reasonable time. Humanity and equity might require indulgence in extreme cases. Libellant received the hurt complained of without fault on the part of the officers of the vessel while coming into the port of discharge; and after his discharge and receipt of his wages, he travelled by land about ninety miles to the city of Milwaukee. He cannot recover against the vessel for expenses incurred by him in this city, and his libel must be dismissed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF NEW YORK.

SUPREME COURT OF VERMONT.[4]

Attorney.

Attorney's Fees.—A demand by an attorney upon his client for a certain sum, as a compensation for services rendered, is only a proposition to receive that amount for the debt, and if payment is refused the recovery cannot be limited to the amount demanded, if the services are shown to be of greater value: *Miller* v. *Beal*, 26 Ind.

Bills and Notes.

Contingency—Negotiability.—A contingency depending on an event which necessarily must happen, or a contingency as to time of payment depending on an act to be done by the holder in reference to the instrument itself, to hasten or fix the time of payment, does not destroy the negotiability of a note or bill of exchange: *Smilie* v. *Stevens*, 39 Vt.

The plaintiff held a writing as indorsee in words as follows: "New York, Aug. 17th 1865. I certify that James Smilie, Jr., has deposited with me five hundred dollars, payable to his order on demand with interest from February 15th 1864, on the return of this certificate and my guarantee of his note to his brother John Smilie, dated February 15th 1864, for the sum of five hundred dollars. Simon Stevens." *Held*, that the negotiable character of this instrument is not affected by the fact that it was made payable "on the return of this certificate:" *Id.*

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[1] From Benj. Harrison, Esq., Reporter; to appear in 26 Indiana Reports.

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

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

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

But the provision of a return of the maker's guarantee of the payee's note for $500 to his brother John Smilie, is a condition that destroys its negotiability, therefore the plaintiff cannot recover in his own name: *Id.*

If the plaintiff could show a special promise by the defendant to pay to him as assignee or indorser, and show the condition performed, he might recover, if the declaration contained such an allegation: *Id.*

Demand and Notice.—Where the demand of payment is not made by the notary himself, but his certificate is founded on an entry made by his clerk, the act of the clerk is not to be deemed the act of the notary, but may be proven as the act of an individual, and is subject to the ordinary rules of evidence: *Gawtry et al.* v. *Doane*, 48 Barb.

Where the clerk who made the demand and gave notice to the indorsers in the name of the notary is dead, memoranda made by him and entered in the register of the notary, are admissible in evidence to prove demand and notice: *Id.*

Admission of Liability.—An admission of liability, by an indorser, after maturity, is never held to be sufficient to overcome the want of demand and notice without proof that at the time of the admission the indorser knew that there was such defective protest: *Id.*

Waiver of Demand and Notice.—If there has been no due presentment of a note or notice of dishonor, and the indorser, after the maturity of the note, supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment and notice: *Id.*

Carriers.

It is well settled that when a loss to cargo, from leakage or otherwise, occurs in the port where it is laden and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the vessel has left the port of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages: *Krohn* v. *Oechs*, 48 Barb.

Citizenship.

Negroes.—A free man of color born within the *United States* is a citizen of the *United States*, and as such is entitled to become a citizen of any one of the several states, by becoming a resident thereof: *Smith* v. *Moody et al.*, 26 Ind.

Right to Vote and Hold Office.—The right to vote and the legal capacity to hold office are not essential to the character of a citizen. Allegiance on the part of the person, and the duty of protection on the part of the government, constitute citizenship under the Constitution: *Id.*

Conflict of Laws.

Foreign Judgment.—Where judgment is rendered in another state against a non-resident thereof, a citizen of Vermont, without process or

notice being served on him in the state where the judgment is rendered, and where he does not submit to the jurisdiction by appearing in the suit, the presence and attachment of the property of the defendant in the state where judgment is rendered, give no jurisdiction over the person or validity to the judgment, when sought to be enforced by action in Vermont, either upon general principles, or under the Constitution and laws of the United States. Nor does the fact that process was served upon, or notice given to the defendant in Vermont, or out of the state in which judgment was rendered, add anything to the force or validity of the judgment; such service and notice being regarded as a nullity: *Price* v. *Hickok*, 39 Vt.

Whether a judgment against a defendant who is a resident of the state where the judgment is rendered, but temporarily absent, without service of process or notice, is valid or not, is not decided: *Id.*

Corporations.

