ABSTRACTS OF RECENT AMERICAN CASES.

21 *Day's Conn. Rep.*

Accomplice.—Where D, an accomplice, having testified on the trial before the petit jury, witnesses were called to prove circumstances tending to corroborate the testimony of D; it was held, that the evidence of such witnesses was admissible. *The State* vs. *Wolcott and others.*

Administrator.—It is the duty of an administrator, in selling estate of the deceased, by order of the Court of Probate, to sell for ready money; and if he neglect to do so, and sell on the personal security of the purchaser, it is a breach of duty, for which, if a loss ensues, he is liable on his bond to the Court of Probate. And in such case, his having acted prudently and in good faith, will not exonerate him from liability. *Foster* vs. *Thomas and another.*

Amendment.—Where the original declaration was in covenant for rent on an indenture between S and W, setting forth the indenture as the ground of action, and averring an assignment of it to the plaintiff with notice, and assigning a breach; during the pendency of the action, the plaintiff offered a new count as an amendment, setting forth more specially the manner of the assignment to the plaintiff, showing how he became assignee, not of the lease merely, but of the reversionary interest; which amendment being allowed, it was held, that this was not erroneous, as changing the form or ground of the action. *Baldwin* vs. *Walker.*

Arrest of Judgment.—In a motion in arrest of judgment, for the misconduct of one of the jurors, it appeared, that during the progress of the trial, just before the assembling of the Court, after an adjournment at noon, a map or diagram of the pond and of the stream issuing therefrom, with the dam and flume at the outlet, constructed by engineers employed by both parties, and previously used before the jury, was lying upon the bar table; and one of the jurors coming in, took it up, and while he was examining it, T, one of the witnesees who had testified in the cause, and one of the mill-owners on said stream below the plaintiff, and of course, interested in the question, took hold of the map and turned it around, saying to the juror, that he would understand it better if it was turned around, and then pointed to certain localities marked upon it. The interview between T and the juror continued, in a low voice, for two or three minutes, in the presence, but not within the hearing of the sheriff, clerk

and some of the members of the bar. T testified that he did not know that the juror was one; and the juror testified that what was said and done had no effect upon his mind, and no influence upon the verdict. Held, with some hesitation, that the verdict ought not to be disturbed. *Hickox and another* vs. *Parmelee and another.*

Attorney.—An attorney, employed to commence and prosecute a suit, but not otherwise authorized, has no power to settle that suit, and discharge the defendant from the plaintiff's claim. *Derwort and wife* vs. *Loomer.*

Charge to the Jury.—Where the defence to an action on note was, that when the note was given by A, he was blind, and could not read it; that he was then under arrest and held in custody, on a criminal prosecution; and that, in that condition, he was overcome by threats, and was not a free and voluntary agent in giving the note. In view of all the evidence upon the point, the Court charged the jury, that the threats in question, in order to avoid the note, must have been such as would intimidate a man of ordinary firmness; adding, that if A had mind enough fairly and fully to comprehend the cause and object of the note, and the nature and extent of it, and if he acted as a free and voluntary agent in executing it, it would be good,—otherwise, it would be absolutely void; after a verdict for the plaintiff, it was held, that the charge was unexceptionable. *Walbridge* vs. *Arnold and another.*

Where a further defence to such action was, that the note was given under the pressure of a criminal prosecution, and to induce a suppression of it; which was denied by the plaintiff, who claimed that the pendency of the criminal process had no influence, and was not intended to have any, in procuring the note; and the Court charged the jury, that if the note was given freely, to satisfy the plaintiff's private claim for damages, it was good; but void, if it was given, in whole or in part, to suppress an inquiry into the commission of an offence, or to prevent, in any measure, the administration of criminal justice; it was held, that the charge was not erroneous. *Ib.*

The Court, in its charge to the jury, is not bound to state the law arising upon abstract questions. *Cowles, ex'r of Cowles* vs. *Bacon.*

