

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Right of Married Woman to Rent of separate Real Estate.—The rent of real estate bought by a married woman, who had with her husband given a mortgage for the purchase-money, cannot be attached by one of his creditors for a debt contracted by him after the purchase: *Goff vs. Nuttall and Kirkpatrick*.

Liability of Garnishee for Interest.—As in foreign, so in execution attachment, interest on a debt due by the garnishee to his creditor as whose property it was attached, is suspended during the pendency of the proceedings, if there be no fraud, collusion, or wilful delay on the part of the defendant or garnishee: *Jackson's Executors vs. Lloyd*.

Competency of Witness—When to be objected to.—An objection to a witness called by one party in the trial of a cause, if known to the opposite party, must be made before he is examined: if he is permitted to testify without objection, his competency cannot afterwards be objected to when recalled for examination, at any subsequent stage of the trial: *Patterson & Co. vs. Wallace*.

Assignment, when valid without recording or filing Inventory.—An assignment by a railroad company of unpaid instalments due on subscriptions to capital stock, to an indorser, to secure him against loss by reason of his indorsement for the company, is not an assignment in trust for creditors, and therefore is not invalid, because not recorded nor an inventory filed within thirty days thereafter: *McBroom & Wood's Appeal*.

Liens, prior to Fraudulent Conveyance, not divested by Sheriff's Sale under subsequent Lien—What Estate passes by such Sale—Proceeds of Sale distributed among all subsequent Creditors.—Where the owner of land encumbered with liens makes a conveyance fraudulent against creditors, and the land is sold by the sheriff under a judgment subsequently obtained, the liens existing before the conveyance remain, and are therefore not payable out of the proceeds of the sale: *Hoffman's Appeal*.

The estate of the debtor is what is sold under the execution; and those

¹ From R. E. Wright, Esq., to appear in Vol. VIII. of his Reports.

liens only which attached after the fraudulent grant, are payable, in their order, out of the proceeds : *Id.*

Right of Employee to recover on Contract for Services for a determinate period—Evidence for Defendant in mitigation of Damages.—An employee for a determinate period, if improperly dismissed before the term of service has expired, is *prima facie* entitled to recover the stipulated compensation for the whole time : *King & Graham vs. Steiren.*

If the plaintiff was engaged in other profitable employment during the term, or such employment was offered to him and refused, the defendant, upon whom is the burden of proof, may show it, in mitigation of damages : *Id.*

Surety not discharged by Notice to sue Principal in Note not yet due.—A notice by a surety on an undue note, that he would not remain responsible, if the holder did not sue the principal debtor as soon as the note came due or get other security, will not discharge the surety : *Hellen vs Crawford.*

Liability of Special Partner under the Limited Partnership Law.—Under the Limited Partnership Law, a special partner cannot be personally involved except by his own acts of violation or omission of duty, or by assenting to those of his copartners when he knows or is presumed to know them : *Singer vs. Kelly.*

Hence an alteration by the general partners, in the nature of the business provided for in the certificate of copartnership, without the knowledge of the special partner, does not make him a general partner so as to render him personally liable to the creditors of the firm : *Id.*

It is not the duty of the special partner to care for or collect the assets of the firm after failure : *Id.*

The special partner could not be affected by any assignments of the assets of the firm, if he had not assented thereto ; and where there was no offer to prove that assent, but only that the general partners had made them, it was properly rejected : *Id.*

Proper mode of answering Points propounded to the Court—Liability of General Partners for Trespass of Agent and Employees—Liability of Special Partner under Limited Partnership Law for Trespass of Agent of Firm—Measure of Plaintiff's Damage in Trespass.—Where propositions embodied in points propounded to the court are true as general principles,

they should not be negatived without qualification, but if deemed inapplicable to the circumstances of the case, the court should refuse on that ground to charge as requested: *McKnight vs. Ratcliff and Johnson*.