Subscriptions to Stock.—In a suit upon a subscription alleged to have been made to the stock of an existing corporation, organized under the laws of this state, where the name imports such a corporation as is authorized by law, a *primâ facie* right to sue is shown, without setting out the manner of the organization or its specific objects: *Williams* v. *The Franklin Township Academical Association*, 26 Ind.

Estoppel to deny existence of.—The rule that a person contracting with a corporation is estopped to deny the corporate existence is subject to the limitation that if the plaintiff assumes to be a corporation organized in this state, the name must be such as to imply such a corporation as is authorized by some statute of the state: *Id.*

The rule does not apply to a suit upon a subscription of stock made with a view to the organization of a corporation, when other acts are required by law as a condition precedent to the exercise of corporate powers. In such case, it is for the plaintiff to show that the requisite steps have been taken to complete the corporate organization: *Id.*

Criminal Law.

Evidence—Handwriting.—In criminal prosecutions where the guilt of the accused is sought to be established by proof afforded by comparison of handwriting, the sufficiency of the proof given of the genuineness of the papers offered as standards, is a preliminary point addressed to and in the first instance to be determined by the court, before permitting the papers to go to the jury. The court having adjudged the papers genuine, and having permitted them to go to the jury, it then becomes the duty of the jury, before making comparison of a disputed writing with them, to examine the testimony respecting their genuineness, and to decide whether it is established beyond a reasonable doubt; and upon this point they should require the same measure of proof as upon any other essential point in the case. And the court should instruct the jury that if they do not find, by such measure of proof, that the papers offered as standards are genuine, they should not be used as evidence against the prisoner: *State* v. *Ward* alias *La Vigne*, 39 Vt.

Once in Jeopardy—Discharge of Jury.—When the accused is put upon trial on a valid indictment, before a legal jury, and the jury is discharged by the court without good cause, and without the consent of the defendant, he has incurred the first peril, and the discharge of the jury is equivalent to a verdict of not guilty: *The State* v. *Walker*, 26 Ind.

That the jury, after ample time spent in consultation, is unable to agree upon a verdict constitutes good cause for their discharge: *Id.*

The jury should not be discharged until ample time has been given for deliberation, nor until the court is satisfied that an agreement is impossible: *Id.*

A jury in a criminal case was out nineteen hours, and then reported to the court that there was no possibility of agreeing upon a verdict. *Held*, that the court was justified in discharging them: *Id.*

The discharge of a jury in a criminal case, because of their inability to agree upon a verdict, after a protracted deliberation, does not entitle the defendant to his discharge on the ground that he has been once in jeopardy: *The State* v. *Nelson*, 26 Ind.

Miller v. *The State*, 8 Ind. 326, *Morgan* v. *The State*, 13 Id. 215, and *Joy* v. *The State*, Id. 139, so far as they hold that the discharge of a jury in a criminal case, without the consent of the accused, because of their inability to agree upon a verdict, after ample time spent in deliberation, operates as an acquittal, overruled: *The State* v. *Walker*, *The State* v. *Nelson*, 26 Ind.

Former Adjudication.

Plea of.—An answer of a former adjudication must show either that the matter in controversy was actually determined in the former suit, or that it might have been litigated under the issues then joined: *Columbus and Shelby Railroad Co.* v. *Watson et al.*, 26 Ind.

Highways.

Eminent Domain.—The power to appropriate property in any manner, without the consent of the owner, is in derogation of private right, and such appropriation should not interfere, further than public necessity requires, with the right of the owner to enjoy his property: *Edgerton et al.* v. *Huff*, 26 Ind.

Where a simple servitude is sufficient to answer the public want, the court should, when it is possible by reasonable construction, so limit the legislative enactment: *Id.*

Husband and Wife.

Trover—Conversion.—*It seems* that the administrator of a *feme covert* succeeds to her rights in respect to her property, but in enforcing those rights is not restricted in his remedy to the very remedy to which the intestate was limited by reason of the personal disability of coverture, whereby she is legally incapacitated to sue her husband, at law: *Albee, Admr.*, v. *Cole*, 39 Vt.

An absolute refusal by a party to give up a note on demand, precludes him from setting up on trial the excuse that he had not a reasonable

time and opportunity afforded him to comply with the demand, though he was away from home at the time of the demand and had not the note with him: *Id.*

Where a man makes an ante-nuptial contract by which his wife is to retain her entire interest and control of her property, and after marriage receives notes which she holds, as trustee or agent for her, and then appropriates them to his own use and benefit, with the intent and purpose of depriving her of her property, it is *held* to constitute a conversion of her property in fact and in law: *Id.*

Malicious Prosecution.

