence proof of the market value in Paris of wines made at Rheims, a hundred and more miles off, may be given; there being no other evidence on the subject: *Cliquot's Champagne*, 3 Wall.

The provisions in the 70th and 71st sections of the Revenue Act of 1799, by which, when a probable cause of forfeiture is made out to the satisfaction of the judge trying the case, the *onus* of proving innocence is thrown upon the claimant, apply to the Act of 3d March 1863, though not in terms adopted by it; neither of the said sections having been ever repealed, and this rule of *onus probandi* having been always regarded as a permanent feature of our revenue system: *Id.*

The expression in the Act of 3d March 1863, "If any owner, consignee, or agent shall *knowingly* make an entry of goods, &c., by means of any false invoice, certificate, or by means of any other false or fraudulent document," &c., means if such person shall make such entry, &c., of goods knowing that the invoice, &c., does not express their actual market value—swearing falsely and knowing it,—and the expression as used in the act refers to the guilty knowledge on the part of either the owner, consignee, or agent; the act of an agent or consignee being the act of the guilty principal: *Id.*

Prices-current obtained from the agent of a manufacturer or from dealers in the manufactured articles generally, and which have been prepared and used by the parties furnishing them in the ordinary course of their business, are so far evidence of the value of the articles mentioned in them as that they may be submitted to the jury as "throwing light" on the matter; as "some guides to candid men," and for their "consideration." And this rule was held to apply so far as that the *comparative* value, at the town of manufacture (Rheims) and at the capital of the country (Paris), of champagne wines made by one manufacturer (Cliquot), was allowed to be shown by the prices-current giving the value of that made by others (Mumm, Moet & Chandon); it not appearing—either by evidence in the case set forth in the bill of exceptions, or by an admission of the judge upon the bill, that such evidence

was given—but that the articles were the same in price, kind, and quality: *Id.*

Whether there is sufficient proof of agency to warrant the admission of the acts and declarations of the agent in evidence, is a preliminary question for the court: *Id.*

Debtor and Creditor.

Rights of Creditor who has attached Land to redeem prior Incumbrances.—An attachment upon land creates a specific lien thereon, and vests in the attaching-creditor a right in equity to redeem the land, even before judgment and levy, from a prior incumbrance, in order to make his own claim beneficial or available to himself: *Chandler* v. *Dyer*, 37 Vt.

He is entitled to the same right of redemption as a mortgagee has; and if not joined as a party in a suit of foreclosure upon the same land, his right to redeem is not affected by the decree: *Id.*

His payment of the prior mortgage-incumbrance is not regarded as a voluntary payment, but the exercise of an equitable right, and, as against the mortgagor and all holding under him and subsequent to his, the creditor's, attachment, the effect of the redemption is not to extinguish the mortgage so redeemed, but to keep it alive as a subsisting lien upon the land, whether the creditor pursue his attachment-lien or not: *Id.*

Deed.

Setting aside for Fraud.—One who has the superior legal title, by deed from the purchaser at a mortgage-sale, and who is in possession, no attempt having been made to disturb him, cannot maintain an action to set aside a deed executed by the mortgagee, and to have the same declared void, on the ground that the grantor was induced to execute it by fraud on the part of the grantee: *Butler* v. *Viele*, 44 Barb.

Easement.

Conveyance of adjoining Estates by same Owner.—If the owner of two adjoining estates, through one of which a drain exists for the benefit of the other, conveys them both on the same day to different purchasers, the right to use the drain will not pass as an easement or appurtenance to the purchaser of the upper estate, provided a new drain can be built upon his own land by reasonable labor and expense: *Randall* v. *McLaughlin*, 10 Allen.

Ejectment.

Duty of Officer serving Writ of Possession.—It is not the duty of an officer who serves a writ of possession to expel from the premises any persons who were in possession, claiming title in themselves, at the time when the suit was commenced in which the writ issued, and who do not claim under the person against whom that writ runs, nor resist the officer in his attempt to remove the latter and those claiming under him: *Clark* v. *Parkinson and Another*, 10 Allen.

Estoppel.

Parol Settlement of Boundary Line.—Where a boundary line is

fixed and settled by parol agreement between A. and B., adjoining owners, and B. afterwards, with the knowledge of A., makes valuable and expensive improvements, relying upon such settlement, without any objection or remonstrance or notice of dissent from A., in regard to the line thus established, the latter is estopped from claiming that such was not the true boundary line between their respective lots: *Corkhill* v. *Sanders*, 44 Barb.