Partners are liable for a trespass by themselves or their agents, employees, or servants, in the legitimate conduct of the partnership business: or if the trespass be done by their agents or workmen, acting within the scope of their authority or while in the employment of the firm: *Id.*

In an action for causing the flooding of plaintiff's coal-mine, brought against three defendants individually, who were carrying on business under a limited partnership, two of them being general partners (one of whom died before trial), and the other the special partner, it was sought to charge the latter by proof that he had done some act, which under the law rendered him liable as a general partner. *Held*, that as he was not a managing partner, employing the workmen and directing their operations, proof of an act, having no relation to the trespass sued for, which might make him liable for firm debts, did not establish that trespass against him, or raise the presumption of his assent and consequent liability: and hence it was error to instruct the jury that if the special partner had made himself a general partner, and the act complained of was done by the agents of the firm, and assented to by one of the partners, the special partner was equally liable with the other, and the verdict must be against both: *Id.*

Where there was no proof to charge the special as a general partner, the jury should have been instructed that there was no evidence which in point of law made him liable in the action: *Id.*

Though the defendants, who were in the mining business, permitted the plaintiffs, in the same business, to operate through their gangway, that permission would not justify the defendants in wilfully filling up the plaintiffs' shaft with water; the question is not one of negligence, wherein counter negligence would have been a defence, but a case in which the injury was alleged to have been wilful, and within the scope of the duties of defendants' workmen and employees: *Id.*

Where a point was presented by defendants, to the effect, that if the plaintiffs had notified and informed defendants that the water would escape before it could damage them, then any damages done resulted from their own misrepresentations, for which they could not recover; it should have been affirmed, referring the special circumstances of the case to the jury: *Id.*

The measure of damages was the actual injury sustained in delay, loss of time, damage to machinery, &c., and if the mine was irreclaimable

then the value of the estate and property; but merely speculative profits supposed to have been lost cannot be included; it was therefore error to instruct the jury, that "if the mine was rendered entirely useless, then the profits that might have been made out of the coal, would be a fair basis for estimating damages." *Id.*

Rights of Special Partner as Creditor—Limited Partnership.—Under the Limited Partnership Act, the special partner cannot claim as a creditor of an insolvent firm of which he was a member: *Dunning's Appeal.*

Promise to pay the Debt of another, when not required to be in Writing, under the Statute of Frauds.—The Statute of Frauds does not require the promise of a defendant to be in writing where it is in effect to pay his own debt, though that of a third person be incidentally guaranteed: it applies to the mere promise to become responsible, but not to actual obligations. Hence, where contractors to build a railroad, on settlement with a subcontractor for work done for them, gave in part payment one of the notes of the company, verbally agreeing to pay it if the company did not, the promise was not within the Statute of Frauds: and on failure of the company to pay their note, an action would lie against the promissors: *Malone et al. vs. Keener.*

SUPREME COURT OF ILLINOIS.¹

Responsibility of Railroad Company for safety of Passengers.—The responsibility of a railroad company for the safety of their passengers does not depend on the kind of cars on which they are carried, whether passenger, construction, or freight cars, or on the fact of payment of fare by the passenger: *The Ohio & Mississippi Railroad Co. vs. Muhling.*

If the passenger is lawfully on the cars, the company is bound to carry him safely, whether he has paid his fare or not; but if he refuses to pay, on demand, the company may eject him from the train: *Id.*

Currency, meaning and value of.—By the term "currency," bank-bills or other paper money, issued by authority, which pass as and for coin, are understood: *Springfield Marine and Fire Insurance Co. vs. Tincher et al.*

Current bills, or currency, are of the value of cash, and exclude the idea of depreciated paper money: *Id.*

Sheriff's excessive and deficient Levy—Damages.—In determining the

¹ From Hon. E. Peck, late Reporter, to appear in 30 Illinois Reports.

amount of property necessary to be levied upon to satisfy an execution, the officer should take into account the probable sacrifice to which it would be subject at a public sale: *French et al. vs. Snyder*.

In an action against a sheriff for failing to collect an execution, it is no defence, that the sheriff had reasonable grounds to believe, and did believe, that he had seized sufficient property: *Id.*

He should show further, that he used such diligence as governs prudent men in the management of their own business. He should take property enough to allow for the probable depreciation of a public sale. And at the same time he should not make so excessive a levy as to bear on its face the appearance of oppression and unnecessary rigor: *Id.*

In an action against a sheriff for failing to collect an execution, the damages are not necessarily the amount of the execution, but only such damages as the plaintiff shall actually suffer by the sheriff's neglect: *Id.*

Statute of Limitations—New Promise.—A verbal promise to pay a note, previously given, has the same effect, as regards the Statute of Limitations, as a redelivery of the note; and the note is good for the same period that it would be if it were dated on the day of the new promise: *Sennott, Administratrix, vs. Horner et al.*