Proof, in actions for.—To maintain an action for a malicious prosecution the plaintiff must prove: 1st. That the defendant instigated the prosecution against the plaintiff; 2d. That such prosecution was without probable cause; 3d. That it was accompanied with malice and terminated favorably to the party prosecuted: *Miller* v. *Milligan*, 48 Barb.

Malice and want of probable cause for the former suit must *both* be alleged and proved. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious: *Id.*

If there is an absence of proof to show that the defendant was the real prosecutor in the former suit; or, if he was, that he was without evidence or circumstances justifying a *reasonable suspicion* of the truth of the charge then made, the plaintiff should be nonsuited, and has no legal right to ask for a submission of the facts to a jury: *Id.*

Probable Cause.—The question of probable cause does not depend upon the actual guilt or innocence of the accused, but upon the *belief* of the prosecutor concerning such guilt or innocence: *Id.*

If the party has positive proof of the facts, in the affidavit of another, and he believes the truth of that person's statement, and proceeds against the plaintiff upon that proof, and under a belief in its truthfulness, he will be deemed to have had probable cause for so doing: *Id.*

Master and Servant.

Negligence of Servant—Liability of Master.—A master is ordinarily responsible for the consequences resulting to others from the negligence or want of skill with which his employees do his business: *Evansville and Crawfordsville Railroad Co.* v. *Baum*, 26 Ind.

But for a wilful and malicious trespass of a servant, not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for his master, no action will lie against the master: *Id.*

But if the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose, then it was implied in the employment, and the master is liable, though the servant may have executed it wilfully and maliciously: *Id.*

These rules apply equally to corporations as to private individuals: *Id.*

Suit against a railroad company for a trespass committed by a servant

of the company. The complaint alleged that the plaintiff had paid his fare and was seated in the car, when he was violently assaulted and beaten, and ejected from the car, by a servant of the company; that the duty and employment of said servant was to provide seats for passengers and exercise care for their comfort, and that he then had charge of said car and committed said trespass in the course of his business as such servant.

Held, that the expulsion of the plaintiff from the car, where he lawfully was, if done without unnecessary violence, would give a right of action against the company, and as this state of facts might have been proved under the allegations of the complaint, a demurrer to the complaint was correctly overruled: *Id.*

Mortgage.

Mortgagee in Possession—Rents and Profits—Waste.—The right of the mortgagor on redemption to call the mortgagee in possession to account for rents and profits is an incident of the right to redeem, and must, like it, be enforced at equity: *Seaver et al.* v. *Durant et al.*, 39 Vt.

The right to hold the mortgagee responsible for waste which occurred during the period of the mortgagee's possession, after condition broken, stands on the same ground as the right to an account for rents and profits, and is only a right at equity: *Id.*

The law cannot imply that the mortgagor after redemption is entitled, in the mortgagee's name against his will, to sue for a breach of a covenant previously made by a third party with the mortgagee in possession, relating to repairs; because, at law, it is not the mortgagor, but the mortgagee in possession, who is interested in the estate and its repairs, and is entitled to damages for its mismanagement or waste. The entire legal interest is in the mortgagee in possession after condition broken: *Id.*

M., the mortgagee in possession after default, let D. occupy under a covenant with him by D. to keep the estate in repair. L., the mortgagor, redeemed and sued D. at law in M.'s name and against his will, but with an offer of indemnity for a breach of this covenant which occurred before L. redeemed. *Held*, that the action could not be sustained: *Id.*

Railroad.

Specific Performance—Cattle Guards.—A suit for specific performance will not lie upon a covenant by a railroad company to maintain and keep in repair the cattle guards upon the land of the plaintiff: *Columbus and Shelby Railroad Co.* v. *Watson et al.*, 26 Ind.

Negligence—Recklessness—Where the negligence of the defendant is so gross as to imply a disregard of consequences, or a willingness to inflict the injury, the plaintiff may recover, though he be a trespasser, or did not use ordinary care to avoid the injury: *Lafayette and Indianapolis Railroad Co.* v. *Adams*, 26 Ind.

REMOVAL OF CAUSE INTO CIRCUIT COURT OF THE UNITED STATES.

An action commenced in the Supreme Court by one foreign corporation against another, cannot be removed for trial into the Circuit Court of the United States under the Act of Congress of 1789: *Ayres* v. *The Western Railroad Corporation*, 48 Barb.

