ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF MAINE.[2]

SUPREME COURT OF NEW YORK.[3]

AGREEMENT.

Promise to pay Debt of Another.—An agreement to forbear to sue is a good consideration for the promise of a third person to pay the debt: *The Mechanics' and Farmers' Bank of Albany* v. *Wixon and others*, 46 Barb.

Although the law will not infer that any forbearance was agreed to, or intended, merely because a new note was taken for an old debt, yet when the evidence establishes that such an agreement was made in connection with the making of a note having time to run, it will hold it to be valid and binding: *Id.*

CHARITY.

Bequest for charitable use.—A testator bequeathed the residue of his estate to his executors in trust to hold and invest the same and the income thereof, and appropriate so much or the whole of the principal or income as they might think proper "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths," and gave said trustees and their successors "full power, discretion, and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote the objects above mentioned." *Held*, that by "objects and purposes of benevolence or charity, public or private," the testator intended general relief of the poor, either through public institutions or almsgiving by the agency of individuals; and that this was a good charitable bequest: *Saltonstall and Others* v. *Sanders and Others*, 11 Allen.

DAMAGES.

Building blown up to stay a Fire.—If, for the purpose of staying a conflagration, a building has been blown up without right, the jury in estimating the damages should consider the circumstances under which the building and its contents were situated, and their chance of being saved, even though the same were not actually on fire; and should determine their value with reference to the peril to which they were exposed: *Parsons* v. *Pettingell and others*, 11 Allen.

Slander.—In a case for slander, it is proper for the presiding judge to instruct the jury, that, in the assessment of damages, they may take into consideration the wealth of the defendant: *Humphries* v. *Parker*, 52 Me.

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[1] From Charles Allen, Esq., Reporter, to appear in vol. 11 of his Reports.

[2] From Wm. W. Virgin, Esq., Reporter, to appear in 52 Maine Rep.

[3] From Hon. O. L. Barbour, Reporter, to appear in vol. 46 of his Reports.

Debtor and Creditor.

Resorting to original Indebtedness.—Creditors who have taken a new security, in the shape of promissory notes, upon extending the time of payment of a debt, shall not, by an allegation of their own turpitude, set aside the new security, and resort to the original indebtedness. Yet if the debtors themselves take the initiative in avoidance of the new notes, as being usurious, either by defence in a suit upon them alone, or in a suit upon the original security, the plaintiffs may recover upon the original notes: *The Winsted Bank*, 46 Barb.

In an action upon promissory notes, made by the defendants, the complaint alleged that after said notes matured, the same not being paid, new notes were given for the same amount, and the time of payment extended. That the defendants claimed that the new notes were usurious and void by reason of an illegal rate of interest being included in them, and that the defendants therefore refused to pay them. And the plaintiff demanded judgment for the amount of the original notes. The defendants by their answer not only admitted that they claimed the new notes to be usurious, but distinctly set up the usury as a part of their defence. On the trial, the plaintiff's counsel, in opening his case, set forth the transaction as made by the pleadings, and admitted that the new notes were usurious. *Held*, that the plaintiffs, under these circumstances, might resort to the original notes, and recover upon them: *Id.*

Deed.

Implied Covenant—Playground.—If the granted premises in a deed are described simply by courses and distances, and without reference to visible monuments, except on one side, where they are bounded on a new open street, and are further described as being lots marked on a plan which is referred to, and on the plan it appears that a considerable number of lots are laid down on one side of the street, and on the opposite side the land is marked "Ornamental Grounds" and "Play Ground," without any designation of how much land is to be so appropriated, there is no implied covenant that any land on the opposite side of the street shall be so appropriated, although the grantor owned the same: *Light* v. *Goddard*, 11 Allen.

Name of one of the Makers not in Body of the Deed.—When one, jointly with others, signs, seals, and delivers an instrument supposed to be a perfect deed, but *his* name appears in no other part thereof, his interest in the premises described in such instrument is not thereby conveyed: *Peabody* v. *Hewett*, 52 Me.

Consideration.—If a consideration is expressed, in a conveyance, no proof of its actual payment need be given; and though the amount be merely nominal, that is sufficient: *Webster* v. *Van Steenbergh*, 46 Barb.

What will pass by.—Where the owner of land conveys the same by an absolute conveyance, *wine plants*, set in the ground, and growing there at the time, will pass by the conveyance, notwithstanding a *parol reservation* thereof by the grantor: *Wintermute* v. *Light*, 46 Barb.

Dower.

Momentary seisin—Mortgage by Grantee immediately on Conveyance.

—If at the same time that a deed of land is received the grantee mortgages it to a third person for the purpose of procuring money to enable himself to obtain his deed, and as a part of the same transaction, his seisin is only instantaneous, and the mortgage will bar his wife's dower, although she does not sign it: *King* v. *Stetson & another*, 11 Allen.

