ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF MICHIGAN.[2]

SUPREME COURT OF NEW HAMPSHIRE.[3]

COURT OF APPEALS OF NEW YORK.[4]

ACTION.

Note partly founded on illegal Consideration—Action on the Case for the legal part of the Consideration.—Where the plaintiff sells the defendant intoxicating liquors in violation of law, and also other goods by a separate sale, and afterwards takes the defendant's note in payment for all the goods, the plaintiff by taking the note is not precluded from recovering the price of the articles legally sold in an action for goods sold and delivered: *Pecker et al.* v. *Kenniston*, Sup. Ct. N. H.

Fraudulent Pretence as to Cause of Action—Judgment founded on.—A town, against which a judgment has been rendered by agreement in an action brought by A. to recover for damage alleged to have happened to him by reason of a defect in a highway, cannot, while such judgment remains in full force, maintain an action on the case against A. for obtaining the judgment by false and fraudulent pretences as to his alleged cause of action, and without the existence of any cause of action in fact: *Hillsborough* v. *William C. Nichols*, Sup. Ct. N. H.

An allegation in the declaration of a conspiracy between A. and another, will not make such an action maintainable against A.: *Id.*

AGENT.

Authority to bind Principal.—A. factor cannot bind his principal by a disposition of his property, in any other way than by sale in the usual course of trade: *Easton* v. *Clark*, 35 N. Y.

When the attempted transfer of property by an agent is made in a manner not within the scope of the authority confided to him, or with which the agent is not apparently clothed, no title passes, and the property may be reclaimed by the owner: *Id.*

So when the purchaser gives to the agent his check for a part of the price, with a full knowledge that the agent designs to use the same for his own private benefit, the principal is not bound thereby: *Id.*

ASSESSOR.

Nature of the Office.—The office of assessor, in determining what property is subject to, and what is exempt from, taxation, is judicial; and the assessor, in determining such questions, acts judicially; and is not liable for errors committed in arriving at his conclusions upon that subject: *Barhyte* v. *Shepherd and Vose*, 35 N. Y.

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[1] From Charles Allen, Esq., Reporter; to appear in vol. 12 of his Reports.

[2] From Hon. T. M. Cooley, to appear in 15 Michigan Rep.

[3] For these abstracts we are indebted to the courtesy of the judges of the court. The cases will appear in 46 or 47 N. H. Rep.

[4] From Joel Tiffany, Esq., Reporter; to appear in vol. 8 of his Reports (35 N. Y.).

ASSUMPSIT.

Voluntary Subscription — Consideration — Parties.—A subscription by which several persons promise to pay the sums set opposite their names to provide a free dinner on the 4th of July, is legally binding, notwithstanding no promissee is named; and it may be collected in the name of one of the number, who is selected by the rest to collect and disburse the money: *Comstock* v. *Howe*, 15 Mich.

BANKS.

Taxation of Real Estate owned by National Banks.—National banks may be taxed by the town or city in which they are located, for their real estate situated in such town or city, to the same extent according to its value as other real estate is taxed; but they cannot be taxed, under state laws, for the shares of any of their stockholders: *First N. Bank* v. *Portsmouth*, Sup. Ct. N. H.

The owner of stock of a national bank in N. H. residing, April 1st 1865, in the town or city in which the bank was located, could then be taxed in said town or city for such stock, under the laws of N. H. which, to that extent, were in conformity to the laws of the U. S.: *Id.*

BILLS AND NOTES.

Holder without Notice.—A *bonâ fide* holder of a bill or note, taken with no other knowledge than the paper furnishes, has the right to treat the parties to the same as liable to him, in the same manner and order, and to the same extent, as they appear on the instrument, although, as between themselves, their relations may be different. Knowledge subsequently acquired by the holder does not affect his rights: *Hoge and Others* v. *Lansing*, 35 N. Y.

L. made his note for $1693, and loaned the same to A. & H. for their accommodation. A. & H. transferred the note to the plaintiff, who received the same without knowledge of this relation of the parties, and paid full value therefor. The plaintiff afterward, and after learning the real position of the parties, made arrangements with the assignees of A. & H., extending the time for the payment of such note, and authorizing a sale of the assets at less than their value. *Held*, that this afforded no defence to L., the maker of the note; that he was liable to the plaintiff in the order and to the extent indicated by the note itself: *Id.*

BOND.

Irregular Execution.—If a person named as surety in the body of a bond signs his name on the left-hand side of the page, in the place appropriate for the attestation of witnesses, and a person not named in the body of the bond signs his name on the right-hand side of the page, by one of the seals, it may be shown by parol evidence that the former intended to sign as a surety and the latter as a witness; and the former may accordingly be held liable on the bond: *Richardson* v. *Boynton and Others*, 12 Allen.

BOUNDARY.

