discharge the duties of his office," by granting permits for the removal of distilled spirits from bonded warehouses in his district to bonded warehouses in another district, without exacting transportation bonds with sufficient sureties, in double the amount of taxes imposed on the spirits, as required by the Act of June 30th 1864, sect. 61, and the regulations of the treasury department. The evidence was that permits had been given for the removal of nearly one thousand barrels of whiskey, and on suing out the bond the sureties could not be found. No residence was attached to their names on the bond, and in some cases only the initials of their first names were given. The defence was that defendant had relied on a clerk, and therefore could not be held on the ground of negligence, and there was no evidence of corruption or any dishonest purpose. The evidence, however, failed to show that the clerk had been intrusted with the duty of examining the sufficiency of the sureties, and in some instances the permits had been issued before the bonds were handed to him. Under the charge of FIELD, J., the jury found a verdict for the United States for $100,000, the full amount of the defendant's bond. J. T. M.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MISSOURI.[1]

SUPREME COURT OF NEW YORK.[2]

ACCORD AND SATISFACTION.

Factors, who had agreed to insure property consigned to them, effected insurance to the amount of 41 per cent. only, and the property being destroyed by fire, they wrote to the consignors conceding their liability to account for all they had received from the insurers, and placed the amount to the credit of the consignors, hoping it would prove satisfactory. The consignors replied: "We supposed you were nearly insured in full; but if this is all we are entitled to, we must submit." And they drew a draft upon the factors for the amount received by them on account of insurance, which was paid: *Held* that, there being no dispute between the parties about the facts, or about the claim, this did not amount to an accord and satisfaction: *Beardsley et al.* v. *Davis*, 52 Barb.

AGREEMENT.

Acceptance of Proposition.—To constitute an agreement, it is not necessary that a proposition made by one party to another by letter, should be accepted expressly. If it is acted upon, and complied with, that is a sufficient acceptance: *Beardsley et al.* v. *Davis*, 52 Barb.

Thus, where the defendants, factors and produce commission mer-

[1] From T. A. Post, Esq., Reporter; to appear in 43 Mo. Reports.

[2] From Hon. O. L. Barbour; to appear in vol. 52 of his Reports.

chants, addressed a letter to the plaintiffs, who were maltsters, soliciting their business, or a continuance thereof, stating their terms and inviting consignments of malt, and the plaintiffs, without replying to the letter, or expressly accepting the proposition made therein, made several shipments of malt to the defendants: *Held*, that this was an acceptance of the terms proposed; and that it was not material that the plaintiffs had previously done business with the defendants without any knowledge of their terms: *Id.*

Held, also, that on receiving such letter from the defendants, stating that their charges for selling were 5 per cent., which covered all expenses—insurance, storage, &c., and a guaranty of the sales the plaintiffs were at liberty to withdraw their business, or continue it as they pleased; and that the making of further shipments by them, after that, was evidence that the terms were satisfactory, and that they were accepted: *Id.*

Held, further, that these facts justified a finding by the referee, that there was an agreement between the parties that the defendants should cause the property of the plaintiffs to be *insured: Id.*

To Insure; Construction of.—When an agreement to insure is general, and there is no difficulty in procuring full insurance, and such is the general practice in the particular matter embraced in the contract, the fair and reasonable construction of the agreement is that the party undertook to procure a contract for a full indemnity: *Id.*

In the absence of any evidence, aside from the general agreement *to insure*, the court, in fixing the *amount* of the insurance, would not, *it seems*, stop short of a full insurance; unless it was shown that in the particular matter or business it is not the practice to fully insure: *Id.*

Validity.—A simple request, from one person to another, to do an act from which the former can derive no sort of benefit, made under an entire misapprehension of his rights, does not constitute a lawful contract which is obligatory upon him: *Wells* v. *Mann*, 52 Barb.

Void within the Statute of Frauds.—Where the defence of a suit brought against A. upon a promissory note, is of no benefit to B., he not being liable therein, a request from B. to A. to go on and defend the suit, if it can be considered a contract, is an independent promise on the part of B. to answer for the debt of another, which he is not otherwise liable to pay; and if not in writing, is void within the Statute of Frauds: *Id.*

Assignment for Creditors.

