ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

SUPREME COURT OF VERMONT.[3]

AGENT.

An insurance agent to receive and transmit applications is an agent to receive and transmit notice, which building, where there are two, was intended: *Lycoming Mut. Ins. Co.* v. *Sailer*, 67 Penna.

Payment of the debts of a principal by the agent are presumed to be from the principal's money: *Woods* v. *Gummert*, 67 Penna.

ASSAULT AND BATTERY.

Where, on the trial of an action for assault and battery, the jury, upon the whole charge of the judge, were left to consider a charge of false swearing, made by the defendant against the plaintiff, at the time of the assault, one of the circumstances to enhance the damages; it was *held*, that this was erroneous, and for such error a new trial was granted: *Pulver* v. *Harris*, 61 Barb.

ASSUMPSIT.

Contract—Compensation for Labor.—Where one goes to work for another under an agreement to be compensated in a particular way, he is entitled to compensation in money upon the refusal of the other to compensate him as was agreed upon: *Stone* v. *Stone*, 43 Vt.

The plaintiff and defendant entered into a parol agreement, by which the plaintiff was to go to work for the defendant on his farm and help him pay off some encumbrances thereon, and the defendant was to deed the plaintiff one-half the farm, no definite time for making the deed being agreed upon. The plaintiff worked from May 1st to November under the agreement, the defendant neglecting upon repeated demands to make the deed, and in November the plaintiff left upon giving notice that he should leave unless the defendant gave him the deed, which he still neglected to do. *Held*, that the plaintiff could recover in *assumpsit* for his labor: *Id.*

ATTACHMENT.

In an action brought by the receivers of an insurance company upon premium notes, it is no defence that before the commencement of the action, but after the company had ceased to have a corporate existence, the claim in suit had been attached in an action pending in the state of Massachusetts, where the defendant resided, by a creditor of the insurance company, and that the plaintiffs had made themselves parties to that suit, which was still pending: *Osgood et al.* v. *Maguire*, 61 Barb.

The pendency of an attachment suit in another state is no bar to the action in New York, although a *judgment* there might be: *Id.*

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[1] From Hon. O. L. Barbour; to appear in vol. 61 of his Reports.

[2] From P. F. Smith, Esq., Reporter; to appear in 67 Penna. State Reports.

[3] From W. G. Veazey, Esq., Reporter; to appear in 43 Vt. Reports.

ATTORNEY.

Lien—Default—Judgment.—Where a default is entered in an action of covenant and the case continued, and the parties then make a *bonâ fide* settlement of the litigated claim and costs, the plaintiff's attorneys will not be entitled to have a judgment in favor of the plaintiff against the defendant for their benefit as counsel. The entry of the default does not constitute a perfected judgment, and no such lien then existed in favor of the plaintiff's counsel for fees and expenses as would prevent the defendant from making a *bonâ fide* settlement: *Hooper* v. *Welch*, 43 Vt.

AUDITA QUERELA. See *Debtor and Creditor.*

BILLS AND NOTES.

Irregular Endorsement.—Scott drew a note for his own accommodation to the order of Slack; to secure its discount at bank, he procured Kirk's endorsement who placed his name above Slack's. Slack paid one-half the note; Kirk under threat of suit by the bank paid the other half. *Held*, that Kirk could recover from Slack the amount paid by him: *Slack* v. *Kirk*, 67 Penna.

Slack by his endorsement was liable to the bank for the amount of the note: *Id.*

As to the bank, Slack could set up neither the Statute of Frauds nor Kirk's want of liability: *Id.*

Slack could not object to payment to any transferee of the bank or to any one rightfully paying the bank and entitled to substitution to its rights: *Id.*

Kirk as irregular endorser was the only one who could set up the Statute of Frauds, and if he, although an irregular endorser, chose to comply with his parol promise to pay, no one could object: *Id.*

Kirk had a right to pay if he would, and having paid, to be subrogated to the rights of the bank: *Id.*

There was a moral obligation on Kirk to perform his promise to pay the bank, and this followed by actual payment constituted his equity and entitled him to substitution: *Id.*

On paying the bank, Kirk was entitled to the note and could claim as holder under Slack's blank endorsement: *Id.*

Affidavit of defence.—In a suit on a negotiable note by an endorsee against the maker, the affidavit of defence was that the note was the property of the payee, that the endorser's name was used to avoid a defence of usury against the note, that the note had been renewed four times and at each time the payee received usury and the defendant was entitled to a defence to the extent of the usury. The defendant did not aver that he expected to be able to prove the defence alleged. *Held*, to be a sufficient affidavit of defence: *Evans* v. *Yohe*, 67 Penna.