Where the Court, in an action for an injury sustained by the plaintiff, in a stage-coach, instructed the jury, that if the defendant owned the horses, in the absence of all evidence to the contrary, it was reasonable to presume that the driver having the control of them, was placed in that

situation by the defendant's consent, and that they were employed in his business; but that the contrary might be shown; submitting the question to them as one of *fact* for them to decide; it was held, that the charge was unexceptionable. *Haight and wife* vs. *Turner and others.*

Declaration.—Where the declaration, in an action against a railroad corporation, for a personal injury to one of the plaintiffs, after stating that the defendants were the owners of a certain railroad, running through the towns of W and P, and of certain cars for the conveyance of passengers upon that road, averred, that on the day specified, the defendants were the owners of, and were running and propelling upon said road, a certain train of passenger cars, for a certain reasonable reward paid to the defendants; it was held, that it sufficiently appeared from the declaration, that the defendants were common carriers. *Fuller and wife* vs. *Naugatuck Railroad Company.*

Where the declaration, by husband and wife, for a personal injury to the wife, after stating the nature and extent of the injury complained of, proceeded to allege, that by means of such injury, she became sick, and was prevented from attending to her necessary affairs, and that the plaintiffs were thereby forced to, and did, necessarily expend two hundred dollars in endeavoring to effect a cure; it was held, that although the plaintiffs could not recover, in the same action, for the wife's personal injury, and also for the expenses of her cure, yet in this case, the ground of damages, was the wife's personal injury alone, and the statement regarding the expenses of her cure, was to be considered as descriptive of the extent of her injury, and not as a distinct and substantive ground of damages, and in that aspect, though unnecessary, still it was very proper; but if otherwise, yet as the *gist* of the action was the breach of contract in not carrying the wife safely, and this was a ground on which the plaintiffs could recover, it will be presumed, after verdict, that the Court confined the evidence to that ground. *Ibid.*

Where in one count of the declaration in such action, the promise was alleged as made to the wife, and in another, as made to the plaintiffs; but in the latter case, the allegation of the promise was preceded and followed by language, which showed that the promise was made for the wife's benefit; it was held, that the fair reading of this count was, that the promise was made to her; and consequently there was no misjoinder of counts. *Ib.*

Evidence.—Where a party offered in evidence an entry in a shop book, unac-

companied by the testimony of the clerk who made the entry, though he was living, and in the immediate vicinity, and no reason for his absence appeared; it was held, the evidence offered was inadmissible. *Stiles and others* vs. *Homer and others.*

Foreign Attachment.—Where it appeared on a *scire facias* in a process of foreign attachment, that the defendant was indebted to F, the absconding debtor, by a promissory note, payable to F, or order, on demand, with interest, and secured by mortgage; that F, while the holder of such note, demanded payment of the maker, several times, which he failed to make, after which this process was commenced; and that subsequently, on the same day, and twenty-one days after the making of the note, F, for a full and valuable consideration, indorsed it to G, who had notice of the service of process on the defendant; it was held—1st. That the note had become due, and of course was over-due when it was indorsed to G. 2d. That being so over-due, the transfer of it did not vacate the plaintiff's lien. 3d. That the circumstance that the note was collaterally secured by mortgage, did not vary the case in favor of the defendant. 4th That though the equities to which a negotiable note, negotiated after due, is subject, are limited to such as attach to the note itself, and not to claims arising out of collateral matters, yet this doctrine is not applicable to the attachment of such note, by process of foreign attachment; the only case excepted from the operation of this process being where the note is negotiated before it becomes payable. *Culver* vs. *Parish.*

Husband and wife.—A promise founded on a consideration relating to the wife's personal security, does not vest absolutely in the husband, but may be the subject of an action in the name of husband and wife. *Fuller and wife* vs. *Naugatuck Railroad Company.*

In all cases where the cause of action will survive to the wife, she may join with her husband in a suit upon it. *Ibid.*