Attaching Creditor excluded.—A creditor who attaches and sells the goods of his debtor, after they have been assigned under the statute for the benefit of all the creditors, will not be allowed to prove up his claim before the assignee, nor to avail himself of any of the benefits of the assignment: *Valentine* v. *Decker*, 43 Mo.

Attachment.

Garnishee.—If it appears that the contract of a garnishee is to pay in property, a judgment cannot be rendered against him as being indebted to the defendant, unless there has been a demand and failure to pay according to the contract: *Weil* v. *Tyler*, 43 Mo.

Where set aside as irregular, no Protection.—After an attachment, under which goods have been seized, has been set aside as irregular, it affords no shield or protection to the plaintiffs, for such taking. The moment it is set aside, they stand as though no process had ever been issued, and become trespassers *ab initio: Lyon* v. *Yates et al.*, 52 Barb.

Having taken the property as trespassers, they cannot, in an action against them for the tort, show that they subsequently caused it to be levied upon by virtue of a valid execution in their favor: *Id.*

Banks.

Subscription for Stock.—Where, upon the organization of a bank, individuals make and sign a certificate, stating that they have associated themselves under and pursuant to the Act of 1838, to authorize the business of banking, &c., which certificate contains the name of the bank, &c., and is, in other respects, according to the requirements of the statute, and declares that the subscribers have respectively subscribed and set their hands and seals, &c., and the number of shares taken and held by each, and such numbers are affixed to the several signatures; this, without any other subscription, is sufficient to render the subscribers stockholders, and severally liable to the bank to take and pay for the number of shares set opposite each signature: *Cole, Receiver, &c.* v. *Ryan*, 52 Barb.

Action by Receiver of Bank, to recover Subscription.—Where one who has agreed to take stock, but has not paid for it, transfers the same in good faith and without fraud, to an apparently responsible person, and no debts of the bank existing at the time of such transfer, are outstanding at the time a receiver of the bank is appointed, such receiver is bound by the acts of the bank in recognising the transferee as the owner of the stock and the debtor thereon; and cannot maintain an action against the transferor to recover the amount of his subscription for the stock: *Id.*

Criminal Law.

Gambling—Evidence of.—The defendant was found with others around a card-table, with a faro-box and cards in his hands. Checks and money passed between them. No rebutting testimony. *Held* that this evidence was sufficient to warrant a conviction for gambling: *Missouri* v. *Andrews*, 43 Mo.

Damages.

Measure of.—In an action against an agent for negligence, in not procuring full insurance, the measure of damages is the value of the property destroyed; to be reduced by any amount received under a partial insurance: *Beardsley et al.* v. *Davis*, 52 Barb.

Ejectment.

Evidence of Title.—In an action of ejectment, prior possession, accompanied with a claim of the fee, raises a presumption of title; and is sufficient to sustain an ejectment against one who shows only naked possession: *Dale* v. *Faivre*, 43 Mo.

Execution.

Exempt Property; Burden of Proof.—Where, in an action against a constable, for returning an execution unsatisfied, when it might have been collected, the question arises whether certain property of the defendant in the execution was exempt from levy or sale, the affirmative is with the officer claiming the exemption. *Primâ facie* all property is liable to execution: *Baker* v. *Brintnall*, 52 Barb.

Exemption is a statutory privilege, and is strictly personal. It therefore will not avail an officer sued for neglect of duty in not levying on property: *Id.*

The question of exemption being one that a constable cannot raise in his defence, when sued for not levying and selling, his acceptance of the execution, and a bond of indemnity, with his consent to act upon the execution, and his action so far as to take an inventory of the property of the defendant in the execution, *estops* him, in law, from returning the execution unsatisfied: *Id.*

If he is not satisfied with the bond of indemnity he should refuse it. Having accepted it, he is bound to go on and act as instructed: *Id.*

Insurance.

Assignment of Policy.—A policy of insurance was issued to John Franklin, payable to P. H. French. After loss French assigned to the Union Savings Association, and the latter assigned to John Franklin. In an action on the policy by Franklin as assignee of French, it was held that French as payee of the policy had a sufficient interest in the contract to sustain the validity of the policy. It is to be regarded in the same light as if assigned at its inception to French with the consent of the company: *Franklin* v. *National Ins. Co.*, 43 Mo.

