There is, in my judgment, evidence enough, under the circumstances, to establish the fact against the denial of it by the defendants as to the $60,000, and to make it highly probable as to the remaining $30,000.

On the whole, I think that the plaintiff should be allowed to recover the sum claimed by the petition as due January 1862, and January and July 1863, and January 1864, to the amount of $60,000. And as to the amount claimed as due July 1864 and January 1865 ($30,000), he may recover that on giving defendants good security, to be approved by the court, to save them harmless from all persons hereafter to claim to recover the same.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF NEW YORK.[3]

AGREEMENT.

Construction.—The defendant executed the following agreement, dated New York, October 8th 1863: "For value received the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen per cent., any time in six months from date, without interest. The bearer is entitled to all the dividends declared during the time to half past one P. M. each day." *Held*, that the holder of the contract was not entitled to a dividend which had been declared and announced previous to the date of the contract; although at the time of its execution the stock was selling "dividend on": *Lombardo* v. *Case*, 45 Barb.

BANKERS.

Measure of Damages in Action for Negligence in not presenting a Note for payment at its maturity.—In an action against bankers to recover damages for omitting to present a note for payment at maturity, and to charge the indorser, the judge left it to the jury to find so much

[1] To appear in 3 Wallace's Reports.

[2] From Charles Allen, Esq., Reporter; to appear in vol. 10 of his Reports.

[3] From Hon. O. L. Barbour, Reporter; to appear in vol. 45 of his Reports.

damages as they would consider such a claim to be worth against "*such a man* as the indorser was shown to be." *Held* erroneous; and that the charge should have had reference to the *pecuniary means* of the indorser: *Bridge* v. *Mason*, 45 Barb.

Held, also, that the amount of the note was *primâ facie* the rule of damages. But that the defendants could show, in mitigation of damages, that the indorser was insolvent, or not worth property enough to pay the debt; and that if this was shown, the defendants were entitled to a verdict: *Id.*

In such an action the plaintiffs are entitled to recover such damages only as they have sustained, having reference to the amount of property which it shall appear from the evidence that the indorser was possessed of as owner: *Id.*

Bills and Notes.

Notes given for illegal Consideration.—Promissory notes given for a balance found due on settlement in a transaction itself forbidden by statute and illegal, or for money lent to enable a party to pay bills which the person taking the promissory notes had himself assisted, in violation of statute, to issue and circulate, cannot be enforced: *Brown* v. *Tarkington*, 3 Wall.

The fact that such promissory notes are given for a balance found due, or to enable a principal party in the illegal transaction to pay notes that have got into public circulation and are unpaid, does not purge them from the infirmity which belonged to the original vicious transaction: *Id.*

Where a deposition, after a motion on grounds set forth has been unsuccessfully made at one term to suppress it, as irregularly taken, is at another read on trial without objection or exception, it cannot be objected to here on the grounds that were made for its suppression, or at all: *Id.*

Brokers.

Sales for their own Account subject to Duty.—Under the Internal Revenue Act of June 30th 1864, as amended by the Act of March 3d 1865, the sales of stocks, bonds, and securities made by *brokers* for themselves are subject to the same duties as those made by them for others: *United States* v. *Cutting*, 3 Wall.

Sales by Bankers for their own Account not subject to Duties.—"Bankers" who sell the Federal securities no otherwise than for the United States and for themselves, and who therefore do not sell them for others or for a commission, are not liable to pay the duties imposed by the 99th section of the Internal Revenue Act, of June 30th 1864, imposed upon "brokers and *bankers doing business as brokers:*" *United States* v. *Fisk*, 3 Wall.

Common Carrier.

Limitation of Liability by Special Contract.—The common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special *contract* with the owner; provided such special

contract do not attempt to cover losses by negligence or misconduct: *York Company* v. *Central Railroad*, 3 Wall.

Thus where a contract for the transportation of *cotton* from Memphis to Boston was in the form of a bill of lading containing a clause exempting the carrier from liability for losses by *fire*, and the cotton was destroyed by fire, the exemption was held sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part: *Id.*

Damages for injury to Cattle in transporting.—In an action against a carrier to recover damages for injuries sustained by a lot of cattle received for transportation, through the negligence of the carrier or its employees, the rule of damages is the difference in value between the cattle when placed in the carrier's charge and their condition when delivered: *Black* v. *The Camden and Amboy Railroad and Trans. Co.*, 45 Barb.