To permit A., after the improvements are completed, to raise the objection and dispossess B., on the ground that the line was not in fact the true line, would be allowing him to take advantage of his own culpable neglect, to the great injury of B. Hence the principle of equitable estoppel applies: *Id.*

The rule applies equally to transactions in regard to real and personal property. It does not at all touch the question of creating title to real estate by parol: *Id.*

A defence of that kind, may be set up in the action of ejectment: *Id.*

Evidence.

Church Record.—The entry of a baptism, contemporaneously made by a Roman Catholic priest, in the discharge of his ecclesiastical duty, in his church record of baptisms, is competent evidence, after his death, of the date of the baptism, if the book is produced from the proper custody; although he was not a sworn officer, and the record was not required by law to be kept: *Kennedy* v. *Doyle*, 10 Allen.

Executor.

Recovery of Debt owed by the Estate.—One who has been an executor of an estate and resigned his trust cannot maintain a suit either at law or in equity against the administrator with the will annexed, to recover a debt due to him from the estate. His remedy is in the settlement of the accounts of administration in the probate court: *Prentice* v. *Dehon et al.*, 10 Allen.

Forwarding.

Obligation of Shipper to know Customs of the Forwarding Business—How far bound to use Telegraph.—Where a bill of lading, signed by a master, shows that a voyage to a particular place named on it is but part of a longer transit, which it is understood is to be made by the cargo shipped, and that the cargo is to be carried forward in a continuous way on its further voyage, the master must be presumed to have contracted in reference to the course of trade connected with getting the cargo forward: *The Convoy's Wheat*, 3 Wall.

In such a case, if any obstacle should intervene, which by the regular course of the trade is liable to occur and for a short time retard the forwarding, the master cannot from a mere inability to find storage at the *entrepôt*, turn about, and taking the cargo to some near port, store it there, inform the consignees, and clear out. He should wait: *Id.*

If there is easy telegraphic communication with the consignees, he should notify to them his difficulty, that they may send him, if they please, instructions: *Id.*

Frauds, Statute of.

Part Performance.—Previous to the purchase of mortgaged premises by C. at a foreclosure sale, it was agreed by parol, between him and M., that M. should have the premises conveyed to him, upon payment to C. of the amount of his bid, with interest and costs. M. was then in possession of a portion of the premises under a contract to purchase from a former owner. After C. had purchased, the parol agreement was renewed or reaffirmed, by parol, and C. gave up to M. the possession of the residue of the premises, and authorized him to keep possession and rent the same. M. accordingly rented a portion of the premises to a tenant, and made payments according to his parol agreement, amounting to more than one-third of the purchase-money, which C. accepted and received. *Held*, that such possession and part payment took the parol agreement out of the operation of the Statute of Frauds; and that the agreement could have been enforced specifically against C.: *Merithew* v. *Andrews*, 44 Barb.

Husband and Wife.

Ante-nuptial Contract.—An ante-nuptial contract by which a woman agrees to relinquish her distributive share of her intended husband's estate will be enforced in equity, if entered into understandingly, for an adequate consideration, and without fraud or misrepresentation on his part: *Tarbell* v. *Tarbell*, 10 Allen.

Evidence of Marriage and Legitimacy.—Though on a question of marriage and legitimacy, it is competent, in order to prove an heirship asserted, to give in evidence the declarations of any deceased member of *that* family to which the person from whom the estate descends belonged, yet it is not competent to give the declarations of a person belonging to another family,—such person being connected with the person from whom the estate descends only by an asserted intermarriage of a member of each family: *Blackburn* v. *Crawfords*, 3 Wall.

Independently of statute requiring it to be kept, a baptismal register of a church, in which entries of baptism are made in the ordinary course of the clergyman's business, is admissible to prove the *fact* and *date* of baptism, but not to prove other facts, as, *ex. gr.*, that the child was baptized as the *lawful* child of the parents, and hence to infer a marriage between them: *Id.*

Where there has been no official registry of marriages kept in the church where a clergyman ministered, a private memorandum in which the minister, in the ordinary course of his business, has entered or intended to enter, as it occurred, each marriage celebrated by him, is admissible on a question whether such minister ever did or did not celebrate a particular marriage in question: *Id.*

But the memorandum ought itself to be produced; and if the testimony of the minister proving the memorandum is taken by commission, the memorandum ought itself to be annexed to the deposition; or—if the deposition is taken in a foreign country and the possessor of the memorandum be unwilling to part with the original—a proved copy: *Id.*

However, if neither the original nor such copy has been annexed, the objection to the want of such original or copy should be taken in some form (such as motion to suppress) before the trial. If made first on the

trial it is too late: *York Co.* v. *Central Railroad*, 2 Wall. 107, on this point, affirmed: *Id.*

