

adopted in 1783, provided that the two States should have concurrent jurisdiction in and upon the water of that river. Of so little importance, however, was this regulation that it was not until so lately as 1856 that a law of this State was passed for the punishment of offences committed on that river.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF PENNSYLVANIA.<sup>1</sup>

*Assignment for benefit of Creditors.*—An agreement of lease by which the Philadelphia and Sunbury Railroad Company placed its entire road in the possession of the Sunbury and Erie Railroad Company, to be stocked, repaired, and run at certain rates of tolls, and after applying the proceeds to these objects, so far as necessary, then to pay the earnings remaining to certain preferred creditors of the Philadelphia and Sunbury Railroad Company, lessors, is an assignment for the benefit of creditors, within the meaning of the Act 24th March, 1818, and, having been recorded within thirty days from its date, in the county wherein the road of the lessors was situated, is good as an assignment, though not intended as such by the parties: *Bittenbender vs. Sunbury and Erie Railroad Company*.

The preferences in the assignment are void because forbidden by law; but for all other purposes, the assignment is good, and is not avoided, if the railroad company's lessee had no power under their charter to act as trustee; for, if so, the courts would supply a trustee who was competent: *Id.*

An assignment, like a grant, may be made of any property of which the assignor has the actual or potential possession; and the road of the Philadelphia and Sunbury Railroad Company being property in possession, and its future earnings potential, capable of being inventoried and appraised under the Act of Assembly relating to assignments, both interests passed to and vested in the Sunbury and Erie Railroad Company for the purposes of the agreement, the legal effect of which was an assignment in the trust for creditors: *Id.*

The operative words of the instrument were not an assignment directly

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<sup>1</sup> From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

to the preferred creditors, but to the Sunbury and Erie Railroad Company, for them; the possession of the road was granted as property to the latter company as trustee under an express trust for the benefit of creditors: the lease, therefore, possessing all the elements of an assignment, must be construed as such: *Id.*

Where one of the preferred creditors, whose bill was against the Philadelphia and Sunbury Railroad Company for repairs of the rolling stock, continued work for the Sunbury and Erie Railroad Company after they had taken possession, upon the promise of the president to pay him as prescribed in the agreement of lease, and, upon failure of payment, brought his action of *assumpsit* against the latter company, proving the agreement, and that the lessors had received net profits sufficient to meet his claim, it was

*Held*, that the agreement of lease being but an assignment for the benefit of creditors, and the preference therein in the plaintiff's favor being void, though the work had been done for repairs of the rolling stock, the promise of the assignee to pay according to the preferences therein expressed, was but a promise to execute the assignment, and not such as could be enforced against the Sunbury and Erie Railroad Company, whose president was the promissor: *Id.*

*Bailment—Pledge—Warranty of Title.*—A pledgor, by the act of pledging, impliedly engages that he is the owner of the property pledged; and where the ownership of any part of it is not in him, he is liable to the pledgee in damages, if by reason of defective title it is taken from him: *Mairs vs. Taylor.*

B., the owner of a lot of sheep in Ohio, executed a chattel mortgage to T. to secure purchase-money, and afterwards sold to M. 350 of them at \$3 per head, T. agreeing to release the lien of his mortgage upon those bought by M., who agreed to pay him a certain sum "upon the arrival of the sheep at Pittsburgh, and to allow T. to hold possession of the sheep until said sum was paid." While on the road, in T.'s possession, 200 of them were replevied by another party on a claim of lien on them as against B., and the remainder taken to the place mentioned, where M. demanded the whole number, tendering the sum agreed on, which T. was willing to receive, and to deliver the 150 sheep still in his possession. M. refused this offer, and brought replevin. On case stated, in the replevin suit, the Court entered judgment for the defendant for the value of the sheep at the price agreed to be paid.

