452; nor do we think, because a vessel described as a steamboat in the process of building, while yet on the stocks, and known as such to both the insurers and insured, may be covered by a policy when such a description is used, that any such construction can be permitted when the vessel is already navigating our rivers by steam.

It would seem to be a singular coincidence that the steamer Admiral, to which the machinery and appurtenances taken from the Sioux City were removed, was lost by the ice at the same time the remains of the latter vessel were destroyed.

There cannot be, nor is there claimed to be, any pretence to recover for the loss of that machinery, though it was once covered by the policy; and a like rule should be applied to the loss of the hull.

The plaintiff has been unfortunate, but his remedy against the defendant was gone when his vessel ceased to be a steamer. There is a clause in the policy by which it is covenanted that the steamer should, during the continuance of the risk, be sufficiently "found in tackle and appurtenances." This was urged by the counsel of defendants in his argument, but we suppose it is but the statement of what the law would require without any express stipulation.

It was the necessary result of the express warranty that the vessel was a steamboat.

On the whole case we find no error in the judgment of the Court at Special Term, and it is therefore affirmed.

Fox and TAFT, JJ., concurred.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF VERMONT.[2]

AGENT.

Book Account.—It is the duty of an agent, when the nature of the business of his agency requires it, to keep an accurate account of his payments and disbursements, and to render at all proper times an

[1] From Hon. O. L. Barbour, Reporter; to appear in Vol. 50 of his Reports.

[2] From W. G. Veazey, Esq., Reporter; to appear in 40 Vt. Rep.

account thereof to his principal "without concealment, suppression, or overcharge:" *Gallup* v. *Merrill*, 40 Vt.

The neglect of an agent to render a specific and accurate account to his principal when required, is not a bar to an action in favor of the agent to recover a balance due him from his principal, but, as a matter of evidence, it raises a presumption against his claim: *Id.*

Attorney.

Service upon.—As a general rule, when an attorney is employed, all papers in the cause must be served upon him, instead of the party. The only exception to this rule is where the object is to bring the party into contempt: *Flynn* v. *Bailey*, 50 Barb.

Where an order required that if the defendant refused to refund certain moneys within twenty days after service of a copy, a judgment should be set aside and vacated, but did not require a personal service upon the defendant: *Held*, that a service upon his attorney was sufficient: *Id.*

Bills and Notes.

Revenue Stamp—Original Consideration.—In an action of general *assumpsit*, the payee of a promissory note, having no revenue stamp affixed thereto, and if, for that reason, invalid, can recover of the maker upon the original consideration for which such note was given: *Wilson* v. *Carey*, 40 Vt.

Trover—Evidence.—The defendant purchased the note in question of his daughter, who told him that B., to whom she was betrothed, and who was a soldier in the army, gave it to her. He had also seen a receipt in her possession, signed by her, stating that she had received the note of B., and was to account for it on demand, and a promise to pay him or bearer. At B.'s death this receipt was found in the hands of S., who was a depositary of B.'s papers. *Held*, that this knowledge of the receipt was not alone sufficient to put the defendant on inquiry in respect to his daughter's title to the note, but he was a *bonâ fide* holder: *Benoir* v. *Paquin*, 40 Vt.

The holder of a note, as security for money lent, is not chargeable with a wrongful conversion of it by refusing to deliver it up, until the person claiming it pays, or offers to pay, the amount for which it is held: *Id*

The county court having ruled that the title to the note was in B., and his administrator, and the defendant being thereby left to stand exclusively upon his transaction with his daughter, she was a competent witness, not being within either the terms or intent of the statute excluding, as a witness, a living party to a cause or contract in issue where the other party is dead: *Id.*

Carriers.

Liability for Baggage.—The undertaking of a carrier of passengers is that he will carry the passenger and his trunk to the place of destination, and deliver the same, with its contents, to him there, on presentation of his check for it, within a reasonable time, under the circumstances, after arriving: *Jones* v. *The Norwich and New York Transportation Co*, 50 Barb.

