

by shortening the time of payment: *Cumber v. Wane, ubi sup.* Now, an additional remedy being given to the creditor, is equivalent to shortening the time of payment, and therefore, by analogy, ought to be considered as an adequate consideration for a binding composition agreement. Nevertheless, Vice-Chancellor STUART observed, in the principal case, that he "was not aware of any authority for saying that an agreement to take 500*l.* recoverable at law, for 1000*l.* recoverable in equity, could be said to be founded upon a sufficient consideration."

We are not inclined to look with a favorable eye upon the principle involved in *Cumber v. Wane*, whereby the law takes upon itself to unmake the contracts

of persons perfectly *sui juris*, not upon any supposed ground of public policy, but simply because it considers that the contractors have not looked sufficiently closely after their own interests. Still less are we inclined to approve of the system of first establishing a general principle, and then "frittering it away with nice distinctions." But so long as the cases to which we have adverted remain undisturbed, it is exceedingly hard to reconcile these cases with the opinion of the Vice-Chancellor in the principal case, that the fact that a debtor has given a legal remedy to his equitable creditor is not a sufficient consideration for a composition of the debt.—*Solicitors' Journal.*

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

SUPREME COURT OF MISSOURI.²

SUPREME COURT OF NEW YORK.³

BILLS AND NOTES.

Waiver of Demand and Protest.—A waiver of presentment and demand of payment of a negotiable note would imply and include a waiver of protest and of notice of non-payment, but a waiver of notice only would not be a waiver of demand. A "waiver of protest" would imply a waiver of presentment, demand, and notice. The waiver is a matter between the holder of the note and the indorser to be charged, and the agreement must be made between them: *Jaccard v. Anderson*, 37 Mo.

Usury.—The mere fact that a promissory note, payable in the city of New York, is made and discounted in the country, and a portion or the whole of the proceeds paid to the borrower in a draft upon the city, at the usual price or charge for city drafts, does not render such note usurious: *The Union Bank of Rochester v. Gregory*, 46 Barb.

Perhaps the note might be held to be usurious if both the place of payment thereof, and the purchase of the draft, were made the condition of the loan. But where nothing of that kind is shown, and for aught that appears in the finding of facts, the borrower desired a draft on the city for his own convenience, if the fact was otherwise it is for the defendant alleging the usury to prove it: *Id.*

¹ From Charles Allen, Esq., Reporter, to appear in vol. 11 of his Reports.

² From C. C. Whittlesey, Esq., Reporter, to appear in 37 Mo. Reps.

³ From Hon. O. L. Barbour, Reporter, to appear in vol. 46 of his Reports.

Notarial Certificate.—A notarial certificate of presentment, protest for non-payment, and notice thereof, is properly received as presumptive evidence of the facts stated therein, where the defendant does not, by his answer, deny the fact of having received notice, but on the contrary he admits that he received notice, though not until after the note fell due: *Id.*

The statute making such certificate presumptive evidence of the facts contained therein, unless the defendant shall annex to his plea an affidavit denying the receipt of notice, only applies where no notice has been received at any time: *Id.*

COMMON CARRIER.

Connecting Railroads.—If an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company so receiving them shall pay to its predecessor the amount already due for the carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and a payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them: *Darling v. Boston and Worcester R. R. Co.*, 11 Allen.

Goods not called for.—If a common carrier by water cannot find the person to whom goods carried by him are consigned, or any person representing the owner, and thereupon delivers them to a responsible warehouseman for safe keeping, receiving from him payment of all his charges, and there are no special facts to show that the warehouseman undertook to act as bailee of the carrier and not of the owner or consignee, and the goods are never called for, the carrier is not entitled to reclaim them from the warehouseman by paying the amount of his charges: *Hamilton v. Nickerson*, 11 Allen.

CONSTITUTIONAL LAW.

Tax on Dividends due to Non-Residents.—The legislature have no power to pass a statute requiring domestic corporations to reserve and pay into the treasury of the commonwealth a certain portion of all dividends declared by them on shares of non-resident owners: *Oliver v. Washington Mills*, 11 Allen.

CONTRACT.

