the stockholders in Massachusetts did not belong to any corporation in that state, to which the Massachusetts laws, to which alone they were amenable, had any application.

The plaintiffs must first enforce New Hampshire laws upon those who are citizens of New Hampshire, or those upon whom service has been made, within this jurisdiction or those who are willing to submit voluntarily to this jurisdiction, and when such stockholders as thus become proper parties to the bill and who are solvent have paid the whole debt, if they should find that their remedy for contribution against the stockholders in Massachusetts is in any way defective (which we presume will not be the case), they must learn wisdom by experience, and not become associated with stockholders from other states, another time, without some contract among themselves, for contribution, which will bind all parties under any jurisdiction.

Case discharged.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF MISSISSIPPI.[2]

SUPREME COURT OF NEW YORK.[3]

AGENT.

Exceeding his Powers becomes Principal, and acquires the Rights of one.—One who is simply employed to sell goods and pay over to his employer the money received from the sales, has no authority to exchange such money with a third person; and if he does so, and receives in exchange a counterfeit bill, he may maintain an action in his own name to recover back the money paid out by him for it; and it is not necessary, before bringing such action, to offer to return the counterfeit bill: *Kent* v. *Bornstein*, 12 Allen.

BANKRUPTCY.

Right to Bankrupt's Property omitted from Schedule—Jurisdiction of Equity to annul Discharge, &c.—Whether property fraudulently omitted from his schedule belongs to his assignee for distribution among his creditors, or whether it would be appropriated by a court of equity in satisfaction of the debt of a creditor, at whose instance the court set aside the bankrupt's discharge for fraud—*Quære?* But if it did belong

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

[2] From J. Z. George, Esq., Reporter; to appear in 39 Mi. Reports.

[3] From Hon. O. L. Barbour; to appear in vol. 47 of his Reports.

to the assignee, the court would nevertheless entertain a bill to annul the bankrupt's discharge for fraud, and to render a decree against him for the complainant's debt: *Edwards* v. *Gibbs et al.*, 39 Mi.

Vested Remainder must be returned in Schedule.—The wilful omission, from his schedule, by a bankrupt, of his interest in a vested estate in remainder to take effect in possession after the termination of a precedent life estate, is such a fraud as will vitiate his discharge: *Id.*

Champerty.

Right to sue for a Wrong not assignable.—A right of action to sue for a wrongful conversion of property is not assignable: such an assignment would be but a mere transfer of a right to sue for a wrong, and is against public policy and void. Nor is the rule different where the assignment is a mere release or quit-claim of the assignor's right. See Goodwin *v.* Lloyd, 8 Porter 237; Gardner *v.* Adams, 12 Wend. 297; Dunklin *v.* Wilkins, 5 Ala. Rep. 199; McGoon *v.* Ankeny, 11 Ill. Rep. 558; 3 Littell 41: *Davis* v. *Herndon*, 39 Mi.

A Chattel held adversely by another not assignable.—An assignment of a chattel in the adverse possession of a third party claiming it as his own, and which is known to the assignee at the time, is against public policy and void. See Brown *v.* Lipscomb, 9 Porter 472; Young *v.* Ferguson, 1 Littell 298; McGoon *v.* Ankeny, 11 Ill. Rep. 558; Dunklin *v.* Wilkins, 5 Ala. Rep. 199: *Id.*

Common Carrier.

What constitutes a Common Carrier—Case in Judgment.—Where a planter, employing his wagons in hauling his cotton crop to market, and habitually lading them on their return trips with goods to be transported for hire, receives such goods and executes his receipt therefor, undertaking to deliver them to the consignee in good order and without delay at the customary rate of charges, he will be responsible as a common carrier. See Gibson *v.* Hunt, 1 Salk. 249; Satterlee *v.* Grant, 1 Wend. 272; Edwards on Bail. 430: *Harrison* v. *Roy*, 39 Mi.

