rule. They have not shown an express agreement of this character; they have not furnished any evidence that it was their practice, or the understanding between them and Josiah Lee & Co., that cash balances should stand and await the collection of paper remitted to the party in whose favor a balance might exist.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Spirituous Liquors—Action for Liquors illegally consigned for sale—Who is an Importer.—One who has consigned spirituous liquors to another to be sold in violation of statute 1855, c. 215, cannot maintain an action for the breach of an agreement by the consignee to render an account of sales, pay the value of the liquors sold, and return the residue: *King* vs. *McEvoy*.

One who receives from an importer, and duly forecloses, a mortgage of a cask of spirituous liquors, which is in the United States warehouse, in bond, and pays the duties and receives the cask of liquors, does not thereby become the importer thereof, within the meaning of statute 1855, c. 215, § 2: *Id.*

Common Carrier—Measure of Damages.—In an action against a carrier to whom goods have been intrusted, for not delivering them according to contract, the measure of damages is the value of the goods at the place of delivery, and at the time when they should have been delivered; with interest from that time: *Spring* vs. *Haskell*.

Award—Partiality of Arbitrator.—An award is rightly rejected if, previously to the selection of the arbitrators, a portion of them made an *ex parte* examination of the matter afterwards submitted to them, at the

[1] From Charles Allen, Esq., State Reporter.

request of one of the parties, to whom the substance of the result at which they arrived was known, and these facts were not communicated to the other party. So also, it is a good reason for setting aside an award, and refusing to recommit it to the same arbitrators, if they decided upon the matters submitted to them before giving notice of a hearing to one of the parties: *Conrad* vs. *Massasoit Insurance Company.*

Divorce—Recrimination.—A wife who has wilfully and utterly deserted her husband for a period of five years, without fault on his part during that time, cannot maintain a libel for divorce against him, on account of his subsequent adultery. But she may maintain her libel, if, before the expiration of the five years, he has taken another woman for his wife: *Hall* vs. *Hall.*

Infancy—Ratification of Contract made during Minority.—A direct promise, when of age, is necessary to establish a contract made during minority, and a mere acknowledgment will not have that effect: *Proctor* vs. *Sears.*

A conditional promise, when of age, to perform a contract made during minority, will not sustain an action thereon, without proof that the condition has been fulfilled: *Id.*

Life Insurance—Suicide—Construction of Policy.—Suicide committed by a person who understood the nature of the act, and intended to take his own life, though committed during insanity, avoids a policy of life insurance, which provides that it shall be void, if the assured shall die by his own hand: *Dean* vs. *American Mutual Life Insurance Company.*

Justice of the Peace—Action.—No action lies against a magistrate to recover damages sustained by reason of his taking an invalid recognisance: *Way* vs. *Townsend.*

Void Consideration of Contract.—No action lies on a promise by a railroad company to pay to the widow of one who was killed by an accident on their railroad a certain sum of money, in consideration of her forbearance to sue them for damages: *Palfrey* vs. *Portland, Saco, and Portsmouth Railroad Company.*

Estoppel—Public Officers not Agents of a City.—A city is not estopped from claiming land which it owns, by the wrongful act of its assessors in

taxing it to a person who had no title to or possession of the same, or by a collector's sale for non-payment of such tax: *Rossire* vs. *City of Boston.*

Way.—A city is not liable for an injury caused by the combined effect of the unsafe condition of a highway, and the unlawful or careless act of a third person: *Shepherd* vs. *Inhabitants of Chelsea.*

Award—Presumption in favor of.—The legal presumption, unless the contrary appears, is, that arbitrators decide all the matters which are submitted to them, and only those: *Sperry* vs. *Ricker.*

SUPREME COURT OF PENNSYLVANIA.[1]

Ejectment, effect of Verdict and Judgment on Equitable Title—Judgment in, how to be entered—Lien Docket, an Index next the record.—Though one verdict and judgment in ejectment upon an equitable title is conclusive between the parties, and a bar to any subsequent ejectment for the same land, yet in order to have this effect, the judgment upon the verdict must have been regularly entered on the record: it is not enough that the jury fee was paid after verdict, and an entry thereof indexed in the lien docket: *Ferguson & Betts* vs. *Staver.*

The lien docket is not the *record* of judgments, but only their essential index: and the entry in the lien docket does not make the judgment, but only refers to one supposed to be already made: *Id.*