Accommodation Indorsers—Right to Indemnity.—Where county bonds have been deposited by a railroad company with its president, under an agreement with an accommodation indorser, that the bonds should be held for the purpose of paying notes, which had been indorsed for the benefit of the company; the president becomes a trustee, independent of his official character, and is personally responsible for the execution of the trust. In such a case it will be no defence for him to allege that he was directed by the corporation to make another disposition of the bonds: *Wilkinson vs. Stewart et al.*

An indorser, who takes up and cancels the indorsed paper by giving a new obligation, has a right to regard this as a payment, and to call upon his principal for indemnity: *Id.*

Assignment of Promissory Note—Consideration.—When a promissory note is assigned before maturity, but without any consideration therefor, the assignee takes it as a volunteer subject to all its infirmities in the hands of his assignor, the same as if he had had actual notice of them, or as if the note had been assigned after maturity: *Harpham vs. Haynes.*

A plea that the payee of a note, at the time suit was instituted, wrote his name on the back and then commenced the suit in the name of the

plaintiff, and without his knowledge or consent, is bad. It should state further, that the plaintiff had not subsequently sanctioned or approved the use of his name: *Id.*

*Mandamus—When it should issue—Effect of Speaker's Certificate—Mandamus to Secretary of State—Mandamus to Governor of a State—Evidence—What Evidence of Legislative Proceedings is competent—Adjournment of Legislature—Resumption of Session—Days—Meaning of Term.—*The writ of *mandamus* ought not to issue unless the right of the relator is clear to have the things sought by it done, and unless the party sought to be coerced ought to do it: *People, ex rel. Harless, vs. The Secretary of State; People, ex rel. Keyes, vs. The Auditor of Public Accounts of the State of Illinois: PER BREESE.*¹

The certificate of the Speaker of a House of Representatives, certifying the attendance of the party therein named as a member of the house, is not conclusive upon the auditor of state. The latter officer may act upon his own knowledge of the fact, and if he decides wrong, the party injured may correct the erroneous decision by *mandamus*, if no other remedy exists: *Id.*

This writ confers no new right. It can only compel the performance of an existing duty. The secretary of state cannot *virtute officii* decide what acts make a law. He can only certify to be laws those which have been properly authenticated and deposited with him as such, and he cannot be called on to determine whether a bill is or is not a law. Therefore a *mandamus* will not issue to compel the secretary of state to make a copy of a bill under the seal of the state and certify that the same is a law by reason of the failure of the governor to return it with his objections to the legislature within the required number of days: *Id.*

It seems that the governor of a state cannot be coerced by *mandamus* to perform an official duty. (But see *The State vs. Moffitt*, 5 Ohio Rep. 362): *Id.*

Where the constitution requires the legislature to keep a journal of its proceedings, parol evidence of such proceedings cannot, it seems, be admitted: *Id.*

If the members of a legislature disperse and abandon the capital, it is a practical "adjournment" of the body, though no entry thereof is made upon the journals: *Id.*

If the executive makes an order for the adjournment of a legislature

¹ These cases were decided very lately, and the volume of reports in which they will appear cannot yet be ascertained.

without the happening of the contingency which would authorize such order, yet if it is acquiesced in and the members accordingly disperse, the session is terminated notwithstanding the order may be illegal: *Id.*

After a session is terminated in any mode it cannot be resumed at a future day at a time not fixed by law, without a previous vote of the two houses or by due proclamation by the governor, unless, perhaps, in case where the body is dispersed by sudden insurrection or external force: *Id.*

The constitution of Illinois allows the governor the full period of ten days of twenty-four hours each, excluding Sundays, and not simply ten legislative days, in which to return bills which he does not approve: *Id.*

SUPREME COURT OF MASSACHUSETTS.¹

Insurance—Warranty against Perils of the Sea, Capture, Seizure, &c.—Capture by Cruiser of so-called Confederate States.—A warranty by the assured in a policy of insurance that the vessel shall be free from capture, seizure, or detention, includes a capture by a cruiser of the so-called Confederate States: *Dole vs. New England Mutual Marine Ins. Co.*

In case of a warranty by the insured in a policy of insurance that the vessel shall be free from capture, seizure, or detention, the liability of the insurers is terminated by a capture by a cruiser of the so-called Confederate States, so that they are not liable for the burning of the vessel immediately thereafter, although the policy contains a provision that in case of capture or detention the insured shall not have the right to abandon therefor until proof is exhibited of condemnation, or of the continuance of the detention by capture or other arrest for at least ninety days: *Id.*