*Held*, that the entry of the judgment was not error: *Id.*

*Chattel Mortgage—Decedent.*—Where, under a mortgage of chattels, the mortgagee having the right to take possession and sell on default in payment, did, upon such default, after death of mortgagor, take possession of and sell the chattels mortgaged, it was *Held*, That an action of trover would lie against him, by the administrator of the decedent, to recover the value of the goods sold: *Kater vs. Steinruck's Administrator.*

On the death of a mortgagor, his personal estate in possession passes into the custody of the law, to be administered for the benefit of all parties, and the mortgagee has no right to take it in satisfaction of his own debt, whether sufficient property has been left by the decedent to pay the debts or not: *Id.*

The mortgagee in such case cannot, in the action of trover, set off the debt due him by the mortgagor against the value of the property converted; because, to allow the set-off, would be to sanction the seizure of the property, and would mix the remedies of tort and debt in the same action: *Id.*

*Constitutional Law—Stay Law.*—The proviso of the first section of the Act 21st May 1861, granting stay of execution, under certain conditions, on "all judgments or debts upon which stay of execution has been or may be waived by the debtor in any original obligation or contract upon which such judgment has been or may hereafter be obtained," is unconstitutional, being in conflict with Section 10, Art. I., of the Constitution of the United States, and with Section 17, Article IX., of the Constitution of Pennsylvania: *Billmeyer vs. Evans & Rodenbaugh.*

Where the defendants, on the 12th July 1860, signed a sealed bill authorizing the entry of judgment against them for \$1000, payable twelve months after date, "*without stay of execution after the day of payment,*" the release of their statutory right to a further stay became a part of the contract, and, as such, could not be impaired or altered by the legislature; therefore, where the Court of Common Pleas, after the day of payment, granted an additional stay of execution under the Act 21st May 1861, it was error: *Id.*

If the parties to a contract include in it the legal remedy by which it is to be enforced, a legislative enactment changing the remedial process agreed on in regard to that contract, is as clearly unconstitutional as the attempt to impair the obligation of any other contract: *Id.*

*Criminal Law—Peremptory Challenges—Trial by Jury—Constitutional Law.*—The allowance of four peremptory challenges, under the “Criminal Procedure Act” of 1860, does not conflict with the constitutional provision “that trials by jury shall be as heretofore, and the right thereof remain inviolate :” *Hartzell vs. Commonwealth.*

Where the peremptory challenges on the part of the Commonwealth exhaust the jury selected from the regular “*Venire*,” and *talesmen* are called from the bystanders, the prisoner is not thereby deprived of a trial by jury, “as heretofore,” under the constitution ; for if the Commonwealth have the right to challenge, the legal consequences which flow from its exercise cannot affect the right itself, and the right existing, its incidents are legal, one of which is the calling and impannelling *talesmen* : *Id.*

The Commonwealth is not compelled to exercise her right of challenge, in the order of calling the jury, so that if the challenges to the first four called are waived she cannot afterwards challenge, but is entitled to four peremptory challenges out of *all* the jurors that may be called at any time before the panel is full, and passing by individual jurors, and permitting them to be challenged by the prisoner or sworn, is no waiver of the right : *Id.*

*Deed—Subscribing Witness—Opinion as to Capacity.*—Though subscribing witnesses to a *will* may be asked their opinion of the testator’s capacity to make a will, at the time of their attesting it, yet in case of a *deed* they must testify to facts only on the point of the sanity or capacity of the grantor ; they cannot give their opinion as to his competency to contract, for the *execution* of the deed is all that is attested by them : *Dean vs. Fuller.*

Therefore it was not error in the Court below to overrule questions propounded to the subscribing witness in a deed, “whether in his opinion the plaintiff had an unusual or undue influence upon” the grantor “at the time of the execution of the deed,” and “whether in your opinion was ‘the grantor’ in a fit condition to make the deed to ‘the grantee’ or to deal with him at all at the time ;” for the facts to show undue influence were for the jury, who alone were to draw the conclusion whether or not it existed, while the questions offered, if admitted, would have proved the conclusion without the facts : *Id.*

Where the evidence offered to set aside a deed was not such as would justify a chancellor in decreeing its cancellation, or a common law court in declaring it inoperative, no fraud, legal incapacity, or mistake being shown, it was not error to direct the jury to find a verdict for the plaintiff,

who, in an action of ejectment brought by him to recover the land conveyed therein, claimed under the alleged fraudulent deed. Insufficient evidence need not be submitted to a jury: *Id.*

COURT OF CHANCERY OF THE STATE OF NEW JERSEY.<sup>1</sup>

*Will.—Heirs, when construed next of Kin.*—Testatrix was possessed of personal and real estate, and by her will directed the latter should be sold by her executors, and after giving numerous pecuniary legacies, principally among her relatives and the relatives of her deceased husband, she added, "and if there is anything over and above left, let it be equally divided among all the heirs."

