

ment on a contract for doubloons would follow the same rule, and be not for doubloons, but for the value which the doubloons would have had if delivered according to the contract. Why should a contract for gold dollars receive a different or more favorable construction, and entitle the party who seeks to enforce it to an anomalous judgment, not for compensation, but for the things, or rather for the class of things contracted for? Judgments should be so shaped and moulded that the benefit to one party may be attained with the least amount of injury to the other, and this is what the law has done by rendering them for currency generally, and leaving the defendant free to choose that sort of current money which can be obtained with the least difficulty; but a judgment and execution solely for gold, or exclusively for silver, might impose a burden on the defendant which he ought not to be compelled to bear, and lead to the sacrifice of his property without any corresponding advantage to the plaintiff. And as the present writ of *feri facias* sins against these principles, and departs from the even tenor which every judgment should pursue, by limiting the sheriff to one particular kind of currency, instead of leaving the defendant free to pay, and purchasers under the writ free to buy in all, it is set aside in accordance with the prayer of the defendants.

Rule absolute.

STROUD, J., dissented.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Contract to pay the Debt of Another, when valid.—A firm sold out their partnership effects to another, who agreed verbally to pay the firm debts. One of the firm creditors sued the purchaser for his debt, relying on the contract of sale, without showing that he was a party to it. *Held*, that he could not recover, for the agreement upon which the action was brought was not in writing and signed by the party to be charged therewith, as required by the Act 26th April, 1855. *Shoemaker vs. King.*

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

Though such a contract is valid between the immediate parties to it, it is void as a contract in favor of the creditors of the parties, unless they, as a part of the arrangement, give up their original claims and accept the new contract instead. Without this it is void, when *expressly* made to the creditors, and therefore it cannot be *implied* as made to them. While the old debt remains, the new contract cannot be substituted, but is only a collateral one—a promise to pay another's debt, which is forbidden by the statute, as a cause of action. *Id.*

*Act of May 6th, 1844, relative to "Lapsed Legacies," construed.—Distribution per stirpes and per capita.—Construction of Will.—*Under section 2d of Act 6th May, 1844, a bequest by a testator to his sister is valid, though she was dead when the will was written, but left children who survived the testator: *Minter's Appeal*.

Where the testator directed his bequests to be distributed, "share and share alike among the children of my brother Adam, and the children of my brother Martin, and to my sister Barbara," who died before him leaving children; but by another clause in the will, the mode of distribution was rendered doubtful; it was *held*, that the legal statutory form of distribution should be applied, and that the legatees should be classified in three classes, allowing each class to take as their parents would have done, *per stirpes*: *Id.*

*Distribution of Personal Estate of Decedent as between first and second Cousins.—*Under the Act of 27th April, 1855, the children of deceased uncles and aunts take by representation, such part of the estate of a decedent as the parents would be entitled to if living. The rule of distribution is *per stirpes* and not *per capita*: *Brenneman's Appeal*.

That act constituted the grandchildren of brothers and sisters, and the children of uncles and aunts, additional *classes* of collateral heirs, as contradistinguished from next of kin, and they, therefore, take as such, when entitled to inherit, and not as next of kin as under the Act of 1833: *Id.*

The second cousins of the decedent are not entitled to a distribution under the act: whenever they are entitled to inherit, it must be as next of kin, and their distribution is *per capita*: *Id.*

*Liability of Stockholder for Debts of Manufacturing Corporation.—Joinder of Defendants.—Defence to the Action.—*The Act of April 20th, 1853, supplementary to the Act of April 7th, 1849, entitled an "Act to encourage Manufacturing Operations in this Commonwealth," renders the

stockholders in all companies incorporated in pursuance of its provisions, or under the act of 1849 and its supplements, liable for all debts contracted while they are stockholders, although they have paid up the whole of their stock: *Patterson & Co. vs. The Wyomissing Manufacturing Company et al.*

Though the corporation is the principal debtor, and the liability of the stockholders is only secondary and collateral, yet the form of the remedy and the character of the right, under the Acts of Assembly, allow the use of separate actions against the primary and secondary debtors: *Id.*

In an action against stockholders, brought to enforce such liability, the plaintiff may join the corporation, even though he has previously obtained a judgment against it, for a portion of the debt sued for: *Id.*