It is not necessary on such positive affidavit that defendant should aver his ability to prove the defence alleged, especially as the defendant is a competent witness on the trial: *Id.*

COMMON CARRIER.

Liability under a Special Contract; Construction and Effect of Agree-

ment.—The defendant was a common carrier, owning and operating a railroad extending from Baltimore, Md., to Parkersburgh, W. Va., on the Ohio river, but not owning any railroad terminating either in the city of New York or at Maysville, Ky. On the 1st of September 1866, one of the plaintiffs called at the defendant's freight office in New York, and stated to the freight agent that he was desirous of sending certain merchandise to his firm at Maysville, and inquired at what rate the defendant would carry the same. The agent mentioned the rate, and instructed the plaintiff how to mark and where to deliver the freight. The plaintiff did not accept the proposition at the time or agree to ship any goods, but directed B. & Co., of whom he had purchased certain goods, to mark the same in the manner specified by the freight agent, and to send the same to the freight depot he had named. On the 19th of September B. & Co. delivered such goods at the depot, marked as directed, and addressed to the plaintiffs at Maysville. *Held*, 1. That the conversation between the plaintiff and the freight agent did not amount to an agreement by the former to ship any goods, and that the sending of the goods to the place designated, marked as directed, eighteen days afterwards, could not be said to be an acceptance by the plaintiff of what was but an offer or proposition on the part of the defendant. 2. That the contract, whatever it was, was made when the plaintiffs, on the 19th of September, through B. & Co. shipped the goods in question and took a receipt therefor. 3. That the contract between the parties was contained in the receipt then given: *Ricketts* v. *The Baltimore and Ohio Railroad Co.*, 61 Barb.

And, it being, by the express terms of such receipt, agreed that the company should alone be held answerable for the goods, in whose actual custody they should be at the happening of loss, *Held*, that for a loss occurring after the delivery thereof by the defendant at the end of its road, at Parkersburgh, to other carriers for transportation by steamboat from that place to Maysville, the defendant was not liable: *Id.*

CONTRACT. See *Deed.*

Payment of Money.—In ordinary cases the payment of money is not necessary to make a contract complete. It is only where the question is whether a future contract was not in contemplation that it becomes of significance: *Orr's Appeal*, 67 Penna.

Fraud—Evidence—Vendor.—A deed tendered containing an imperfect description, but like that in the articles, *held* to be admissible in an action of debt to recover the purchase-money: *Negley et al.* v. *Lindsay*, 67 Penna.

In an action of debt to recover the purchase-money under an agreement, the defence being fraud in misrepresenting the value of the land, evidence was inadmissible for the plaintiff that he previously had a higher offer for the land from responsible persons: *Id.*

Where a contract is void on the ground of public policy or against a statute, its confirmation is affected with the original taint: *Id.*

Where a contract is void on account of fraud practised on the party, it may be confirmed or ratified without a new contract founded on a new consideration: *Id.*

If a contract be merely against conscience, and the party being in-

formed of all its circumstances and the objections to it, confirms it, he bars himself from the relief he otherwise might have had: *Id.*

In an action of debt for the purchase-money of land for which he bound himself by articles to give "a warranty deed," the plaintiff declared that he had kept and observed the agreement and had been at all times ready and willing to do and perform all things required by it; the plea was, that the plaintiff was not at the date of the agreement and is not seised of the land. This was a traverse of the plaintiff's performance and readiness to perform, and was notice to the plaintiff to prove his title: *Id.*

Under the pleadings the *onus* was on the plaintiff to prove that he had a good title before he could recover the purchase-money: *Id.*

CORPORATION.