By Prescription.—Practical location of a boundary line, and an acquiescence therein of the parties for a period of more than twenty years, is conclusive of the location of the boundary line: *Reed* v. *Farr*, 35 N. Y.

Such location and acquiescence is deemed conclusive, on the ground that it is evidence of the correct location of so high a nature as admits of no contradiction: *Id.*

CONDITIONS.

Removal of County Seat on Conditions.—The board of supervisors having authority to remove the county seat with the consent of a popular vote, passed a resolution for removing it on certain conditions to be performed by the people of the town to which it was to be removed; and then submitted to the electors the question of removal: *Held*, that to make the submission valid, the electors must have the right to pass upon the removal upon the conditions annexed; and a submission of the question generally, separate from the conditions, was void: *People* v. *Russell*, 15 Mich.

CONSTITUTIONAL LAW.

Freedom of Religion.—The school committee of a town may lawfully pass an order that the schools thereof shall be opened each morning with reading from the Bible and prayer, and that during the prayer each scholar shall bow the head, unless his parents request that he shall be excused from doing so; and may lawfully exclude from the school a scholar who refuses to comply with such order, and whose parents refuse to request that he shall be excused from doing so: *Spiller* v. *Inhabitants of Woburn*, 12 Allen.

CONTRACT.

Against Public Policy.—An agreement by two that one of them shall bid in behalf of both for a mail contract, is not invalid unless made for an illegal purpose affecting the public policy: *Huntington* v. *Bardwell*, Sup. Ct. N. H.

It is not illegal for one interested in a mail contract, but not a nominal party to it with the government, to sign the bid and contract as surety, unless this was done with a design to defraud the government: *Id.*

CUSTOM.

Mercantile Custom, when void.—A custom that an intermediate carrier who receives property subject to charges may deduct from the freight earned by a prior carrier, the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading, would not be a valid custom which the courts would enforce: *Strong* v. *Grand Trunk Railway Co.*, 15 Mich.

DEBTOR AND CREDITOR.

Action against Assignee for Account.—In an action by a preferred creditor against a general assignee for the benefit of creditors, for an accounting, the answer by the assignee, setting up that he had incurred certain expenses in repairing a steamboat belonging to the estate, and in defending suits against the boat, &c., is not a counter-claim, and need not be replied to by the plaintiff: *Duffy* v. *Duncan*, 35 N. Y.

In such action the assignee must prove the estate benefited by the money paid out, before he is entitled to be credited therefor: *Id.*

The referee is a competent judge of the value of the services rendered

by the assignee, and the compensation payable to executors is a proper allowance: *Id.*

DOMICIL.

Nature of Residence required.—In order to acquire a new domicil, it is not necessary that the person should reside in the place in question with the purpose of making it his permanent home and residence; but it is sufficient if he resides there with the intention to remain for an indefinite period of time, and without any fixed or certain purpose to return to his former place of abode: *Whitney* v. *Inhabitants of Sherborn*, 12 Allen.

EQUITY.

Injunction Bond.—Where upon a bill in equity brought by A. against B. a temporary injunction was issued upon condition that before it was served A. should file a bond of indemnity satisfactory to the clerk, with a condition that A. should pay and satisfy all such damages as might be occasioned to B. in case the bill in equity should be determined against A., and before the service of the injunction, which was on the 17th day of August 1860, a bond with such a condition was filed and was accepted by the clerk as satisfactory for the time, upon the express understanding that a new bond should be filed if required, and, it being required, a new bond with a condition in the same terms was filed on the 27th day of the same August: *Held*, that the condition of the second bond covered all the damages occasioned to B. by reason of the injunction: *Charles D. Towle* v. *Levi G. Towle et al.*, Sup. Ct. N. H.

An injunction forbidding A. to carry any passengers to or from a certain depot in the town of E., forbids him to carry passengers from that depot to places outside of such town, and from such places to that depot: *Id.*

In an action at law by B. against A. and his sureties upon such a bond to recover damages for a breach of its condition, in the absence of fraud the defendants are concluded by the final decree in equity, so far as the same matters come in question: *Id.*

EVIDENCE.

Admissions.—Admissions by a party that the conditions upon the failure of which his title and right of action depended had been performed, are admissible in evidence in an action prosecuted by the plaintiffs as heirs of the party making the admissions, by reason of privity between them: *Spaulding and Another* v. *Hallenbeck and Another*, 35 N. Y.

Where a defendant is put on the stand as a witness, and is then examined, without objection, touching matters in respect to which he is not competent to testify, and, after the examination is closed, a motion is made to strike out all the testimony of the said party, the motion should be denied if it would include any testimony which it was competent for the party to give: *Id.*

FIXTURES.