But where the assignee of a foreign corporation suing another foreign corporation, is a citizen of this state, the action may be removed, provided the claim is of such a nature that the United States court can take cognisance of it: *Id.*

The 17th section of the Act of Congress, which provides that the Circuit Courts of the United States shall not "have cognisance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents if no assignment had been made," applies to a claim against a railroad company, as a common carrier, to recover the value of goods intrusted to it for transportation; such a claim being a chose in action: *Id.*

SHIPPING.

Bill of Lading—Demurrage.—If a bill of lading contains no provision for the payment of demurrage by the consignee, he is not liable therefor, even upon his acceptance of the cargo; and certainly not, if he assigns the bill of lading before any of the cargo has been delivered: *Gage* v. *Morse*, 12 Allen.

Liability of Owners, for Supplies.—In an action against the owners of a ship, for goods furnished to the ship, on the order of the captain, the plaintiff must give some proof to show that the articles furnished were necessaries: *Ford et al.* v. *Crocker et al.*, 48 Barb.

The rule adopted in the courts of this country, while it admits the right to confine the supplies thus furnished to such as are necessary, leaves the decision as to what is necessary rather to the captain than to the creditor: *Id.*

Tradesmen are not called upon, before delivering supplies for a vessel, on the order of the captain, to examine whether each article ordered is actually necessary to enable the vessel to make the voyage. If it is proper that they should be ordered on account of, and for the use of, the vessel, the vendors may rely on the captain to decide whether they are necessary or not; and his order for the goods on that account is sufficient: *Id.*

STAMP.

Appeal Bond.—The bond given on appeal from the judgment of a justice to the Circuit or Common Pleas Court, does not require a revenue stamp: *Violet* v. *Heath*, *Anderson* v. *Coble*, *Topf* v. *King*, 26 Ind.

Deposition.—The certificate of the officer taking a deposition is not subject to stamp duty: *Prather* v. *Pritchard*, 26 Ind.

TAXES.

Exemption from.—A steamship company, incorporated under the laws

of New York, for the transportation of passengers and freight between New York and Brazil, whose capital is invested in vessels employed for that purpose, and whose office is located in the city of New York, is not exempted from state taxation on its capital under the Constitution of the United States, on the ground that the whole amount is invested in steamships engaged in foreign commerce, and in carrying the mails under contract with the United States: *The People ex rel. U. S. and B. Steamship Co.* v. *The Comm'rs. of Taxes*, 48 Barb.

Vendor and Vendee.

Reservation of Water-Right in a Grant.—A vendor of land may reserve an assignable right of taking water from a spring situated thereon through pipes of certain dimensions, with the right to enter upon the land to make repairs, upon payment of the damages caused thereby; and such right need not be annexed to any particular estate, or be limited as to the place or manner of its enjoyment: *Goodrich* v. *Burbank*, 12 Allen.

A vendor of land reserved to himself, his heirs and assigns, the right of taking for ever so much water from a spring situated thereon, from which water was then taken in a pipe to supply the grounds of a neighbor, as then ran in said pipe, so long as the same should last, together with the right to replace the same with a pipe of a certain size, and thereupon to take so much water as would run through the substituted pipe, and to enter and repair the aqueduct at all times, upon payment of the damages caused thereby. The neighbor received the water under a revocable license; and no part of the vendor's remaining land had the use of water from the spring. *Held*, that the reservation gave to the vendor an assignable right to take the specified quantity of water, not annexed to any particular estate or limited as to the place or manner of its enjoyment: *Id.*

Watercourses.

Canals—Rights of the Owners of the Soil—The canals constructed under the internal improvement law of 1836 were built for navigation, and to furnish hydraulic power, and the proprietor of the soil is entitled to every use to which the land can be applied consistently with an easement for the purposes named: *Edgerton et al.* v. *Huff*, 26 Ind.

Right to take Ice.—The owner of the fee is entitled to take ice from the canal, if the taking of it does not interfere with navigation, or with the use of the water for hydraulic purposes: *Id.*

Will.

Guardian and Ward—Insanity—Pleading.—The appointment of a guardian is not conclusive of the incompetency of the ward to make a will, though the guardianship still exists: *Robinson's Estate*, 39 Vt.

Pleas by a contestant of a will that the testator before making the will had been adjudged insane, and that a guardian had been appointed over him, and the guardianship existed at the time of making the will, *held*, insufficient upon demurrer: *Id.*