

United States is interested or to direct the solicitor general or any officer of the department of justice to do so, clearly does not authorize him to bring such suit in his own name or authorize the solicitor-general or any officer of the department of justice to do so.

The demurrer was therefore sustained and the information dismissed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

COURT OF CHANCERY OF DELAWARE.²

SUPREME COURT OF PENNSYLVANIA.³

AGENT. See *Evidence*.

BILLS AND NOTES.

Fraud—Rights of bonâ fide Holder.—In the case of the sale of a promissory note for a sum payable in instalments, and circumstances occur showing the existence of fraud, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards: *Dresser v. Railway Construction Co.*, S. C. U. S., Oct. Term 1876.

In such a case, one who pays with knowledge of a fraud is in no better position than if he had not paid at all: *Id.*

BOUNDARY. See *Deed*.

CORPORATION.

Conditional Subscriptions.—After the approval of an Act of Assembly incorporating a company, conditional subscriptions to the capital stock of the company are valid, and this though made before letters patent are issued, the company having afterwards fulfilled conditions necessary to their issuance: *Hanover Junction Railroad Co. v. Halde- man*, 1 Norris (Penna.).

It may be shown by the acts and declarations of the party making a conditional subscription that there has been a release or waiver of the conditions, the fulfilment of which entitled the company to a recovery at law, and it is error to refuse testimony of such character: *Id.*

Sale under Mortgage passes Franchises to Purchaser—Immunity from taxation is not a Franchise.—Upon a sale of the property and franchises of a railroad corporation, under a decree founded upon a mortgage which in terms covers the franchises, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company provided in the act of incorporation does not accompany the property in its transfer to the purchaser. The immunity from taxa-

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1876. The cases will probably be reported in 3 or 4 Otto.

² From Hon. D. M. Bates, Reporter; to appear in 2 Delaware Chan. Reports.

³ From A. Wilson Norris, Esq., Reporter; to appear in Vol. 1 of his Reports, (probably 83 Penna. St. Reports).

tion in such cases is a personal privilege of the company, and not transferable: *Morgan v. State of Louisiana*, S. C. U. S., Oct. Term 1876.

The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. Immunity from taxation is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property. *Id.*

DAMAGES. See *Evidence*.

DEBTOR AND CREDITOR.

Claims against different Debtors for same Debt.—B. & S. were holders of a note of J. M., endorsed by A. M. Both J. M. and A. M. at different times made assignments for the benefit of their respective creditors. B. & S. received a dividend on the note from the estate of J. M. *Held* (reversing the court below), that they were entitled, in the subsequent distribution of the estate of A. M., to a dividend upon the amount of the whole note: *Miller's Estate. Bair & Shenk's Appeal*, 1 Norris (Penna.).

Insolvency—Preference—Statute of Frauds.—A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and as to the balance under a parol trust to pay certain other creditors, per schedule. *Held*, void as to the other creditors, who were not named in the bond and with whom there was no communication. *Comly v. Waters et al.*, 2 Del. Ch.

Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds: *Id.*

A bond given by a debtor in failing circumstances, covering all his property for the benefit of preferred creditors, is contrary to the policy of the statute against fraudulent insolvency: *Id.*

DEED.

Construction—Boundary—Monuments.—It is true that, as a general rule, monuments, natural or artificial, referred to in a deed, control, on its construction, rather than courses and distances; but this rule is not inflexible, and must yield where the whole circumstances show that it ought not to be applied. Thus where a deed called for seven courses successively along a certain fence, and it appeared that only six of them did in fact, coincide with the line of the fence, and by taking that line for the seventh course, a plainly erroneous or impossible plat would be produced, while by abandoning the fence and following the course in the deed, the lines of the survey would close, it was held that the latter must be followed: *White v. Lanning*, S. C. U. S., Oct. Term 1876.

DONATIO CAUSA MORTIS. See *Husband and Wife*.

EQUITY.

Issue for Jury.—An inquiry, whether there was any and what consideration existing at the time of the execution of a certain writing obligatory, does not present a sufficiently distinct fact to be the subject of

an issue out of chancery, for trial by a jury: *Comly v. Waters et al.*, 2 Del. Ch.

The chancellor will not, upon application, order issues for trial by a jury respecting facts not material, in his judgment, to a decree in the cause: *Id.*

Relief must Accord with Bill—General Relief.—The relief granted in equity must be according to the case made by the bill. Bill against one charging him as *executor* for payment of a legacy, will not authorize a decree against him personally, as *devisee of land charged with the legacy*: *Cloud, Adm'r of Kibler, v. Whiteman*, 2 Del. Ch.