Where a traveller by steamboat neglects to present his check and claim his baggage within a reasonable time after the arrival of the boat at the end of the route, the carrier becomes a mere gratuitous bailee; and if the baggage is afterwards destroyed by fire, without any negligence on his part, he is not liable for the value: *Id.*

Where a traveller by steamboat, on reaching the end of one of the stages of her journey, not wishing to be troubled with her trunk, intentionally abandoned it to the care of the carrier, without any inquiry about it, or presentation of her check, or explanation, special arrangement, or notice, for about seventeen hours, while she left the boat and went about three miles to visit a friend; and during that period the trunk with its contents were accidentally and without negligence on the part of the carrier, destroyed by fire, in a baggage-room on the dock, into which it had been removed by the carrier's employees. *Held*, that the carrier was not liable for the value of the trunk and its contents: *Id.*

Held, also, that the statute of Connecticut, prohibiting the doing of any secular work, or travelling, on the Lord's day, did not vary or affect the question of the carrier's liability; and that it furnished no excuse for the traveller leaving her trunk in the manner she did, on Sunday morning, without any special arrangement for its keeping, until her return on Monday, and without notice to the captain, baggage-master, or other employee of the carriers: *Id.*

Contract.

Statute of Frauds—Damages—Sale.—Where, under a verbal contract of sale of 1900 bushels potatoes, one car load was received and paid for, this took the contract out of the Statute of Frauds as to the entire contract as originally made, notwithstanding the defendant had previously written the plaintiff to purchase no more for the defendant: *Danforth & Co.* v. *Walker*, 40 Vt.

The plaintiff, however, had no right, after receiving the letter, to purchase potatoes and then recover for loss sustained on them by frost and rot. His damages as to such after purchases, must be limited to the difference between the price the defendant had agreed to pay the plaintiff, and what it would cost the plaintiff to procure and deliver them: *Id.*

If the potatoes were to be delivered in good condition, and no time was stipulated within which the defendant was to take them, he would have a reasonable time for that purpose, and would not be liable for loss occasioned by freezing or rot before such reasonable time had elapsed: *Id.*

Soldiers' Bounty—Towns—Evidence.—It is a rule in the construction of contracts that any contract is to be construed with reference to its object—so that effect may be given to the intention of the parties when ascertained: *Johnson* v. *Town of Newfane*, 40 Vt.

A town having voted to pay a bounty to those who should enlist under an existing call for troops and apply on its quota, is bound to pay to those who enlisted previous to the vote, but were mustered in subsequent thereto—they having had the right at the time of muster to be credited to any town they chose: *Id.*

On the 30th of November 1863, the defendant town voted to "raise $300 for every volunteer that may enlist previous to the 5th day of January next under the last call of the President for 300,000 volunteers." And it was further voted "that the selectmen be authorized to borrow a sum of money, not exceeding $3000, to be paid $300 to each recruit when mustered into the service of the United States." The town had eleven men to furnish under that call. The plaintiff enlisted November 13th, and was mustered in December 1st 1863, to the credit of said town, and with the expectation at the time of enlistment that he should receive the same bounty that the town might pay to others, otherwise he would not have enlisted or been mustered in to the credit of that town. The selectmen had notice of his enlistment and claim for bounty prior to said meeting. *Held*, that he was entitled to recover the $300 bounty—and that evidence as to his expectation was properly received: *Id.*

Criminal Law.

Evidence.—On the trial of an indictment against a husband for administering poison to his wife, with intent to kill her, the wife may be admitted as a witness for the prosecution. And being a competent witness, there is no rule by which any part of her testimony should be excluded: *The People* v. *Northrup*, 50 Barb.

Damages.

Threatening Letter.—To warrant an action against one for writing a letter giving information wilfully false, and with the malicious design of annoying the plaintiff, and frightening him out of town, the loss or inconvenience sustained must be the direct and reasonable result of the letter and of a reliance upon it, and must consist of something more than mental suffering or annoyance. The letter in this case would justify neither anxiety nor expense: *Taft* v. *Taft and Wife*, 40 Vt.

Deed.