Common Carrier bound to transport Goods under his Common-Law Responsibility.—A common carrier is bound by law for a reasonable reward, to receive and carry goods offered for transportation, subject to all the responsibilities legally incident to his employment. He has no right to refuse to receive and transport goods because the shipper will not assent to a special contract of shipment which limits his common-law responsibility; and if he do so he will be liable to an action for damages: *Southern Express Co.* v. *Moon*, 39 Mi.

Limitations of Carrier's Responsibility by Special Contract.—Whether a common carrier has a right to limit, by special contract with the shipper, his common-law responsibility as an insurer of the goods intrusted to him for transportation: *Quære?* But, conceding that he can, the assent of the shipper must be express, and upon a sufficient consideration, and be freely and fairly given with a full knowledge of the contract and of the legal rights thereby waived, and not obtained by the fraud and circumvention of artfully-contrived printed receipts thrust upon the shipper in the hurry and press of railroad travel, or under other

circumstances not favorable to a full understanding of the force and effect of the contract: *Id.*

Limitations do not extend to Negligence.—Exceptions in a common carrier's receipt, limiting his common-law responsibility, are strictly construed against the carrier, and are never extended to relieve from responsibility for a loss occasioned by his own negligence: *Id.*

Same.—In case of loss of goods by a common carrier, he will be responsible, unless he show affirmatively that the loss was occasioned by a cause within some one of the exceptions in his receipt: *Id.*

Common-Law Responsibility of Common Carriers.—A common carrier, when there is no special contract limiting his responsibility, is bound as an insurer of goods received by him for transportation, as against loss occasioned by any cause other than the act of God, the public enemy, or by the conduct of the shipper: *Id.*

Liability for Goods destroyed by Fire.—The plaintiff delivered a quantity of beer barrels at one of the freight houses of the defendant, at East Albany, for transportation to Boston, directed to a person in that city. The barrels were not tallied, counted, booked, or receipted, according to the usual custom of the company, nor did the plaintiff ask to have them tallied, &c.; but they were delivered at the usual place for transacting such business, and received by persons in the employ of the defendant; and the defendant's agent was present when a portion of the property was delivered, and directed where it should be put. The barrels were accidentally destroyed, by fire on the same evening they were delivered, and while in the possession of the defendant, in its freight-house: *Held*, that the defendant received the property for the purpose of *transportation*, and not as a *warehouseman*; and that it was liable as a *common carrier*, for the value: *Coyle* v. *The Western Railroad Corporation*, 47 Barb.

Contribution.

Marshalling Assets—Not enforced between Co-legatees when Legacy of one has been taken by Title paramount to Title of Testator.—The doctrine of marshalling of assets does not apply to a case between specific legatees under a will where all the property bequeathed to them is subject to an encumbrance paramount to the title of the testator, and the property bequeathed to one of the legatees has alone been seized to satisfy the encumbrance: *People et al.* v. *Horton et al.*, 39 Mi.

Case in Judgment—Contribution between Co-legatees.—A. died, giving all his estate to B., who afterwards died, leaving specific legacies of the personalty so bequeathed to him to several legatees. Afterwards a judgment was rendered against the administrator of A., which was wholly satisfied by a levy on the property lequeathed to one of the legatees:—*Held*, that he was not entitled to contribution from his co-legatees, whose legacies were equally with his liable to the satisfaction of the judgment. In such a case the creditor has a right to levy his execution on any part of the property, and if he levy solely on the legacy of one it is a misfortune for which the legatee has no remedy against his co-legatees: *Id.*

When Co-legatees entitled to Contribution against each Other.—Where one of several specific legatees has been compelled to pay the whole of a

debt due by the testator, he will not be entitled to contribution against his co-legatees who have received their legacies, if the estate be solvent independent of their legacies, nor in case it become insolvent by the *devastavit* of the executor: *Id.*

Corporation.