Non-compliance by reason of Arrest and Imprisonment.—An arrest, conviction, and imprisonment for crime will exonerate a workman from the duty of giving to his employers two weeks' notice before leaving their service, under a contract by the terms of which he has agreed to give such notice, or not claim any wages due: *Hughes v. Wamsutta Mills*, 11 Allen.

DAMAGES.

Evidence of Injury in Action for Compensation.—In an action to recover damages for a personal injury, the plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he was accustomed to do before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity: *Ballou v. Farnum and Others*, 11 Allen.

DEBTOR AND CREDITOR.

Creditors, how aided in Equity.—Where a person, who is insolvent at the time, transfers his interest in a legacy, for an inadequate consideration, to a party who is aware of his insolvency, the creditors of the assignor may maintain a suit in equity, to have their debts satisfied out of the interest or fund, beyond the consideration actually paid or agreed to be paid; even though the transaction was not-in fact fraudulent, so as to authorize the court to set it aside on that ground: *Bigelow et al. v. Ayrault et al.*, 46 Barb.

In such a case the assignor, in the absence of any fraudulent design in making the transfer, may obtain the same relief himself, by showing that it was made under the pressure of his debts, or other importunate needs. And, certainly equity should regard with quite as much favor the claims of his creditors—especially in a case where it appears that he intended to defraud them by a cheap transfer of his estate: *Id.*

DEED.

Effect of its Destruction.—When a deed has been delivered, so as to divest the grantor of the title and vest it in the grantee, the subsequent destruction of it by the parties will not change the title back to the grantor, and reinvest him with it: *Fonda v. Sage et al.*, 46 Barb.

Conditions in.—It is well settled that a condition, in a conveyance, can only be reserved for the benefit of the grantor of the estate, and his heirs; and that no stranger can take advantage of the breach of a condition: *Id.*

Until re-entry by the grantor or his heirs, for the breach of a condition, the estate is not forfeited, but remains in the grantee. Mere neglect to perform the condition is not sufficient to work a forfeiture: *Id.*

Nor is a mere verbal refusal by the grantee to perform the condition, if he is an infant at the time: *Id.*

Where a deed, or other instrument, is handed over by the maker to the other party, and retained by the latter, and nothing further is said, the law presumes that the instrument is made according to the agreement, and that the party to whom it is thus handed over accepts it as a delivery in fulfilment of the agreement between them: *Id.*

But it is not every mere handing over and retention, for a greater or less period of time, which will constitute a full and effectual delivery of an instrument. If it is taken by the grantee or other party merely for the purpose of examination, to see whether it is in accordance with the agreement, it is no delivery unless the party concludes to retain it after such examination: *Id.*

And so, where a party makes a purchase of land, and the agreement is that the vendor is to convey it to the purchaser by a deed, with some special provision in it, and a deed is made and handed over to such purchaser, which conveys the land to another person, and the purchaser receives it without any examination of its contents, understanding and believing that it is a deed made to him, and which vests the title in him, and he retains it in that belief, until he discovers that it is not such an instrument as he was to have, and does not give him the land he had purchased, he may return it to the vendor, and require one to be made in accordance with the agreement: *Id.*

EQUITY.

Jurisdiction.—Where the complaint alleged that the defendants were proceeding to acquire the title to land under a destroyed instrument, or to put themselves in a situation to assail the plaintiff's title to the same premises through that deed: *Held*, that whether the case was to be regarded as strictly in the nature of a bill in equity to remove a cloud upon the title to real estate, or generally, in the nature of a bill *quia timet*, to settle the plaintiff's title to the property, and establish it securely against all claims which might be brought against it by reason of the destroyed deed, the case was clearly one of equitable cognisance, and the action might be maintained upon either or both grounds: *Fonda v. Sage et al.*, 46 Barb.

FRAUD.

Agent when liable for.—A purchaser of chattels, after having sued the vendor for a breach of warranty in the sale, and been defeated in the action, may bring an action against the *agent* by whom the sale was made, for a fraud practised by him on such sale: *Gutchess v. Whiting*, 46 Barb.

HUSBAND AND WIFE.