In an action of ejectment by F. & B., the holders of the legal title to the undivided half of a tract of land, against S., who claimed under an equitable title, a verdict was returned for the defendant, but, the charge of the court being excepted to, no judgment was regularly entered upon the verdict: the jury fee was paid by the defendant, and the verdict indexed in the lien docket. A second ejectment for the same land, and between the same parties, was brought, and a verdict found for the plaintiffs, upon which judgment was regularly entered, which was never reversed. Afterwards a third ejectment was brought by S. against F. & B., and a verdict rendered for the plaintiff, which was reversed by the Supreme Court, and a new trial ordered. On the new trial, S., the plaintiff, set up and relied upon the record of the verdict in the first ejectment as a bar to defendant's recovery; whereon judgment was entered for the plaintiff by

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

the court below. *Held*, that the record was not a bar, and no defence, for there had been no judgment entered upon the verdict, the payment of the jury fee and the entry upon the lien docket not being equivalent thereto; that there being a verdict and judgment in favor of the defendants, F. & B., in the second ejectment, it was conclusive in their favor—and that judgment should have been entered for them by the Court below: *Id.*

After-acquired Real Estate when included in general Devise—Act of April 8th 1833 construed—Effect of electing to take or reject Property given by Will.—One, by will dated in 1829, devised to his wife all the real estate of which he should die possessed: in 1847 he purchased a farm, which he held until his death, in 1850, when his widow entered into possession under the will: in 1857 she sold the farm, taking as a part of the purchase-money three judgment-bonds, and the same year died, leaving a will, wherein she gave one half of the residue of her estate to her own brothers and sisters, and the children of such as were deceased, and the other half to the brothers and sisters of her deceased husband, and their children. After her death, her executors issued executions upon the judgment-bonds, given for the farm sold by her, which were stayed by the Court, and the defendant—the purchaser—let into a defence, upon the ground that the title was not in the widow, but in the heirs of her husband. *Held*,

That the will of the testator, executed in 1829, did not pass the farm purchased by him in 1847, as the 10th section of the Act of 8th April 1833, providing that real estate acquired by the testator after the date of his will shall pass by a general devise, did not apply to a will dated before its passage: *Gable's Executors* vs. *Daub.*

But that, if the heirs of the testator, who were his brothers and sisters, and their children, and who, under the will of the wife, were entitled to one-half of all the property of which she died possessed, including the judgment-bonds given for the purchase of the farm, should elect to take under that will, their title would pass to the defendant, the purchaser, and the plaintiffs, her executors, were entitled to recover on the judgment-bonds given by him, as the words of the will of the testator were sufficient to include after-acquired real estate, and *his* heirs could not claim both under and against *her* will: *Id.*

Executors, Liability of, for Interest—Partial Distribution allowed where absent Distributees are secured—Payment into Court by Executor when

proper—Grandchildren when not included in term Children.—Where the assets of a decedent's estate are invested and drawing interest, the executors, after filing their account, are chargeable with interest upon the balance for distribution therein up to the date of the final decree, even though they have charged themselves with the principal of the uncollected securities; and it was not error in the Orphans' Court to confirm an auditor's report, wherein, upon part of the fund, interest was charged from the date of a former auditor's report and upon the balance, from the date of the confirmation of the first account by the Supreme Court, up to the filing of the second report; though the first auditor's report was filed before the confirmation of the first account, and in the second, the auditor went back of that account as confirmed to the date of the first report, as a period from which to calculate the interest upon a part of the fund: *Appeal of Gable's Executors.*

It is not error to permit a partial distribution of an estate (a share in which is claimed by one whose right as a legatee under the will had not been determined), if, in the opinion of the Orphans' Court, enough of the estate remains thereafter to satisfy the claim when it should be established; if not, a sufficient sum should be set apart and invested under the direction of the Court to abide the event: *Id.*

Where the names and number of the children of one of those entitled under the will, who died before testatrix, had not been ascertained; it was not error in the Orphans' Court to order the share of the father to be paid into Court, to await further order and decree; for in this way the executors would be relieved from responsibility, and the distribution to each child made as by law entitled: *Id.*