EJECTMENT.

Equitable Title.—Where the plaintiff has, at most, a mere equitable title to the piece of land the possession of which he seeks to recover, no action will lie: *Peck* v. *Newton*, 46 Barb.

An action in which no equitable interest in the premises is set up in the complaint, and no equitable relief is demanded—the plaintiff, suing as trustee of a school district, alleging therein that the district has lawful title as the owner in fee simple—so that the possession is not sought as incidental to a specific performance, or other equitable relief, but the plaintiff counts upon his title, and demands judgment for the possession of the premises, cannot be maintained: *Id.*

An action to recover the possession of real estate will not lie against a stranger in possession, in favor of a plaintiff resting not on a legal but a mere equitable title: *Id.*

EVIDENCE.

Handwriting—Experts.—An expert in handwriting, having testified that, several years since, he carefully examined, and now has a recollection of three signatures purporting to be the signatures of S., and acknowledged by him to be genuine; that he never saw S. write, and should not feel able to testify to S.'s signature, without a comparison with other writings; may, after examining another signature presented purporting to be the signature of S., give his opinion whether or not the signature in question is in the same handwriting as the three acknowledged to be genuine: *Woodman* v. *Dana*, 52 Me.

No witness, except an expert, is competent to give an opinion simply by comparison of hands by juxtaposition, and this is done by the production of the standard in open court: *Id.*

Non-experts can only give opinions in cases where they have previous acquaintance or knowledge of the handwriting by which the genuineness of the controverted specimen is to be tested. And, in this case, the standard need not be present: *Id.*

An expert need have no previous acquaintance or knowledge of his standard to authorize him to express an opinion by comparison: *Id.*

A non-expert cannot express an opinion without such previous acquaintance or knowledge: *Id.*

Presumption of Death.—Absence of a party for seven years or more from any place does not raise a presumption of his death, unless it is shown that he had a previous established residence at that place: *Stinchfield* v. *Emerson*, 52 Me.

And where a title is claimed to be in the father, because of the death of his son, not only the death of the son must be shown but also that he died without issue: *Id.*

Fraud.

Execution on Real Estate conveyed by Debtor.—Under our statutes, a creditor may levy upon real estate, which the debtor, having had the legal title thereto, has fraudulently conveyed: *Hall* v. *Sands*, 52 Me.

Such land may be attached, as well in actions of *tort* as of *contract*, and held as against subsequent conveyances: *Id.*

The plaintiff in an action of tort becomes a *creditor*, when he recovers his judgment: *Id.*

By the statute 13 Eliz. c. 5, a fraudulent conveyance, for a valuable consideration, is void as to all persons liable or intended to be injured thereby: *Id.*

And if it is both *fraudulent* and *voluntary*, so as to raise the presumption of a secret trust, it is a continuing fraud, and void both as to *existing* and *subsequent* creditors: *Id.*

A fraudulent conveyance, for a sufficient consideration, is void as to *subsequent* creditors, only when it was made for the purpose of defrauding them: *Id.*

A plaintiff in an action of tort, attaching real estate which the defendant had previously mortgaged, can avoid the mortgage only by showing that it was fraudulent *as to him*: *Id.*

In such a case, an instruction to the jury, "that, if the mortgage was fraudulent, it could only be avoided, on that ground, by the then existing creditors of the grantor," is erroneous: *Id.*

If such mortgage was intended to delay or defraud subsequent creditors, it is voidable as to them; and the question of fraudulent interest is one of *fact* for the jury: *Id.*

Highway.

Right of Municipal Corporation to lay out a way for access to Scenery.—The selectmen of a town have authority to lay out a town way wholly upon land of citizens, against their consent, entering their land from a highway and returning to it at about the same place where it enters, and leading to no other way or landing-place, and capable of being used for no purposes of business or duty, or of access to the land of any other person; and which is laid out with the design to provide access not for the town merely, but for the public, to points or places in the lands of those citizens, esteemed as pleasing natural scenery: *Higginson and others* v. *Inhabitants of Nahant*, 11 Allen.

Insurance.

Breach of Conditions of Policy—Forfeiture—Acts of Agent.—A forfeiture of a policy of insurance is to be construed strictly; and its enforcement is not to be favored: *North Berwick Co.* v. *N. E. F. & M. Ins. Co.*, 52 Me.