Pleading and Practice—Character of Party set out in Pleading not traversable unless denied under Oath.—A subscriber for stock was garnisheed by a creditor of the company, and he answered in the usual form, denying any indebtedness. The creditor took issue upon the answer, alleging that the garnishee was indebted to the company on account of his subscription for stock in the same:—*Held*, that on the trial of this issue the garnishee could not object that the company had never been legally incorporated, he having failed to deny under oath the legal incorporation of the company as required by art. 237, p. 518, of the Rev. Code: *Saffold* v. *Barnes*, 39 Mi.

Subscriber for Stock is not released by Fraud in procuring his Subscription.—A member of an incorporated company is bound by the acts of its officers and agents within the scope of their authority; and he cannot therefore set up, against a creditor of the company who seeks to subject to the payment of his debt the indebtedness of such member on account of his subscription for stock in the same, that his subscription was obtained by fraud of the agent of the company, nor any secret agreement between him and such agent, by which he was to be released from his subscription in case certain conditions promised by the agent were not complied with. See Walker *v.* Mobile and Ohio Railroad Co., 34 Miss. Rep. 245; Ellison *v.* Same, 36 Id. 572: *Id.*

Counterfeit Money.—See *Agent.*

Criminal Law.

Two Statutes imposing Penalty—Question of Repeal of First by the Second.—A statute imposing the penalty of a certain fine and *minimum* term of imprisonment for a first offence is not repealed by the enactment of a subsequent statute, providing that on conviction of such an offence the court may in its discretion impose the penalty either of the fine or the imprisonment, where the offender shall prove to the satisfaction of the court that he has not before been convicted of a similar offence, and also providing that all inconsistent statutes are repealed: *Dolan* v. *Thomas*, 12 Allen.

A statute imposing, for an offence, the penalty of imprisonment in the house of correction in the county where the offence was committed, is not repealed by the enactment of a subsequent statute, providing that the court in its discretion may commit the person under sentence to the house of correction in any county in the Commonwealth, in the same manner as such person might be committed in the county where the court is holden, and that all inconsistent statutes are repealed: *Carter* v. *Burt*, 12 Allen.

A statute imposing, for an offence, the penalty of a fine or imprisonment not exceeding one year is repealed by the enactment of a subsequent statute, which contains no saving clause as to offences already committed, and imposes for the like offence the penalty of a fine and

imprisonment, not less than three nor more than twelve months, unless the offender shall prove to the satisfaction of the court that he has not before been convicted of a similar offence, in which case he may, in the discretion of the court, be sentenced to be punished by imprisonment without fine, or by fine without imprisonment. And after the enactment of such subsequent statute, one who committed the offence before its enactment cannot be punished: *Flaherty* v. *Thomas*, 12 Allen.

Debt.

When to be deemed contracted.—The discounting of a new note, and the application of the proceeds to the payment of a former note, extinguishes the old debt, and creates a new one: *Fisher* v. *Marvin et al.*, 47 Barb.

Under such circumstances, the contract does not relate back to the time when the first note was discounted; but, the old note having been paid and taken up, the debt will be deemed to have been *contracted* when the new note was given: *Id.*

And if a debt thus contracted by a manufacturing corporation, by the giving of a new note, is payable within one year after the date of such new note, and a suit is brought on the note against the company, within one year after the same becomes due, the stockholders are personally liable: *Id.*

Estate for Life.

What is Capital to which the Remainder-Man is entitled.—If new shares are created in the capital stock of a corporation, and the right to subscribe for such new shares at par is given to the existing stockholders *pro rata*, and is valuable, and certain shares are held in trust, to pay the income thereof to A. during life, with remainder to B., the amount received on the sale of the right to take the proportionate number of new shares is to be held in trust as capital, the interest or income whereof shall be paid to A. during life, with remainder to B.: *Atkins* v. *Albree*, 12 Allen.

Executor and Administrator.

May sue for Trespass to Realty.—The right to recover damages for a trespass committed on realty in the lifetime of the intestate survives to his administrator: *N. O. J. & G. N. R. Co.* v. *Moye*, 39 Mi.