On a question whether a particular priest of the Roman Church ever celebrated a marriage at a particular church between parties who had been previously living in fornication, his statement that no official registry of marriages was kept, but that he kept a private memorandum for himself (producing and annexing it as above specified), and that the alleged marriage did not appear in it; that he was aware the law imposed a penalty for performing the ceremony without a license; that he never married parties without a license; that he always required the presence of two witnesses; and that he never celebrated a secret marriage between parties living in sin, one or both of whom would only be married on the condition that such marriage was to be kept secret—is admissible: *Id.*

On a question of marriage and legitimacy, an attorney, who drew a will for the alleged husband now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation of the will: *Id.*

It is error to instruct a jury that if a man and woman live together as husband and wife, and the man acknowledge the woman as his wife, and always treat her as such, and acknowledge and treat the children which she bore him as his children, and permit them to be called by his name,—then that the *presumption of law* is in favor of their legitimacy. The question of legitimacy, under such circumstances, is a question for the jury; the law making no presumptions about it: *Id.*

Infant.

Ratification of Promise made during Minority.—A promise by a minor to pay money borrowed on joint account with another person, may be ratified by the minor after coming of age, like other voidable promises: *Kennedy* v. *Doyle*, 10 Allen.

Insurance.

By Owner of Equity of Redemption.—If the owner of the equity of redemption of land procures a policy of insurance upon the buildings standing thereon, at his own expense, payable to the mortgagee in case of loss, and the policy contains a written provision that no sale of the property shall affect the right of the mortgagee to recover in case of loss under the policy, and the equity of redemption is afterwards sold, and a loss occurs, and the insurance company upon paying the amount thereof to the mortgagee take from him an assignment of the mortgage and policy, the purchaser of the equity of redemption is entitled to the benefit of the money so paid by the insurance company, and may redeem the land upon paying to the insurance company the balance due upon the mortgage-debt after deducting that amount: *Graves* v. *Hampden Fire Insurance Co.*, 10 Allen.

Damages for partial Loss—Construction of Policy.—If a partial loss occurs upon a policy, for a sum expressed in dollars, made here, upon

property situated in a foreign country, the rule for estimating damages is to determine the loss at the place where it occurred, in the currency of that country, and then to find the equivalent in the country where suit is brought, by determining the actual intrinsic value of the currency of that country, as compared with the currency of the other; and it is immaterial, in reference to this, that the policy contains a provision that in case of loss the company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness: *Burgess et al.* v. *Alliance Insurance Co.*, 10 Allen.

An open policy of insurance upon merchandise will not cover articles kept wholly or partially for use in and about a building, but only articles kept for sale; but an open policy upon "property" contained in "specified" buildings, will cover articles kept for use as well as those kept for sale: *Id.*

Pleading.

Charging Fraud.—The burden of *charging*, as well as proving fraud, is on the party alleging it; and while it is not necessary or proper that he should spread out, in his pleading, the *evidence* on which he relies, he must aver, fully and explicitly, the *facts* constituting the alleged fraud. Mere conclusions will not avail: *Butler* v. *Viele*, 44 Barb.

Vendor and Purchaser.

Title of Purchaser under Foreclosure Sale.—One who purchases mortgaged premises from the purchaser at a foreclosure sale acquires, by his deed, the title which the mortgagor had before giving the mortgage: *Butler* v. *Viele*, 44 Barb.

Where one purchases with actual notice of a prior unregistered mortgage upon the premises, the registry of his deed will be of no avail, against such notice: *Id.*

Purchaser bound to take notice of Rights of Party in Possession.—Where one is in possession of premises, and exercising acts of ownership, a party coming to purchase is bound to take notice of his rights, whatever they may be; and the law will oblige him, if he takes the premises at all, to take them subject to those rights: *Merithew* v. *Andrews*, 44 Barb.

A purchaser of land, having actual or constructive notice of the equitable rights of a third party, under a contract with the immediate vendor of such purchaser, is bound to respect those rights, and may be decreed to perform the contract on the part of his vendor, upon the performance, or tender of performance, thereof by such third party: *Id.*

Witness.

Privilege not to Answer—Inference from Refusal.—Assuming that a witness is privileged from answering a question addressed to him as a witness on the part of the plaintiff, the mere conjecture that his refusal to answer, followed by a decision of the justice that he is not bound to do so, or his refusal, followed by a ruling that he is privileged, may have created an impression in the minds of the jury that his testimony, if given, would have tended to make out the plaintiff's case, should not be entertained, as the basis of reversing a judgment which is in all respects, apparently, free from error: *Murphy* v. *Tripp*, 44 Barb.