

# I N D E X

TO THE

PRINCIPAL CASES CONTAINED IN THIS VOLUME.

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## ACTION ON THE CASE.

See SALE OF GOODS, III. 2.

## ADMIRALTY.

I. *Pleading on Libel for Information.*

See STEAMBOAT, 3.

II. *Jurisdiction.*

See STEAMBOAT, 4.

## AGENCY.

I. *Undisclosed Principal.*

Agent for foreign principal, selling goods by sample, without disclosing his agency, liable in case on the implied warranty. *Allen vs. Schuchardt*, 13

II. *Fraudulent Appropriation of Proceeds of Sale by Agent.*

See FRAUD.

## ANTECEDENT DEBT.

*Where a good Consideration.*

See BILLS AND NOTES, II.

FRAUD.

## ARREST.

I. *How made on Civil Process—Escape.*

1. An officer is not bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid. *Whithead vs. Keyes*, 471

2. An officer is bound to use all reasonable and proper personal exertions to secure a person for whose arrest he has a writ; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time. *Id.*

3. An officer effects an arrest by laying his hand upon a person whom he has authority to arrest, for the purpose of arresting him although he may not succeed in stopping or holding him. *Id.*

VOL. 10.—49

(769)

## ARREST.

II. *Actual Possession of Warrant, necessary.*

1. A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G., and convey him before two justices of C. to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station house. W. G. was rescued by several persons, who assaulted the constables D. and S. Whereupon informations for the rescue and assault were laid against the parties by the constables; and at the hearing before justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:

*Held*, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time. *Gal-liard vs. Laxton*, . . . . . 305

*Held*, also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault. *Id.*

## ATTORNEY.

*Lien for Costs.*

1. A collusive settlement of an action, by the parties, to deprive an attorney of his costs, made after a notice from the attorney, of his claim, to the defendant, will not be allowed to prejudice the attorney's right to enforce payment of his taxable costs. *Carpenter vs. The Sixth Avenue Railroad Company*, . . . . . 410

2. His claim for taxable costs will be protected against a collusive settlement in an action upon a *tort* merely *personal*, as well as in an action upon contract; and as well against a settlement made before trial as after judgment. *Id.*

3. But an attorney, by an agreement between him and his client, that, besides taxable costs, he shall receive as a compensation for his services a sum equal to one-third of the sum recovered, will not acquire any right in the *subject-matter* of such an action, or control over it, which will affect the power of the plaintiff to settle and release the *claim for damages* before a trial has been had. *Id.*

4. The reported cases in regard to an attorney's *lien*, or right to be compensated for his costs, classified and considered. *Id.*

## BANKS AND BANKERS.

I. *Charter requiring payment in Gold or Silver Coin.*

See CONSTITUTIONAL LAW, II. 2.

II. *Bills remitted to Banker for Collection.*

See BILLS AND NOTES, I.

## BASTARD.

See CONSTITUTIONAL LAW.

## BILLS AND NOTES.

I. *Remitted for collection, and credited as cash, when held for value.*

M., C. & M., of Baltimore, indorsed in blank and deposited for collection with J. L. & Co., bankers and collecting agents in the same city, a bill payable in New York. The latter indorsed for collection to the plaintiffs, also bankers and collection agents doing business in New York. Each of these two houses was constantly remitting paper to the other

## BILLS AND NOTES.

for collection, and knew that each remitted paper for collection belonged to third persons. The remitted paper, when payable at sight, was collected, and then credited as cash. That payable in *future* was entered in the books of the house receiving it, as received for collection, and was not otherwise credited, unless, nor until it was actually paid. According to the course of business, each house drew for the cash balance in its favor, arising from actual collections, and not against paper remitted and not matured. There was no express agreement between them, that either should hold the paper it held running to maturity, as security for the paper remitted to the other for collection, or for cash balances. J. L. & Co., at the time of remitting the bill in question to the plaintiffs, owed them a small cash balance, and immediately thereafter received from the plaintiffs other remittances, which they collected, but failed to pay over, and failed in business before the bill in question matured. The plaintiffs were immediately notified that the bill belonged to M., C. & M., but on demand thereof refused to surrender it.