Failure to apply Assets to Debts a Breach of Official Bond.—It is the duty of an administrator to apply the assets in his hands to the payment of the intestate's debts; and a suit on the administration-bond by a judgment-creditor alleging a sufficiency of assets and the failure of the administrator to pay the debt, is an action to recover for a breach of this duty; and hence it is no answer to such an action that the administrator has not wasted or misapplied the assets; his retention of the assets in his own hands, and his failure to apply them to the payment of the debt, constitute in law a breach of the bond: *Cannon* v. *Cooper et al.*, 39 Mi.

Making Joint Bond, each liable for the other.—The execution of a joint administration-bond by two administrators renders each of them liable for the faithful performance of the duty of his associate as well as

of himself; and hence, though one of the administrators may have received all of the assets and conducted the entire administration of the estate, the other is liable to account. See Boyd *v.* Boyd, 1 Watts 365; Still's Appeal, 10 Penna. St. Rep. (Barr) 152; Green *v.* Harberry, 2 Brock. 403; Lidderdale *v.* Robinson, Id. 159; Babcock *v.* Hubbard, 2 Conn. Rep. 536: *Jeffries* v. *Lawson*, 39 Mi.

Effect of Acknowledgment of Liability for Acts of Administrator when made by a Lawyer.—When a positive and absolute acknowledgment of liability for the acts of his co-administrator is made by one cognisant of all the facts, and entirely competent to form an opinion as to the extent of his liability (as by a lawyer of eminence), the acknowledgment is conclusive, unless it be shown affirmatively that it was founded on mistake: *Id.*

Liable to account for Assets left by Heir in his hands to pay illegal Legacy.—If, in a partial voluntary settlement between an executor and the heir, funds be left in the hands of the former to pay certain legacies in the will which are illegal, the funds so retained continue to be assets in his hands, and, upon his failure to pay the illegal legacies, he will be liable to account for them to the heir: *Wells* v. *Mitchell*, 39 Mi.

Insurance.

Liability of Insurers for Money paid for Injury by Collision—What may be included in the Damages.—The rule that insurers are liable for the amount paid for an injury done by a vessel insured to another vessel by reason of collision is settled in this Commonwealth, and will not now be reconsidered: *Blanchard* v. *Equitable Safety Ins. Co.*, 12 Allen.

In an action on a policy of insurance on a vessel, issued here, for a sum expressed in dollars, to recover the amount paid in a foreign country for an injury done to another vessel by a collision, the insured may also recover, as a part of his damages, the fees of counsel and commissions of an agent, if fairly and properly incurred in defending against the claim for the injury, and also the premium for exchange paid by the insured in order to enable him to remit the amount to such foreign country: *Id.*

Conveyance of Vessel by Insured and Reconveyance to him—Validity of Policy.—If a mortgagor of a vessel sells his remaining interest therein, with a stipulation that he will pay off the mortgage, and fails to comply with this stipulation, and the bargain is accordingly given up and the title reconveyed to him, a policy of insurance issued to him before his agreement of sale will be valid to cover a loss of the vessel after the reconveyance of the title to him: *Worthington* v. *Bearse*, 12 Allen.

Waiver of Objections by Insurers—Condemnation and Sale of Vessel as unnavigable in a Port of Necessity—What may be recovered.—A general refusal by insurers to pay a loss, and a subsequent negotiation with the insured for a settlement, without objection to the form of the preliminary proof of loss, will be a waiver of such objection: *Graves* v. *Washington Marine Ins. Co.*, 12 Allen.

