ABSTRACTS OF RECENT DECISIONS.

Supreme Court of Pennsylvania,—Abstracts of Decisions at Pittsburg, 1853.

Arbitrament.—In an action of trespass, *qu. cl. fr.*, then pending, it was agreed by the parties in the open Court, to refer the question, which was a dispute as to boundary lines, to an umpire, who made an award. Held good at common law, and conclusive of the question. *Carr* vs. *Walford.*

Assignment of Debt—Notice.—A release by the assignor of a judgment to the debtor, will discharge the latter, where he has had no notice of the assignment, and it has not been marked on the record. *Gallaher* vs. *Caldwell.*

A debt in the hands of an assignee, may be reduced by set-off of claims against the assignor, purchased by the debtor after the assignment; but before notice thereof. *Ib.*

Fraudulent Assignment— Sale—Debtor and Creditor.—A sale or assignment of chattels is voidable by creditors, unless it be accompanied or followed within a reasonable time, by such a corresponding change of possession, as the thing is reasonably capable of. *Hugus* vs. *Robinson.*

If an undivided part of a thing be sold, a concurrent possession is proper, for it corresponds with the sale. *Ib.*

A mere symbolical, formal or feigned delivery, where an actual and real one is reasonably practicable, is of no avail. *Ib.*

It must be a delivery with a *bona fide* intention of really changing the possession as well as the title. *Ib.*

If, upon the face of the transaction, the attempt to delay or defraud creditors is apparent, or the delivery equivocal, the vendee must explain it by satisfactory evidence or the Court will declare it void, taking care, however, not to invade the provision of the jury, by deciding disputed facts. *Ib.*

If the circumstances of the sale and delivery be in accordance with those that usually and naturally accompany such a transaction, it cannot be declared a legal fraud. *Ib.*

Where one purchases out a store, and continues the business in the same place, the fact that the general arrangements and internal appear-

ances about the store, remain the same after as before the sale, will not justify the Court in declaring the transaction a legal fraud, if actual and exclusive possession was taken. *Ib.*

Church-membership—Right to Bury in Church ground.—Where people associate as a religious congregation, and in their constitution declare the qualifications of membership, and a clause provides that those who have no right to the burying ground and church shall, for the good of the church pay, according to their circumstances, from $1 to $50, and their names shall be entered on the church books, and their right shall be as good as others. Held that one entering under this rule becomes a member of the congregation, and holds his rights as such, and when he ceases to be a member, he loses all right as such to the church burying ground.—*St. John's Church, of Erie,* vs. *Hanns.*

Criminal Law—Costs—Power of Jury over Law.—The Court, in a criminal as well as a civil case, has the right to grant a new trial where the verdict is against law or evidence, or for erroneous admission or rejection of evidence, or for error in the charge to the jury; except only in the case of a verdict of acquittal, on the constitutional principle of "once in jeopardy, &c." Therefore the Court has the power to set aside a verdict of acquittal, so far as it imposes costs on the prosecutor, under the Act of 1804, where there is no evidence of any improper conduct on the part of the prosecutor. *Gaffy* vs. *The Commonwealth.* KNOX, J., dissenting.

Criminal Law—False Pretences.—An indictment for false pretences, alleging that the defendent, by himself and through one A. C., falsely and fraudulently represented to the prosecutor, that he had a warrant issued by competent authority, for the arrest of his daughter for a public offence; and by reason of such representation, obtained from the prosecutor, divers goods and monies, &c., is good.—*Commonwealth* vs. *Thompson,* 3 P. L. J.; commented on. *Comm.* vs. *Henry.*

Criminal Law—Mistake in Juror's name.—The administration of criminal justice would be impracticable, if mistakes in the names of jurors returned on the venire, and to which no objection was taken on the trial, should be a cause of reversing the sentence of a criminal Court; and such mistakes are cured by verdict under the Act of 1814. *Jewell* vs. *The Comm.*