Constitutional Law.

Contract valid according to the Law of a State when made, cannot be impaired by subsequent Construction of the Law by the State Courts.—The case of *Gelpcke* v. *The City of Dubuque* (1 Wallace 175) affirmed and enforced; and the doctrine reasserted that if a contract, when made, was valid by the constitution and laws of a state, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation: *Havemeyer* v. *Iowa County*, 3 Wall.

Where the judges of the Circuit Court certify a division of opinion to this court for its judgment, this court will not return an answer unless the question raised involve a distinct legal point, and sufficient facts are set forth to show its bearing on the rights of the parties. Hence no answer will be given to a proposition merely abstract: *Id.*

Courts.

Suit in State Court against Officer of United States Court for Acts done under authority of Process from the latter.—A suit prosecuted in the state courts to the highest court of such state, against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper Federal court, presents a case for a writ of error under the 25th section of the Judiciary Act, when the final decision of the state courts is *against* the validity of the authority thus set up by the marshal: *Buck* v. *Colbath*, 3 Wall.

The case of *Freeman* v. *Howe*, 24 How. 450, an action of replevin, decided that property held by the marshal under a writ from the Federal court, could not be lawfully taken from his possession by any process issuing from a state court; and decided nothing more: *Id.*

The ground of that decision was that the possession of the marshal was the possession of the court, and that pending the litigation, no other court of merely concurrent jurisdiction could be permitted to disturb that possession: *Id.*

An action of trespass, for taking goods, does not come within the

principle of that case, inasmuch as it does not seek to interfere with the possession of the property attached; but it involves the question, not raised in that case, of the extent to which the Federal courts will protect their officers in the execution of their processes: *Id.*

With reference to this question, all writs and processes of the courts may be divided into two classes: 1. Those which point out specifically the property or thing to be seized. 2. Those which command the officer to make or levy certain sums of money out of property of a party named: *Id.*

In the first class the officer has no discretion but must do precisely what he is commanded. Therefore if the court had jurisdiction to issue the writ, it is a protection to the officer in all courts: *Id.*

But in the second class the officer must determine for himself whether the property which he proposes to seize under the process, is legally liable to be so taken, and the court can afford him no protection against the consequences of an erroneous exercise of his judgment in that determination. He is liable to suit for injuries growing out of such mistakes in any court of competent jurisdiction: *Id.*

A plea, therefore, which does not deny that the property seized was the property of the plaintiff, or aver that it was liable to the writ under which it was seized, is bad in any court: *Id.*

The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties or privies seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought; and does not extend to all matters which may by possibility become involved in it: *Id.*

Fraud.

Evidence of.—In an action to set aside as fraudulent and void as against creditors, a sale of merchandise made by S. & Co., in August 1861, the judge admitted evidence of an assignment made by S. to his son, in May 1861, and of the consideration therefor, and the manner of payment. *Held*, that the assignment having occurred after the embarrassments of S. & Co. commenced, and appearing to be a part of the general plan of S. to place his property beyond the reach of his creditors, upon execution, the inquiry was clearly within the rule in respect to evidence of contemporaneous frauds: *Angrave* v. *Stone et al.*, 45 Barb.

Gift.

Necessity of Delivery.—It is essential to a valid gift by parol that there should be an actual or symbolical delivery. The title does not pass unless possession, or the means of obtaining it, are conferred by the donor and accepted by the donee: *Cooper* v. *Burr et al.*, 45 Barb.