A testatrix by will divided the residue of her estate into two parts, giving one half to her brothers and sisters of the whole blood, and the children of such of them as were deceased, share and share alike, the children of each deceased brother or sister to take together for their share, an amount equal to the share of a surviving brother or sister, and no more; the other half of her estate was given to the brothers and sisters of her deceased husband and their children in similar terms. *Held*, that under the will "grandchildren" were excluded, and were not entitled to any portion of the estate, as the word "children" in itself did not include "grandchildren" or "issue"—therefore it was error in the Orphans' Court to award any portion of the estate to the grandchildren of the deceased brothers and sisters of testatrix, or those of the brothers and sisters of her deceased husband: *Id.*

Conditional Subscription to Railroad Companies—Defence to Action for Instalments on Stock.—One subscribed in 1853 for twenty shares of the stock of the Pittsburgh and Connellsville Railroad Company on the express condition that the company "should locate and construct their railroad along the route contemplated by the Meyer's Mill Plank-Road Company for their road," paid one instalment, part of the second, but delayed the payment of the balance as the calls were made, until the company, before the road was *constructed* along the route mentioned, suspended operations, after which payment was refused on the ground that though the road had been *located* by the company, they had not *constructed* it, according to the condition in the subscription. In an action brought therefor by the company it was *Held*,

1. That the promise of subscription being precedent to that of construction upon the part of the company, the defendant could not insist upon performance by the railroad company while he refused performance on his part; and that the road having been located as stipulated, and completed so far as the means of the company would allow, it was a compliance with the condition, and the plaintiffs were entitled to recover: *Miller* vs. *The Pittsburgh and Connellsville Railroad Company.*

2. That the condition in the contract of subscription was not a condition precedent, and did not require the completion of the road before payment could be required, but only that when located and constructed it should occupy the route designated, the undertaking being, on the part of the subscriber, to pay as calls should be made by the directors, and on the part of the company to locate as stipulated and construct as fast as their means would allow: *Id.*

3. That the suspension of operations made by the directors, long after the payments upon defendant's stock had been due, was not a defence in an action brought against him for the unpaid balance thereon: *Id.*

4. Where the company had received subscriptions on a guarantee that they would pay interest on stock "as soon as paid," until the road was finished, interest would not accrue until the stock was fully paid; and where but a small part of the stock had been paid for by the defendant, he could not, in a suit against him for the balance, set up the non-payment of interest on his stock by the company as a breach of condition: *Id.*

Custom of Merchants as to Credit on Sale of Goods—Evidence of, in Action for Goods sold and delivered.—Where suit was brought for a bill

of goods sold more than six years before, and the Statute of Limitations was pleaded; evidence of the practice and custom of the trade to sell goods upon a system of credits, was held inadmissible for the purpose of proving that the price was not to be paid when the goods were sold, but on a certain date thereafter, so as to avoid the bar of the statute by showing that the bill was not due until within the six years; and it was error in the Court below to receive the evidence and refer it to the jury as testimony from which they might infer a contract different in terms from that exhibited in the account: *Hursh* vs. *North, Chase & North.*

But if any such general custom had been proved, or a special custom affecting the peculiar locality or trade, it would have been the law of the contract, and both parties would have been bound by it: *Id.*

The usage and practice of the firm, though not good as a custom, would have been binding, if expressly made part of the contract, or shown to have been known and assented to by the defendant at the time: and evidence of such a contract, either direct, or by proving a course of dealing between the parties on such terms, and of such frequency, as to justify the inference that the transaction was on the accustomed terms, is admissible: *Id.*

Lien of prior Execution, when postponed to subsequent one by conduct of Plaintiff.—If an execution be issued, not for the enforcement of the judgment by levy and sale, but for the purpose of a lien, and to acquire security for the debt, it will be postponed to a subsequent execution issued in good faith: *Freeburger's Appeal.*

Where the plaintiffs in the prior execution alleged that they had given orders to the sheriff to proceed and sell before the second execution came into his hands, they must prove the fact affirmatively, or their execution will lose its priority: *Id.*

Where one of the plaintiffs and his attorney instructed the sheriff, when the execution was placed in his hands, "not to proceed until further orders;" afterwards, that he "should make a levy, but not sell;" and subsequently, by arrangement, permitted the debtor to have access to the property levied, giving him the keys of the shop, it is sufficient evidence that their execution was not issued to collect the judgment-debt, but for another purpose, which was not legitimate nor protected by the law: *Id.*

COURT OF CHANCERY OF THE STATE OF NEW JERSEY.[1]