Covenant as to mode of Building upon, or using Premises.—The acceptance, by the grantee, of a conveyance containing a covenant by him, his heirs, and assigns, as to the manner of building upon, or using, the premises conveyed, is equivalent to an express agreement on his part, to perform the covenant; and the obligation affects the title of his grantees: *The Atlantic Dock Co.* v. *Leavitt*, 50 Barb.

Where the covenant was, among other things, not to erect or permit, upon the premises conveyed, any brewery, *distillery*, slaughter-house, or "*other* noxious or dangerous trade or business," and the defendants, in one case, had erected a manufactory for the distillation of train-oil, and in the other, a manufactory for the production of paraffine; in both cases the building and machinery being like those usually employed in the distillation of alcohol, and the evidence showing that such distillation might be accomplished by means thereof. *Held*, that the defendants were disabled by the covenant from erecting or maintaining such buildings or machinery; and that it was not necessary, in order to show a breach thereof, to prove an actual use of such buildings and machinery for the purpose of a distillery; that it was enough that they might be so used; and that a breach was committed before an actual use: *Id.*

Held, also, that if the buildings in question were not distilleries, within the meaning of the covenant, they fell within the prohibition against "other dangerous trade or business:" *Id.*

EVIDENCE.

Waiver of Objections to.—Where no objection is made to evidence on the trial, and no exceptions taken to its admission, *it seems* the court will not reverse the judgment, even though satisfied that the evidence was originally inadmissible. The party should be held to have waived the objection by not raising it at the trial: *Voorhis* v. *Voorhis et al.*, 50 Barb.

EXECUTORS.

Where an executor has received a portion of the estate, and sold the same, and applied the money arising from the sale to his own business, thereby commingling it with his own property, and preserving no evidence by which the trust fund can be identified; in the distribution of the assets of such executor, after his death, by the surrogate, no preference can be allowed in favor of the trust estate on account of such moneys, but the estate must stand on a footing with the other creditors of the executor: *Barlow, Executrix, &c.*, v. *Yeomans, Adm'r., &c., et al.*, 50 Barb.

FIXTURES.

Windows and Blinds.—Double windows made for a house, fitted to its window casings, not nailed or fastened in, but held only by being closely fitted and pushed in, which remained in through one winter until warm weather when they were taken out and set away in the house, and blinds made for side lights and set up in the hall, but never fitted to the windows or put in, both windows and blinds not being intended by the grantor to pass with the house, but secreted so that the grantee did not, at the time of purchase, know of their existence, and there being nothing about the casings to indicate that any double windows belonged thereto. *Held*, not to pass by deed of the premises, they never having been actually or constructively annexed to the house: *Peck* v. *Batchelder*, 40 Vt.

INJUNCTION.

To stay collection of a Tax.—The equity powers of the Supreme Court cannot be successfully invoked to stay or prevent the assessment or collection of a tax: *Messeck* v. *The Board of Supervisors of Columbia County*, 50 Barb.

INTEREST.

Upon an unliquidated Demand.—The rule, as modified by recent decisions, allows interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values, because such values are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he is to pay: *Sipperly* v. *Stewart*, 50 Barb.

JOINDER.

Of Causes of Action.—A cause of action for the recovery of money

collected upon a judgment regular on its face, and not for a tort, is improperly united with a cause of action to recover damages for an alleged false imprisonment of the plaintiff, where it does not appear satisfactorily and clearly from the complaint, by a proper statement of the facts, that the causes of action arose out of the same transaction. A mere general allegation that they so arose, is not enough: *Flynn* v. *Bailey*, 50 Barb.

The provision of the code requiring that the complaint shall contain a plain and concise statement of the facts which constitute the cause of action, applies to each count of the complaint; and the general allegation that the second cause of action arose out of the transactions connected with the first, does not establish a case within the above rule: *Id.*

SALE.

Personal Property—Memorandum—Parol Evidence.—The defendant sold the plaintiff a farm, together with certain farming tools and other personal property, and executed a memorandum of such sale of the personal property, in which many articles were enumerated, and concluding with these words: "Meaning all the farming tools, &c., now owned by him (the defendant), and on said farm." *Held*, that parol evidence was admissible for the purpose of ascertaining to what specific property these words applied: *Rugg and Elliott* v. *Hale*, 40 Vt.