Forfeiture for Non-User—Receiver.—An action cannot be maintained against a corporation by a stockholder to effect a forfeiture of the charter, for non-user within a year. And in any case, even when the action is brought by the Attorney-General, a receiver cannot be appointed until judgment in the action: *Gilman* v. *The Green Point Sugar Company*, 61 Barb.

Lease executed by.—A lease, executed by one gas company to another, of its works and property for five years, with the privilege of renewal for five years longer, the necessary effect of which is to suspend the ordinary business of the lessor for more than one year, is invalid, as against the stockholders not consenting to its execution: *Copeland* v. *The Citizens' Gas Light Company*, 61 Barb.

Action to set aside Lease.—An action to set aside such lease may be brought by a stockholder in the lessor's company who has not consented to or ratified the execution of such lease, in behalf of himself and other stockholders similarly situated: *Id.*

In such an action, the court is not bound to adjust the equities between the lessor and the lessee, where such equities are not embraced in the pleadings containing the issues tried: *Id.*

Liability of Corporation and its Agents for Torts.—In an action brought against a corporation and its managing agents, to recover damages for an injury to real estate caused by the explosion of a steam-boiler upon the premises of the corporation, it is erroneous to charge the jury that such agents are not liable for any negligence or unskilfulness on the part of the corporation, or the manufacturers of the boilers: *Losee* v. *Buchanan*, 61 Barb.

Where an injury done by a corporation, is occasioned by the negligence or unskilfulness of the agent who put the corporation in motion, it is erroneous to hold that the corporation alone is liable, and not the controlling agent: *Id.*

It is also erroneous to hold that a corporation may escape liability, if an injury occurs at the time its sub-agent, whom it employs to conduct its affairs, happens to be in charge; or, that in such a case, the corporation, *only*, is liable: *Id.*

In an action against a corporation and its managing agents, to recover damages for an injury to real estate caused by the explosion of a steam-

boiler, owned by it, it is erroneous to charge that if the engineer who had charge of the boiler came to the conclusion that to reduce the pressure from 120 to 110 pounds to the square inch would render the use of the boiler prudent and safe, and communicated that idea to a director and managing agent, and the latter believed and acted upon the information, then he was not liable: *Id.*

It is also error to refuse to charge, in such an action, that the defendants cannot excuse or justify themselves, in the use of the boiler in question, on the ground that the same was purchased of reputable manufacturers; where it is proved that the size, form, character, and materials of the boiler had been directed and ordered by the defendants, and the boiler was made in conformity with the directions: *Id.*

CRIMINAL LAW. See *Libel.*

DEBTOR AND CREDITOR.

Execution—Half-Pay of Army Officer.—The half-pay of an officer of the government is not liable to be taken by his creditors: *Elwyn's Appeal*, 67 Penna.

The pay having reached the beneficiary (a lunatic) and lost its distinctive character and being in the hands of his committee, as a distributable fund it is to be governed by the direction of the law: *Id.*

A surplus of the pay not needed for the lunatic's subsistence may be applied with the sanction of the court for the payment of his debts: *Id.*

His pay in the future could not be assigned by him if sane, nor intercepted by creditors: *Id.*

In the distribution of such fund in the hands of the committee, it is not liable to the claim of the $300 exemption against creditors: *Id.*

Audita Querela—Fraudulent Judgment—Attaching Creditors—Costs.—Subsequent attaching creditors cannot maintain *audita querela*, using the name of the judgment-debtor against his consent, to vacate a judgment, execution, and levy in favor of a prior attaching creditor, without showing a legal right to the property levied upon paramount to the right of such creditor, and also that in order to avail themselves of that right it is necessary that the proceedings under which the prior creditor acquired his title be vacated and set aside by *audita querela*. And the suit failing, the defendant would be entitled to his costs: *Essex Mining Company* v. *Bullard*, 43 Vt.