*Held*, that the word heirs, in the above connection, means "next of kin." *Jane Scudder's Executors vs. Isaac Vanarsdale and others.*

Where money or personal property is bequeathed to the heirs of A. or to the heirs of the testator, if there be nothing in the will showing that the testator used the word in a different sense, the next of kin are entitled to claim under the description as the persons appointed by law to succeed to personal property: *Id.*

*Infant.—Right of Father to Custody.—Constitutional Law.*—At common law the father, in the first instance, is entitled to the custody of his children, but courts will exercise a sound discretion for the benefit of the children in disposing of their custody: *Bennet vs. Bennet.*

The act of the 20th of March 1860, has materially altered the rule of the common law, and has, to a certain extent, deprived the court of this exercise of its discretion in disposing of the custody of children. By this act the custody of the children within the age of seven years is transferred from the father to the mother: *Id.*

This act is not unconstitutional, nor is it void as being incompatible with the fundamental principles of government: *Id.*

*Deed.—Cancellation does not divest Estate.—Purchaser with Notice.*—The question is well settled at common law that the cancellation of a deed by consent of parties will not divest the grantee, and re-vest in the grantor an estate which has once vested: *Harris Wilson vs. Josiah Hill and Catharine his wife and Frances Watts.*

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<sup>1</sup> From Mercer Beasley, Esq., Reporter of the Court, to be reported in the 2d volume of his Reports.

The title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be cancelled, and a conveyance made by her grantor to her husband: *Id.*

A *feme covert* was seised of certain lands. She being ill, consented, at the solicitation of her husband, to the cancellation of her deed and to a conveyance from her grantor to her husband. During her lifetime her husband married a second wife. Being imprisoned on charge of bigamy, he and his mistress reconveyed the lands to his wife, she and her husband executing a mortgage for the benefit of the husband to a third party; this mortgage was afterwards assigned to complainant, who was a lawyer, the counsel of the husband, and had knowledge that the property had been held by the husband in trust, and that the mortgage was also held in trust for the husband—it was *held* that the complainant had sufficient knowledge to put him on inquiry; that he was not a *bonâ fide* holder, and that the mortgage was void in his hands: *Id.*

*Married Woman—Power to Contract.*—Liabilities voluntarily incurred by a married woman will be charged upon her separate estate, but she cannot by her contract make herself personally liable: *Pentz vs. Simonson and Wife.*

The act of 1857, which provides that a *feme covert* may covenant as to the title of her lands, affords the strongest legislative construction that the act of 1852 does not by necessary implication confer upon her the right to dispose of her real estate, or to make contracts in regard to it: *Id.*

A contract entered into by a married woman for the sale of her estate cannot be enforced: *Id.*

But equity will charge her separate property with the repayment of money advanced to the wife, at her instance and for her benefit, or on account of her estate: *Id.*

*Subrogation—Married Woman—Separate Estate.*—To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment: *Garret Wilson vs. William Brown and Mary Ann Brown, his Wife.*

Where the title to land is in a married woman as her separate property, she and her husband living separate, and money is paid and advanced at her instance and for her benefit, a mortgage executed by her alone to secure such advances will be a valid and equitable lien on such property: *Id.*

*Interest—Mortgage.*—A decree will bear only six per cent. interest, although founded on a mortgage drawing seven per cent.: *Wilson vs. Marsh.*

Decrees in equity, as well as judgments at law, universally bear the legal rate of interest, without regard to the terms of the contract or to the place where it was executed, whether within the state or abroad: *Id.*

SUPREME COURT OF MASSACHUSETTS.<sup>1</sup>

*Shipping—General Average—Bill for Contribution.*—The owners of a vessel may maintain a bill in equity to recover contribution from the owners of the cargo, if the master, in order to avoid the danger of being driven, broadside on, upon a reef, sacrifices the chance of saving her from this peril, and runs her over the reef and upon the beach, and thus saves a portion of the cargo which would have been lost, if she had gone to pieces upon the reef: *Merithew vs. Sampson.*

A claim for contribution may be maintained against the owners of a cargo, although the vessel is totally lost: *Id.*