It is not a good plea in bar to an action against the stockholders, that the corporation had not paid the bonus of one-half per cent. on the amount of the original capital stock, as required by the state: the *proviso* to the Act of April 20th, 1853, is not properly a proviso, but an additional law: *Id.*

Resolutions of City Councils of Harrisburg, not valid unless approved by Mayor and recorded.—Regulations, Resolutions, and Ordinances, defined and distinguished.—A resolution of the city councils, which is to be executed and carried into effect by the mayor, must be presented to him for his approval and be recorded, in order to be valid: *Kepner vs. The Commonwealth.*

Where by one section of the act incorporating the city, it was provided, that the council may make "by-laws, ordinances, resolutions, and regulations," and by another, that "by-laws and ordinances" were to be submitted to the mayor for his approval, it was *held*, that there was no such distinction between the sections, as would require that "by laws and ordinances" should, and "regulations and resolutions" should not be submitted to the mayor, to be approved by him: *Id.*

Personal Liability of Grantee not implied from mention of Encumbrance in habendum of Deed sealed only by Grantor.—Covenant, interpreted by intention of Parties.—Remedy to recover Money charged on Land during Life of Widow.—Devisee of Land subject to Widow's Thirds takes cum onere.—One bought land subject to the payment of the dower of a widow charged upon it in the hands of the grantor, but the grantee did not sign nor seal the deed, in the *habendum* of which, the charge of the dower was expressed: he devised the land to his daughter by his will,

and after his death, and when the dower had become payable by the death of the widow, an action of debt was brought against his executors for the dower, by those entitled thereto. *Held*, that the words in the *habendum* of the deed to the testator, did not in themselves import a covenant or promise by the acceptance of it, to be personally answerable to discharge the dower: *Shoenberger's Executors vs. Hay et al.*

The true rule for the interpretation of covenants, is so to expound them as to give effect to the actual intent of the parties, as collected from the whole instrument; though the result may be, that words *per se*, implying a personal obligation, will be denied the effect of a covenant or a personal promise to pay, without regard to the enjoyment of the property: *Id.*

That the devisee of the testator took the estate subject to the dower: *Id.*

Liability of Married Woman for Purchase-money of Real Estate.—Bond and Mortgage of, when valid.—Waiver of Twelve Months' Delay in issuing scire facias.—A married woman bought land, received the deed and gave bond and mortgage, all in her own name alone, for the balance of the purchase-money, to be paid at the death of two annuitants, to whom the interest was to be paid annually during life. By condition in the bond, the principal could "be collected as if fully due," on default for six months in paying the interest. *Held*, that upon such default, the principal could be collected by suit upon the mortgage: *Glass vs. Warwick.*

Though in strict law a married woman has no power to make such contracts, except when joined with her husband, yet, in order to prevent great injustice, they will be enforced in equity, and according to the necessities of common justice, rather than to the terms of the contract: *Id.*

Surety on Bond of Assignee for Creditors, Liability of.—What Acts of Creditor will relieve Surety.—The mere omission of a creditor to sue the principal debtor, does not discharge a surety; but where the creditor has the means of satisfaction, either actually or potentially, in his hands, and does not retain it, the surety is discharged: *Richards vs. The Commonwealth.*

A. became surety for an assignee B., into whose hands a distribution out of the estate of his assignor C. came for a creditor D., who died before the account was finally settled; afterwards, B. himself made an assignment for the benefit of his creditors, who were paid in full and a surplus returned to the assignor. The administrator of the creditor D. in

neither instance presented his claim for payment, but afterwards, brought suit against the surety A., for the distribution to which he was entitled, under the original assignment of C. to B. : *Held*, that he was entitled to recover, notwithstanding his inactivity and neglect in presenting his claim ; that the creditor had not the possession, actual or potential, of the means of satisfaction ; that mere forbearance would not discharge the surety, who under the law had the means, by notice to the creditor, to compel him to collect the claim against the principal debtor, and that unless the surety had given such notice, lapse of time, in itself, would be no defence : *Id*.

Parol Evidence of Contents of Lost Records, when admissible.—Decree of Divorce not to be reversed Collaterally.—Evidence of Fraud not admissible, if Collusive.—Divorce, when a Bar to Dower.—Evidence of the contents of lost portions of the record is admissible after existence and loss have been proved : Miltimore vs. Miltimore and De Bourbon.