If the defendants, in an action upon a policy of insurance, have put in evidence some of the papers which constituted the preliminary proof of loss, without objecting to their sufficiency at any time during the

trial, it will be too late to raise the objection at the argument in this court on exceptions; although the judge at the trial refused to require the plaintiff to read the paper to the jury: *Id.*

If a vessel which is insured by a valued policy becomes unnavigable by reason of perils of the sea, while on her voyage, and requires repairs which will cost more than her valuation, and is thereupon condemned and sold in a port of necessity, without any repairs being made, and without an abandonment, the owner may recover the full sum insured, deducting the proceeds from the sale, if the amount so found does not exceed his net loss; and it is not necessary to inquire into her diminished value at the home port: *Id.*

Limitations, Statute of.

Effect of concealed Fraud.—If the fraud by which the plaintiff is prevented from asserting his rights during the time prescribed by the Statute of Limitations be so concealed by the positive act of the defendant that plaintiff could not have discovered it by reasonable diligence, the Statute of Limitations will not commence running until the discovery of the fraud: *Edwards* v. *Gibbs et al.*, 39 Mi.

The bill charged that W., at the time of his application, and at the date of his discharge as a bankrupt, had an estate in remainder, to vest after the death of his mother, in a large amount of property. This estate was secured to him by the will of his stepfather, which was probated in 1835. W., being then largely indebted, fraudulently withheld it from record after it had been probated, and kept it concealed until 1856, when he supposed all his debts were barred, and then placed it on record. W., being well apprised of his interest in the property, fraudulently omitted it from his bankrupt schedule, and thereby concealed it from his creditors. The complainant recovered a judgment against W. in 1839, but had no notice of these frauds nor means of knowing them, nor was there anything to put him on inquiry as to the interest of W. in the property until the year 1856, when the will was recorded. The bill was filed in March 1857: *Held*, on demurrer to the bill, that it was not barred by the Statute of Limitations. See Buckner & Stanton *v.* Calcote, 28 Miss. Rep. 431: *Id.*

Married Woman.

Capacity to Contract.—A married woman cannot bind herself, or create a charge upon her separate estate, by a promise to pay for nursing and taking care of her sick and infirm father, where she does not agree or indicate an intention to bind her separate estate: *Manchester* v. *Sahler*, 47 Barb.

Nor is she liable, in such a case, on the ground that under the statute she is bound to maintain her father, where it appears that she did not assume to pay, for that reason and upon that consideration, and did not agree to bind her separate estate: *Id.*

The Statutes of 1848 and 1849, were not intended to confer any greater authority upon *femes covert*, to enter into contracts generally, than previously existed; and did not remove their legal incapacity to contract debts: *Id.*

They do not authorize a married woman to charge her separate estate for a debt which did not arise in connection with it, and which is not for her own benefit, or the benefit of the estate: *Id.*

Mortgage.

Voluntary Promise of Mortgagee not to Sell without Notice to Mortgagor—Fraudulent Sale.—If a mortgagee of land voluntarily promises the mortgagor not to act under a power of sale contained in the mortgage without notice to him, but is afterwards induced by falsehood to assign the mortgage to persons who thereupon proceed to sell the land, under the power of sale, without notice to the mortgagor and clandestinely, whereby the latter is deprived of his equity of redemption, he can maintain no action at law against the parties guilty of the fraud: *Randall* v. *Hazelton*, 12 Allen.

Rivers.

Navigable River—Meaning of the Term.—The term "navigable," by the common law, had reference only to such waters as were by the law of nations free to the commerce and navigation of all nations, and not to the capacity of a river or other stream for navigation; and hence "navigable river" means only that part of a fresh-water stream debouching into the sea, in which the tide ebbs and flows: *Steamer Magnolia* v. *Marshall*, 39 Mi.