Evidence of Intent.—The situation, station, and circumstances of the parties, and of the subject of the gift, may be taken into consideration in determining the intent to give and the fact as to delivery: *Id.*

A total exclusion of the power or means of resuming possession by the donor is not necessary: *Id.*

C., who had been confined to her room by illness for nineteen or twenty years, and to her bed for five or six years prior to her death, kept in her room a bureau and trunks containing gold and silver coin and jewelry. About six weeks before her decease, handing to the plaintiff, who had lived with and taken care of her for twenty-seven years, the keys of the bureau and trunks, she said, "Mary, here are these keys; I give them to you; they are the keys of my trunks and bureau; take them and keep them, and take good care of them; all my property and everything I give to you; you have been a good girl to me, and be so still; * * * you know I have given it all to you; take whatever you please; it is all yours, but take good care of it." *Held*, that the language of the donor, accompanied by a delivery of the keys of the trunks and bureau, evinced the intention of the donor, and placed the donee in possession of the means of assuming absolute control of the contents at her pleasure, and constituted a valid gift of the coin and jewelry in the trunks and bureau: *Id.*

Held, also, that the fact that the trunks and bureau, or their contents, were not removed, or even handled by the donee, was not a controlling consideration: *Id.*

Insurance.

Construction of Marine Policy.—A policy of insurance on a vessel from New York to ports in South America and thence to ports of discharge in the United States, with an indorsement thereon of "liberty to deviate by going to port or ports in Europe, by paying an equitable premium therefor," covers one round voyage, but does not include a distinct and independent voyage, having no connection with the general objects and purposes of the voyage insured; and in an action upon such a policy evidence is inadmissible to show a usage among commercial men and underwriters which permitted the making of intermediate voyages between the ports of Europe, under the protection of such deviation clause; or a usage, upon which policies have been issued and paid, and which gave to the language of such deviation clause a peculiar and technical sense, namely, the signification of the liberty to make such intermediate voyages; or a usage of trade and commerce by which American vessels at Constantinople, seeking return cargo from Smyrna or other Mediterranean port, in the interval between the discharge of the outward cargo and the season for obtaining cargo therefrom, make intermediate voyages; or to control the legal meaning of such deviation clauses by proof of conversation, at the time it was written, between the underwriters and the assured: *Seccomb and Another* v. *Provincial Insurance Company*, 10 Allen.

International Law.

The Law of Blockade and Rights of Neutral Commerce.—No trade honestly carried on between neutral ports, whether of the same or of different nations, can be lawfully interrupted by belligerents; but good faith must preside over such commerce; enemy commerce under neutral disguises has no claim to neutral immunity: *The Bermuda*, 3 Wall.

Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such

articles as either may wish to buy, subject to risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports: *Id.*

Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port; but voyages from neutral ports intended for belligerent ports are not protected in respect to seizure either of ship or cargo by an intention, real or pretended, to touch at intermediate neutral ports: *Id.*

Neutrals may convey to belligerent ports, not under blockade, whatever belligerents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners or of the master with the sanction of the owners: *Id.*

Vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage: *Id.*

A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose: *Id.*

Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but, in the last case, ship and cargo not contraband are free from seizure except in cases of fraud or bad faith: *Id.*

Circumstances, such as selection of master, control in lading and destination, instructions for conduct of voyage, and other like acts of ownership by an enemy, may *repel*, in the absence of charter-party or other explanation, presumptions of ownership in a neutral arising from registry or other documents, and will warrant condemnation of a ship captured in the employment of enemies as enemy property: *Id.*

Spoliation of papers, at the time of capture, under instructions and without explanation by production of the instructions, or otherwise, warrants the most unfavorable inferences as to employment, destination, and ownership of the captured vessel: *Id.*

Landlord and Tenant.

Tenant not allowed to dispute Landlord's Title.—One who has acknowledged the right of another, to premises, and made an agreement with him for the occupation thereof by himself as tenant, for a limited period, cannot dispute his landlord's title by setting up an outstanding title held by himself, of which the landlord had no notice: *The People ex rel. Stover* v. *Stiner et al.*, 45 Barb.

Lease.

Unrecorded Lease—Validity of Sub-lease.—If a lease is invalid, as

against subsequent conveyances, for want of being recorded, a sub-lease of the same premises will also be of no validity: *The People ex rel. Stover* v. *Stiner et al.*, 45 Barb.

LICENSE.

Under United States Laws does not take away Necessity of complying with State Law.—A license granted by the United States, under the Internal Revenue Act of July 1st 1862, to carry on the business of a wholesale liquor dealer, in a particular state named, does not, although it have been granted in consideration of a fee paid, give the licensee power to carry on the business in violation of the state laws forbidding such business to be carried on within its limits: *McGuire* v. *The Commonwealth*, 3 Wall.

