ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF VERMONT.[2]

APPEARANCE.

What amounts to.—Where a defendant applies for and obtains an order from the court, giving him time to answer, and serves that order, with a notice signed by an attorney, as "attorney for the defendant," this is doing an act in the progress of the cause, and submitting to the jurisdiction of the court; which is equivalent to an appearance: *Ayres* v. *The Western Railroad Corporation*, 48 Barb.

CRIMINAL LAW.

Rape—Evidence.—Upon a trial for rape, if the woman alleged to have been forced, is examined as a witness for the state, she may be asked on cross-examination, whether at a specified time and place she had illicit intercourse with a person named: *State* v. *Reed*, 39 Vt.

The decision of this point in the case, *State* v. *Johnson*, 28 Vt. 512, approved: *Id.*

Challenge to the Array.—The mere fact that the sheriff has expressed his opinion that the prisoner is guilty, in a criminal case, is not a ground of challenge to the array. It is necessary for some other fact to be alleged, in the challenge, to render the charge material; as, that the sheriff has intentionally omitted to summon some juror, or has stated his opinion to some juror: *Ferris* v. *The People*, 48 Barb.

Mere irregularities, in drawing and summoning the jurors, not shown to have prejudiced the prisoner, are not a ground of challenge to the array, where there is no charge of fraud or corruption in any of the officers who drew or summoned the jurors, or certified the list: *Id.*

Nor is it a ground of challenge to the array, that the court excused and excluded 764 of a panel of 1000 jurors drawn, from attendance, without reasonable cause shown; the act being within the proper discretion of the court: *Id.*

Plea of former Indictment, &c.—A plea of a former indictment for the same offence, arraignment thereon, plea of not guilty, and the commencing of the trial, when the same was abandoned, without going to the jury, is no bar to a second indictment: *Id.*

EJECTMENT.

Parties Defendant.—Where, in an action of ejectment, it appears from the complaint that the relation of landlord and tenant exists between the defendants, and they omit to set up the misjoinder in their answer, it is too late on the trial to successfully raise that question. It will be presumed that the landlord intended to waive that objection, and

---

[1] From Hon. O. L. Barbour, Reporter; to appear in Vol. 48 of his Reports.

[2] From W. G. Veazey, Esq., State Reporter; to appear in 39 Vermont Reports.

that he elected to remain a party defendant in the action: *Ames* v. *Harper*, 48 Barb.

Limitations, Statute of.

Pleading—Book Account.—In an action on book account, the Statute of Limitations may not be pleaded in bar to prevent a judgment to account, but must be taken advantage of before the auditor: *Smith* v. *Bradley*, 39 Vt.

Negligence.

Liability of Surgeons.—There is an implied obligation on a man holding himself out to the community as a surgeon, and practising that profession, that he should possess the ordinary skill in surgery of the profession generally: *Wilmot* v. *Howard*, 39 Vt.

Where by improper treatment of an injury by a surgeon, the patient must inevitably have a defective arm, the surgeon is liable to action, even though the mismanagement or negligence of those having the care of the patient, may have aggravated the case and rendered the ultimate condition of the arm worse than it otherwise would have been: *Id.*

The liability of the surgeon being established, the showing of such mismanagement or negligence only affects the measure and amount of damages: *Id.*

This case distinguished from those where the contributory negligence on the part of the patient entered into the creation of the cause of action, and not merely supervened upon it, by way of aggravating the damaging results: *Id.*

The plaintiff broke his arm and called upon the defendant, a professed surgeon, to set it, which he did, but the evidence showed that by the improper manner of dressing the arm and subsequent negligence of the defendant, the plaintiff must necessarily have a defective arm, irrespective of the management of those having the care of the plaintiff. *Held*, that the defendant was not entitled to have the court charge the jury that if the damage or injury to the plaintiff's arm resulted *in part* from the mismanagement and negligence of those having the care and management of the plaintiff, that the plaintiff could not recover, the court having given a full and satisfactory charge upon every other feature and theory of the defence: *Id.*

Right of Action.

Assignability.—A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is assignable, and an action can be maintained by the assignee: *The Grocers' National Bank of the City of New York* v. *Clark*, 48 Barb.

Such a right of action is assignable when the wrong is committed against a banking association, equally as if the property of an individual was thus misapplied or converted: *Id.*

The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons: *Id.*

SLANDER.

Explanatory Matter.—Where it is claimed, in an action for slander, that the explanatory matter which accompanied the slanderous words, so qualified them that the crime in question was not imputed, it must be shown that the explanations not only accompanied the words, but that they were sufficiently explicit to enable those who heard the same, reasonably to understand to what the words uttered referred; and that the crime which the words, standing alone and taken in their natural and ordinary meaning, would impute, was not intended to be charged: *Van Akin* v. *Caler*, 48 Barb.

STAMPS.

On Writs—Accidental Omission of Stamp.—Under the Act of Congress, approved June 30th 1864, entitled "An act to provide internal revenue," &c., the instrument is not forfeited, nor is the penalty incurred by an *accidental* omission to affix a United States Internal Revenue Stamp thereon. The forfeiture of the penalty and the forfeiture of the instrument are both embraced in one entire, connected proposition, and both rest on the same facts, the omission of the stamp, *with intent to evade the provisions of the act*: *Hitchcock* v. *Sawyer*, 39 Vt.

Therefore a motion to dismiss a suit for the reason that no stamp was affixed to the writ, without alleging that the omission was with intent to evade the provisions of the statute, was held insufficient: *Id.*

TROVER.

Conversion—Receiptor.—Trover cannot be sustained by an attaching officer against the receiptors of the attached property, where the property becomes materially damaged or lessened in value through their negligence merely, such negligence not being regarded as equivalent to a conversion: *Tinker* v. *Morrill*, 39 Vt.

In the sense of the law of trover, a conversion consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own: *Id.*

WILL.

Nuncupative Will of Soldiers.—A nuncupative will of "a soldier in actual military service" may be established in a court regulated and controlled by the rules of the common law, upon the testimony of one witness only: *Gould* v. *Safford's Estate*, 39 Vt.

The deceased, while a soldier "in actual military service," within the meaning of the statute, declared to his comrades, that he desired a certain uncle and aunt named to have enough of his property to make them whole, stating that he had lived with his uncle through several winters, and that his aunt had taken care of him through a fit of sickness, and neither had ever been paid therefor; and declared that he had a brother, and wanted the remainder of his property, which was