The act of receiving an additional premium for a variation of the risk after the existence of facts which would authorize a forfeiture had become known to the insurers, must, in the absence of fraud and concealment, be regarded as a waiver of the forfeiture: *Id.*

From the answer to a question in an application, that the factory insured is "worked *usually*" certain specified hours in the day time "in the summer," and certain specified hours "in the winter—*short time now*," it may be inferred that it was expected at times the factory would be run nights: *Id.*

Where an agent, by the power of attorney appointing him, was authorized to "make insurance by policies of" the defendant company, "to renew the same, and to indorse upon policies issued by him permission to the assured to *vary the risk*, according to the rules and instructions he shall from time to time receive from said company, and all policies, issued by said agent, shall be to all *intents* valid and binding upon said company;" and, upon the receipt of an additional premium, fixed by him, such agent varied the risk by a written permission to run the factory insured "day *and night*," until the expiration of the policy without prejudice;" and the factory was burned in the night:—*Held*, that in the absence of any proof that the agent had violated any rules or regulations he may have received from the company, the permit to *run nights* was binding on the company, and the agent had ample power to waive such previous running which had come to his knowledge: *Id.*

When the plaintiffs procured a policy on their merchandise in their storehouse, and another on their factory; and the former contained a provision that, "if the risk be increased by *any means whatever* within the *control* of the *assured*," it should be void, but no limitation as to the time the plaintiffs were to run their factory; but such limitation was contained in the latter; and, subsequently, such limitation was removed by the written permit of the defendants in consideration of an additional premium:—*Held*, that the policies were distinct and independent; and the removing of the limitation was not an "*increase of the risk*," within the meaning of the former policy: *Id.*

It is no objection that only a *few*, and not *all*, of the letters comprising a correspondence between the parties, are offered in evidence: *Id.*

Judgment.

Notice to Defendant.—No court can rightfully render judgment in a cause, until it has acquired complete jurisdiction over the parties, the subject-matter of the suit, and the process: *Penobscot R. R. Co.* v. *Weeks*, 52 Me.

Such jurisdiction is not acquired until the defendant is in some way notified of the pendency of the suit: *Id.*

If, upon inspection of the record, a judgment, by whatever court rendered, and by whatever means brought in question, appears to have been rendered without such notice, it is absolutely void for such purposes: *Id.*

Landlord and Tenant.

Wine-plants, growing upon a farm, are, as between landlord and tenant, personal property, and the latter has a right to remove them: *Wintermute* v. *Light*, 46 Barb.

If the tenant executes a mortgage upon such plants, the same is valid as between the parties to it, and will enable the mortgagee, by foreclosure and sale, to acquire the mortgagor's right of removal: *Id.*

Limitations, Statute of.

Effect of a Payment.—The law respecting the effect of a payment, on a question as to taking a case out of the operation of the Statute of Limitations, has not been changed by the code of procedure. And the

language of the authorities is, that a payment which will take a case out of the operation of this statute, must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognise the debt in question as subsisting, and which he was willing to pay: *Miller* v. *Talcot*, 46 Barb.

Lost Goods.

Right of Owner of place where found, as against Finder.—A stranger in a shop who first sees a pocket-book which has been accidentally left by another upon a table there, is not authorized to take and hold possession of it, as against the shopkeeper: *McAvoy* v. *Medina*, 11 Allen.

Mandamus.

Removal of Attorney from the Rolls of Court.—This court will not issue a writ of *mandamus* directing the superior court to restore an attorney at law whom they have removed from practice, although such removal was made without any previous written charge of misconduct against him, and without any summons or other process to bring him before the court; especially if it appears that in fact he had notice of proceedings in that court, and appeared therein, and had ample time allowed to him, and a full hearing on the merits, and that, on the facts found by the court, the removal was proper, and that after alleging exceptions to the judgment of removal, which were disallowed by that court on the ground that the subject-matter was not open to exception, he omitted to prosecute them in this court, by proving them under Gen. Sts. c. 115, § 11: *Randall, Petitioner for Mandamus*, 11 Allen.

Municipal Corporation.

Liabilities for Negligence of Officers.—The cases *Mitchell* v. *Rockland*, 41 Me. 363, and 45 Me. 504, re-affirmed: *Mitchell* v. *Rockland*, 52 Me.

The consent of the owners of a vessel to the appropriation of it for a hospital, by the health officers of a town, does not render the town liable for any injuries caused by the negligence of such officers, while they are in possession of it: *Id.*

Neither the relation of master or servant, nor of principal and agent, exists between a town and its health or police officers; nor is the town liable for their unlawful or negligent acts: *Id.*

As a general rule, municipal corporations are not liable to a suit, except when the right of action is given by statute: *Id.*

It seems that a city government cannot legally *ratify* the negligent, careless, or tortious acts of their officers, knowing them to be such, so as to make the city liable therefor: *Id.*

The payment of a bill by a city government to one employed by the health officers, is no evidence that the city government had knowledge that the services, for which the payment is made, were so negligently performed as to injure others; or that the negligent acts of such *employee* were approved or sanctioned: *Id.*

Negligence.