Between Mortgagor and Mortgagee.—If, after the execution of a mortgage of real estate, fixtures are added by a tenant at will of the mortgagor, his right to remove them, after an entry by the mortgagee

for the purpose of foreclosure, must be determined by the rule which prevails as between mortgagor and mortgagee, and not that which prevails as between landlord and tenant: *Lynde* v. *Rowe and Others*, 12 Allen.

Highway.

By Prescription.—The use of a road by the public as a highway for twenty years openly, adversely under a claim of right, exclusively and continuously, will make it a public highway by prescription against all parties interested: *Connary* v. *Jefferson*, Sup. Ct. N. H.

Damages from insufficiency of.—Under our statute which provides for the recovery of damages against a town for injuries done to the plaintiff's "person, or to his team or carriage," by the insufficiency of a highway: *Held*, that plaintiff might recover for injuries to his sled and load of coal thereon: *Id.*

Indictment against Town.—Under our statutes a town is liable upon indictment for neglect to keep a highway therein in good and suitable repair, although the defect in the highway is caused by the wrongful obstruction of the highway by a bridge erected by a railroad corporation: *State* v. *Dover*, Sup. Ct. N. H.

No arrangement between the town and the railroad corporation can bar the right of the state to require the town to keep such highway in suitable repair: *Id.*

A *nolle prosequi* entered before trial on an information is no bar to a subsequent indictment: *Id.*

Discontinuance of new Highway, not constructed.—In petitions for discontinuance of new highways, not constructed, the commissioners should not discontinue unless they find that the change of circumstances which has taken place since the highway was laid out, has been such as to render the same no longer necessary and to require its discontinuance: *Marlborough's Petition*, Sup. Ct. N. H.

And in their report discontinuing any such highway, the commissioners should state not only the changes that have occurred since the highway was laid out, but should also state explicitly that the highway is discontinued by reason of such changes, and they should also set forth not only the changes generally, but the particular circumstances and how they affect the case: *Id.*

The indebtedness of a town, incurred after a highway was laid out and before it was constructed, may be a proper cause for discontinuance of such highway, but though such indebtedness may be large, it is not necessarily such a cause: that must depend upon all the circumstances: *Id.*

Homestead.

As against a Creditor whose Debt accrued before the passage of the Statute.—If a creditor, whose debt accrued before the passage of the New Hampshire Homestead Act, present his claim to the commissioner on an insolvent estate, take his dividend and without objection allow the widow's homestead to be assigned by the Probate Court; and the administrator for the payment of the debts allowed sells the land assigned subject to the widow's homestead. such creditor cannot afterwards require the administrator to sell any interest of the estate in the land

assigned for homestead to pay the balance of his debt: *Judge of Probate* v. *Simonds*, Sup. Ct. N. H.

In such case, if a creditor would enforce his claim against the widow's right of homestead, he should object to the assignment till his debt is paid: *Id.*

Husband and Wife.

Second Marriage on Presumption of Death of Former Husband.—A woman married a second husband, after living separate from her first husband for about four years without hearing of him or of his death, and did not hear of him for sixteen years afterwards. *Held*, that the presumption was that she was the lawful wife of the second husband: *Kelly* v. *Drew*, 12 Allen.

Dower—Evidence of Death of Husband.—The demandant in a writ of dower is a competent witness to prove her husband's death: *Flynn* v. *Coffee*, 12 Allen.

In order to rebut the presumption of death arising from absence for seven years, evidence is admissible to show that the person has been heard of as living within that time, though by others than members of his family: *Id.*

Property of Married Women—Estate by the Curtesy.—Under the constitutional and statutory provisions by which the real estate acquired by a married woman is to be and remain hers the same as if she were unmarried, and not liable for the husband's debts or engagements, the estate of the husband by the curtesy can no longer exist: *Tong* v. *Marvin*, 15 Mich.

Marriage where one Party is under Age of Consent.—Where parties are married, one of whom is over and the other under the age of consent, the former, by the statutes of this state, is bound by the marriage, unless they separate by consent before the other reaches lawful age, and do not cohabit afterwards; or unless the other refuses consent on arriving at that age. And a second marriage by the former, in the absence of such mutual separation, or of such refusal to consent, is bigamy: *People* v. *Slack*, 15 Mich.

Insurance.

Waiver of Condition of Policy.—Although, by the printed terms of the policy, it is stated that no policy will be considered binding until the premium is paid, yet the agent may waive such condition, and give a short credit: *Boehen* v. *Williamsburgh City Ins. Co.*, 35 N. Y.

The delivery of a policy, without requiring payment, raises a presumption that a short credit is intended: *Id.*

Where it is to be inferred, from the facts of the case, that a credit is intended, the policy will be valid, though the premium has not been paid: *Id.*

Judgment.

On Joint and Several Bond.—In an action on a joint and several bond against all the obligors, the plaintiff cannot have judgment against all the defendants otherwise than jointly: *Judge of Probate* v. *Webster et al.*, Sup. Ct. N. H.