Fresh-water Rivers—Rights of riparian Owner and Public in.—The rules of the common law, which secured the property of the shores of the sea and of navigable rivers in the crown for the public, were never applied to fresh-water streams, though in fact capable of navigation. The soil under these streams belonged to the riparian proprietors, and not to the crown; this right, however, is subject to an easement in the public to navigate such streams as were in fact navigable: *Id.*

Grant conveys usque ad filum.—A grant of land, bounded "by" or "on" a fresh-water stream, whether in fact capable of navigation or not, conveys the soil *usque ad medium filum aquæ*, and of course conveys to the grantee the shore between high and low water mark: *Id.*

Navigator cannot land on, or the Public approach Stream over, Shore.—The right in the public to navigate a fresh-water stream capable of navigation does not deprive the owner of the shore between high and low water mark of his exclusive right and dominion over it, nor secure to the navigator the right to land his vessel and use the shore for the purpose of taking on or discharging a cargo; nor does it secure the public the right to approach the stream over the land of the riparian proprietor against his consent: *Id.*

Right of riparian Proprietor to charge for use of Shore.—The owner of the shore of a fresh-water river, capable of navigation, has the right to charge such sums as he sees proper, to navigators, for using the shore in lading and unlading their vessels, if he give notice of his charge before such use is made of his property: *Id.*

Mississippi River not a navigable River.—The Mississippi River is not, above tide water, a navigable stream, in the technical sense of that term, and is in all respects subject to the rules of the common law regulating the rights of the public and of riparian proprietors in fresh-water streams capable of being navigated: *Id.*

Authorities cited.—The authorities, both English and American, in relation to navigable streams and fresh-water streams capable of being navigated, and to the rights of the public and the riparian proprietors, collected and reviewed in this case: *Id.*

STATUTES.—See *Criminal Law.*

SURETY.

Admissions of Principal as Evidence against—Several Bond—Liability of Surety on.—In an action against a surety who has signed the bond of the cashier of a bank, severally and not jointly, to secure the cashier's faithful performance of the duties of his office, the plaintiffs, after proving that it was the custom of the directors to have an examination of the affairs of the bank once in six months, and of the cashier to lay before them twice a week a general statement of the condition of the bank, and that on a particular day the cashier presented to the directors a statement which purported to show the condition of the bank, may introduce evidence of his admissions made at that time, in reply to questions put to him by the directors concerning such statement, that the same was false, and that he had embezzled certain sums, and forced the accounts: *The Bank of Brighton* v. *Smith*, 12 Allen.

If an official bond is taken in the penal sum of $20,000, and is signed by ten sureties, who bind themselves severally and not jointly in the sum of $2000 each, a surety may be held liable in the full sum of $2000, if an unsatisfied defalcation of the principal exceeds that sum, although such defalcation is less than $20,000: *Id.*

Although a bond in a penal sum does not carry interest as a part of the contract, interest on the amount of the penal sum may be added by way of damages for the detention thereof. after it is the duty of a surety to pay the same: *Id.*

TAXATION.

Savings Bank—Tax assessed on its whole Deposits though part of its Funds invested in United States Securities.—Although a savings bank has invested a portion of its funds in United States securities, the tax imposed by Sts. 1862, c. 224, and 1863, c. 164, may be assessed upon the whole average amount of its deposits, as therein provided, and may be collected in full: *Commonwealth* v. *Provident Institution for Savings*, 12 Allen.

VENDOR AND PURCHASER.

Notice to quit—Demand of Possession, or of Amount due—Tender of Deed.—Where the purchaser of land has made default in the payment of money, under an executory contract, no notice to quit, nor any demand of the amount due, or of the possession, or tender of a deed, is necessary on the part of the vendor, before bringing an action of ejectment: *Hotaling* v. *Hotaling*, 47 Barb.

Construction of Agreement.—By a parol contract between the parties, certain premises were sold by the plaintiff to the defendant for $55, a portion of which sum was paid at the time of the sale, without any agreement as to the time when the remainder should be paid. *Held*, that the legal effect of the contract was to make the balance payable whenever the purchaser should take possession of the premises: *Id.*

And the purchaser having entered into possession without paying such balance: *held*, that he was in default from that time; and that a demand of the money and tender of a deed by the vendor was unnecessary, as a preliminary to an action of ejectment: *Id.*