*Held*, That the plaintiffs could not retain the bill as against M., C. & M., as indemnity against the balance owing to them by J. L. & Co., and that they were not *bonâ fide* holders for value in such sense as to have acquired a title superior to that of M., C. & M. *Hoffman vs. Miller*, 676

2. *Held*, also, That evidence by the plaintiffs, that in making the remittances, made after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands, received from J. L. & Co., was not entitled to any consideration, as neither any agreement nor the course of dealing between them and J. L. & Co., authorized them to so rely, and J. L. & Co. had no reason to suspect that any remittance made to them was influenced by any such consideration. *Id.*

## II. *Fraudulently negotiated—Bonâ fide Holder—Antecedent Debt, when good Consideration.*

Where L. executed and delivered to H. four blank promissory notes, and authorized him to fill the blanks with sums not exceeding \$5000 each, for the purpose of negotiating them for the benefit of L.; and H. delivered to L. similar notes, to serve as receipts, or to indemnify him in case he (H.) should misuse any of the funds arising from the negotiation of L.'s notes; and H. returned the notes executed by L. to him with the blanks unfilled; and one of the notes executed by H. was filled by L. with the sum of \$8629.81, and passed to the plaintiffs by indorsement as collateral security for an antecedent debt, *it was held*, that the court did not err in instructing the jury:

1. That the *onus* of showing the consideration of the note was upon the maker, the presumption being that it was sufficient.

2. That if the indorsees were *bonâ fide* holders for a good consideration, it could make no difference that it was executed in blank, or that it was accommodation paper which had been misused by the indorser.

3. That if the transaction was an exchange of notes, the indorsee could not be defeated by showing that, subsequent to the transfer, H. had delivered up and cancelled the notes of the indorser.

4. That if H.'s notes were delivered merely to stand as receipts to protect L. in case H. should misuse the funds arising from the notes given to him to negotiate, any note filled up by L. (his notes having been returned to him) would in his hands be without consideration.

5. That the presumption was that the indorsee took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it is sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character as necessarily to cast a shade upon the transaction and put them upon inquiry; that the indorsees are not charged with notice because of any want of diligence on their part in making inquiry, or if they took the note under

## BILLS AND NOTES.

suspicious circumstances, provided they had no notice actual or constructive of the equities between the original parties; that the defendant was not bound to prove that the plaintiff purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril.

6. That though the plaintiffs took the note as collateral security for an antecedent debt, they are nevertheless *prima facie*, though not *conclusively*, to be considered as holders for value, and it is on the defendant to show that they are not such holders; that if it was taken for collateral security only, the plaintiffs parting with nothing, giving no time, relinquishing no right, nor suffering damages or injury as the consideration or in consequence of receiving it, they would not be such holders. *Trustees of Iowa College vs. Hill*, . . . . . 745

III. *Where Demand to be made, on change of Residence of Maker.*

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the indorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the indorser, to present the note for payment at the maker's former place of residence in New York. *Foster vs. Julien*, . . . . . 363

2. The cases of *Anderson vs. Drake*, 14 Johnson 114, and *Taylor vs. Snyder*, 3 Denio 145, commented upon, and the case of *Wheeler vs. Field*, 6 Metcalf, 290 overruled. *Id.*

## BILL OF PARCELS.

See SALE OF GOODS, I.

## BUILDING RESTRICTIONS.

*Jurisdiction of Equity to enforce.*

See INJUNCTION.

## COAL.

*Dug by mistake of Boundaries.*

See TROVER.

## CONDITION.

I. *When enforced as agreement in Equity.*

See INJUNCTION.

II. *Release of.*

See INJUNCTION.