Subsequent Insurance.—A policy of insurance contained the usual stipulation requiring notice and endorsement upon the policy or acknowledgment in writing of all previous and subsequent insurances, in default of which the policy should cease and be of no effect.

Held that a subsequent temporary insurance effected after the issuing of the policy, without notice, but not existing at the time of the loss, did not avoid the policy under this stipulation: *Obermeyer* v. *Globe Ins. Co.*, 43 Mo.

Justice of the Peace.

Docket.—Although the statute directs that every justice shall keep a book called a docket, and also directs what entries he shall make therein, the omission, by a justice, so to keep his book will not render his judgment void. Proceedings before him can still be proved by himself: *Baker* v. *Brintnall*, 52 Barb.

For certain purposes, the docket fails to be evidence, if not kept as the statute directs, but the omission so to keep it is not jurisdictional: *Id.*

Justice's Court.

Jurisdiction of the Person.—Where a defendant, sued by long summons in a justice's court, in a different county from that in which he resided, appeared by attorney and put in an answer, the attorney stating

that the defendant resided in another county, but he did not plead that fact, nor would he make an affidavit of it: *Held*, that the defendant, by answering, waived any defence on the ground of residence, and thus gave the justice jurisdiction of his person: *Osburne* v. *Gilbert*, 52 Barb.

Legal Tender Notes.

Where a bond was conditioned to pay "in gold or silver coin of the standard by which the coins of the United States were regulated by the laws existing on the 26th day of May 1846, the sum of $4000," in three years, with interest: *Held*, that the bond, and a mortgage given in connection therewith, were paid and satisfied by a payment *in legal tender notes*: *Murray* v. *Gale, adm'x., &c.*, 52 Barb.

Limitations.

Special Act.—Action upon notes issued by the Kirksville branch of the Bank of St. Louis. By the Act of February 16th 1864, provisions were made for winding up the branch banks throughout the state. In this act it was provided that all claims, dues, and demands against said banks not presented within two years, should be for ever barred, saving the usual disabilities. Held that this special limitation was legal, and that the notes in suit not being presented within the two years were barred: *Stevens* v. *St. Louis National Bank*, 43 Mo.

Married Women.

Actions by.—Since the acts of the legislature of 1860, chap. 90, and of 1862, chap. 172, a married woman may bring an action in her own name against a wrong-doer, for a wrong committed upon her person, without joining her husband with her as a party: *Ball* v. *Bullard*, 52 Barb.

To the damages which are recoverable for a personal injury to the wife, committed previous to the statute of 1860, the husband has no vested or other interest or right, legal or natural. Hence there is no ground for making him a party to an action therefor: *Id.*

As to the right to bring such an action, the statute of 1860 makes a married woman a feme sole. By suing as a feme sole, she accepts its provisions, and takes it subject to its letter, its spirit and intent, limitations and liabilities: *Id.*

And treating her as a feme sole, with the disability removed, the Statute of Limitations applies to the case, and if the action is not brought within one year, nor within six years, after the removal of her disability to sue, by the Act of 1860, it will be barred: *Id.*

Negligence.

Adjoining Tenants.—The occupant of a second story is liable for the negligence of his servants in allowing a hydrant to flood the story below, and damage the goods of the occupant of said story: *Gass* v. *Callunry*, 43 Mo.

Contributing to the Injury.—The negligence of the deceased, in order to defeat an action in favor of his widow for the injury causing his

death, must be direct and proximate in contributing to the injury; and an instruction referring to negligence generally was properly refused: *Meyer* v. *People's Railway*, 43 Mo.

Evidence.—In an action against an overseer of highways, for causing embankments or breaks to be made across the road, on a hill, whereby the plaintiff was thrown from his wagon and injured, evidence to show that within a week of the time of the accident, a person was upset at the same place, and a lady was thrown out of a wagon; and that about the time or within two or three months of the plaintiff's injury, several accidents of a similar kind occurred from the same cause at the place in question, is not admissible: *Sherman* v. *Kortright*, 52 Barb.

Where, in such an action, the plaintiff alleged, in one count of his complaint, that the defendant was fully informed and knew of the danger of the embankments placed by him upon the highway, and that he *wilfully and wrongfully* persisted in erecting and maintaining them across the highway: *Held*, that an issue being raised as to the defendant's malice and intentions, it was not erroneous to permit him to prove that he had no malice or ill will, or intention to injure the plaintiff: *Id.*

Nuisance.