Dower—Right to a Sum in gross in lieu of.—In proceedings for partition, where after a sale of the premises the widow, who was entitled to dower therein, had agreed in writing under her hand and seal, according to the statutes of this State, to accept in lieu of her said dower such sum in gross as the Chancellor should deem reasonable, and then having died before distribution, it was *held*, that the right vested in the widow to receive a sum in gross, interest could not be divested by her death, but should go to her children. *Held further*, that the value of the widow's interest should be ascertained on the principles of life annuities: *Mulford* vs. *Hiers.*

Where the estate is ordered to be sold, and the widow agrees to accept a gross sum in lieu of dower, and she dies before a sale of the premises, her estate is determined by her death, and her children can have no claim to any portion of the proceeds of the sale: *Id.*

Railroad—Construction of Charter—Terminus.—The charter of the defendants contained the following clause: "the president and directors of said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of the said street, or south of Market street, in the city of Newark."

Held, that this enactment relates not to the *route*, but to the *termination* of the road, and that thereby the road of the company was not excluded from being located in or through Market street: *McFarland* vs. *The Orange, &c., Horse Car Railroad Company.*

Corporation—Transfer of Stock in Blank—Collateral Security.—Shares in a corporation, whose charter provides that the capital stock of the company shall be deemed personal estate, and "be transferable upon the books of the said corporation," can be effectually transferred as collateral security for a debt, as against a creditor of the bailor, who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with a blank irrevocable power of attorney for the transfer thereof from the bailor to the bailee: *The Broadway Bank* vs. *Thomas McElrath.*

[1] From Mercer Beasley, Esq., Reporter of the Court, to be reported in the 2d volume of his Reports.

M. delivered to the complainants the certificates of certain stock of a corporation, accompanied by a power of attorney irrevocable for the transfer thereof, as collateral security for certain of his notes, and the renewals thereof. The charter of said corporation provided that its capital stock should be deemed personal estate, and "be transferable upon the books of said corporation: and further, "that books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of said corporation." A creditor of M. then levied an attachment upon this stock. *Held*, that the transfer to the complainants was effectual as against such attaching creditor: *Id.*

Divorce—Desertion.—To establish a case of desertion sufficient to authorize a divorce, it should appear that the wife left her husband of her own accord, without his consent and against his will, or that she obstinately refused to return without just cause on the request of her husband: *Jennings* vs. *Jennings.*

Desertion cannot be inferred from the mere unaided fact that the parties do not live together: *Id.*

Bridge between two States—Compact between Pennsylvania and New Jersey—Exclusive Franchise—Constitutional Law.—Upon principles of public law, it is clear that the power of erecting a bridge, and taking tolls thereon, over a navigable river which forms the coterminous boundary between two States, can only be conferred by the concurrent legislation of both States: *The President, Managers, &c.*, vs. *The Trenton City Bridge Company and Others.*

When the power to make and maintain such bridge, and take tolls thereon, has been given by the joint legislature of both States, the principle could hardly be admitted, that either State, by its separate legislation, could declare that no other bridge should be built across such river within certain limits, and thus render the franchise exclusive: *Id.*

By the agreement entered into between the States of New Jersey and Pennsylvania, the river Delaware, in its whole length and breadth, is to be and remain a common highway equally free and open for the use of both States, and each State is to enjoy and exercise concurrent jurisdiction within and upon the water between the shores of said river. Both States concurred in granting to complainants the right to erect and maintain their bridge, and take tolls thereon. The legislature of New Jersey after-

wards passed an act declaring "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges across the said river Delaware at any place or places within three miles of the bridge to be erected."

Held, that even if it was the intention that this act should take effect without the assent of the State of Pennsylvania, that it is void on the ground that it is in contravention of the agreement above mentioned between the two States. As neither State, by the exercise of her sole jurisdiction, has the right, by the terms of the agreement, to grant the franchise, so neither can lawfully contract to refuse to grant it: *Id.*

Under the circumstances, as exhibited in the case, it was *further held*, that the Act of 1801, which conferred the exclusive privilege on the complainants, was not designed by the legislature of New Jersey to go into effect until the same had received the assent of the legislature of Pennsylvania: *Id.*

Whether a corporation has violated its charter, or forfeited its franchise, is a question solely for the determination of a court of law: *Id.*

But when a bridge company, setting up an exclusive right within certain limits, asks an injunction to prohibit the building a bridge within such limits, a court of equity will not lend its assistance when it appears from the answer that the bridge of the complainants has been so far appropriated to the uses of a railroad as to render it inconvenient and dangerous for ordinary travel: *Id.*