## CONFLICT OF LAWS.

I. *Contracts.*

An oral contract valid by the laws of the state where made, may be enforced in another state in which such contracts are required to be in writing. *Allen vs. Schuchardt*, . . . . . 13

II. *Domicil, effect of, on Testamentary Acts.*

1. In executing a will of personal property, the testator must observe the formalities required by the law of his domicil, and not those of the place where the will is made. The maxim "locus regit actum" has no place in English or American testamentary jurisprudence. This principle is universally true when the domicil continues to the time of the testator's death. *Moultrie et al. vs. Hunt*, . . . . . 148

## CONFLICT OF LAWS.

2. If the testator, after executing the will, changes his domicile and resides under another jurisdiction at his death, the formalities required by the new domicile must have been observed, or the will is void. *Id.*

3. A will is an inchoate and provisional transaction until the testator's death, and the law may require, after its execution, new formalities to be complied with. These, as well as other formalities, must have been observed by all testators domiciled in the jurisdiction at the time of their death, without reference to their domicile when the will was executed. *Id.*

4. In order that the principles of "comity" may be invoked in favor of the wills of testators domiciled elsewhere, they must have resided in another State at the time of their death. The will is then enforced in accordance with the rules of international law applicable to the subject. *Id.*

5. An act done in another State, in order to create rights which our Courts ought to enforce on the ground of comity, must be of such a character, that if done in this State in conformity with its laws, it could not be constitutionally impaired by subsequent legislation. Per DENIO, J. *Id.*

6. H., the alleged testator, made his will of personal estate in South Carolina, where he then resided. He did not, when it was executed, declare to the subscribing witnesses that it was his last will and testament. This declaration was not necessary by the law of that State, and it was conceded that the will was at the time properly executed for South Carolina purposes. After making his will he removed to New York, where he resided at the time of his death. In this State such a declaration is necessary. He died without republishing his will. *Held*, that the will was void, and that H. died intestate. *Id.*

7. The law of the continent of Europe is not to be resorted to in determining a question of this kind, until the sources of instruction, furnished by the Courts and jurists of England and of this country, have been exhausted. *Id.*

III. *Domicil, how far it governs Succession.*

1. The inheritance, whether testamentary or from intestacy of a foreigner, and especially of an American of the United States, not domiciled in France, must be regulated as to personal property existing in France, without excepting the loans of the State by the law of the country where the foreigner's domicile was, and where, consequently, his inheritance was unobstructed. *Succession of Gourid*, . . . . . 424

2. This rule, founded upon the maxim *mobilia sequuntur personam*, has no exception, except where Frenchmen interested as heirs in the inheritance of a foreigner, have to defend themselves as to property existing in France against dispositions or statutes contrary to some one of the essential and fundamental rights rendered sacred by French legislation, such as the legal reservation, the prohibition of substitutions, &c.; in which case the right of deduction created by Article 2, of the law of July 14th, 1819, is open to them. *Id.*

3. ESPECIALLY: The widow of a citizen of the state of Pennsylvania, married agreeably to the law of that State, which is also that of the inheritance, and endowed by virtue of its matrimonial law, with one-half of all the personal property of her husband, has a right to demand in France in opposition to a French universal legatee, the transfer, by virtue of this title, of the one-half of a *rente* inscribed upon the great book of the public debt. (Treaty of Reciprocity between France and the United States of September 15th, 1853.) *Id.*

IV. *Validity of blank transfer of Stock, governed by Law of State where to take effect.*

See CORPORATION, II. 7.

## CONSTITUTIONAL LAW.

I. *Laws legitimating Bastards.*

1. An estate already descended cannot be divested from the legal heirs, and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the legislature may cure the taint of a bastard's blood for the purpose of future inheritance. *Killam vs. Killam*, . . . . . 18