A wife obtained a decree of divorce A. V. M. from her husband, on the ground of adultery, having herself procured the issuing of the subpoena, but twelve days before the ensuing term. After more than seven years, on the death of her husband, she endeavored to avoid the decree on the ground of irregularity, and demanded dower in her husband's estate. *Held*, that she was estopped by her own acts, and that the decree of the court having jurisdiction both of the cause of action, and the parties, was not void, but only voidable if taken in time by a party who had a right to object : *Id*.

Evidence is not admissible on the part of the demandant, that there was fraud in obtaining the decree, in that the application for divorce was collusive. *Nemo allegans suam turpitudinem*, etc. The principle of estoppel applies, though, without reference to the decree of divorce, she could make out a *prima facie* case for dower : *Id*.

It was not error in the court to charge the jury, that there having been a decree of divorce from the bonds of matrimony, which remained unreversed and unappealed from, the demandant was not entitled to dower in the real estate of the decedent : *Id*.

Forfeiture of Charter not to be tried Collaterally.—Equitable Estoppel.—On the trial of an action of *assumpsit* by plaintiffs, who were owners of a turnpike road, against a defendant for tolls due for the use of the road, a plea involving a forfeiture or invalidity of the charter is demurrable, or may be treated as a nullity by the court. The violation of a charter of

incorporation, cannot be made the subject of a judicial investigation in a collateral suit: *Dyer & Co. vs. Walker & Howard*.

Where the defendants had used the road, and had contracted to pay for such use, there being no other claimants for the tolls, they are in equity estopped from setting up defects in the plaintiff's title, or the charter if there were any; and they are liable to pay for the use of the road, if not prevented from using it, by the defects alleged: *Id.*

SUPREME COURT OF MASSACHUSETTS.¹

Deposition—Officer—Arrest—Escape.—No exception lies to the decision of a judge of the superior court upon the question whether a deposition which has been read in evidence in a trial shall be delivered to the jury when they retire to consider of their verdict: *Whithead vs. Keyes*.

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant: *Id.*

An officer is not bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid: *Id.*

An officer is bound to use all reasonable and proper personal exertions to secure a person for whose arrest he has a writ; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time: *Id.*

An officer effects an arrest by laying his hand upon a person whom he has authority to arrest, for the purpose of arresting him, although he may not succeed in stopping or holding him: *Id.*

Composition with Creditors—Fraudulent Agreement.—If a voluntary assignment for the benefit of creditors has been executed by a debtor, upon the delivery to him of a release from his debts, a creditor who, by a secret agreement not to claim any portion of the proceeds of the estate, induced the assignee, who was also a creditor, to sign the release and to procure the signatures of other creditors thereto, cannot maintain an action against the assignee to recover the dividend upon his debt: *Frost vs. Gage*.

¹ From Charles Allen, Esq., State Reporter; to be published in the forthcoming volume of his reports.

Way.—No action lies to recover damages for the obstruction of a highway, against a city which is bound to keep it in repair, by an individual whose place of business thereby becomes more difficult to reach, his business injured, the delivery of articles which he has sold and the gathering in of his crops more expensive, his houses less desirable for tenants, and his rents diminished in value, if other persons suffer damages from the same cause, similar in kind, though less in degree: *Willard vs. City of Cambridge.*

Conversion.—One who receives goods into his possession and control, knowing that they were not lawfully in the possession of the person who brought them to him, and afterwards allows them to be taken away by the same person, is not thereby guilty of a conversion: *Loring vs. Mulcahy.*

Divorce; Fraud.—This court has power, under Gen. Sts. c. 107, § 4, to declare a marriage void, into which a man was induced to enter by confiding in representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man, if her husband repudiated her as soon as he had reason to know the fact: *Reynolds vs. Reynolds.*

Bailment—Negligence.—The hirer of a horse who, by improperly feeding and watering him, has made him sick, and returns him in this condition to the owner, is liable for his full value, if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treats him according to his best judgment, is unable to cure him; although such treatment was in fact improper, and contributed to the horse's death: *Eastman vs. Sanborn.*

Pauper.—One who, being in need of immediate relief and support, has received the same from the town of his lawful settlement, is not, in the absence of fraud, liable to an action by the town therefor, although he was possessed of property at the time: *Inhabitants of Stow vs. Sawyer.*

Fraud—Foreclosure of Mortgage.—An action to foreclose a mortgage which has not been discharged, but has been delivered up to the mortgagor, together with the note which it was given to secure, may be maintained, by proving to the satisfaction of the jury that the note has never in fact been paid, and that such delivery of the note and mortgage was procured through the fraud of the mortgagor, in falsely representing that another worthless note and mortgage of real estate, delivered to and

accepted by the mortgagee in exchange therefor, were good and sufficient: *Grimes vs. Kimball*.