Sale of Dangerous Article.—The sale of an article in itself harmless,

and which becomes dangerous only by being used in combination with some other article, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchases the article from the original vendee, and who is injured while using it in dangerous combination with another article; although by mistake the article actually sold is different from that which is intended to be sold: *Davidson* v. *Nichols and Another*, 11 Allen.

New Trial.

Interested Juror.—A party seeking a new trial, by reason of interest in a juror, should negative his knowledge of such interest: *Jameson* v. *Androscoggin R. R. Co.*, 52 Me.

A simple denial of such knowledge, made in the motion, omitting to negative such knowledge on the part of his counsel, unaccompanied by any affidavit or other proof establishing the truth of such denial, is not sufficient to warrant the court to set aside the verdict: *Id.*

Principal and Surety.

Discharge of Surety by Forbearance to sue.—Forbearance by a creditor, without any binding agreement to refrain from taking proceedings, will not exonerate a surety. There must be a valid consideration for the agreement, and such as will preclude the creditor from enforcing payment against the surety until the expiration of the time specified: *Van Rensselaer* v. *Kirkpatrick*, 46 Barb.

Where an agreement was made between the maker and holder of promissory notes that the former should pay the latter weekly instalments upon the notes until the same should be paid, and that he would assign an account against the county, which had not yet become due, without any new note being given or new security actually taken; and the holder thereupon agreed that if the maker paid as he proposed, and continued to do so, he would not trouble the indorser: *Held*, that there being no valid consideration for the agreement to extend the time of payment, the terms of the original contract between the maker and the holder of the notes were not changed, and the indorser was not discharged: *Id.*

Held, also, that the payment of a single instalment, by the maker, was but a partial execution of the contract, and only the payment of what was actually due; and that it could not be regarded either as a consideration for extending the time, or as the actual full execution of the agreement: *Id.*

Steamboats.

Redress for Injuries to Passengers.—The Act of Congress, passed August 30th 1852, entitled "An act to amend an act entitled 'an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes,'" was intended to provide additional guards and securities for passengers who might embark upon steam-vessels, without exempting the owners from the liabilities imposed by the legal relationship which existed between them and passengers: *Swarthout* v. *The New Jersey Steamboat Company*, 46 Barb.

The regulations contained in the act did not supersede, and were not

intended to supersede the redress which the common law extended to aggrieved parties, for injuries received: *Id.*

Accordingly, a certificate made by an officer of the government, showing that the boilers of a steamboat have been properly inspected as directed by the Act of Congress, and showing a compliance with the provisions of the act, by the owners, will not exonerate such owners from liability, in an action brought by a passenger, to recover damages for a personal injury occasioned by the explosion of a boiler: *Id.*

In such an action the plaintiff is entitled to recover damages for his bodily pain and suffering: *Id.*

TENDER.

What is sufficient.—In order to constitute a valid tender, it must be proved that there was a production of the money, and an actual offer of it to the creditor; unless it be shown that the latter dispensed with it by some positive act or declaration: *Strong* v. *Blake et al.*, 46 Barb.

It is not enough that the debtor had the money in his pocket, and informed his creditor that he was ready to pay, without offering to do so; nor that he retained it in an envelope which was shown to, or shaken at the creditor. There must be an actual offer or presentation of the money, so that the creditor can take it: *Id.*

Waiver of.—Where a creditor, on being informed by a person that he had come to make a tender, referred him to his attorney, saying his office was open and it was but a step, without however refusing to receive the money, or interposing any objection, or intimating in any way that the presentation of the money was not required: *Held* that this did not amount to a *waiver* of the production and offer of the money: *Id.*

VENDOR AND PURCHASER.

Demand of Price.—Upon a sale of barley, by M. to D., for cash on delivery at the storehouse of G., it was agreed the money should be left by D. with G. to pay the price. The purchaser did not attend in person to the receiving and measuring of the grain, but had a clerk or agent there for that purpose:—*Held*, that a demand of the money of such clerk or agent was sufficient: and that it was not necessary for the vendor to go in search of the purchaser himself. to make the demand of him: *Morgan* v. *Gregg*, 46 Barb.

Held, also, that the clear intent of the contract was, that the money should be at the place of delivery; and if it was not there, the purchaser was in default; unless the vendor waived that condition. That whether he waived it or not, depended on his *intent* at the time of the delivery; and that was a question of fact for the jury: *Id.*

Admixture—Tenants in Common.—Held, further, that the fact that the grain was, as the same was delivered from day to day, at the storehouse of G., put into bins in which other barley of D. was being put, at the same time, was not such an admixture of the grain as to make the owners thereof tenants in common; no such tenancy being contemplated, and the admixture being for no such purpose: *Id.*

And that M., notwithstanding the admixture of the barley delivered by him, with barley delivered by others, did not lose his ownership, but remained owner of the quantity delivered, as though it had not been so