Criminal Law—Peremptory Challenge.—In cases of felony, the Commonwealth's counsel have no right of peremptory challenge; but

when an objectionable juror is called, he may request that he be ordered to stand aside, and such juror shall not be again called until the panel is exhausted, and then he may be challenged by the Commonwealth for cause, with as much effect as he could have been at first. *Ib.*

Criminal Law—Excusing Juror.—When a juror is disabled by sickness or other cause, from sitting, the Court ought not to require him to be sworn. The Court must be permitted to judge what is a sufficient reason for excusing a juror. It is within their discretion, and not the subject of revision. *Ib.*

Criminal Law—Call of Talesmen.—It is an irregularity to call talesmen, unless it appear of record, that the regular panel was exhausted and an order for talesmen made; but such irregularity not objected to at the time, is an error or defect in the summoning of jurors, and is cured by the verdict under the Act of 1814. *Jewell* vs. *The Comm.*

Criminal Law—Names of Witnesses.—It is not error in a case of homicide, that the names of the witnesses do not appear in the body of the record. It is sufficient that they appear in the usual way on the margin of the minute book. *Ib.*

Criminal Law—New Trial.—The granting or refusing of a new trial in a capital case, is purely discretionary, and nothing connected with the manner of its refusal, can be the subject of error. Therefore it is not error that the defendant was not present at the motion for a new trial, or at any of the proceedings on said motion. *Ib.*

Criminal Law—Judgment.—An error occurring after verdict, can effect the judgment only and not the verdict; and if the judgment be thereby effected, this Court will correct the error by entering the proper judgment or pronouncing the proper sentence, or will remit the case to the Court below for that purpose. *Ib.*

Equity—Ejectment—Inadequacy of price—Fraud on heir.—Though an executory contract will not be enforced in equity, if it be apparently unconscionable; this is by itself not sufficient ground for setting aside one that is executed. *Davison* vs. *Moore.*

Gross inadequacy of price, on a sale of real estate, though evidence of fraud, is not sufficient by itself to prove it; all the facts of the transaction must be considered together. *Ib.*

One who shortly after he becomes of age, in whom a tract of land is vested, but in one-half of which another has a life estate, sells the whole

tract, is not within the rule in equity with regard to bargains by expectant heirs. *Ib.*

A defendant in ejectment, who has possession without title, cannot set up against the plaintiff fraud in the execution of a deed under which the latter claims, it not appearing that the party injured, his representatives or creditors, have objected. *Ib.*

Guardian and Ward.—A guardian who neglects to sue for a debt due his ward for an unreasonable time, whereby the debt is lost, is responsible for its amount; and no subsequent diligence after the insolvency of the debtor, will excuse him. *Will's Appeal.*

Guardians appointed in 1833, permitted an administrator, then greatly in debt, and whose insolvency was publicly known in 1837, to receive the rents of the estate of their wards, till 1841, when they obtained a judgment. In 1843, one of the wards, being then a minor, took a conveyance of real estate in satisfaction of the judgment, which subsequently proved to be worthless, but with the approbation of another ward, who was of age, *held*, that the administrator was to be treated as the agent of the guardians in the receipt of the rents; that the guardians were liable; and that the advice and confirmation of the adult ward, did not relieve them. *Ib.*

Where guardians who have neglected to pursue a debtor of their wards till his insolvency, subsequently in satisfaction of the debt, take a conveyance of land, which is worthless, for part, and also receive a part of the money due in hand; a receipt of his proportionate share of the money by one of the wards, after arriving of age, will not by itself relieve the guardians from responsibility. *Ib.*

Loose declarations by the ward, shortly after arriving of age, without proof of any knowledge of the character of the guardian's acts, or of his own rights, are no evidence of confirmation. *Ib.*

Where the question is as to a confirmation by a ward, of a guardian's acceptance of a conveyance of land, in discharge of an insolvent debtor's liability, evidence of the entire worthlessness of the land conveyed is admissible on the part of the ward, as is a subsequent conveyance of the same land by the guardians to a stranger. *Ib.*

Husband and Wife—Divorce.—It seems that the reasonable cause which would justify a wife in abandoning her husband, is such as would entitle her to a divorce. *Cattison* vs. *Cattison.*

Where an answer to a libel for divorce, on the ground of desertion, sets up a justification in general language, libellant is entitled to demand specifications of time, place and circumstance, before joining issue; but where he neglects to do so, filing general replication, and obtains an issue, it is too late to object.

