

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

Insolvent Laws, Ex-Territorial Effect of—Constitutional Law.—A certificate of discharge under the insolvent laws of this Commonwealth, is no bar to an action upon a promissory note given in this Commonwealth, payable at no particular place, but indorsed to a citizen of another State before the commencement of the proceedings in insolvency, although not indorsed until after it became due: *Fessenden vs. Willey*.

Principal and Agent.—Insurance Company, Liability for Representations as to Capital.—An insurance company is bound by representations in reference to the amount of its capital stock which is paid in and invested, made, in reply to the inquiries of applicants for insurance, by an agent duly appointed under its by-laws, whose business it is to solicit risks, receive and transmit applications, receive back and deliver policies, and receive the premiums; especially if it appears that he was expressly authorized to make the representations by officers of the company: *Fogg vs. Griffin*.

Trust and Trustee—Ante-Nuptial Contract—Rights of Cestui que Trust to compel Execution.—The surviving husband of a woman who, in contemplation of marriage with him, made with him ante-nuptial contract, providing, that in case she should die leaving issue surviving her, a certain note and mortgage should be held to the use of her intended husband for his life, with remainder to her issue in fee simple, and she has since died leaving issue surviving her, may maintain a bill in equity against one to whom she, in her last sickness, delivered the note and mortgage, with directions to retain and hold them in trust for the purposes declared in the ante-nuptial contract, and especially to protect the rights and interests of her children, to compel the delivery of the same either to himself, or to such person as the court may appoint trustee: *Lawrence vs. Bartlett*.

Mortgage—Right of Mortgagee to claim Rent of Premises.—A mortgagee of a term of years, upon giving notice to one who holds a prior underlease of a portion of the premises, that by virtue of his mortgage he shall claim all rent then and thereafter due from him, is entitled to recover the same; and an oral agreement between the mortgagor and mortgagee

¹The following abstracts have been furnished by Charles Allen, Esq., the State Reporter.

that the former shall receive the rent cannot be shown in defence of an action by the mortgagee to recover it: *Russell vs. Allen*.

Assignment—Operation on future Rights.—An assignment of all claims which the assignor may have on a future day, which is named, for sums of money due and to become due for services in the fire department in the city of Boston, is ineffectual to pass to the assignee sums earned before that day; but under a subsequent appointment as fireman, if there was no agreement for such subsequent appointment existing at the time of making the assignment; a sum earned under such subsequent appointment, and collected of the city by the administrator of the assignee, may be recovered from the administrator in an action for money had and received: *Twiss vs. Cheever*.

Husband and Wife—Dower, Whether barred by Elopement with an Adulterer.—In this Commonwealth, a woman is not barred of her right to dower by leaving her husband and living with an adulterer, if no divorce is decreed therefor: *Lakin vs. Lakin*.

Husband and Wife—Action for Wife's Property, How brought.—No action can be sustained, in Massachusetts, by a husband and wife jointly, to recover for the conversion of property which they claim under a mortgage executed to the wife alone, to secure money lent by her, a portion of which was furnished to her by her husband: *Hennessey vs. White*.

Principal and Surety—Liability of Principal not Discharged by offer of Payment by Surety After Action Brought.—In an action to recover the price of labor, in which the defence is that the labor was performed on the credit of a third person, evidence of an offer by such third person, after the commencement of the action, to pay the plaintiff for the same, is incompetent: and the admission of such evidence is sufficient ground for setting aside a verdict in favor of the defendant, although the jury were instructed that, if the work was done for the defendant, the plaintiff was not bound to accept payment from any one else, and that, in such case, no offer of payment by a third person should have the slightest influence upon their judgment: *Larry vs. Sherburne*.

Trust—How constituted.—A deposit of money in the hands of a third person, to be held in trust for the depositor's minor son, with the agreement that the trustee shall retain it for a specified time at a specified rate of interest, and in the mean time prepare a deed of trust, creates a complete trust, and leaves no power in the depositor to dispose of the money for his own benefit: *Sherwood vs. Andrews*.