*Criminal Law—Passing Counterfeit Money—Pleading.*—It is no variance to allege that a counterfeit bank bill was uttered and passed as true to a person to whom it was actually delivered by the defendant as a true bill, although that person was only the servant of another and had no interest in the transaction: *Commonwealth vs. Starr.*

If a counterfeit bank bill is uttered and passed as true to a person who in taking it acts only as the servant of another, and has no interest in the transaction, the jury may nevertheless find as a fact an intent to defraud that person, if the defendant did not know him to be a servant, and dealt with him as a principal; although the evidence would also support an allegation of an intent to defraud the unknown master: *Id.*

*Criminal—Larceny of Gas.*—Illuminating gas may be the subject of larceny: *Commonwealth vs. Shaw.*

Larceny of illuminating gas may be committed by a person on his own land, by secretly opening a gas company's service-pipe which was laid there for the purpose of supplying his house with gas, and connecting the same with another pipe, through which he secretly and fraudulently re-

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<sup>1</sup> From Charles Allen, Esq., State Reporter; to be published in the forthcoming volume of his Reports.

ceives and uses the company's gas, after they have closed their service-pipe and removed their meter, and given him notice thereof : *Id.*

*Criminal Law—Murder—Aiding to commit Suicide.*—Aiding another to commit suicide is murder : *Commonwealth vs. Pratt.*

*Promissory Note—Invalidity of Indorsement.*—In an action by the indorsee against the maker of a promissory note, the defendant cannot show in defence that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid indorsement, if the payee or his legal representatives have never disaffirmed it; or that the payee, for a valuable consideration, had agreed to give up the note at his death to the maker, reserving meanwhile the right to collect the interest thereon : *Carrier vs. Sears.*

*Decedent—Order of Sale for Payment of Debts.*—An administrator cannot maintain a petition for leave to sell real estate for the payment of debts of his intestate, if there are no debts due from the estate which can be enforced at law : *Lamson vs. Schutt.*

*Guardian and Ward—Liability for Support.*—In the absence of an express contract, no action can be sustained against a guardian to charge him personally with the support and education of his ward. And if he has permitted his ward to remain in the care and custody of another, without any express contract for any definite period of time, he may terminate his personal liability to pay for their support and education by giving notice to that effect, although at the time of giving notice the ward is sick and unable to be removed : *Spring vs. Woodworth.*

*Guardian and Ward—Effect of Foreign Appointment.*—One who has been appointed under the laws of another state to be the guardian of a child whose legal domicile is in that state, has no absolute right to the custody of the person of his ward in this Commonwealth; but his official position will be considered by the Court as an important element in determining to whom the custody of the child shall be granted : *Woodworth vs. Spring.*

The appointment in this Commonwealth of a guardian over a child whose legal domicile is in another State, and who has a guardian appointed under the laws of that State, does not deprive this Court of the power, in its discretion, to decree the custody of the child to the foreign guardian : *Id.*

*Criminal Law—Evidence of Wife.*—In the trial of a complaint against a man for an assault and battery upon his wife, she is a competent witness in his favor: *Commonwealth vs. Murphy*.

*Lost Note—Action by Holder.*—The owner of a lost note cannot maintain an action at law against the indorser, in a case where a bond to indemnify the defendant against being called on a second time to pay the note would not afford to him an adequate protection: *Tuttle vs. Standish*.

*Town—Liability for Defective Highway.*—A town is not responsible in damages if a horse, being frightened by an accident, breaks away from his driver and escapes from all control, and afterwards, while running at large, meets with an injury through a defect in a highway: *Davis vs. Dudley*.

*Will—Construction—Perpetuity.*—Under a will which, after various specific devises and bequests, contains the following provision: "If anything remains, my will is that the residue shall be deposited in the Worcester Savings Bank, and to be appropriated by my executors to the relief of my heirs, if they at any time shall need pecuniary assistance;" the entire beneficial interest in the residue vests in those who are the heirs at law of the testator at the time of his death, and, if they all desire it, and the executors consent, the trust may be annulled, and the property distributed amongst them, upon their executing a release to the executors: *Smith vs. Harrington*.

*Note payable in Instalments—Indorsement when overdue—Mortgage.*—A note payable by instalments is overdue when the first instalment is overdue and unpaid; and one who takes it afterwards takes it subject to all equities between the original parties: *Vinton vs. King*.