Insolvent Debtors.—A promissory note is not provable in insolvency against the estate of an indorser, before its maturity: *Stowell vs. Richardson*.

Foreclosure of Mortgage by Second Mortgagee—Executors.—A second mortgagee of land may maintain an action to foreclose his mortgage against the first mortgagee, who is in possession for the purpose of foreclosure, if the latter is also the owner of the equity of redemption; and under his execution may be put temporarily in possession, without an actual ouster of the first mortgagee: *Cronin vs. Hazletine*.

(One of two executors may assign a mortgage given to his testator: *Note*.)

Fraud.—The purchaser of a note and a mortgage given as security therefor, who had an opportunity to examine the property described in the mortgage, cannot maintain an action of tort against the seller for falsely and fraudulently representing to him that the security of the mortgage was undoubted, and the property conveyed was of great value over and above all encumbrances, and amply worth the amount of the note, and could be sold for its face at any time: *Veasey vs. Doton*.

SUPREME COURT OF NEW YORK.¹

Inland Lakes—Riparian Proprietors—Land under Water—Obstruction of View.—An inland lake, five miles long and three-fourths of a mile wide, having no current and no main inlet, is not, in any legal or just sense of the term, navigable water: *Ledyard vs. Ten Eyck*.

Where the State issued a patent, embracing a portion of such a lake within its boundaries, the northern line crossing the lake, but there was no restriction or exception of the lake, no reference made to it, and no reservation of the water or the land under the water, it was *held*, that the grant carried the southern portion of the lake to the grantee, absolutely: *Id.*

Where lands are bounded, in a deed of conveyance, by a lake of that description and the outlet thereof, the title of the grantee extends *usque ad medium filum aquæ*. At all events, the deed will carry the right to land subsequently filled in, where the water is shallow, immediately in front of the grantee's premises: *Id.*

¹ From the Hon. O. L. Barbour, Reporter of the Court.

Where the State has sold and conveyed land bounded by a *navigable* lake or river, it holds the title to the land under water in front of the premises as *trustee* for the *public*, in order to protect navigation and prevent hindrances or obstructions. At the same time the State declares itself trustee for the *riparian proprietor*, and provides that grants shall be made to him alone, and that they will be made not only for purposes of commerce, but wherever proper for the beneficial enjoyment of his adjacent lands: *Id.*

Where the public authorities proceed to deepen the outlet of a lake, and deposit the earth and stones that are removed in the shallow water in front of and adjacent to premises previously conveyed to another, it is a visible and public declaration that that portion of the lake can no longer be used for navigation; and the grantee will enter into possession, and the trusteeship of the State, both for the public and the riparian proprietor, is virtually at an end: *Id.*

No action will lie against such riparian proprietor, in favor of an adjoining owner, to restrain the planting of trees upon such newly acquired land, and thereby obstructing the plaintiff's view of the lake: *Id.*

Title to Land occupied by a Turnpike Road—Deeds bounding Lands by a Highway—Possession sufficient to maintain Trespass or Ejectment.—Where the language of a statute, incorporating a turnpike company, is such as to vest the title to the land over which the road passes in the company, it must nevertheless be considered as vested only for the purposes of the road; and when the road is abandoned the land reverts to the original owners: *Dunham vs. Williams.*

Where premises conveyed by deed were bounded easterly by a road or public highway, without any words indicating an intention to limit the eastern boundary to the westerly line of the road: *Held*, that the words of the grant included, by fair interpretation, the one-half of the road bed: *Id.*