2. By an act of the Legislature, passed in 1853, it was provided that George W. K., son, and Emily M., daughter of George K., shall have and enjoy all the rights and privileges, benefits and advantages, of children born in lawful wedlock, and shall be able to inherit and transmit any estate whatsoever, as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock." The persons named were, in point of fact, children of George K., by the same mother, who, after their birth, but before the passage of the act, had been married to a third person, X. At the date of the act all parties were living. George W. died in 1859, unmarried, and without issue, seised of land which had been conveyed to him by his father. In an ejectment by the father against a grantee of X. and his wife: *Held*, that the effect of the act of 1853, was to remove, for all purposes of inheritance, the defect of blood of the children, as though at the time of their birth their parents had been lawfully married; that the land passed, under the intestate laws of this State, to his natural parents for their joint lives, notwithstanding that the mother was then still the wife of X., remainder to his natural sister, Emily M., in fee; and therefore that the father was entitled to recover, but only as to an equal moiety of the land. *Id.*

3. *Held*, also, that the case was not affected by the general law of 1855, which provides that the estate of a bastard, dying unmarried and without issue, shall pass to his mother absolutely. *Id.*

4. *Held*, further, that the fact that the conveyance of the land in question to George W. K., by his father, was expressed to be in consideration of natural love and affection, was not material. *Id.*

II. *Legal tender Notes.*

1. Defendants executed a bond with warrant of attorney, for \$28,000, payable "in specie, current gold and silver money of the United States," and "that no existing law or laws, and no law or laws which may be hereafter enacted, shall operate, or be construed as operating to allow payment to be made in any other money, than that above designated;" "the said obligors expressly waiving the benefit derived or to be derived from such law or laws."

Judgment was entered and *fi. fa.* issued, in which the sheriff was required to levy the debt and interest "in specie, current gold and silver money." The Court, on motion, set aside the *fi. fa.*, and *held*: That the *fi. fa.* was irregular; as a *final judgment* is necessarily for *lawful* money, and is payable in any money which the law has made a legal tender. *Shoenberger vs. Watts*, . . . . . 553

2. By the charter of the Bank of the State of Indiana, it was provided, that the bank should not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, &c., and that if it should neglect or refuse to do so, then the holder should be entitled to recover the amount with twelve per cent. interest. On the 1st of April 1862, the plaintiff demanded of a branch bank payment of its notes in coin, which was refused, but the amount tendered in United States legal tender Treasury Notes.

*Held*, (1st,) That the provision in the charter in question, did not amount to a restriction of the right of the bank to avail itself of the privilege of using anything else as money, as a tender, which the United States, by their laws, might legally declare to be such.

(2d,) That Congress had *not* the Constitutional power to declare paper money a legal tender; but

## CONSTITUTIONAL LAW.

(3d), That, considering that the Legislature and Executive Departments of the Federal Government had decided in favor of the existence of such a power, and what the consequences of an opposite decision at the present time by the court would be, they would hold the Treasury Notes to be a legal tender until the Federal Courts should determine otherwise. *Reynolds vs. Bank of the State of Indiana*, . . . . . 669

III. *Liability of U. S. loans to State taxation.*

1. Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State. *The People vs. The Commissioners of Taxes*, . . . . . 81

2. The taxation, by the State, of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States, where no unfriendly discrimination to the United States, as borrowers, is applied by the State law, and property in its stock is subjected to no greater burdens than property in general. *Id.*

3. Whether Congress, for the purpose of giving effect to its powers to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *quære. Id.*

4. The cases of *McCullough vs. Maryland*, 4 Wheat. 116; *Osborn vs. U. S. Bank*, 9 Wheat. 738; and *Weston vs. The City of Charleston*, 2 Pet., examined and distinguished. *Id.*

IV. *Stay Law, validity of.*

The Indiana statute of 1861, which provides that in all cases of sales by the Sheriff on execution, after its passage, the Sheriff shall not give the purchaser a deed for, and possession of the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed in the manner therein provided, is unconstitutional, so far as it applies to sales on judgments upon contracts existing at, and before its passage. *Scoby vs. Gibson*, . . . . . 221

## CONTEMPT.

*In refusing to testify.*

See WITNESS.