Divorce obtained in another State.—A divorce obtained in Illinois by a citizen thereof from his wife, for the cause of desertion, upon notice to her by publication in a newspaper in the manner prescribed by the statutes of that state, is valid, although she was then living in Massachusetts under an agreement by which, after reciting their separation, he promised to pay her a certain weekly sum as long as she should remain single, and although she had no actual notice of his proceedings for a divorce and was not in Illinois during the pendency thereof; and it is not competent for her, in this commonwealth, to offer evidence that he obtained the decree of divorce there by fraud, and upon facts which would not entitle him to a divorce here: *Hood v. Hood*, 11 Allen.

Adultery by Marriage when former Husband is not really dead, though supposed to be.—A man may be convicted of adultery who in good faith and in the belief that she is a widow marries and cohabits with a woman who has left her husband and remained absent from him for more than seven years together without hearing of him, if in fact her husband is still living: *Commonwealth v. Thompson*, 11 Allen.

INSURANCE.

Cause of Loss.—A policy of insurance upon a building is an insurance upon the building as such, and not upon the materials of which it is composed. If from any defect of construction or overloading the building fall into ruins, and subsequently the materials take fire, the insurer is not liable for the loss: *Nave et al. v. Home Mutual Insurance Co.*, 37 Mo.

INTEREST.

Conflict of Laws.—A corporation, created by the laws of another state, although forbidden by its charter to take more than six per centum interest, may, upon loans made in this state, charge the rate of interest allowed by our laws. The law of the place where the contract is to be performed will govern the rate of interest. One state will not enforce

the usury laws of another state, in respect to contracts made within its own limits: *Bank of Louisville v. Young*, 37 Mo.

LIEN.

On Vessel built for the United States.—If a vessel has been built for the United States for the purpose of being used as a floating light, under an agreement to construct and equip her according to certain specifications annexed, and to the satisfaction and approval of an agent of the United States, and to deliver her in this commonwealth, for a gross sum to be paid by the United States to the builder after her completion, and the builder has completed the same, and received the contract price, and the title to her has vested in the United States, subject to the lien, and possession has been taken of her by the United States, and the spars and rigging been put up, and the lanterns put on board and prepared for use, a lien upon her cannot be enforced in the courts of this commonwealth upon proceedings afterwards commenced, for timber which has been used in her construction: *Briggs & Another v. A Light Boat*, 11 Allen.

NEGLIGENCE.

Action against Contractors—Receipt of Money in Settlement.—One who is employed by a dealer in lumber to deliver lumber upon an unfinished bridge to sub-contractors who have undertaken to build the wooden portion thereof may recover damages against the contractors who have undertaken to build the entire superstructure, for an injury sustained by him while so delivering lumber, through a defect in the iron-work of that portion of the bridge which has been completed: *Curley v. Harris & Others*, 11 Allen.

If one who has received a personal injury through the negligence of another signs a paper acknowledging the receipt of a small sum of money in full for his damages, a subsequent action cannot be maintained to recover damages for the same injury, unless his signature to the receipt was procured through mistake or fraud; and if instructions to this effect are requested, and the jury are simply instructed that if they are satisfied that the parties "fairly settled the claim it is sufficient, and the amount received in the settlement is not material to its validity as a settlement," a verdict for the plaintiff will be set aside: *Id.*

Action for Personal Injury survives to Administrator.—An action at law to recover damages for an injury which causes immediate insensibility, and death in fifteen minutes, survives to the administrator of the estate of the deceased: *Bancroft v. Boston and Worcester R. R. Co.*, 11 Allen.

Ferry Company.—A ferry company, being common carriers of passengers, are bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means so employed; but they are not bound to adopt and use a new and improved method, because it is safer or better than the method employed by them, if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive; and the cost of such improved method may be a sufficient reason for their refusing to adopt it: *Barron v. East Boston Ferry Co.*, 11 Allen.

In an action against a ferry company to recover damages sustained in passing from their boat, through the negligence of the defendants in failing to provide a safe and sufficient drop over which to pass, proof of due care on the part of the plaintiff, and of the injury, will not raise a presumption of law that the defendants were negligent, or change the burden of proof which rests upon the plaintiff to prove their negligence; but the same may be taken into consideration by the jury, and allowed such weight as they think reasonable, in view of the whole evidence: *Id.*

NUISANCE.