Vendor and Vendee—Assumption of Mortgage-Debt.—Where one purchases land, and assumes in his deed to pay off a bond and mortgage of his grantor, to which such land is subject, he thereby becomes a surety in respect to the mortgage-debt: *Klapworth* vs. *Dressler & Ise.*

This obligation of the purchaser to pay the debt enures in equity to the benefit of the mortgagee, and he may enforce it against the purchaser to the extent of the deficiency in a bill to foreclose: *Id.*

Trust—Fraudulent Conveyance—Religious Corporation—Restriction on Alienation.—The trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their charters, cannot purchase and hold real estate under trusts of their own creation which shall protect their property from the reach of their creditors: *Magie* vs. *The German Evangelical Dutch Church of Newark.*

Where property is *given* to a corporation in trust for a charitable use,

the trust is the creature of the donor, and he may impose upon it such character, conditions, and qualifications as he may see fit: *Id.*

But the case is widely different where a corporation attempts, by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors: *Id.*

The premises in question, and upon which the defendants had erected a house of worship, were conveyed to them for the consideration of one thousand dollars. The deed was an absolute conveyance in fee upon certain trusts that the property should be held as a Lutheran Church for ever, &c., and contained a clause that the grantee should not by deed alienate, dispose of, or otherwise charge or encumber said property, &c. The corporation executed a mortgage to secure a legitimate debt:

Held, that the corporation had the legal title to the land, and the power at law of executing the mortgage, and that there was no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use: *Id.*

SUPREME COURT OF NEW YORK.[1]

Writ of Prohibition.—The writ of prohibition does not issue to correct errors or irregularities in administering justice by inferior courts, but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognisance: *The People, ex rel. Brownson*, vs. *Marine Court of New York.*

It ought not to issue where the party has a complete remedy in some other and more ordinary form: *Id.*

The writ will not be issued upon the ground that the affidavits on which proceedings by attachment were founded did not show certain matters which were necessary to justify the issuing of the attachment: *Id.*

Nor will it be issued on the ground that the debt for which the plaintiff was entitled to sue in the court below, was larger than the jurisdiction of that court permitted to be recovered there; provided the plaintiff, to obviate that difficulty, remits all beyond the amount of which the court has jurisdiction: *Id.*

Principal and Agent.—An agent cannot act for his own benefit in relation to the subject-matter of the agency, to the injury of his principal: *Bruce et al.* vs. *Davenport.*

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

An agent is bound to follow the instructions of his principal; and if he neglects to do so he will make himself liable for the loss or damage which his principal sustains: *Id.*

The plaintiffs were employed by T. D., in behalf of himself and J. D., who were partners, as their brokers and agents, to sell a certain promissory note held by them, made by third persons, and were instructed to sell the same at a discount of twelve per cent., without their indorsement and without recourse. Subsequently the plaintiffs called upon J. D., in the absence of T. D., and, by falsely stating that T. D. had before indorsed similar notes which the plaintiffs had been employed to sell, and concealing from him the fact that T. D. had instructed them to sell without recourse, procured from him the indorsement of the name of the firm upon the note. *Held*, that the indorsement having been obtained by an abuse of the confidential relation of principal and agent, did not constitute a contract upon which the latter could sue the former: *Id.*

Held, also, that for the same reasons the indorsement could not be considered a modification of the instructions to sell without recourse; and that, for whatever damage the principals had sustained by the disregard of their instructions, the agents were liable: *Id.*

Deed—Exception.—A grantee, by accepting a deed containing an exception of certain lands previously sold and conveyed to another, and then entering into the possession of the lands thus excepted, will be deemed in law to have entered in subserviency to the title of the grantee of the excepted land, and to continue to hold in subserviency thereto; unless he can establish the contrary by some clear and unequivocal act or claim of title in himself: *Rosseel* vs. *Wickham.*

Fire Insurance; who can sue on Policy.—Policies of insurance are not deemed, in their nature, incidents to the property insured, and do not cover any interest which a person other than the insured may have in the property, as heir, grantee, mortgagee, or creditor, unless there be a valid assignment of the policy: *Wyman* vs. *Prosser.*

The contract of insurance being a mere personal contract, in no way attached to or running with the real property insured, it does not pass with it, either to a grantee or an heir. The executor or administrator is the only one who can take the contract and enforce it: *Id.*