place in the cause for Article 2 of that law, which treats only of the regulation of the respective rights of French and foreign heirs, nor even for the application of Article 17 of the treaty of September 15th, 1853, in so far as it has the same object;

"Annuls, and, deciding upon the main question, says that there shall be a grant, in complete ownership, made to the widow Gourié, otherwise called Boutard, of the half of all the personal property depending in France, upon the succession of her husband, and particularly of the half of two inscriptions of *rente*, 4½ per cent., upon the French State, amounting to 2,280 francs, or the price of those which have been or should be sold, &c.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Action for Refusal of Vote.—No action lies against the selectmen of a town for refusing to put upon the list of voters therein the name, and rejecting the vote, of one who was not a legal voter, although the proof produced by him to them was sufficient to establish, *primâ facie*, his right to vote, and they may prove at the trial that, in fact, he was not a legal voter: *Lombard* vs. *Oliver.*

Promissory Note—Giving Time to Maker of, when Discharges Endorser.—The taking of money by the holder of an over-due note from the maker, in consideration of forbearance for a time to come to press him for payment, and forbearance accordingly, without the consent or knowledge of an endorser who has been duly notified of the dishonor of the note, will discharge the latter from his liability thereon: *Veazie* vs. *Carr.*

Negligence—Law of the Road.—The driver of a team which is on the left-hand side of a street, in violation of the law of the road, may, nevertheless, recover damages for an injury sustained by him from a collision with another team, the driver of which, in meeting him, carelessly or recklessly runs against him or his team: *Spofford* vs. *Harlow.*

[1] The following abstracts, furnished by Charles Allen, Esq., Reporter, will appear in the forthcoming volume of the State Reports.

Action on Lost Bank Notes — What Evidence Necessary. — The owner of bank-bills, which cannot be identified or distinguished from other similar bills, cannot maintain an action against the bank which issued them upon circumstantial evidence that they have been destroyed, and in each case a bond of indemnity does not afford to the bank an adequate protection: *Tower* vs. *Appleton Bank.*

Agent—Liability of Broker for Selling Forged Note—Undisclosed Principal.—An action lies to recover back money paid to a broker for a note, the signature to which is forged, sold to him without disclosing his principal, although he has paid the money to his principal, and although the note was sold for a sum less than its face: *Merriam* vs. *Wolcott.*

Liability of Draw-Tender of Bridge for Negligence—Evidence of Opinion.—A draw-tender of a bridge, appointed by the governor, with a salary, having full control and direction of the passing of all vessels through the draw, and of the opening of the draw, and of the care of the lamps upon the bridge, furnishing all necessary assistance therefor, whose duty it is to allow no unnecessary detention of vessels, having due regard and caution for the public travel, and who is required to give bond to the Treasurer of the Commonwealth for the faithful performance of his duties, is liable in damages to a person injured, solely through his favor to have due regard and caution for the public travel in performing his duties: *Howell* vs. *Wright.*

In an action against the draw-tender of a bridge to recover damages sustained by reason of his neglect, to have due regard and caution for the public travel in performing his duties, the opinion of another draw-tender as to the necessity of keeping a gate shut and lanterns lighted while the draw is open in the night time, is inadmissible: *Ib.*

Action for Negligence of a Jailor — Where it lies by a Prisoner.—A prisoner onfined in a house of correction, under sentence of court, and while there put into solitary confinement for refractory conduct, in accordance with rules established for such cases, cannot maintain an action against the master for neglect to provide for him sufficient food, clothing, and fires, if he is kept in one of the usual cells, and there is no evidence of express malice, or of such gross negligence as to authorize the inference of malice: *Williams* vs. *Adams.*

Mortgage—Action to foreclose by Second against First 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: *Crovin* vs. *Hazletine.*

One of two executors may assign a mortgage given to his testator: *Ib.*

Award when a bar.—If a passenger who is traveling in and seated by an open window of a railroad car, receives an injury from the swinging of an unfastened door of a car, which has been left by another railroad company standing upon a track parallel with that over which he is riding, an award in his favor against the company by which the stationary car was left in its position, which has been returned into the Superior Court in compliance with the terms of the submission, and is still pending therein, without entry of judgment thereon, is no bar to an action by him for the same injury against the company in whose car he was riding, although the costs of the arbitration have been paid by the company against whom the award was made: *Todd* vs. *The Old Colony, &c. Railroad Company.*