Under a policy of insurance of a vessel against perils of the seas, fire, enemies, pirates, assailing thieves, restraints, and detainments, of all kings, princes, or people, &c., with an agreement contained in the policy that in case of capture or detention the insured shall not have the right to abandon therefor until proof is exhibited of condemnation, or of the continuance of the detention by capture or other arrest for at least ninety days, and that the insurers shall not be answerable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war, a printed stipulation in the margin of the policy, by which the insured warrant the vessel free from capture, seizure, or detention, any stipulation in the policy to the contrary notwithstanding, exonerates the insurers from lia

¹ From Charles Allen, Esq.; to appear in Vol. VI. of his Reports.

bility, in case of a capture by a cruiser of the so-called Confederate States: *Id.*

Common Carrier—General Notice to limit Liability.—A common carrier cannot, by a general notice, exonerate himself entirely from his legal duty and liability for property which is delivered to him for transportation, or fix the amount beyond which he will not be held responsible in case of injury or loss; although such property is delivered to him by another carrier, to whom the notice has been made known, and who received the same from the owner under an agreement to carry it over his own line, and then, as agent of the consignor, to send it forward by a carrier: *Judson vs. Western Railroad Co.*

Shipping—Charter-Party—Construction of Contract.—Under a charter-party of a vessel for an entire voyage to ports in the Mediterranean and back to the United States, for a gross sum, "and all foreign port charges, pilotages, and lighterages, and to furnish sums abroad for the ordinary disbursements of the vessel, not to exceed five hundred dollars, said advance to be furnished at cost and free of commission, charter payable on discharge of cargo at port in the United States," if the vessel is lost after the advance of the five hundred dollars and before reaching the United States, the owner is liable to a claim for reimbursement in favor of the shipper, and may recover on a policy by which the freight is insured, without deduction on account of the advance: *Benner vs. Equitable Insurance Co.*

Highway—Maintenance of Fence. Title by Limitation.—Maintaining a fence within the limits of a highway for forty years, under a claim of right, gives to the owner an absolute right, under the statutes of this commonwealth, to continue it there, as against the public: *Cutter vs. Cambridge.*

Water dripping from Roof—Injury to Building in consequence.—If the roof of a building is so constructed that the water which falls or accumulates thereon is projected therefrom so as to be thrown over the line of the owner's land, and in and upon the premises of the adjoining proprietor, in such quantities and manner as to weaken, impair, or in any way injure a wall of the latter, by means whereof the same is in part caused to fall upon the building, a tenant of the building cannot recover damages for the injury thereby occasioned to his property or business therein: *Martin vs Simpson.*

Mortgage—Defeasance not of same Date as Deed.—In order to con-

stitute a mortgage, it is not necessary that a bond of defeasance from the grantee to the grantor in a deed should bear the same date as the deed. But if, after the making of such a bond, a deed has been given in accordance with its terms, and afterwards the premises are reconveyed to the obligor, and it is agreed that the same bond shall continue in force for the same purpose, this will amount to a redelivery of the bond, and make the transaction a mortgage: *McIntire vs. Shaw*.

Unincorporated Society—Title to Land conveyed to—Rights of Members of.—A deed of land to an organized and acting, though unincorporated, religious society, vests a valid title in the grantees as a body, and does not create a tenancy in common among the individuals who compose the society: *Hamblett & Wife vs. Bennett*.

A vote by such society, which has received a grant of land and built a church thereon, that a committee "have charge of the church and basement, and see that the whole be kept in repair," authorizes the committee, or one of them who acts for the whole, to take possession thereof, lock up the same, and remove any person therefrom who has not a superior right: *Id.*

Neither an unincorporated association formed by members of a religious society for charitable and religious purposes, and by its constitution made auxiliary to the society, nor its members, acquire any permanent rights in or become tenants at will of the basement of the church, by reason of having contributed to the expense of fitting it up, under a general agreement, not expressed in any vote or other formal manner, that they might use it for their meetings, and for fairs and parties: *Id.*

Husband and Wife—Curtesy.—The birth of living children, after the conveyance by a married woman of land held by her to her sole and separate use, under St. 1845, c. 208, will entitle her husband, after her death, to an estate by the curtesy therein: *Comer vs. Chamberlain and Others*.