NEW YORK COURT OF APPEALS.¹

Husband—Action for Injury causing Wife's Death—Measure of Damages.—Where a husband brings an action as administrator of his wife, for the damages resulting from her death by the negligence of the defendant, he can recover only for the pecuniary injury sustained by her next of kin. The value of her services to him does not enter into the estimate of damages, and evidence thereof is inadmissible: *Dickens vs. The N. Y. Central R. R. Co.*

Constitutional Law—Prohibition Against Pledge of State Credit for Corporation—State Loan when Payable.—A State loan, reimbursable at the pleasure of the State after twenty years, has no term of payment until the Legislature has fixed it by law: *People, ex rel. De Forest, vs. Deniston.*

Where such a loan was made under a law passed before the Constitution of 1846, for the benefit of the Long Island Railroad Company, which was bound to redeem the stock, an act giving to its holders the option of having it made payable in 1876, is not in violation of the constitutional prohibition of the loan of the State credit to corporations: *Ib.*

Bills and Notes—Liability of Endorser of Note Payable on Demand.—A promissory note payable on demand, with interest, is a continuing security; an endorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time: *Merrit vs. Todd.*

Whether, however, the lapse of time, or a failure to pay interest at the customary periods, may not subject the holder of a note after transfer to a defence existing in favor of the maker against the first holder. *Quære. Ib.*

Railroads—Right to eject Passengers, how to be exercised—Lawful Resistance to—Concurrent Negligence.—To eject a passenger from a railroad car, while in motion, is so dangerous an act that it may justify the same resistance on the part of the passenger as to a direct attempt to take his life: *Sanford vs. The Eighth Av. R. R. Co.*

Where the passenger is liable to ejection in a proper manner, for refusing to pay fare, his resistance to the attempt to expel him without stopping the car, does not present a case of concurrent negligence on his part: *Ib.*

¹ From E. P. Smith, Esq., Reporter of the Court.

Where, in such a case, the principal is responsible for the act of his agent, he is, it seems, also responsible for any circumstances of aggravation which attended the wrong: *Sanford vs. The Eighth Av. R. R. Co.*

Water-course, Action for Obstructing—Public Improvement.—One who, without legislative authority, interferes with the current of a running stream, is responsible, absolutely and without regard to actual negligence, for the damages sustained in consequence of his interposition by those who are entitled to have the water flow in its natural channel: *Bellinger vs. N. Y. Cent. Railroad.*

Where, however, such interference is in pursuance of legislative authority, granted for the purpose of constructing a work of public utility, upon making compensation, the party obstructing the stream is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods: *Ib.*

Non-Resident Debtor—Effect of Foreign Composition.—Under the proceedings against a non-resident debtor, all creditors at the time of issuing the first warrant of attachment against him, are entitled to come in and share in the distribution of his estate, whether they be residents or not residents of this State or the United States, and without regard to the place where the debt was contracted: *Matter of Bonaffe.*

Such right is not divested by the creditor's being a party to a *concordat* or composition with creditors, made in France, where the debtor resided, and confirmed by its judicial tribunals, which provided that the debtor should be free in his person and his property: *Ib.*

Whatever may be the effect of such a *concordat* in respect to the future acquisitions of the debtor, it does not discharge the claim of any creditor to share in the existing property of the debtor: *Ib.*

It seems that the proceedings under the French bankrupt system, never effect the absolute discharge of the debtor, but that its extent depends upon the interpretation of the composition between him and the creditors. Per DAVIES, J.: *Ib.*

Husband and Wife—Of what Widow Dowable.—A widow is not dowable of land in which her husband has only a vested remainder, expectant upon an estate for life: *Durando vs. Durando et al.*

This rule holds as well where the estate of the husband comes by devise, as by inheritance: *Ib.*

The word "purchase," as used in Coke, Litt. 31, in reference to this point, is limited to a purchase by deed: *Ib.*

SUPREME COURT OF PENNSYLVANIA.¹

Criminal Law—Homicide in Self-defence.—The killing of one who appears to be an assailant is excusable, if there be reasonable apprehension of loss of life or of great bodily harm, so imminent at the moment of assault as to present no alternative of escaping the consequences but by resistance, though it afterwards appear that there was no actual danger: *Logue vs. Com.*, 2 Wright, 265.

Guardian—Personal Liability for Mortgage on Ward's Estate—Relief in Equity.—A guardian who purchases a house and lot expressly subject to the payment of the balance of a mortgage given to his vendor, incurs a personal responsibility to the amount of the unpaid mortgage, though the purchase was made by the sanction and direction of the Orphans' Court: *Woodward & Craig's Appeal*, 2 Wright, 322.

But the Orphans' Court, as a court of equity, has the right, before the estate passes out of its control, so to dispose of the trust fund in the hands of the testamentary trustee, as to protect the guardian who incurs such personal responsibility, and indemnify him against loss on account of it: *Id.*

Negligence of Fellow Servant—Liability of Employer for—Railroad Company.—Character for care, skill, truth, &c., though growing out of the special acts of a party, cannot be established by proof of such acts, but by evidence of general reputation.—*Frazier vs. Penna. R. R. Co.*, 2 Wright, 104.