Passenger on Free Ticket.—A railroad company which carries a passenger without fare, by consent of its superintendent and the conductor of the train, is liable for an injury sustained by him through the want of due and reasonable care in performing its duty: *Ib.*

What amounts to Negligence in Railway Passenger.—A traveler in a railroad car cannot recover damages against the railroad company for a personal injury sustained, wholly or in part, by reason of allowing his arm or elbow to be outside of the window: *Ib.*

Factor—Commissions when due—Evidence of Usage.—Under a written contract, by which commission merchants agree that they will receive goods consigned to them, and insure and sell the same in accordance with provisions therein contained, and charge on all such sales a certain specified commission, which charge shall include commission, labor, cartage, insurance, and every expense whatever, no action lies to recover for services or expenditures on goods consigned to and received by them under the contract, and not sold, but, at the termination of the contract, at the request of the consignees and by consent of the consignors, transferred by them to other commission merchants, who were appointed to succeed them as agents for the sale of the goods; and evidence is incompetent to prove

a usage of commission merchants to charge one-half commissions, under such circumstances; *Ware* vs. *Hayward Rubber Company.*

COURT OF APPEALS OF NEW YORK.[1]

Will, construction of—Validity of Limitations and Trusts contained in, under Revised Statutes—A trust to receive the rents and profits of real estate and apply them to the use of the issue of the testator's infant children, for a period not exceeding two lives in being, is not void because the beneficiaries are not ascertained: *Gilman* vs. *Reddington, et al.*

The statute (1 R. S., p. 728, § 55) does not forbid a shifting use for the benefit, in case of the death of the primary beneficiaries, of persons unknown or not in existence at the creation of the trust: *Ib.*

Nor, it seems, does the statute invalidate a trust which may permit the sale of the real estate and the application of the proceeds to the use of such unborn beneficiaries, within the duration of two lives in being: *Ib.*

A provision in a will that trustees in whom real and personal estate was vested, should apply the rents and profits to the use of the testator's infant children and their unborn issue for the lives of the two youngest of three children, though, by possibility, two or more successive generations might enjoy the benefit for their lives, respectively, does not contravene the statute (1 R. S., p. 723, § 18) against the creation of successive life estates, or of a remainder for life upon a term for years, in favor of persons not in being: *Ib.*

The trustees were required to "pay, convey, or make over" the real and personal estate upon the death of the two younger children, or the expiration of thirty years, to the survivors of such children or the issue then living of such as might be dead, in equal proportions, the issue to take the share of the parent, with a substitutional limitation in favor of other persons: *Held*, that the children took a vested fee determinable as to each upon his dying without issue within the prescribed period: *Ib.*

It does not invalidate the trust that it enables the trustees, in their discretion, to apply the entire income and profits, or the estate itself, to the use of unborn posterity, to the exclusion of the testator's children: *Ib.*

It creates no illegal suspense of the power of alienation, that the executors, after expiration of the trust term, may be required to retain in

[1] From E. P. Smith, Esq., State Reporter.

their possession real and personal property—the ultimate right to which has vested—for the purpose of paying the income to the widow for her life: *Ib.*

The will directed a certain portion of income to be accumulated, without restricting the period to the minority of the children. This provision being void as to the income after the termination of such minority, the surplus goes, *it seems*, to the children as presumptively entitled to the next eventual estate: *Ib.*

Libel—Privileged Communication.—The statute (ch. 130 of 1854) exempting from prosecution for libel the publishers of legislative debates, &c., is prospective only, and is no defence for a publication prior to its enactment: *Sanford* vs. *Bennett.*

The publication of a slander uttered by a murderer at the time of his execution, is not privileged either under that statute or at the common law: *Ib.*

The statute relates only to statements made in judicial, legislative, or administrative bodies in execution of some public duty: *Ib.*