The payment of a license fee and a tax to the United States under the Internal Revenue Acts does not authorize the sale of intoxicating liquors in this commonwealth in violation of the laws of this commonwealth: *Commonwealth* v. *Holbrook*, 10 Allen.

LIEN UPON VESSELS.

Where the master of a vessel is sailing her under an agreement between him and the owner, by which he, the master, is to sail her "on shares," paying all bills for wages of officers and crew, and furnishing provisions, and as "wages for himself," receiving one-half of the gross amount of freight, the knowledge of the existence of such a contract, by persons furnishing supplies for the use of the vessel, on the order of the master, will not import an exclusive credit to the master, or prevent the enforcement of a lien upon the vessel for such supplies: *Vose et al.* v. *Cockroft et al.*, 45 Barb.

Such an agreement between the owner of a vessel and the master, being only for the mode of compensating the master, does not release the vessel from the ordinary liability for supplies: *Id.*

MORTGAGE.

Surplus Moneys from Sale of Mortgaged Land, under Foreclosure.—The surplus moneys arising on a sale of land under a mortgage foreclosure, stand in the place of the land, in respect to those having liens or vested rights therein, and the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale: *Matthews* v. *Duryee et al.*, 45 Barb.

Where the widow of a mortgagor is made a party defendant in a foreclosure suit, but omits to appear or assert her claim for dower, she is not barred of her action for her share of the surplus moneys by any order for their distribution made in the foreclosure suit: *Id.*

Nor is she barred from bringing such an action against the person to whom the surplus moneys were assigned in the foreclosure suit by reason of her neglect or omission to assert her claim, on being made a party to a suit brought by that person, for the settlement and closing of his trust as assignee of the mortgagor: *Id.*

Municipal Corporations.

Railroad Bonds and Coupons issued for Subscriptions to Railroads, &c.—The general doctrines of this court, as settled by various recent decisions, on the subject of railroad bonds issued by municipal corporations to "bearer," and which have passed into the hands of *bonâ fide* holders for value,—affirmed and acted on; in the following points decided:

A county, or other municipal corporation, has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained either with or without the sanction of the popular vote: *Thomson* v. *Lee County*, 3 Wall.

If the courts of a state have when an agreement is made construed their constitution and laws so as to give the agreement force and vitality, the same courts cannot, by a subsequent and contrary construction, render it invalid: *Id.*

If the legislature possess the power to authorize an act to be done, it can by a retrospective act cure the evils which existed, because the power thus conferred has been *irregularly* executed: *Id.*

Bonds with coupons, payable to bearer, are negotiable securities, and pass by delivery; and, in fact, have all the qualities and incidents of commercial paper: *Id.*

If coupons to bonds are drawn so that they can be separated from the bonds, and like the bonds, are negotiable, the owner of them can sue on the coupons without producing the bonds to which they were attached, or without being interested in them: *Id.*

City Railroads.—The common council of the city of New York has no power to authorize an extension of a city railroad, unless possibly where such extension is really necessary to the enjoyment of a previous valid grant: *The People* v. *The Third Avenue Railroad Company*, 45 Barb.

Where a judge has found that the extension of a railroad is a public nuisance, that alone, on a trial, entitles the plaintiffs to relief by injunction, although no damage be shown: *Id.*

If the necessity of the extension is not established the extension is unlawful. It is then the attempted exercise by the company of a valuable franchise not authorized by law. This, independently of any other consideration or proof, is a sufficient damage to uphold a decree for a perpetual injunction: *Id.*

Duty to keep Travelled Way, whether public or private, in a safe condition for Travel.—If a travelled way, either public or private, over lots adjoining a public street in a city and leading into that street, for a long time before and after the existence of an excavation in the street, has been so much used by persons having occasion to pass as to become known as a common way for travel, and to make it reasonably necessary for the city, in the exercise of due and proper care, to provide a barrier for the

purpose of preventing travellers, who pass over such way from the adjacent lots into the street, and use due care from falling into the excavation, and the city have unreasonably omitted to erect such barrier, they are guilty of negligence, and are liable for an injury happening to a traveller in the street by reason thereof: *Burnham* v. *City of Boston*, 10 Allen.