Married Woman—Separate Business—Promissory Note.—A married woman who carries on the business of farming upon land for which she holds a bond for a deed, to her sole and separate use, is liable upon a promissory note given by her for money borrowed to enable her to pay for the land, and actually applied by her to that purpose, and thus to entitle herself to a deed under the bond: *Chapman vs. Foster*.

SUPREME COURT OF NEW YORK.¹

Liability for Damages caused by Carelessness and Negligence in the use of Fire.—The defendants being engaged in removing a sunken boat from the channel of a canal, by means of a steam dredging-machine, using wood for fuel, without any spark-catcher or screen upon their smoke-stack, the wind blew the sparks and cinders to and over the farm-buildings of the plaintiff; and although notified of the danger to the buildings, they continued to use their dredge, without putting on a spark-catcher, or using any extra precaution to prevent injury from fire. *Held*, that the defendants were guilty of carelessness and negligence, and were liable for the damages occasioned by fire communicated to the buildings by means of their sparks: *Teall vs. Barton et al.*

Fraudulent Intent, how proved—Deed—Presumption as to Consideration, how rebutted.—In actions involving questions of fraud, the intent is always a material inquiry; and for the purpose of establishing that, other acts of a similar character, done about the same time, may always be shown: *Amsden vs. Manchester.*

Hence, in an action to set aside a conveyance made by a debtor in fraud of his creditors, evidence showing what other property he had, at or before the time, and the value thereof, and that he had conveyed the same to different grantees without consideration, and with intent to defraud his creditors, is admissible on two grounds: 1st. To show the situation of the debtor in respect to his property at the time in question, and what has been done with the property he previously had; and 2d. For the purpose of establishing the fraudulent intent charged in the complaint: *Id.*

A deed expressing a money consideration, and acknowledging the payment thereof, is *prima facie* evidence that such was the true consideration, and that it has been paid. But a judgment-creditor has the right to rebut the presumption, and to show that the sum specified in the deed was never paid by the grantee: *Id.*

For this purpose it is proper to show that the grantee was a married woman, and had no separate property or estate, before the execution of the deed; and that her husband was notoriously poor, and destitute of the means of paying the consideration specified in the conveyance: *Id.*

Assignment in Trust for the benefit of Creditors.—An assignment in

¹ From Hon. O. L. Barbour, to appear in Vol. XL. of his Reports.

trust for the benefit of creditors, of "all the goods, chattels," &c., "and property of every name and nature whatsoever" of the assignor, stated to be more particularly enumerated and described in a schedule annexed to the assignment, operates to transfer to the assignee property not mentioned in the schedule: *Turner vs. Jaycox et al.*

A provision in an assignment executed by partners for the payment of the private and individual debts of the assignors, out of the residue of the net proceeds of the assigned property remaining after the payment of all the debts of the partnership, furnishes no evidence of an intention to hinder, delay, or defraud creditors: *Id.*

It seems the legal intendments are all in favor of the validity of assignments in trust for the benefit of creditors, the same as in respect to other instruments: *Id.*

Building-Contracts—Recoupment.—Where, in an action to recover money due for work done under a building-contract, the defence is that the building was not completed within the time stipulated, if it appears that the defendant had the building erected for his own use, and that he was kept out of its use by the plaintiff's failure to perform on his part, the law will presume that he was damnified, and will give him, by way of compensation, what such use was worth for the time he was deprived of it: *Wagner vs. Corkhill.*

So if he shows that he was deprived of the privilege of renting the building by the plaintiff's default: *Id.*

But if it be proved that the defendant did not contemplate using the building himself, or in his own business, but that he caused it to be built for the purpose of renting it to others; and that he did not in fact lose any opportunity of renting it, by reason of the plaintiff's delay, he cannot recoupe against the plaintiff's claim, the rents and profits of the building from the time when it should have been, to the time when it was, completed: *Id.*

Bankers, Liability for Deposits—Assignment of Claim—Corporation, Power of Officers.—Where money is deposited with a banker to the credit of another, the former becomes indebted to the latter for the amount, payable on demand. But if the banker, by his words or conduct, denies the right of the depositor, as by placing the deposit to the credit of a third person, he thereby becomes presently liable to an action for the amount without a formal demand: *Carroll et al. vs. Cone.*

So held where the banker voluntarily, and without authority from the