## CONTRACT.

I. *When varied by subsequent Parol Agreement, or by Custom.*

1. Where a contract is made by written correspondence solely, it must be treated as a contract in writing, not subject to addition or alteration by proof of the acts, declarations, and intentions of the parties aliunde. *Whitmore vs. South Boston Iron Company*, . . . . . 403

2. But it is competent to show that the parties subsequent to entering into the same, consented to waive any of its provisions, and to substitute others in their stead. *Id.*

3. But an additional warranty, not expressed, or implied by its terms, that the article sold is fit for a particular use, cannot be added, either by implication of law or parol proof. *Id.*

4. Nor can the question whether such warranty is fairly to be inferred from the application of the terms of the written contract to its subject-matter, or from the attending circumstances, be submitted to the jury; they should be instructed that no such warranty exists in the case. *Id.*

5. A contract to manufacture "retorts like the one before furnished" imports more than likeness in "size, shape, and exterior form." It has reference to the material and workmanship. *Id.*

6. Such a contract cannot be controlled by proving a custom in the vicinity of the transaction, that founders shall not be held to warrant

## CONTRACT.

their manufacture, unless by express contract; or, in case of apparent defects, and the absence of any express agreement, that they shall have their castings returned in a reasonable time, and the right to replace them by new ones. *Id.*

7. The rule of damages for not furnishing manufactured articles according to contract, is the difference in value between those actually furnished and such as should have been, unless they were to have been furnished for a particular use. *Id.*

II. *When void as against Public Policy.*

See INSURANCE, II.

## CORPORATION.

I. *Stock, how to be transferred.*

1. Upon a pledge of stock in a railroad corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and *indicia* of ownership. *Pinkerton vs. Manchester and Lawrence Railroad,*

96

2. Under the laws of New Hampshire, a record of the ownership of shares must be kept by such corporations in this State, and by proper certifying officers resident therein. *Id.*

3. On the transfer of stock the delivery will not be complete, until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if unexplained, conclusive evidence of a secret trust, and therefore as matter of law fraudulent and void as to creditors. Where the transfer was made at a distance from the office, and the old certificates surrendered, and new ones given by a transfer agent appointed for that purpose, and residing in a neighboring State, proof that the proper evidence of such transfer was sent to the keeper of the stock record to be entered by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against the creditor. *Id.*

4. But where the pledge was made in Boston on the eighth day of July by a delivery over of the certificates, and nothing more done until the third day of the following August, and then the old certificates surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester in this State: *It was held,* that as against an attachment made between the obtaining the new certificates and the notice at the office, the possession was not seasonably taken, and the transfer was therefore not valid. *Id.*

5. Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of trial or at any intermediate period. *Id.*

II. *Fraudulent issue of Stock.*

R. & G. L. Schuyler being the owners of one hundred and sixty shares in the defendants' company, of which R. Schuyler was the Register and Transfer Agent, the latter in 1849 delivered to the plaintiffs, as collateral security for a debt due by him, certificates for ninety of those shares, with a blank power. No application for a transfer on the books of the company, as required by the charter, was made until 1854, when it was discovered that R. S. had been guilty of a fraudulent over issue of the stock of the company to his firm, but there was no evidence that any of this spurious stock had passed out of the hands of the firm before the deli-

## CORPORATION.

very of the genuine certificates to the plaintiffs. The company subsequently refused to allow the transfer of the latter. *Held,*

1. *Burden of proof.*—It is incumbent upon the defendants to show, if such be the fact, that these certificates do not represent the genuine stock of the company, that being a fact more exclusively in their power to prove.

2. *Plaintiffs' title.*—The plaintiffs are to be regarded as the first and only equitable purchasers and owners of ninety of the one hundred and sixty shares of genuine stock held by Schuyler.

3. *Plaintiffs' title not lost by delay.*—The *bona fide* holders of such certificates had a right to rely upon them, as securing to the owners the shares which they represented, against all transfer to other parties.

4. *Notice to the Company.*—The *knowledge* of Schuyler that these certificates were held by *bona fide* purchasers, for value, was notice to the Company, while he acted as their transfer agent in registering the transfers to subsequent parties, and thus affected them, constructively, with the fraud of their agent, and thereby avoided the effect of such transfers as between the plaintiffs and the Company, and rendered them liable to make good the plaintiffs' loss thereby sustained.