Violent temper, intemperate habits, and repeated indignities to the person of the wife; in particular, an assault upon her with a knife, are sufficient grounds for divorce under the act, and will therefore justify a desertion by the wife. *Ib.*

Husband and Wife—Dower—Bankruptcy.—Under the proviso to the second section of the Bankrupt Act of 1841, dower is not barred by a decree in bankruptcy, *semble*, that it would be otherwise in Pennsylvania, but for this proviso. *Worcester* vs. *Clark.*

Husband and Wife—Wife's Legacy—Assignment.—An assignment by husband and wife of a legacy to the wife, before 1848, passes the right to the assignee, whether the same was vested or not. *McBurney's Appeal.*

Husband and Wife—Married Women's Act.—The Act of 1848, relative to married women, does not affect the relations of persons then married, and the estates vested in them under the law as it previously stood. Therefore, a woman having an estate in land when she married, before that act, is not entitled to have a trustee appointed by the Court, as of her separate estate. *Sarah Burson's Appeal.*

Infant—Warrant of Attorney.—A warrant of attorney by a minor to confess judgment is void, and the judgment entered on it ought to be vacated on motion, and may be by writ of error. The fact that the infancy may be traversed in the Supreme Court, does not exclude its jurisdiction.—*Knox* vs. *Flack.*

Legacy—Condition—Estate Tail.—Where a father, tenant in tail, devised the land to his wife and gave a legacy to his children, to be void if they should attempt to dispossess their mother, and the oldest son and heir in tail, sold the land to another, who brought and prosecuted an an ejectment against the mother. Held that the legacy was forfeited. *Harper* vs. *Little.*

Manufacturing Law—Liabilities of Directors and Stockholders—Trustee.—In an action under the 14th section of the "General Manu-

facturing Law" of 1849, against a director who has consented to a dividend greater than the net profits of the company, for a debt thereof, the company need not be joined as defendant. *Hill* vs. *Frazier.*

It seems that the 23d section of the act, which authorizes the joinder of one or more *stockholders* in the proceeding against the company, for a liability due by it, is permissive and not directory; and also that a delinquent stockholder may be sued alone, especially if the company had been first pursued, and its property exhausted. *Ib.*

The right of action against a director, under the 14th section, for consenting to an improper dividend, is one which may be assigned in equity. *Ib.*

Such director, being a wrong doer, has no right of subrogation against the company in general; a judgment against him is an entire extinguishment of the debt, and the stockholders of the company are, therefore, incompetent witnesses for the plaintiff, in an action against him, being interested to relieve themselves thus from liability. *Ib.*

The treasurer of a manufacturing or other company, cannot buy up claims against the company, for his own profit; if he do so, he is entitled to be reimbursed only the amount actually paid, or to have credit therefor.

Mortgage—Parol Evidence.—A contract which is, upon its face, a pledge of land for the payment of money, however inartificially drawn, is a mortgage, and it is incompetent to prove, by oral testimony, that it is a conditional sale. *Woods* vs. *Wallace.*

Payments—Application of Debtor.—Where there are various items of debt on one side, and various items of credit on the other, occurring at different times, and no special application of payment is made by either party, the successive credits are to be applied to the items of debt antecedently due, in the order of time in which they stand in the account. And this rule was applied to the case of a public officer, who was in default for two successive years, and having different sureties in each year. *McKee's Executors* vs. *The Commonwealth.*

Power—Trustee—Mortgage.—A substituted trustee, vested with the legal estate, is a proper party to a *scire facias*, on a mortgage given by his predecessor under a power; nor can he raise the objection of a want of joinder of other parties. *Magraw, Trustee, &c.*, vs. *Joseph Pennock.*