NAME.

Change of Name during Infancy.—Where it appeared from the evidence that the plaintiff, suing as Mary Cooper, was called Mary Flood during her early infancy, but that she had been called Mary Cooper by C., with whom she lived, and whose name she took, and by all her acquaintances, since about the age of nine or ten years, a period of about twenty years: *Held*, that the action was properly brought by the plaintiff by the name of Mary Cooper; that being the name by which she was generally known: *Cooper* v. *Burr et al.*, 45 Barb.

NEGLIGENCE.

Injury to Passenger on Railroad.—A railroad corporation is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch upon the track over which he is carried by the corporation, free of charge, between his home and the place of his work, proprovided the corporation has used due care in the selection of the switchman; but if the switchman was an habitual drunkard, and this fact was known or ought to have been known to the corporation, and the injury resulted from his intoxication, the corporation is responsible: *Gilman* v. *Railroad Corporation*, 10 Allen.

Contributory Negligence of Plaintiff.—One who is injured by falling through a trap-door in a portion of a factory which is not open to the public, but is intended exclusively for workmen, and where the owner had held out no invitation or allurement, express or implied, for him to enter, cannot recover damages therefor against the owner of the factory: *Zoebisch* v. *Tarbell and another*, 10 Allen.

Duty to keep a Private Way in safe condition.—If there are two entrances to a store, and there is a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners, who occupy the lower stories, are bound to use the trap-door with reference to the safety of those who have a right to pass there; and if they neglect to exercise suitable and reasonable precautions to guard against accident while the trap-door is open, they may be held liable in damages to a person having lawful occasion to pass to the upper rooms, who, while in the use of due care, falls through the trap-door and sustains injury by reason of their negligence: *Elliott* v. *Pray et al.*, 10 Allen.

If the owners of a store, which is situated upon a public street, have let the upper stories thereof to a tenant, and an entrance, directly in front of the stairs which lead to the upper stories, is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to ascend the stairs, and there is a trap-door between it and the stairs, which is carelessly left open by them, they

may be held liable in damages to one who, while in the use of due care, and having lawful occasion to ascend the stairs, is thereby induced to pass through that entrance, and falls through the trap-door and sustains injury by reason of their negligence: *Id.*

Passenger leaving a Train improperly.—If a railroad train is stopped at night merely for the purpose of allowing a train which is expected from the opposite direction to pass by, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle-guard and receives a personal injury cannot maintain an action against the company to recover damages therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house supposed to have been reached by the train, or that the train was near a passenger station, which was not the place of his destination: *Frost* v. *Grand Trunk Railroad Company*, 10 Allen.

Railroad Crossing—Flag Signal of Safety.—If a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness: *Sweeney* v. *Old Colony and Newport Railroad Company*, 10 Allen.

Practice.

Order of Testimony.—It is no error to admit testimony, irrelevant at the time, if it is afterwards made pertinent by other testimony: *Black* v. *The Camden and Amboy Railroad and Transportation Company*, 45 Barb.

Leading Question.—Whether or not a leading question may be put to a witness, is a matter of discretion with the judge at the trial; and the allowance of a leading question has ceased to be considered a matter to be reviewed on appeal: *Id.*

Interest.—In actions *ex delicto* it is in the discretion of the jury whether to allow interest by way of damages or not: *Id.*

And when the jury are instructed, in an action for negligence, to award the damages the plaintiff has sustained, the court may leave it to them to say whether on such damages the plaintiff is entitled to interest; but it is erroneous to instruct them, as matter of law, that the plaintiff is entitled to interest on the damages: *Id.*

Trial.—If the judge in the trial of a civil case, at the request of the jury, and without the knowledge of the parties, allows them to have a copy of the General Statutes in the jury-room, while deliberating on their verdict, their verdict will be set aside: *Merrill* v. *Nary*, 10 Allen.

Prize.