The prayer for general relief does not sustain such a decree: *Id.*

Remedy at Law not always a Bar to Bill.—The charter of the Wilmington Bridge Company provided that any excess of tolls received by the company over ten per cent. of its capital stock should be paid over to the trustee of the school fund, for the use of the fund. The company were directed to give notice to the trustee of the accruing of such excess, and the trustee was authorized to sue for the same at law. *Held*, that, notwithstanding a remedy at law was given by suit in the name of the trustee, a bill in equity would lie in the name of the state against the company for a discovery, account and payment: *The State v. Wilmington Bridge Co.*, 2 Del. Ch.

EVIDENCE.

Agent—Declarations of—Officer of Corporation.—The declarations of an agent made at the time of the particular transaction, while acting within the scope of his duties, may be given in evidence against his principal. Otherwise, if made after the transaction is fully completed and ended: *Huntingdon and Broad Top Mountain Railroad Co. v. Decker*, 1 Norris (Penna).

The declarations of officers of a corporation rest upon the same principles as apply to other agents: *Id.*

Where a railroad company knowingly employs a conductor who is unfit for his position, it is responsible for his negligence to a fellow-servant, and knowledge in the superintendent possessing general powers is knowledge in the company: *Id.*

In an action for damages arising from an accident caused by the negligence of a railroad company's servant, the court below admitted as evidence of the company's knowledge of this servant's unfitness, a statement of their superintendent made on the day after the accident; *Held*, to be error: *Id.*

Agent—Parties.—The death of the agent through whom a contract has been effected does not exclude the testimony of the party dealing with him, under the Act of 1869, in an action against his principal: *The American Life Ins. and Trust Co. v. Shultz*, 1 Norris (Penna.)

In an action brought against a life insurance company for the violation of an alleged contract to give a "paid up policy" after the third payment upon a life policy, not expressed in the policy, evidence of the powers of the agents generally is inadmissible: *Id.*

Where a life policy has been issued upon proposals signed by the insured, and an action is brought against the company upon a contem-

poraneous verbal agreement to issue a "paid up policy" after the payment of the third premium, it is error to reject evidence, on the part of the company defendant, of the powers of the agent through whom the insurance was effected: *Id.*

In an action brought against an insurance company with whom a life insurance has been effected, upon a contract to deliver a paid up policy after the third annual premium has been paid, the measure of damages is, not the amount of the premiums paid, since the action is not in disaffirmance of the contract, but the difference between the value of a paid up policy and the life policy held by the plaintiff: *Id.*

FRAUDS, STATUTE OF. See *Debtor and Creditor*.

HUSBAND AND WIFE.

Post-Nuptial Agreements—Separate Estate—Donatio Causa Mortis.—A post-nuptial agreement that the wife shall enjoy, for her sole and separate use, property to which the husband has become entitled in her right, if upon sufficient consideration and not in fraud of creditors, will be enforced in equity: *Kilby, Adm'r, v. Godwin*, 2 Del. Ch.

Pending a suit in equity by the wife against her husband for enforcing an ante-nuptial contract, it was agreed by the husband, as a compromise of the suit and in consideration of its dismissal, with the wife's consent, that one-half part of certain funds held by him, in her right, should be for her sole and separate use; and such half part was, pursuant to the agreement, delivered to the wife's solicitor and came to her possession and was afterward, during her last sickness, disposed of by her as a *donatio causa mortis*—*Held*, that the agreement was valid; and that the funds delivered, in pursuance of it, became the wife's separate property, and passed by her disposal of them as a *donatio causa mortis*. *Id.*

A *donatio causa mortis* defined. An actual delivery of the property essential; but this may be made to a third person for the use of the donee: *Id.*

A mother, in her last sickness, holding certain securities for her separate use, delivered the same, together with some articles of personal use, such as a watch and jewelry, to a third person, declaring them to be for the benefit of her two minor children; and, with the securities and articles, also delivered an inventory of the same. She died in a few days afterward—*Held*, a valid *donatio causa mortis*: *Id.*

INSOLVENCY. See *Debtor and Creditor*.

INSURANCE. See *Evidence*.

JUDICIAL SALE.

Presumption in favor of regularity.—The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish: *White et al. v. Luning*, S. C. U. S. Oct. Term 1876.