Injunction.—Equity will interfere by injunction in case of a direct, continuing, and permanent nuisance, without compelling the plaintiff to resort to repeated actions at law. To authorize this interference, there must be such an injury as from its nature is not susceptible of an adequate compensation by damages at law, or such as from its continuance must occasion a constantly recurring grievance, which cannot otherwise be prevented but by injunction. It is only necessary that a party should establish his right in an action at law preparatory to obtaining an injunction, where a question of title is involved, or the right itself is doubtful or uncertain. A purchaser of land may have his action for the continuance of a nuisance erected before his purchase was made. The keeping and standing of jacks and stallions within the immediate view of a private dwelling is a nuisance: *Hayden v. Tucker*, 37 Mo.

RAILROAD COMPANIES.

Time of Commencement of Responsibility for Freight.—If a heavy article has been carried by a truckman to the depot of a railroad corporation, and injured while being loaded upon the cars, the railroad company are liable therefor, if they had accepted and taken charge of the same; and in such case it is no defence to an action against them, that the injury resulted in part from the carelessness of the truckman: *Merritt v. Old Colony and Newport Railroad Co.*, 11 Allen.

Power to exclude improper Persons from the Cars.—The conductor of a street railway car may exclude or expel therefrom a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offence or annoyance: *Vinton v. Middlesex Railroad Co.*, 11 Allen.

Negligence—Damages.—In an action for damages against a railroad, for negligently managing its engines, so that fire was communicated to the standing grass and crops of the plaintiff, the burden of proof is upon the plaintiff, to show that the fire was caused by the negligence or want of care of the defendant. There is no legal presumption of negligence in such cases; it must be shown as a matter of fact: *Smith v. Hannibal and St. Joseph Railroad Co.*, 37 Mo.

Negligence—Acts of Public Enemy.—Carriers of passengers not being insurers of their safety, are not responsible where all reasonable care, skill and diligence, prudence and foresight, have been employed. They are not liable for mere accident, or misadventure, any more than for the act of God, or the public enemy, for any sudden convulsion of nature,

or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the road. In addition to this, there must be some actual negligence, or want of strict care, diligence, and foresight: *Sawyer v. Hannibal and St. Joseph Railroad Co.*, 37 Mo.

In a suit by a passenger on a railroad train for injuries occasioned by the cars being thrown into a chasm, occasioned by the burning of a bridge by the public enemy, of which defect in the road the conductor of the train was prevented from receiving notice by the agents and servants of the road being driven off or overawed by the enemy,—an instruction confining the issue of negligence to the particular case in the running of the cars, and telling the jury that “if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that the injury complained of was the result of mere accident, then the carrier was not liable for the injury,” was improperly refused, as it presented to the jury the principle that the defendant was not to be held liable for mere accident, in the absence of any want of that degree of care and prudence which the law requires. If it were not the negligence of the conductor of the train, or his want of care and foresight, that was the proximate or remote cause of the accident and injury, the carrier was not liable: *Id.*

Liability as common carriers.—Goods destined for S., a place beyond Dunkirk, but directed to F. at Dunkirk, were transported by the defendant, upon its railroad, from Buffalo to Dunkirk. On the day of their arrival at the latter place, the goods were called for by the carrier who was to carry them from Dunkirk to S. The defendant, owing to other engagements of its agents, was not ready to make the delivery when called for; and it was mutually agreed, for the convenience of both parties, that the goods should remain in the defendant's warehouse, where they were, until the next morning. During the night the warehouse took fire, by accident, and the goods were consumed. *Held* that the liability of the defendant as a common carrier, continued until the property should be actually delivered to the next carrier: *Fenner v. The Buffalo and State Line Railroad Company*, 46 Barb.

RECORD.

Cannot be impeached.—The truth of a magistrate's record of a criminal case within his jurisdiction and determined by him cannot be impeached, even in an action against him for fraudulently and corruptly altering the complaint and warrant after the warrant had been served: *Kelley v. Dresser*, 11 Allen.

TELEGRAPH COMPANY.

Contracts limiting liability.—Telegraph companies, whether regarded as common carriers or bailees, may specially limit their liabilities, subject to the qualification that they will not be protected from the consequences of gross carelessness. A telegraph company may reasonably require that, for the purpose of avoiding errors, the message shall be repeated, or that the company shall not be liable for any error in the transmission of the message: *Wann v. Western Union Telegraph Co.*, 37 Mo.