Although it is settled that where several persons are employed as workmen in the same general service, in the prosecution of which one of their number is injured through the carelessness of another, the employer is not responsible; yet, where the defendant (a railroad company) was charged with having knowingly employed a conductor who was unfit for the business, it was held not error to instruct the jury, that, this fact being properly established, the company were chargeable with the consequences of the conductor's carelessness: *Id.*

The officer having charge of the department of business, in which the alleged injury occurred, is the person required to use that degree of dili-

¹ From the advance sheets of the second volume of Mr. Wright's Reports, which he has kindly allowed us to use.

gence in the selection of competent employees, which is necessary to exempt a company from liability for their negligence. His carelessness and his knowledge in this respect, are the carelessness and knowledge of the company. *Held*, therefore, that it was error in the court below to reject evidence offered to show that the Superintendent of the Company (whose duty it was to employ and supervise the conductors of the company) did not know that the person employed in this capacity, and by whose improper conduct the alleged injury occurred, was a careless officer: *Id.*

Where the plaintiff (who was employed by the railroad company as a brakeman) knew that his conductor was habitually careless, and chose to continue in service with him, neither informing the company of his known acts of carelessness, nor refusing to serve with him, it was held, that he could have no claim against the company for injuries suffered from further carelessness on the part of the conductor, even though the company also knew it: *Id.*

Married Women—Validity of Bond by.—A judgment bond given by a married woman for the purchase-money of a lot of ground conveyed to her, though invalid, as a personal obligation, will constitute a valid lien upon the property: *Ramborger's Adm'rs. vs. Ingraham*, 2 Wright, 146.

Limited Partnership—Where Special Partner liable.—No partnership is limited in Pennsylvania, unless it be formed in strict compliance with the Acts of Assembly relating to limited partnership: *Richardson vs. Hogg*, 2 Wright, 153.

The Act of Assembly in relation to limited partnership, requires that the capital contributed by the special partner shall be in actual cash; it cannot be in a stock of goods: *Id.*

Where, in the articles of limited partnership, it was stipulated that the son of the special partner should keep the books, and have a general supervision over the business during the partnership, at a salary, and that the general partner should sign no note, or check on bank for firm money, without the son's knowledge and approval, it was *held*, in an action by one of the creditors against the special partner, that the partnership was not limited but general, and that the special partner was liable for the firm debts: *Id.*

Common Carrier—Freight pro rata—Wrongful Sale of Cargo by Master.—A contract of affreightment, whereby a shipowner undertakes

the conveyance of goods, is executory and entire; and where delivery, according to the consignment, is prevented by the perils of the sea, he can recover from the shipper, neither full freight nor freight *pro rata itineris*, unless the cargo be received by, or on the part of the shippers at an intermediate port, when partial freight is due on an implied new contract: *Richardson vs. Young*, 2 Wright, 169.

A ship laden with corn, from Philadelphia for Liverpool, having stranded, the corn was taken back to Philadelphia, surveyed, condemned, and sold by the master, without notice to the shippers, who, however, sometime afterward received a part of the proceeds. In an action by the shippers against the owners of the vessel to recover the value of the corn, it was *held*, that the defendants were not entitled to a set-off for full or partial freight, there being no acceptance of the cargo on the part of the plaintiffs, by consent to the sale, or by the receipt of part proceeds, on general average account, and that the master, though the agent of the shippers for some objects, was not their agent for the purpose of a sale: *Id.*

The sale of the corn fixed the rights of all parties, and notices subsequent thereto, in relation to the loss, were irrelevant and inadmissible, so also evidence that full freight had been paid on beeswax taken from the stranded ship and reshipped, at the cost of her owners, to the port of destination, upon another vessel: *Id.*

SUPREME COURT OF NEW YORK, GENERAL TERM, FIRST DISTRICT,
FEBRUARY, 1861.¹

Assignment of Property in Trust for the Benefit of Creditors—Action to set aside Assignment.—Though the appropriation, by an insolvent firm, of partnership property to the payment of individual debts, is fraudulent, and renders the assignment void as to creditors of the firm, yet an assignment which purports to be an assignment of all individual as well as partnership property, is not fraudulent and void on its face, where there is nothing appearing thereon to show that all the partners may not have had individual property more than sufficient to pay their individual debts, preferred by the assignment: *Knauth et al. vs. Barrett et al.*