5. *Semble.*—It is by no means certain that the transfers registered are to be regarded as having operated upon the plaintiffs' shares.

6. *Blank transfers.*—Blank powers of attorney, for transferring stock, although under seal, may be filled up at the convenience of the transferee, and thus operate as of their date.

7. *Lex loci.*—Such being the settled law of the State of New York where this instrument was intended to take effect, will remove all question as to its validity, even if we admit that the law of the place where it was executed is otherwise. *Bridgeport Bank vs. The New York and New Haven Railroad,* . . . . . 210

III. *Assignment of Railroad to Creditor, when passes License to use a Patent.*

See PATENT.

IV. *Subscriptions by Towns, &c., to Stock.*

See MUNICIPAL SUBSCRIPTION.

## COSTS.

*Attorney's Lien for.*

See ATTORNEY.

## CUSTOM.

*Where admissible to vary Contract.*

See CONTRACT, I.

## DAMAGES.

See CONTRACT, II. 7.

SLANDER.

TROVER.

## DECEIT.

*On sale of Articles of Food.*

See SALE OF GOODS, II.

## DEED.

*Blank Transfers or Power of Attorney.*

See CORPORATION, II. 6.

## DESCENT AND DISTRIBUTION.

The Intestate law of Pennsylvania of 1833 provides that on the death of a person without issue, his parents shall take his real estate during their joint lives and the life of the survivor of them. A private statute of that state passed in 1853 enacted that A. and B. children of C. should have all the privileges, &c., of children born in lawful wedlock, and inherit and transmit real estate as such. These were the offspring of C. and of X., who had afterwards married Y. A. died intestate without issue, in 1859, at which time C., X., and Y. were all living. *Held*, that C. and X., as the legislative parents of A., took a joint life estate in his lands. *Killam vs. Killam*, . . . . . 18

*Held*, also, that the act of 1855, which provides that the estate of a bastard shall, on his intestacy without issue, pass to his mother absolutely, did not apply. *Id.*

## DOMICIL.

See CONFLICT OF LAWS, II., III.

## DOWER.

I. *Right of Tenant to disprove Seisin in Husband.*

1. A tenant in an action of dower is not estopped from showing that the seisin of the husband was not such as to give his wife a right of dower, where he or his grantor has accepted a deed of the premises from the husband and claims under it, although he may be estopped from denying the right of the husband to give the deed. *Foster vs. Dwinel*, . . . 604

2. Estoppels are mutual. The wife is not estopped if the husband, in a deed, misstates his title—as one not giving dower. *Id.*

3. Dower is no part of the estate of the husband, but an independent and inchoate right, which may become an interest in the estate after his death, if his seisin was such as to give it. But the law will not create this estate by the operation of an estoppel where it otherwise would not exist, where the tenant has simply accepted a deed from the husband, which does not allude to the matter of dower, or to the existence of the wife. *Id.*

4. Where it appears in the deed from the husband, that his title is only that of mortgagee before foreclosure, no estoppel can arise. *Id.*

II. *Wife of Mortgagee when dowable.*

The wife of a mortgagee cannot claim dower in an estate until the same is foreclosed by the husband. *Foster vs. Dwinel*, . . . . . 604

## EASEMENT.

See WAX.

## ERRORS AND APPEALS.

*Discretion at Trial of Case.*

1. As a general rule, the party holding the affirmative of the issues has the right to open and conclude the argument to the jury; but such practice being within the discretion of the court, the refusal to give the defendant the conclusion will be no cause for reversal of the judgment. *Reichard vs. The Manhattan Life Insurance Company*, . . . . . 547

2. No exception lies to the decision of a judge of the superior court upon the question whether a deposition which has been read in evidence in a trial shall be delivered to the jury when they retire to consider of their verdict. *Whithead vs. Keyes*, . . . . . 471

## EQUITY.

I. *Jurisdiction over separate Estate of Married Woman.*

See MARRIED WOMAN'S ACTS.