A power to a trustee to borrow money, and to grant a mortgage to secure it, in order to pay debts for which the trust estate is liable, will authorize a mortgage directly to the creditors themselves. *Ib.*

By a private Act of Assembly, a trustee, under a marriage settlement, was authorized, with the written approbation and assent of the husband and wife, to borrow, on mortgage of any part of the trust estate, such sum of money as might be required to pay any debts for which the trust property was, or might become liable. A mortgage was executed under the direction and with the assent of the husband and wife, as provided by the act, to secure an alleged debt against the trust estate, created before the appointment of the particular trustee: *Held*, that the mortgage passed the legal estate, and that the husband and wife were precluded in equity, by their assent, from setting up the defence that the debt for which the mortgage was given, was not properly chargeable on the trust estate. What effect such mortgage would have on the remainder-men was not decided. *Ib.*

Presumption of Payment—Mutual demands.—Where in an action on a sealed note, evidence is offered, which in the judgment of the Court will, in connection with the period of time actually elapsed, reasonably convince the jury that the debt has been paid, though twenty years have not elapsed; or, on the other hand, that the debt has not been paid, notwithstanding the period of presumption has elapsed, it is the duty of the Court to receive it, and to submit it to the jury, with such advice as will enable them to estimate it at its proper value. The further that the period stops short, or the more it exceeds the period of presumption, the more cogent and decisive must be the circumstances relied on. *Coulter's Ex'r* vs. *Marchand.* BLACK, C. J. and LEWIS, J., dissented.

Mutual demands do not extinguish each other, unless there be an actual application of the one to the other. *Ib.*

Principal and Surety—Usury.—A surety in a bond, is not discharged by a distinct agreement between the principal and the creditor, stipulations for the payment of usurious interest; such agreement being void as to the usury, and not otherwise affecting the original contract. *Mayfield* vs. *Gordon.*

Promissory Note—Non-negotiable Instrument.—The second endorsee of a note, which is not negotiable, takes it subject to the terms on which the

first endorsee received it from the payee or first endorser, who may show that his endorsement was without recourse, and for the mere purpose of passing the title. *Bircleback* vs. *Wilkins.*

Promissory Note—Assignment.—A formal assignment of a promissory note overdue, is not equivalent to an endorsement, and imports no sort of guaranty by the assignor. Nor will the fact that the words "without recourse," were at first put into the assignment and then struck out, alter the result. *Lyon* vs. *Divelbis.*

Statute of Frauds—Part Performance.—In order to take a parol agreement to convey out of the statute of frauds possession thereunder must be exclusive, and therefore where a father, agreed to convey a tract of land to his son, in consideration of his marrying and residence thereon, certain rights being reserved to the father, and subsequently gave a deed to his son for part, reserving a life estate to himself, and promised to convey the rest, but the whole was occupied by son and father in common; it was held that the agreement as to the residue could not be enforced; and held, also, that the execution of the deed was not part performance.

In order to authorize equity to reform a deed, there must be evidence of fraud or clear mistake. *Blakeslee* vs. *Blakeslee.*

Statute of Frauds—Part Performance.—Evidence to take a parol sale out of the statute, must be express and distinct not only as to the subject of the contract, but of its consideration, terms, and conditions; and it is error to leave it to the jury to imply such sale from circumstances.—*Greenlee* vs. *Greenlee.*

A written receipt for part of the purchase money of land, defining the land sold, but not defining the price, or the terms of sale, will not take a case out of the statute. *Ib.*

Possession to take a case out of the statute must be exclusive, and be taken and maintained under the statute. *Ib.*

So a tenant in possession cannot become a purchaser by parol, without a formal surrender of possession under the lease, and a resumption of it under the contract of purchase. *Ib.*

Statute of Limitations—Ejectment—Constitutional Law.—Though the Act of 1850, authorizing the substitution of the alience of a plaintiff in ejectment, in the record, applies so far as to authorize such substitution in then pending actions; yet, it will not affect any intermediate title