Probable Cause.—Prize courts properly deny damages or costs where there has been "probable cause" for seizure: *The Thompson*, 3 Wall

Probable cause exists where there are circumstances sufficient to warrant suspicion, even though not sufficient to warrant condemnation: *Id.*

These principles applied to a case before the court where a captured vessel was restored, but without costs or damages: *Id.*

Presumption of Intent to run Blockade.—Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port, may be inferred from a combination of circumstances, as *ex. gr.* the suspicious character of the supercargo; the suspicious character of the master, left unexplained, though the case was open for further proof; the fact that the vessel, on her outward voyage, was in the neighborhood of the blockaded place, and within the line of the blockading vessels, by *night*, and that her return voyage was apparently timed so as to be there by night again; that the vessel (though in a leaking condition that condition having been known to the master before he set sail) paid no attention to guns fired to bring her to, but, on the contrary, crowded on more sail and ran for the blockaded shore; and that one witness testified *in preparatorio* that the master, just before the capture, told him that he intended to run the blockade from the first: *The Cornelius*, 3 Wall.

Although in such cases it is a possible thing that the intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent: *Id.*

Railroads.

Powers to Mortgage and issue Bonds.—A railroad corporation is not authorized by common law to mortgage its franchise, without further authority than is conferred by its act of incorporation: *Commonwealth* v. *Smith and Others*, 10 Allen.

Corporations have the power by common law to issue bonds. But since St. 1854, c. 286, railroad corporations in this commonwealth have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized; and all bonds issued otherwise are void, and a mortgage to secure such bonds is also void: *Id.*

Although a railroad corporation which has issued such invalid bonds and mortgage does not seek to repudiate them, one who has taken a valid second mortgage which contains no covenants of warranty, but is not made expressly subject to the former mortgage, may take advantage of their invalidity: *Id.*

Such second mortgagee has a plain, adequate, and complete remedy at law, and therefore cannot maintain a bill in equity to procure the cancellation of the first mortgage, and thus remove a cloud upon his title: *Id.*

Vendor and Vendee.

Failure to deliver Goods.—If goods are sent by a carrier and neither the bill of lading nor the direction upon them enables him to deliver them to the purchaser, and they are lost in consequence, the purchaser may recover back the price paid by him to the vendor for the same; nor will he be presumed to have assented to or waived the vendor's omission, from proof that he received a copy of the imperfect bill of lading before the payment was made, and that he thereafter made diligent inquiry to find the goods: *Finn* v. *Clark*, 10 Allen.

Warranty.

Damages for Breach.—The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value, if it had been as warranted, is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty: *Brown* v. *Bigelow*, 10 Allen.

A bill of sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty: *Id.*

Watercourse.

Obstructions to Flow of Water—Joint Action of several Persons—Suit against one—Municipal Corporation.—If the rightful flow of the water of a stream is obstructed by the joint action of several parties, although not acting in combination or by concert, it is no defence to the maintenance of an action against one of them that all are not joined as defendants; but this objection goes only to the damages: *Wheeler* v. *City of Worcester*, 10 Allen.

A city is not liable in an action at law for an injury to a private person by the obstruction of the flow of the water of a stream, caused by an increase of the surface wash from the streets into the same, if such increase is only the natural result of the growth of the city; or by the emptyings of the sewers into the same, if these are no greater than would otherwise have been carried in by surface washings, and are not sufficient to exert any appreciable effect on such person; or by a bridge constructed by a railroad corporation, under the authority of its charter; or by a bridge constructed by the city, if the bridge when built was sufficient to allow the free flow of the water as the stream then was, or with such changes as were likely to be produced by natural causes alone, although it has proved insufficient for this purpose, with such changes as have been produced by the exercise by a railroad corporation of its chartered rights, or by the wrongful acts of individuals: *Id.*

Will.

Proof of Execution.—A will which bears the genuine signatures of three competent subscribing witnesses, who signed their names simply as "witness to signature," with nothing further, may be admitted to probate, although neither of the two survivors of them recollects anything about the circumstances under which it was executed: *Eliot* v. *Eliot*, 10 Allen.

Executor as Witness.—The executor named in a will is a competent subscribing witness thereto, and may testify in support thereof, under the statutes of this commonwealth, although he has not declined the trust: *Wyman and Others* v. *Symmes*, 10 Allen.