## EQUITY.

II. *Specific Performance of Building Covenants and Restrictions.*

See INJUNCTION.

## ESCAPE.

*Action for.*

See ARREST, I.

SHERIFF.

## ESTOPPEL.

See DOWER, I. 1, 2.

## EVIDENCE.

I. *Examination of Witnesses.*

When the plaintiff in the course of a trial calls out the declarations of the defendant, it does not follow, that all that was said by defendant can be given in evidence, but only that which tended to qualify that given in evidence by the plaintiff, and no more. *Brouner vs. Goldsmith et al.*, 47

II. *Foreign Judgment, where not inquirable into.*

See PLEADING.

III. *Written Contract, when varied by Parol Evidence.*

See CONTRACT, I.

## EXECUTION.

*On Stock, when preferred to Unregistered Pledge.*

See CORPORATION, I. 5.

## FOREIGN INSURANCE COMPANY.

See INSURANCE, II.

## FRAUD.

*Antecedent Debt, where constitutes a Purchaser for Value.*

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange. *Le Breton vs. Peirce*, . . . . . 35

## HABEAS CORPUS.

*Commitment for Contempt, when examinable upon.*

See WITNESS.

## HUSBAND AND WIFE.

See DOWER.

MARRIED WOMAN'S ACT.

## INJUNCTION.

*Against Violation of a Building Restriction.*

H., being the owner of two city lots, one a corner property, and the other adjoining it, granted and conveyed the corner lot to D. and R. in fee; reserving a perpetual ground-rent, upon the express condition that the grantees, their heirs and assigns, should not erect any building upon the back part of the lot higher than *ten* feet. H., at the time, and for some years afterwards, occupied the adjoining property as his residence. By five several mesne conveyances, all made subject to the condition, the corner property became vested in M. in fee; H. having some years prior to the conveyance to M. granted to the then owner permission to raise his back building to the height of *eleven* feet, expressly stipulating that such permission should not prejudice or impair the condition. H. died seized of the adjoining property, and also of the rent reserved out of the corner lot. His testamentary trustee granted and conveyed the adjoining property to C., no mention being made in the deed of the restriction imposed on the corner property. M. subsequently, by sundry mesne conveyances, became the owner of the rent reserved, which thus merged; and M. threatened to build in entire disregard of the restriction. C. filed a bill in equity to restrain him, and applied for a special injunction, which was refused; and M. went on and erected a three story back building. *Held*, upon appeal from the decree of the court below, refusing the injunction and dismissing the bill:

1. That although the clause imposing the restriction was a strict condition in law, yet equity would only inquire into the substantial elements of the agreement, and would enforce it for any party, for whose benefit it appeared to be intended.

2. That the duty of the defendant not to build in violation of the condition was clear; and that this duty was not reserved as a mere personal obligation to H., the original grantor, his heirs and assigns; nor for the benefit of the ground-rent; but that it was for the benefit of the adjoining property then owned by H.; and created an obligation to the owner of that property, whoever he might be; and equity would interfere to enforce and protect his right.

3. That a general plan of lots need not be shown; such a plan is only one means of proof of the existence of the right and duty; and this may appear as well from a plan of two lots, as of any greater number.

4. That the release of a part of a condition operates as a release of the whole, only where forfeiture of the estate for a breach of the condition is demanded; equity will enforce the condition in its modified form in favor of a party who asks only compliance with the agreement.