The same defences may be made in an action on a mortgage, the Statute of Limitations excepted, which might be made in an action on the debt which the mortgage was given to secure: *Id.*

#### SUPREME COURT OF NEW YORK.<sup>1</sup>

*Actions by Public Officers—Facts assumed to be true on the Trial.*—Actions by public officers, as such, should be brought in their individual names, with the title of their office added: *Paige vs. Fazerckerly*.

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<sup>1</sup> From the Hon. O. L. Barbour, Reporter of the Court.

If, in an action brought by one as "chamberlain, &c.," no objection is taken, on the trial, that the plaintiff is not chamberlain, it will be *assumed*, on appeal, that the fact of his being the incumbent of the office was understood, or taken for granted: *Id.*

When it is obvious that a fact was assumed on the trial, it is as much in the case as if it were expressly proved: *Id.*

When a court of review is satisfied, from the general scope and tenor of the proceedings on the trial, that a particular fact was not a matter of contest, nor a ground of objection there, but was assumed or taken for granted in the conduct of the cause, it may and should conclude that the fact was as it was assumed to be: *Id.*

*Fire Insurance—Material Stipulations.—Evidence of Assent to other Insurances.*—A stipulation, in a policy of insurance, that the insurance shall be void, in case the assured, or any other person with his knowledge, shall have or make any other insurance on the property, not notified to the insurers, and mentioned in, or indorsed upon, the policy, is a material part of the contract between the parties: *Gilbert vs. The Phoenix Insurance Company.*

The parties to a contract of insurance have the right to stipulate, between themselves, as to the nature and kind of evidence by which the assent of the insurers to other insurances shall be manifested. And when they have thus stipulated, the court has no power to substitute any other kind of evidence, differing in kind or degree: *Id.*

*Variance—False Representations.*—When it appears that the defendant was not, and could not have been, misled by a variance between the complaint and the proof, the variance may be disregarded, without amendment: *Craig vs. Ward et al.*

A party making a representation false in fact renders himself liable in an action for fraud, although he did not actually know the representation to be false at the time: *Id.*

If a party makes a material representation, without knowing whether it is true or false, and it turns out to be false, an action lies for the fraudulent misrepresentation: *Id.*

*Sheriff—Indemnity to Bidders.*—A sheriff acts *officially*, in selling the property of a stranger to the execution as the property of the defendant therein. He may take an indemnity from the plaintiff, for such an act,

when done in good faith, but cannot give an indemnity to the bidders at the sale: *Bell vs. Pratt*.

Where an under-sheriff agreed with the bidders at a sheriff's sale to warrant the title to the property sold, *held*, that the agreement rested upon no consideration of benefit to the sheriff, except as it necessarily tended to increase the fees and perquisites of his office; and that in that respect it was void, as against public policy: *Id.*

A sheriff, while in the discharge of his official duty, cannot divest himself of his official character, and do as an individual what he cannot do as a public officer: *Id.*

*Divorce Suit—Dower.*—The late Court of Chancery had no authority, in a divorce suit, to require a married woman to accept a gross sum from her husband in lieu of, and in satisfaction of, her dower. And her acceptance of such a sum, in the lifetime of her husband, will not defeat her dower: *Crain vs. Cavana*.

Her release of dower, *to her husband*, pursuant to an order of the court, although acknowledged in due form, would be a nullity: *Id.*

*Hops Personal Property.*—Hops growing and maturing on the vines, which are produced by the annual cultivation of the owner, are personal chattels within the meaning of the Statute of Frauds; and as such are subject to sale like other personal property: *Frank vs. Harrington*.

*Railroad Companies—Liability as Carriers of Passengers.*—It is not unlawful, nor against public policy, for a railroad company to convey passengers by stage to and from one of its stations and an adjacent village, in connection with and as a part of its business of transporting passengers upon its road; nor is a contract made by it thus to carry a passenger, *ultra vires*: *Buffit vs. Troy and Boston Railroad Company*.

Such a contract is lawful, and the corporation is estopped from denying its validity: *Id.*

Where a railroad company employs an individual to convey passengers to and fro between a village and a station on the railroad, in stage-sleighs furnished, together with the horses and drivers, by him, such company is liable in damages for any injury sustained by a passenger in consequence of the overturning of a stage-sleigh through the negligence of the owner or his servant: *Id.*