It is for the assignor and their assignee to show that the individual property of each partner was sufficient to pay his own preferred debts: *Id.*

Municipal Corporation—License to run Cars.—Where the Common Council of a city enters into a specific agreement with a Railroad Com-

¹ From the Hon. O. L. Barbour, Reporter of the Court.

pany, prescribing the regulations to which the company shall be subject, requiring no further license, and reserving no right to require one, they are concluded, by their contract, from afterwards passing an ordinance requiring the taking out of a license, and the payment of a fee by the company, to entitle it to run its cars. The agreement itself is a license: *Mayor, &c., of New York vs. Second Av. R. R. Co.*

Assignment of Rights of Action.—One who has conveyed real estate to another, by deed, and who has a right of action against the grantee, to have the conveyance declared void and set aside, on the ground of fraud, undue influence, inadequacy of price, &c., cannot, without possession or a present estate or interest, assign such right of action to another, e. g. to a trustee for creditors, so as to enable the assignee to bring an action in his own name to set aside the conveyance: *McMahon vs. Allen.*

Action to Enforce Rights acquired under a Foreign Bankrupt Law, &c.—Our courts will not recognise or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt judicial proceedings. Accordingly, *held*, that an action could not be brought in the courts of New York, by trustees of the estate and effects of a firm declared by the Tribunal of Commerce of the City of Brussels, in Belgium, to be insolvent and bankrupt, to recover the possession of goods and chattels in the possession of the defendant, in this State, the title and right of possession of which is claimed to have passed to the plaintiffs under and by virtue of such bankrupt proceedings: *Marrelman et al. Trustees, &c., vs. Caen.*

Insuring Ship owned by several persons as Tenants in Common.—Each owner of a ship has a distinct and separate interest as a tenant in common, and he may or may not insure his particular share, as he thinks fit. He is under no obligation to insure for the benefit of the others, or to unite with them in insuring: *McCready et al. vs. Woodhull et al.*

If one joint-owner gives authority to an agent to insure for him, it necessarily means to insure his share; and in order to make him liable jointly with the other owners, for a premium on a policy for the whole vessel, the proof must be clear that he gave express authority for that purpose: *Id.*

If a ship's husband insures the vessel, it must be by a special authority, it not being a part of his general duty to insure: *Id.*

Instructions from all the owners, to insure, will only authorize a ship's husband to insure for each separately, to the value of his separate interest: *Id.*

Articles of Co-Partnership, when Evidence—Rights of Vendor in Case of a Fraudulent Purchase on Credit—Proof of Execution of Sealed Instruments.—Upon an answer setting up the non-joinder of other persons as co-defendants, articles of co-partnership are admissible to prove a partnership between the defendants and the persons omitted. But where the answer alleged that two persons not joined were partners of the defendants, and the articles produced showed that there was only one partner not joined, it was held that the articles were properly excluded: *Keyser vs. Sickel*.

Where vendors have been guilty of a fraud, upon a purchase of goods on credit, the vendor may, without waiting until the time of credit has expired, reclaim the goods, or he may waive the tort, and recover in assumpsit for the value: *Id.*

A party to an instrument under seal, to which there is a subscribing witness, is not a competent witness to prove its execution: *Id.*

To lay a foundation for the admission of any other evidence than that of the subscribing witness, it is necessary to prove that the latter was not capable of being examined, or that he was dead, or incompetent to give evidence, from insanity, or infamy of character, or absence in a foreign country, or that he could not be found: *Id.*

Broker's Commission.—Although a broker's compensation is earned on the completion of the service, which terminates when the vendor and vendee have *agreed*, yet there must be arrangement by which the parties are legally bound: *Barnard vs. Monnot*.

On a negotiation for the sale of real estate, the parties must agree upon the terms, and the contract must be formally reduced to writing and executed by them, before the broker will be entitled to his commissions: *Id.*

Service by Publication—Affidavit to Obtain Order.—The statutory proceedings for acquiring jurisdiction of absent defendants must be strictly complied with. Jurisdiction can only be acquired in the mode prescribed by the statute: *Cook vs. Farren*.

Where an order for the service of the summons upon an infant residing in California was granted upon an affidavit, which did not show that the residence of the infant was unknown to the plaintiff and could not be ascertained, it was *held* that the infant defendant was not properly served with process, so as to give a good title to a purchaser at a sale under the judgment: *Id.*