Showing that the debtor was a non-resident and the prior attaching creditor obtained judgment without notice, by publication or otherwise, is not sufficient: *Id.*

Neither can they maintain their right to prosecute such suit upon the ground that the equitable owner of a demand has the right, when necessary, to use the name of him who has the legal interest. Nor upon the ground that they may enter and defend the suit of a prior attaching creditor. Nor because the judgment sought to be vacated was fraudulent as to creditors; for if fraudulent in that respect it is void as to them, and they may pursue the property in disregard of the prior attachment and levy, without resorting to *audita querela* or other proceeding to vacate the judgment and levy: *Id.*

The fact of an agreement of the first attaching creditor, before he

made his attachment, that the attachment on his writ and on those of the subsequent attaching creditors, should all stand on an equal footing, and the property attached should respond to their several debts *pro ratâ*, and that upon this understanding he was employed to procure the attachments to be made, and that he has taken the whole property upon his own debt and refused to divide *pro ratâ*, would not entitle the subsequent attaching creditors to use the name of the judgment-debtor to prosecute *audita querela* to vacate the judgment and levy, for the above causes, viz., defect in service and fraudulent judgment: *Id.*

There are many errors and mere technical irregularities in the proceedings under a prior attachment, which the defendant in such proceedings may waive, or may successfully interpose, at his election, but of which a subsequent attaching creditor cannot avail himself: *Id.*

DEED. See *Contract.*

Alteration in—Plan.—It is incumbent on a grantee to show that an alteration, beneficial to him, in a deed, was properly made: *Robinson et al.* v. *Myers*, 67 Penna.

If it appear that the alteration is written with the same pen and ink as the body, the inference would be that it was made before the sealing and delivery; if otherwise such inference would not arise and other evidence would be required to explain it: *Id.*

The law does not *presume* that an interlineation in a deed is a forgery or made after execution; it is a question of fact for the jury, upon proof adduced by him who offers the deed: *Id.*

R. made, laid out, and numbered town lots, and recorded the plot; amongst others were 269, 270, and 271. By deed referring to the plot, he conveyed 271 to M., as bounded on the east by an alley, and 269 to W., as bounded on the west by an alley; no alley appearing on the plot. On the application of J., who had become the owner of 269 and 271 and representing 270 as an alley, the Quarter Sessions vacated "said lot 270." *Held*, that J. was not entitled to 270: *Id.*

The plot being referred to, was as much a part of the deed as if incorporated in them: *Id.*

M. and J. fenced 270 and used it as a yard; if it had been an alley, this was an extinguishment: *Id.*

If an alley, it was extinguished also by the proceedings in the Quarter Sessions: *Id.*

Ancient—Estoppel by a Married Woman.—To authorize the admission of a deed as *ancient*, where the only circumstance relied on is possession, nothing less than proof of possession for thirty years in conformity with the deed is sufficient to raise the presumption of its authenticity: *Walker et al.* v. *Walker*, 67 Penna.

Where proof of possession cannot be had, the deed may be read, if its genuineness be satisfactorily established by other circumstances: *Id.*

Children agreed without the knowledge of their father to release to one of them all their right to the father's land at his death, if that one would maintain the father for life. Such contract was not against public policy: *Id.*

Two of the children were married women who did not acknowledge the deed as such: *Held*, that it was binding on the others: *Id.*

The deed was not a legal conveyance, but the agreement having been performed by the maintenance of the father; on his death it would be supported in equity as an estoppel: *Id.*

ESTOPPEL. See *Deed.*

FRAUDS, STATUTE OF.

Parol Contract for Sale of Land.—Proof of a parol contract for the sale of land, delivery of possession pursuant thereto, part payment of the purchase-money and valuable improvements, are the full measure of what is required to take a case out of the Statute of Frauds: *Milliken* v. *Dravo*, 67 Penna.

HIGHWAY.

Contributory Negligence.—Where the plaintiff's gig was broken in passing a depression in the highway, it was *held*, that he was entitled to recover for the injury, provided the accident happened through the insufficiency of the road and without any lack of ordinary care on the part of the plaintiff in the mode of driving and in discovering any imperfection in the gig, although it was unsafe and its defects contributed to the accident: *Fletcher* v. *Town of Barnet*, 43 Vt.

Pent Road—Jurisdiction—Justice of the Peace.—In an action against an individual for obstructing a public pent road alleged in the declaration and proved to have been laid through the defendant's land, the title to land is not so involved as to oust the jurisdiction of a justice to try the case. The right to recover would not depend on the defendant's ownership of the land: *Bell* v. *Prouty*, 43 Vt.