Insurance.—It was provided in one of the conditions of insurance annexed to the policy, that the survey and description of the property should be deemed a part of such policy, and a warranty. The survey consisted of interrogatories and answers. One of the interrogatories was: "Is there a watchman in the mill, during the night?" To which the answer was: "There is a watchman, nights." The property insured was destroyed by fire on the night following the setting of the sun on Saturday, and the fire was first discovered on the morning of Sunday, while it was yet dark; during which period, there was no watchman in the mill. Held, that the

survey contained a clear engagement by the insured, that they would keep a watchman in their mill through the hours of every night in the week; which engagement being broken, there could be no recovery on the policy. *The Glendale Woollen Company* vs. *The Protection Insurance Company.*

Where the charter of a mutual insurance company, whereof the insured are members, provided, that no insurance effected on any property should be good and valid to the insured, unless he had a good and perfect unincumbered title thereto, at the time of effecting such insurance; and in an action on a policy issued under such charter, it appeared, that at the time it was effected, there was outstanding, a title to the property insured, in a third person, by virtue of a mortgage of that property to him, previously executed, and never released; it was held, that the insured had not "a good and unincumbered title," within the meaning of the charter, and consequently, was precluded from a recovery. *Warner* vs. *Middlesex Mutual Insurance Company.*

A *perfect title* imports one that is good, both in law and in equity. *Ibid.*

Juror.—It is now fully settled, that the testimony of a juror cannot be received for the purpose of setting aside a verdict, on the ground of mistake or misconduct of the jury. *Haight and wife* vs. *Turner and others.*

Malicious Prosecution.—In an action for a malicious prosecution, the evidence introduced on the trial of that prosecution is admissible, for the purpose of showing reasonable and probable cause. And such evidence may be proved by any competent witness. *Goodrich* vs. *Warner.*

Nuisance.—The trade and occupation of carriage-making or of a blacksmith is a lawful and useful one; and a building erected for its exercise, is not a nuisance *per se.* But if such building, though erected on the builder's own land, and occupied in the usual manner, be in an *improper place,* where its use will probably result in an injury to another, this is, of itself, a *wrongful act,* for which the wrong-doer is responsible to one essentially injured thereby. *Whitney* vs. *Bartholomew.*

Therefore, where the plaintiff was the owner of a dwelling-house and land; and the defendant was in the occupation of a lot of land adjoining the plaintiff's land, upon which was a large carriage factory and a blacksmith's shop having several chimneys; and the shop and chimneys were placed upon or very near the dividing line of the lands of the parties; and in consequence of the location and use of the blacksmith's shop, the cinders,

ashes and smoke issuing therefrom, were thrown, in large quantities, upon the plaintiff's house and land, rendering the water unfit for use, and the house nearly untenantable; it was held, that the defendant was liable for such injury. *Ibid.*

Partnership.—The debts of a partnership are in equity joint and several; and a person having a debt against a partnership, may, on the death of one of the partners, come immediately against the estate of that partner, and have his claim allowed, by the commissioners, *pari passu* with private claims, though the surviving partner be solvent and within the jurisdiction of our Courts. *Camp* vs. *Grant and others, administrators.*

Though the creditors of a partnership are entitled to a priority of payment, as between them and creditors of an individual partner, out of the partnership funds, so long as they continue partnership funds; yet they have no specific lien thereon; and while the partnership remains and its business is going on, whether it be in fact solvent or not, there is no legal objection to a *bona fide* distribution of the partnership fund among the members of the firm, or a *bona fide* change of them from joint to separate estate. *Allen and another* vs. *The Centre Valley Company and others.*

Principal and Agent.—A note signed by the authorized agents of a corporation, with words annexed to their names intimating their agency, is the note of the corporation, and not of the persons signing it. *Johnson* vs. *Smith and others.*

Though a person duly authorized as agent, and acting as such, may bind himself personally; yet this must be done by language clearly expressive of such an intent. *Ibid.*

So also, a person signing as agent, may bind himself, if he had no authority to bind, and has not bound his principal. *Ibid.*