Action against Continuer of.—Every continuance of a nuisance is, in judgment of law, a fresh nuisance. An action can be maintained against the party continuing the nuisance; whether he be the original wrong-doer, or his alienee: *The Conhocton Stone Company* v. *The Buffalo, New York and Erie Railroad Company*, 52 Barb.

Although a corporation erecting or continuing a nuisance had leased the premises on which the same was erected to another, and given possession prior to the happening of an injury occasioned by it, it is liable for the damages sustained: *Id.*

An action for damages will lie against the continuer of a nuisance, without averring or proving a previous notice to him, of the existence and extent of the nuisance, and a request to abate and remove it: *Id.*

Principal and Agent.

Duty of Agent to his Principal.—An agent, while in his principal's employ, can accept no employment hostile to the interest of his employer. If he does so, and receives remuneration therefor, it constitutes a breach of the contract between him and the company, and affords good and sufficient ground for his discharge. Nor can an agent act in the business of his agency, for himself and his principal at the same time: *Morrison* v. *The Ogdensburgh and Lake Champlain Railroad Company*, 52 Barb.

Thus, an individual employed by a railroad company, as its agent, to purchase wood and timber for its use, has no right, while purchasing woodland for the company, as such agent, to receive from the vendor a commission for promoting the sale. And if the company is compelled, through the agent's neglect of duty, to pay more for the land than it otherwise would have paid, the difference, being the amount of the agent's commissions, in equity belongs to the company: *Id.*

SALE.

Passing of Title to Personalty.—The defendants agreed to furnish the plaintiff's intestate with tobacco of a certain grade, and at a fixed price per pound, for resale by the latter. The plaintiff's testimony tended to show that the tobacco was to be paid for "when sold" by the said intestate, the defendant's testimony tended to show that payment was to be made at "the end of the month" in which the tobacco was delivered, and if not resold by the said intestate at that time, then payment might be made another month. Under this state of circumstances the defendants delivered to said intestate 940 pounds of tobacco at the agreed price. Sales of it were made amounting to $318, when the store of said intestate was consumed by fire and the residue of the tobacco destroyed. At a subsequent date the plaintiff's clerk paid the defendants the full amount of the tobacco, having no knowledge of the nature of the transaction. This suit was brought to recover $622, the amount of the over-payment. *Held* that the transaction was a sale of the tobacco, and that the title passed at the time of delivery, and that an instruction referring the consummation of the sale to the time of payment after resale was erroneous: *Blow, adm'r.* v. *Spear et al.*, 43 Mo.

TAXATION.

Special Tax Bills.—Under the charter of St. Louis city the cost of sewers may be assessed as a tax against the adjoining property. This assessment is made by the city engineer, who apportions it as a special tax against the property, and certifies in the form of special tax bills, the amount against each lot. The charter requires that this assessment shall be "against each lot," in the name of the owner. In an action to enforce one of these tax bills as a lien against the property, it was held that the clause as to ownership was only directory, and that the assessment against the lot was not vitiated by an error in respect to the ownership. An assessment against the lot of E. B. H. de Nouè, who owned it in her separate right, was valid, although made out in the name of L. de Nouè her husband: *City of St. Louis to use of Rotchford* v. *De Nouè et al.*, 43 Mo.

Under the same charter, a special tax bill for the construction of a sewer is properly assessed in the name of Mrs. Bernondy, she being the beneficiary of the lot, although the naked legal title was held in the name of Mr. Garesche for her use and benefit. There would be no law for rendering a personal judgment against Mr. Garesche. Nor could a personal judgment be rendered against Mrs. Bernondy, she being a married lady. The tax could be enforced only as a special lien against her separate estate: *Creamer* v. *Bernondy et al.*, 43 Mo.

State Income Tax—Legality of.—By the Act of February 1865, it was provided that a tax of 2 per cent. upon incomes should be collected for the year 1865. It was also provided that the assessment should be based upon the amount of income received in the year next preceding the time of assessment. *Held* that an assessment for the year 1865, upon the amount of income received in the year ending March 31st