And where the grantees and those claiming under them, had been in the actual possession of the lands adjoining the road, under such a deed of conveyance, subject to the public easement of the highway, for more than seventy years, it was *held* that they were in the constructive if not the actual possession of the western half of the road bed, sufficiently to enable them to maintain trespass or ejectment: *Id.*

Religious Societies; Actions by Trustees.—Where the right of persons claiming to be trustees of a religious society, to the office of trustee, is disputed and denied, and they have not yet been admitted to the exercise of any of its rights or duties, and they are not and have not been in possession of the church edifice, nor of any of the temporalities of the church, they cannot maintain an action in the name of the religious society, to restrain individuals in possession and claiming to be the trustees of the society, duly elected, from closing the church edifice and preventing the pastor from holding religious meetings therein, &c.: *North Baptist Church vs. Parker et al.*

Before they can institute or maintain such an action, the plaintiffs must have been peaceably admitted to the office of trustees of the society, or have established their title thereto by a direct proceeding or action, brought for that purpose, by the attorney-general: *Id.*

The court will not, upon motion, decide who are the rightful trustees of the society, or determine the question of right to the office: *Id.*

Statutes—Taxation and Assessment.—If the State has the power to levy and collect a tax or assessment, to be paid to a railroad company as a compensation for the relinquishment of certain rights, it has the power to direct the transfer of the assessment, collectively, to the same company, for the same purpose, before its payment: *People ex rel. Crowell et al. vs. Lawrence et al.*

When the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expenses of making the same shall be paid by the owners of such adjacent property, the courts have nothing to do with the correctness or incorrectness of the determination, but must assume the fact to be as the legislature assumes or declares it: *Id.*

The wisdom or justice of the taxation is not a subject of judicial inquiry; nor is the purpose for which the tax is to be imposed: *Id.*

The legislature is not confined, in such taxation, to existing political or civil districts; but may create a district for the purpose of taxation or assessment; and may impose the tax equally or *pro rata* upon all the property in the district thus formed *pro re nata*, or upon a rule of estimated benefit to different owners or individuals; and the proceeds of the assessment may be applied to some public or quasi public purpose or to compensation to, or the redress of, individuals: *Id.*

Lien of Vendor.—Whenever a vendor has manifested an intention not to rely on his lien upon the lands sold for the purchase-money, he will be considered as having waived it: *Coit vs. Fougere.*

So if a vendor, for a portion of the purchase-money, agrees to take a conveyance of other property, and a deed of such property is accordingly executed by the vendee, and delivered in escrow, the lien of the vendor will be gone. If the depository refuses to deliver the deed, the remedy of the vendor is upon the agreement of sale between him and the purchaser to compel the delivery of the deed: *Id.*

Carriers of Passengers—Liability for Negligence of Others.—In the case of travel by passengers upon an ordinary highway in a public conveyance—especially where the highway is a crowded city street—the possibility of negligence or misconduct of the owners or drivers of other vehicles, over whom the carrier has no control, is a risk which a passenger cannot cast upon the carrier, but must, so far as the latter is concerned, take upon himself: *Spooner vs. Brooklyn City Railroad Company.*

Hence, if a passenger in a vehicle upon a city street voluntarily assumes a position which is not intended and ordinarily used for the conveyance of passengers, and which is exposed to danger from the misconduct of others, he himself contributes to an injury which he sustains by a collision produced by the wilful or the negligent acts of a third party, without any fault of the carrier; and he cannot recover against the latter: *Id.*

Purchasers at Judicial Sales—Memorandum.—The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to resell the property, and hold him liable for the loss and the additional expenses: *Miller vs. Collyer.*

A paper signed by an individual, on becoming a purchaser of property at a sheriff's sale under a judgment, by which he agrees to comply with the conditions of sale, is not a contract either with the sheriff or the plaintiff in the foreclosure suit, upon which an action can be maintained by the latter, as the assignee of the sheriff: *Id.*

Such an instrument, in the form of a memorandum at the foot of the conditions of sale, signed by the purchaser, is merely a submission by him to the jurisdiction of the court, in the foreclosure suit, as a purchaser under the judgment therein: *Id.*

It seems, that conditions of sale by a sheriff on execution, imposing upon the purchaser a liability to pay the amount of any deficiency in case of a resale, will not apply to any case except that of a resale made forthwith, upon failure of the purchaser to pay the required per centage of his purchase: *Id.*