HUSBAND AND WIFE. See *Deed.*

Appeal from Order granting Alimony—Reference as to.—This court, at general term, can not only entertain an appeal from an order granting alimony, but may order a reference, to ascertain a suitable amount to be allowed: *Galinger* v. *Galinger*, 61 Barb.

Decree for Arrears.—A decree for divorce should not direct the payment, by the defendant, of arrears of alimony. The plaintiff should be left to enforce the payment of the alimony previously ordered, in the usual way: *Id.*

Amount.—Where the defendant's property, over and above the debts owing by him, amounted to but $12,550; *Held*, that alimony to the amount of $600 annually was full as much as should have been allowed to the plaintiff: *Id.*

INSURANCE.

Assignment of Policy without Consent.—One of the conditions to a policy of insurance was that it should not be assigned without the consent of the company endorsed on it. In case of assignment without such consent, whether of the whole policy or an interest in it, the liability of the company should thenceforth cease. The assured assigned the policy as collateral security for a lien against the property insured without obtaining the consent of the company; the property was

burned; afterwards the assured paid the lien. *Held*, that he could not recover for the loss, not having had the consent of the company to the assignment: *Ferree* v. *Oxford Ins. Co.*, 67 Penna.

Policy—Assignment—Chancery.—When the charter of an insurance company provides that a sale of property insured shall render the policy thereon void, but provides further that the grantee having the policy assigned to him may have the same ratified and confirmed to him, &c., upon application to the directors and with their consent, within thirty days next after such alienation, by giving security, &c., and this was incorporated in the policy of insurance, which was to the assured, his heirs and assigns, it was *held* that the sale did not render the policy void, it having been assigned to the grantee at the time of the sale; and the assignee having complied with the terms of the policy in making the application to have the assignment ratified and no objection existing to the person of the assignee, the company was bound to ratify the assignment: *Boynton* v. *Farmers' Ins. Co.*, 43 Vt.

Therefore where under these circumstances the premises were destroyed by fire before the application for ratification of the assignment reached the company, and on receiving it the directors refused to ratify the assignment, it was *held* that the policy was still in force in favor of the assignee and he was entitled to a decree in his favor against the company for the same amount that his grantor would have recovered had there been no sale and conveyance of the property: *Id.*

JUDGMENT. See *Attorney.*

LANDLORD AND TENANT.

Estate at Will—Tenancy from Year to Year—Convertibility—Notice—Trespass.—An estate at will is converted into a tenancy from year to year by the payment of rent; and the conversion is wrought, not by the length of time that the tenant holds and pays rent, but by the fact that the tenant enters and holds under a stipulation to pay annual rent, and pays accordingly: *Silsby* v. *Allen*, 43 Vt.

When the estate becomes converted to a tenancy from year to year, six months' notice of the termination of the tenancy, and looking to the end of the year, is necessary: *Id.*

LIBEL.

Innuendo—Indictment.—It is sufficient in indictments that the charge be stated with so much certainty, that the defendant may know what he is called to answer and the court how to render proper judgment. In criminal pleading, courts should look more to substantial justice than artificial nicety: *Commonwealth* v. *Keenan*, 67 Penna.

Where no new fact is essential to the frame of an indictment for libel or to be found by the grand jury as the ground of a *colloquium* which cannot be dispensed with and the only object of an innuendo is to give point to the meaning of the language, it is not proper to quash the indictment on the ground that the innuendo may be supposed to carry the meaning of the language beyond the customary meaning of the word. It is for the jury to say whether the meaning averred in the innuendo expresses the true meaning of the word: *Id.*

A grand jury may ignore a count, but cannot find less than the whole of any one count: *Id.*

A petit jury may find part of a count, if it be in itself a substantial offence within the charge in the indictment: *Id.*

If some of the innuendoes in an indictment for libel extend the meaning of parts too far, but there be others sufficient to give point to it, the jury may convict under the latter alone: *Id.*

If all the innuendoes be defective, the prosecutor has a right to proceed, to subject the defendant to costs: *Id.*

A petit jury may impose costs on a defendant under a defective indictment: *Id.*

Courts refuse to quash where the indictment is for a serious offence unless on the clearest and plainest ground, but will compel the party to demur, to move in arrest of judgment or to a writ of error: *Id.*

Lis Pendens. See *Attachment.*

Mechanics' Lien.