Guaranty—Continuing Liability.—A contract to be "accountable that B. will pay you for glass, paints, &c., which he may require in his business, to the extent of fifty dollars," is a continuing guaranty. The limitation is not of the credit to B., but of the extent of the guarantor's liability: *Rindge* vs. *Judson.*

The doctrine of *Gates* vs. *McKee*, 3 Kern. 232, re-affirmed: *Ib.*

Married Woman—Confessed Judgment by, void.—A confession of judgment, without action, by a married woman is void, although the consideration be money borrowed for and applied to the improvement of her separate estate: *Watkins* vs. *Abrahams.*

When husband and wife unite in confessing a judgment, it may be retained as good against the husband, though void as to the wife: *Ib.*

Statute of Frauds of Signature by Agent sufficient—Stock-jobbing act, evidence under.—A subscription by the agent of the party to be charged is sufficient under the statute of frauds, though the name or existence of a principal does not appear upon the instrument: *Dykers* vs. *Townsend.*

To avoid a contract as against the stock-jobbing act, (1 R. S., p. 710, § 6,) the burden of proof is upon the party alleging a violation; *Ib.*

Stebbins vs. *Leowolf*, 3 Cush. 143, overruled on this point: *Ib.*

In an action by the vendor of stocks against a vendee refusing to perform his contract to purchase, it was a defence that the vendor did not own, nor was authorized to sell, sufficient stock to fulfill the contract in suit and his previous outstanding contracts. But evidence falling short of this, as merely showing contracts sufficient to absorb all the stock which the plaintiff had *proved* himself to own, is inadmissible: *Ib.*

Will, execution of—Proof of Handwriting of deceased Witness.—The certificate of attestation to a will by a deceased witness is not, it seems, equivalent to his testimony, if he were living, to the contents thereof, but is evidence of an inferior nature: *Orser* vs. *Orser.*

Such an attestation, in connection with the other circumstances of the case, may warrant a jury in finding the due execution of the will against the evidence of the other subscribing witness; but would not, it seems, without regard to any intrinsic fact, support such a verdict against the positive testimony of a living witness: *Ib.*

No distinction exists between the force of the certificate, as evidence of what was done and heard by the deceased witness, and of what it states to have been also witnessed by the survivor: *Ib.*

Criminal Law—Pleading—Auterfois acquit—Embezzlement.—Upon an indictment containing nine counts for embezzlement of different grades, and others for larceny, a verdict, "guilty of embezzlement," is equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution: *Guenther* vs. *The People.*

One of the counts for embezzlement being good, the verdict means that he is guilty of the offence as charged therein: *Ib.*

An entry by order of the court after the jury was discharged, in amendment of the verdict as first recorded, that "the jury find the prisoner not guilty of the larceny charged," is unwarranted and nugatory: *Ib.*

Contract—Specific Performance—Practice.—A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it: *Barlow* vs. *Scott.*

Accordingly, where the vendor of land undertook to execute such a conveyance as he had received from his grantor, which he said was a warranty deed—the same, in fact, containing only a covenant against the

acts of the grantor—the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise a deed with general warranty, and the vendor knew that such was his understanding. *Held*, that the vendor was bound to convey with general warranty: *Ib.*

SUPREME COURT OF PENNSYLVANIA.

Executory Agreement to transfer Chose in Action—Effect of on Ownership—Action for Conspiracy—Evidence of Fraud and Complicity necessary to sustain.—A., entitled to certain post-office warrants for carrying the United States mails, which fell due quarterly, agreed, for a valuable consideration, that he would transfer them to B. for collection, stipulating that he should also pay out of the proceeds certain notes on which C. was surety. The warrants first falling due were allowed to go to B., but the warrants for two following quarters were received by A., who paid a portion of the proceeds to C., a portion to D., another of his sureties, and retained the balance. In an action of conspiracy brought by B. against A., C. and D., for corruptly and fraudulently conspiring to obtain the drafts, and withhold the proceeds from him, knowing them to be his property, *Held*,

That the engagement by A., that he would assign and endorse the drafts as they were received, to B. for collection, amounted only to a promise on A.'s part, and that by the agreement the ownership of the warrants and drafts did not vest in B., for at the time it was made they had no existence, and the service for which they were given had not been performed.