Language in a memorandum of sale, descriptive of the locality of personal property sold, if incorrect, does not affect the validity of the sale: *Id.*

Intoxicating Liquors—Stoppage in transitu—Replevin.—The right of stoppage *in transitu* cannot be enforced by suit in this state as to intoxicating liquors sold therein contrary to law, the statute having taken away all right of action for the recovery or possession thereof: *Howe and French* v. *Stewart*, 40 Vt.

K., who was insolvent, ordered at Johnson, Vt., of M., the agent of H. & F., merchants at Boston, Mass., intoxicating liquors. Upon the receipt of the order from M., on the 21st day of January 1867, H. & F. shipped the goods by railroad directed to K., Waterbury, Vt. After their arrival at their place of destination, they were put into the freight depot of the Vt. C. Railroad Co. On the 30th day of January 1867, while the goods were in said depot, the charges for transportation not having been paid, and before K. or any one in his behalf had exercised any control over them, they were attached by the defendant, a deputy sheriff, on a writ against K., as his property, but were not taken from the depot. On the 5th day of February 1867, the attorney of the plaintiffs notified the agent of the railroad company in charge of the depot, the goods being still there, of their claim to stop them *in transitu*. *Held*, that the *transitus* was at an end, and that the plaintiffs' right of stoppage *in transitu* had ceased: *Id.*

TENDER.

Pleading—Waiver—Interest.—The plaintiff having traversed a plea of tender, and tried the issue of fact before the jury, cannot, after the charge, insist that the defendant had no right to make such plea, and thus try the question as to the sufficiency of the plea on exception to the charge: *Carpenter* v. *Welch*, 40 Vt.

If a tender is received, though made subsequent to the time limited by the statute for making it, it operates as a payment to the amount of the sum so received, as of the time when made: *Id.*

In computing interest with annual rests, in the absence of any evidence of a different understanding between the parties, the first rest is to be made at the end of one year, computing from the commencement of the account, and so from year to year: *Id.*

Trover.

Conversion—Deposition.—Where one obtains possession of another's property, though lawfully, and sells it, believing it to be his own, the sale is a conversion: *Morrill* v. *Moulton*, 40 Vt.

The adverse party notified to be present at the taking of a deposition has not two hours after the time named in the citation to make his appearance, but the magistrate may proceed at once. The statute limits the right of the magistrate to proceed to the condition of his being present within two hours of the appointed time; *Id.*

Usage or Custom.

Evidence of a general *usage* or *custom*, in a particular locality or business, is not sufficient to charge a party, where there is no proof that he *knew*, or had even heard of, such usage or custom: *Sipperly* v. *Stewart*, 50 Barb.

A custom, in order to become a part of a contract, must be so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established, and not casual—uniform and not varying—general, and not personal, and known to the parties: *Id.*

Vendor and Purchaser.

Tender of Bond and Mortgage by Purchaser.—Where a vendor is unable to perform his agreement to convey the premises *free from all incumbrances*, for the reason that they are incumbered by mortgage, the purchaser is excused from offering to execute and deliver a bond and mortgage for the purchase-money: *Karker* v. *Haverly*, 50 Barb.

A tender of performance need not be made when it would be wholly nugatory; and the existence of an incumbrance at the time fixed in the agreement for the execution of a deed, is a breach of the vendor's covenant, which puts it out of his power to perform, and excuses the purchaser from tendering performance: *Id.*

Waiver of Performance.—Where a vendor was at the place appointed, with the holder of a prior mortgage, who was ready to cancel such mortgage as soon as payment should be made by the purchaser, and such mortgagee remained there until quite late in the day, when he left for home, after which the money was tendered; and to the vendor's offer to send for the mortgagee and get a satisfaction of the mortgage, the purchaser replied that he could not wait, or would not wait. *Held*, that this amounted to a direct waiver by the purchaser of any further effort by the vendor to obtain the satisfaction, which precluded the former from insisting, afterwards, that the latter had failed to perform: *Id*