Consent of Landlord.—A landlord in writing extended the lease of his tenants in consideration that they would make certain improvements "at their own cost." The improvements were made. The material-man entered a lien against the building under the Acts of May 1st 1861 and February 16th 1865, authorizing liens for alterations, with the proviso, that there shall be no lien where the alteration has been made by the lessee "without the written consent of the owner." *Held*, that the premises were not liable to the lien: *McClintock* v. *Criswell*, 67 Penna.

The consent to repair in the agreement was only upon the condition of payment by the lessees and was not within the acts: *Id.*

The consent intended by the acts is an absolute consent, consistent with the right to do the work on the credit of the building: *Id.*

Municipal Corporation.

Negligence—Injury by Falling of a Pole in Street.—Where a street in an incorporated town has been opened and graded by the town authorities and under their jurisdiction, although a portion of it may have been conceded as an easement to a railroad, the authorities are not relieved from the obligation to remove dangerous nuisances: *Norristown* v. *Moyer*, 67 Penna.

The use by a citizen of public ways is that of transit only, with such stoppages as business, necessity, accident, or the ordinary exigencies of travel may require: *Id.*

Loungers who occupy the public highway are obstructions of the public right of way and nuisances: *Id.*

A railroad by ordinance of the town council and Act of Assembly was laid upon a street; the plaintiff loading a cart on the railroad track from a car was in the street for a lawful purpose: *Id.*

The plaintiff whilst loading his cart was injured by the falling of a pole in the street, erected by citizens years before, the pole having become rotten. *Held*, that it was the duty of the town to have had the pole removed and they were liable for the injury to the plaintiff, whether the neglect was wilful or not: *Id.*

It was not necessary that the town should have had notice of the condition of the pole: nor it was material that the pole was in such part of the road as not to obstruct the travel: *Id.*

After the plaintiff was hurt money was raised by charitable subscription and paid to him; this was not to be taken into consideration in estimating damages: *Id.*

NEGLIGENCE. See *Highway, Municipal Corporation, Railroad.*

PARTNERSHIP.

Special Partner—Execution.—V. & S. entered into articles of limited partnership, V. as special partner to contribute $3000 in cash; he contributed in cash about $700, and the remainder in goods; no appraisement of the goods was made and the sign was in the name of S. only, &c. *Held*, that under the Act of March 30th 1865, V. was to be treated as a general partner: *Vandike* v. *Rosskam et al.*, 67 Penna.

The goods contributed by V. were subject to all the incidents of property of a general partnership, and were not the sole property of V.: *Id.*

On an execution against one partner the sheriff can levy only on the interest of the partuer in the firm and cannot seize the goods of the firm: *Id.*

Firm goods were levied on as the property of S., one of the partners: in an interpleader, the issue was to try whether the goods were V.'s, the other partner. The court in answer to a point charged that the sheriff could levy only S.'s interest in the firm, but added he might seize the corpus. *Held*, that the point was irrelevant, and the qualification did V. no harm: *Id.*

If the issue had been whether the goods were the firm's, the qualification would have been error: *Id.*

RAILROAD. See *Municipal Corporation.*

Negligence.—In an action for death by negligence from cars striking a cart on scales near to a railroad track, evidence was proper that after the accident the track was removed to a greater distance: *West Chester and Philadelphia Railroad Co.* v. *McElwee*, 67 Penna.

If the track was too near the scales, a higher degree of care was necessary to avoid the accident: *Id.*

What is negligence is always a question for the jury, when the measure of duty is ordinary and reasonable care: *Id.*

When the standard of the degree of care shifts with circumstances, it is always for the jury: *Id.*

When the standard is fixed; when the measure of duty is defined by law and is the same under all circumstances, its omission is negligence and may be so declared by the court: *Id.*

When there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence: *Id.*

VENDOR AND VENDEE. See *Contract.*