Where a judgment has been recovered in an action on such a bond

against the three obligors, and debt is brought upon that judgment against one only of the three, the nonjoinder may be pleaded in abatement: *Id.*

Where a judgment has been rendered at a trial term of the Supreme Judicial Court, it is within the power of the court rendering the judgment to vacate it at a subsequent term for sufficient cause shown: *Id.*

JURY.

Discharge of.—It is not error for the judge to refuse to discharge the jury, until they have agreed upon their verdict. Whether or not to discharge them, is a question addressed to his discretion: *White* v. *Calder*, 35 N. Y.

LEASE.

By Guardian—Ratification.—The guardian for an incompetent person made a lease of lands for a term of years, and a portion of the rent was paid in advance. The ward soon died, and the lessees applied to the heirs to ratify the lease, but they made no response. *Held*, that the lessees might treat this as a refusal to ratify, and that they might recover from the estate the rent paid for the unexpired portion of the term, as paid without consideration: *Campan* v. *Shaw*, 15 Mich.

MUNICIPAL CORPORATIONS.

Enforcing by-laws by penalties.—A municipal corporation cannot enforce its by-laws by penalties, unless authorized to do so by statute: *City of Grand Rapids* v. *Hughes*, 15 Mich.

Encroachments on Streets.—The power to impose penalties for *obstructions* to streets, would not warrant imposing them for *encroachments* upon streets also; the statutes having always distinguished the two offences, and provided different modes of redress: *Id.*

NONSUIT.

Nonsuit by Justice, what is.—A justice of the peace refusing to proceed with a case before him, his refusal may be treated as a judgment of nonsuit, and an appeal taken therefrom: *Partridge* v. *Lott*, 15 Mich.

QUO WARRANTO.

Case of Public Office—Admission of Facts.—Information in the nature of a *quo warranto* being filed to try the right to a public office, the attorney-general has control of the proceedings, and is alone authorized to sign admissions of fact. The case cannot go to a hearing upon stipulations between the relator and the defendant: *People ex rel. Chapman* v. *Pratt*, 15 Mich.

Misjoinder.—Persons claiming to be wardens and vestrymen of a church, cannot join as relators to test in one proceeding their rights to the offices respectively against adverse claimants: *People ex rel. Hudson et al.* v. *Demill et al.*, 15 Mich.

Pleading.—Where an information is filed to try the right to an office in a corporation, it should set forth such facts as, in connection with the public statutes of which the court can take judicial notice, will show that such a corporation exists: *Id.*

REVERTER.

Breach of Condition.—The right or possibility of reverter which belongs to a grantor of land on condition subsequent, is extinguished by a conveyance thereof by deed to a third person before entry for breach of condition; even though such conveyance be to a son of the grantor, who upon the grantor's death becomes his heir: *Rice* v. *Boston and Worcester Railroad Co.*, 12 Allen.

SURETY.

For Guardian—Improvident Investment.—If a guardian improvidently invests his ward's money in the note of a single person, the sureties on his bond thereupon become and remain liable for any loss which may occur, although he dies and the borrower becomes administrator of his estate, and, in settling the account of his intestate as guardian, returns the note as assets of the ward's estate: *Richardson* v. *Boynton*, 12 Allen.

TAXES.

Bill in Equity—Rule of Pleading.—A bill in equity to restrain the collection of taxes for asserted irregularities which are not proved, will not be sustained on proof of other irregularities not set forth in the bill: *Hubbard* v. *Winsor*, 15 Mich.

TITLE.

Bill to Remove Cloud on Title.—A bill to restrain collection of taxes on the ground that they constitute a cloud upon title, must set forth the description of the lands, or it cannot be sustained. And where it alleges that a part only of the taxes are illegal, it should furnish the court with the information which will enable the legal to be separated from the illegal: *Conway* v. *Showerman*, 15 Mich.

TROVER.

Conversion by Tenant in Common.—One tenant in common having removed saw logs owned by the two, down the St. Clair and Detroit rivers, from Port Huron to Trenton, when it was his duty by contract to divide them at the former point, and claiming to own them exclusively by purchase, it was *held* such a conversion as authorized the other to sue in trover: *Ripley* v. *Davis*, 15 Mich.

VENDOR AND VENDEE.

Written Contract in two Separate Papers.—If an order for goods is filled up in duplicate, and one copy, which is signed by the seller, accepting the order, is delivered to the purchaser, and the other copy is signed by the purchaser and delivered to the seller, the two papers may both be submitted to the jury as evidence of a written contract signed by both the parties; and if the purchaser afterwards adds his own signature to the copy in his possession, without fraudulent intent, and subsequently erases it, this will not prevent his using such copy in evidence, in an action against the seller for a failure to deliver the goods: *Rhoades* v. *Castner and Others*, 12 Allen.