In case of a defective power to bind the principal, if the agent speaks only in the language of the principal, and does not use apt language to bind himself, he will not be liable on the contract, but may be subjected for a false assumption of authority. *Ibid.*

Release.—Where A recovered a judgment against the partnership of B & C, for more than 700 dollars, after which the parties met in the State of New York, where the debt was originally contracted, and made a compromise of such debt; whereupon A gave to B a writing, certifying that A had received 300 dollars from B, in consideration of which, A released B from all claims against him individually, and also as one of the firm of B & C; to an action afterwards brought in this State, by A against B, as

surviving partner of B & C, to recover said judgment debt, B pleaded such release at the bar; it was held, first, that this being a New York transaction, must be governed by the law of that State; second, that under such law, the release pleaded was effectual to bar the action; third, that though B was discharged from liability in every form, the estate of C remained liable. *Beam and another* vs. *Barnum.*

Trust.—It is a well established principle of equity, that to raise a trust it must be ascertained what proportion each beneficiary is to take. *Harper and wife* vs. *Phelps and wife.*

Nor will a Court of Equity raise a trust from expressions importing recommendation, hope, confidence, desire, &c., where the objects of the trust are not certain and definite; or where the property, which is to be the subject of the trust, is not certain and definite; or where a clear choice to act, or not to act, is given; or where the prior disposition import an absolute and uncontrollable ownership. *Ibid.*

Will.—Though, for some purposes, a will is considered as speaking from its execution, the time of its inception, and for others, from the death of the testator, the time of its consummation; yet the general rule is, that it speaks from the death of the testator, where there is nothing in its language indicating a different intention. *Gold and wife* vs. *Judson and others.*

Parol evidence is not admissible to vary the construction of a will, where there is no ambiguity created by the application of extraneous circumstances. *Canfield* vs. *Bostwick and others.*

Abstracts in the Court of Appeals of South Carolina, in Chancery.

A marriage solemnized in South Carolina is indissoluble, either by the consent of the parties, or by the judgment of any foreign tribunal, or statute of any foreign legislature.

No judicial tribunal in South Carolina has any authority to declare a divorce; and no divorce has ever been granted by the Legislature of the State.

Nothing but the *actual* or *presumed* death of one of the parties can have the effect of discharging the obligations and legal effects of the marriage contract. *Thomas G. Duke* vs. *John A. Fulmer and others.*

The Stat. 22 & 23 Car. 3, c. 10 (made of force in South Carolina), and the Act of Assembly of 1789, are to be construed together. Before granting letters of administration on the estate of an intestate, the Ordinary is required to take from the party applicant "a sufficient bond with two or more able sureties, respect being had to the value of the estate." *Held*, that *each* of the securities thus required must be of sufficient pecuniary ability to make good the bond.

The omission of the Ordinary to take two good and sufficient sureties to an administration bond, by which loss accrues to the parties interested in the estate, is an official default for which an Ordinary is liable, if it result from negligence or want of due diligence, although it may not amount to corruption or willful default.

When the sureties are proved to have been, *in fact, insufficient* when the bond was taken, the burthen is then upon the Ordinary to show that his having taken such surety was owing to no negligence or want of due diligence on his part.

In this case the value of the personal estate was about five thousand dollars; and a bond, with two sureties in the penalty of ten thousand dollars, was taken by the Ordinary. The estate was squandered by the administrator; and the sureties were proved to have been insufficient at the date of the bond. *Held*, that under the circumstances of the case, the Ordinary was liable to the distributees, although several witnesses testified that they would have been willing at the same time to have taken a bond of that amount with the same sureties.

The law looks to the pecuniary ability or sufficiency of the *sureties* rather than of the *administrator*, inasmuch as the Ordinary, in granting administration, is required to regard propinquity of blood, &c., without reference to the solvency of the applicant. *Duncan McRae and others* vs. *Joshua David, Ordinary of Marlborough District.*