That where the evidence failed to sustain the averments in the declaration as to the ownership of the drafts and the appropriation of the proceeds, knowing them to be the plaintiff's, or to establish any complicity on the part of C., one of the defendants, it was error in the Court to refuse to charge the jury that they were bound to render a verdict of *not guilty* as to him.

That any admissions of the co-defendants as to C.'s declarations in regard to the time when he received the money from A., were not evidence against C., made, if after the alleged common design to defraud the plain-

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

tiff had been accomplished; nor, if the alleged declarations had been made in furtherance of a common purpose, were they admissible against C. until his connection with that purpose had been shown *aliunde.*

That even if C. had known of A.'s agreement with the plaintiff. when he received part of the proceeds of the drafts in payment of his debt —the drafts not being the property of the plaintiff, but only promised to be endorsed to him for collection—his act was not illegal. If a creditor agree to receive money which his debtor has previously promised to another, it is not a conspiracy, and his receipt of the money when paid, will not render him liable to respond in damages to the other creditor, though he knew of the promise which the debtor had made: *Bedford* vs. *Sanner.*

Bequest of Personal Property, with Limitation over, when valid—Intention of Testator, how far controlled by Rules of Law.—A testatrix made bequests of personal property to H. and to O., with a proviso, in a subsequent part of the will, that if either should die without children, the bequests made to either of them should "fall back to the survivor and to B., or the survivor of them and the next of kin of such survivor." On an application by A. to the Orphans' Court, for the absolute payment of the bequest, and without security for those to whom it was to fall back, *Held,*

That although, in a will, the word "children" (which is ordinarily a word of personal description) may be construed to mean issue, (which *ex proprio vigore* indicates succession,) where the context affirmatively shows that the testator intended so to use it, it must be held to its ordinary and usual meaning when no such intention is manifest.

That the intention of testatrix in this case, to give the legacy to B. and O., and the next of kin of survivor, was clear, in case they should outlive H., and she should die without children, and was, therefore, not to be defeated by an arbitrary rule of law, unless it appeared that testatrix also intended to give to H. at least an estate tail, and that the limitation over should not take effect until all the heirs in tail should become extinct.

That the limitation over on the death of A. was not a limitation after an indefinite failure of issue, and for that reason too remote, because there were indications in the will that the gift should take effect, if at all,

on the death of the first taker, and not an undefined period in the future, and that, therefore, the first taker was not entitled to receive it as an absolute bequest, without security to the executors for the legatees over: *Bedford's Appeal.*

Estate Tail created by Will—Children, when a word of Limitation—Failure of Issue, definite and indefinite—Testamentary Trusts.—A testator, by will, directed his executors to account for and pay over, half yearly, to his three daughters, "and to each of them during their natural lives, the income or profit arising out of each of their share of the residue, and after the death of either, then to descend and go to the child, and if children, share and share alike; should, however, either of my daughters die, and leave no lawful issue, then such share or portion is to fall back again to the residue, and form a part of the same." *Held,* that the daughters took an estate tail in the residue of the testator's estate, which, under the Act of April 27th, 1855, became an estate in fee simple: *Haldeman* vs. *Haldeman.*

Whenever, in the devise of a remainder to the "child" or "children" of the first taker, it clearly appears that those words are used in the sense of "issue" or "heirs of the body," they are to be treated as words of limitation, describing lineal succession to an entail, and not as words of purchase in their usual sense: *Ib.*

The devise being to the daughters for life, with remainder to their children, the gift would lapse in default of issue, for the testator had defined the word child as meaning issue, and the legal consequence of a lapse in default of issue must follow: *Ib.*

There was no such trust executed by the will, as would prevent the operation of the rule, that an estate for life, with remainder to the issue of the first devisee, is an estate tail in law: *Ib.*

Conveyance of Estate in Expectancy—Mortgage of Wife's expected interest in her Father's Estate, for Debt of Husband, invalid.—A married woman gave a mortgage to a creditor of her husband's, of "all the estate, right, title, and interest," to which she would be entitled in her father's estate, on his death, and also covenanted with her husband "to stand seized of said estate, right, title, and interest, to the use of the mortgagee and his heirs, and to make further assurances." The mortgage was