MORTGAGE.

Recording of Mortgage—When lien begins to run.—Where a proper book is kept for the purpose of showing when a mortgage is left for record, the lien of the mortgage begins from the time of the entry in this book and the delay of the recorder in recording or indexing a mortgage will not divest its lien: *Wood's and Brown's Appeal*, 1 Norris (Penna.).

It is not incumbent upon the mortgagee to supervise the recorder and see that the mortgage is recorded and indexed: *Id.*

MUNICIPAL CORPORATION.

Superseding by new Corporation—Expiration of Officer's Terms—Extinction of Corporation—Effect on Judgment against Corporation.—A corporation created for municipal purposes being superseded by new and different corporations created for accomplishing the same purposes, ceases to exist except so far as its existence is expressly continued for special objects, such as settling up its indebtedness, and the like: *Barkley v. Board of Levee Commissioners*, S. C. U. S. Oct. Term 1876.

If, in such case, no provision is made for the continuance or new election of the officers of such corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be *de facto* extinct: *Id.*

In such case, also, if there be a judgment against the corporation, mandamus will not lie to enforce the assessment of taxes for its payment, there being no officers to whom it may be directed: *Id.*

The court cannot by mandamus compel the new corporations to perform the duties of the extinct corporation in the levy of taxes for the payment of its debts, especially where their territorial jurisdiction is not the same, and the law has not authorized them to make such levy: *Id.*

Nor can the court order the marshal to levy taxes in such a case, nor in any case, except where a specific law authorizes such a proceeding: *Id.*

Under these circumstances, the judgment creditor is in fact without remedy, and can only apply to the legislature for relief: *Id.*

PARTNERSHIP.

Dissolution—Notice.—It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. That is one of the circumstances contributing to or forming the general notice required. It is an important one, but it is not the only or an indispensable one. Any means that are fair means to publish as widely as possible the fact of dissolution; or which are public and notorious to put the public on its guard; or notice in any other public or notorious manner; or notice by advertisement or otherwise, or by withdrawing the exterior indications of partnership and giving public notice in the manner usual in the community where the retiring partner resides, are means and circumstances proper to be considered on the question of notice: *Lovejoy v. Spafford et al.*, S. C. U. S., Oct. Term 1876.

SET-OFF.

Matters arising under different Contract.—Bell sued Halfpenny on a

single bill; at the trial Halfpenny offered to set off damages arising from a breach of a sealed contract between them, entirely disconnected with the note in suit, which offer was refused; *Held* that under the Pennsylvania statute such damages could properly be set off: *Halfpenny v. Bell*, 1 Norris (Penna.).

Matters *ex contractu* arising out of a different transaction from the one in suit may be proved by way of set-off: *Id.*

SPECIFIC PERFORMANCE. See *Vendor and Purchaser*.

TAXATION. See *Corporation*.

Contract as to—Constitutional Law.—Where a state passes a law allowing a foreign insurance company to do business in its limits on payment of certain fees and a tax upon its gross receipts for premiums, this does not constitute or imply any contract that the state or any municipal corporation having authority to tax, may not impose an additional or different tax upon a company which has complied with such law: *Home Ins. Co. v. City of Augusta*, S. C. U. S., Oct. Term 1876.

TRUST AND TRUSTEE.

Not entitled to Compensation without Contract.—A voluntary trustee without contract for compensation, is not entitled to it in equity; though he will be allowed his expenses and saved from loss: *Brooks, Adm. v. Egbert*, 2 Del. Ch.

Power of Trustee to represent Cestui que trust.—Under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. If he has been made such a representative, his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part: *Kerrison v. Stewart et al.*, S. C. U. S., Oct. Term 1876: *Id.*

In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment unless it is impeached for fraud or collusion between him and the adverse party: *Id.*

VENDOR AND PURCHASER.

Specific Performance.—A party, who by his own negligence or default has prevented or unreasonably delayed the full execution of a contract for the sale of lands, will not be relieved by a decree for specific performance. This principle applies to a contract though it be reduced to writing; *a fortiori* to a parol contract sought to be enforced on the ground of part performance: *Kinney v. Reuden et al.*, 2 Del. Ch.

The ground upon which equity enforces a parol contract, part performed, is the prevention of fraud upon the party by whom there has been a part performance. To entitle such a party to relief it must appear that he will, in consequence of the part performance, suffer detriment, unless relieved, and that he has been himself in no default. *Id.*