5. That the defendant having built in violation of the condition, after bill filed, the complainant was entitled to a decree of abatement without amending his bill. *Clark vs. Martin*, . . . . . 479

## INSURANCE.

I *Authority of Officers of Insurance Company to bind by Guaranty of another Company.*

1. Though by the Charter of an Insurance Company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the President, or, in his absence or inability to serve, by the Vice-President or other officer, &c., and duly attested by the Secretary or other officer," &c., a parol agreement as to the terms on which a policy shall be issued, made by the President, Secretary, or other

## INSURANCE.

general agent of the company, may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed: *GRIER, J. Constant vs. The Allegheny Insurance Company*, . . . . . 116

2. But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced. *Id.*

3. The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging as a reason, that the particular agent had not a good reputation for "settling losses," and added, "I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on" the plaintiff "to hold the policies." The Secretary of the defendants, in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured in offices satisfactory to him, we will have them cancelled; but, though they are not re-insurances, yet in case of loss we will feel ourselves bound for a satisfactory adjustment. We deem the companies good, and if any parties can settle with them, we can. On the faith of this letter the plaintiff closed the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the Secretary of the defendants had no general authority to bind them by a guaranty of the solvency of the substituted companies; and, (2.) if he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers. *Id.*

## II. Conditions in Policy restricting Right of Action, when void.

An agreement in a policy of insurance, executed by a foreign insurance company, that the insured waives the right to bring an action upon the policy except in the courts of the state incorporating such company, is void, both as against public policy and the statute of this state relating to foreign insurance companies of December 8, 1855; R. C., p. 884. *Reichard vs. The Manhattan Life Insurance Company*, . . . . . 547

## III. Representations, on Life Policy.

Where, in a policy of insurance upon life, the representation was made that the insured was sober and temperate and in good health; if the representation was true at the time it was made, the subsequent habits of the insured would be no bar to a recovery upon the policy. *Reichard vs. The Manhattan Life Insurance Company*, . . . . . 547

## IV. Abandonment of Voyage, on Marine Policy.

1. An abandonment of the voyage insured and substitution of a new voyage defeats the policy of insurance from the time of such abandonment, although when the loss occurs the vessel is sailing in a track or course of the voyage common both to the voyage described in the policy, and in the substituted voyage. *Merrill vs. Boylston Fire and Marine Insurance Company*, . . . . . 342

2. Such abandonment may occur after the vessel has commenced her specified voyage. *Id.*

3. The facts in the present case present a case of abandonment, and not one of an intention to deviate, and the policy was therefore at once defeated when the master of the ship abandoned the termini of the

## INSURANCE.

voyage described in the policy, and sailed from Falmouth, bound to Antwerp, as her port of discharge. *Id.*

V. *Agreement for, when enforced in Equity.*

Ante, I. 1.

## INTESTATES.

I. *Succession to Estate, how affected by Domicil.*

See CONFLICT OF LAWS, III.

II. *Laws of Pennsylvania.*

See DESCENT AND DISTRIBUTION.

## JUSTICE OF PEACE.

*Liability for Acts when not duly qualified.*

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the Constitution of the State. *Courser vs. Powers,* . . . . . 268
2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown. *Id.*
3. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify; the official oath is only commensurate with the appointment, and covers only the existing term of office. *Id.*

## LAKE.

See RIPARIAN OWNERS.

## LEASE.

*Re-entry for Non-payment of Rent.*

Our statutes with regard to the recovery of leased premises, except in the specific remedy which they provide and the notice to quit prescribed, do not dispense with the requirements of the common law on the subject. *Bowman vs. Foot,* . . . . . 352

A lease for a term of years, under which the rent was payable quarterly on certain days named, contained the following condition:—"Provided however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and the same possess as of his former estate." *Held,*

1. That the terms *expire and terminate* were merely equivalent to the more common expression, *shall become void.*

2. That the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor.

3. That to take advantage of his right to avoid the lease, it was necessary for the lessor—1st. To make demand of the rent on the day it fell due, on the premises, and at a convenient hour before sunset. 2d. Upon neglect to pay the rent, to make a re-entry on the premises, or in some other positive manner assert the forfeiture of the lease. [Per STORRS, C. J., and HINMAN, J.; ELLSWORTH and SANFORD, Js., dissenting.] *Id.*

Whether, after an entry for non-payment of rent, the acceptance of the rent is a waiver of the forfeiture: *Quere.* The current of authorities is against such a doctrine. *Id.*

## LEGAL TENDER NOTES.

See CONSTITUTIONAL LAW, II.