ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.[1]

Tenancy by the Courtesy, Seisin necessary to create—Construction of Will—Life Estate in Land not created by Bequest of Rights and Privileges in it.—In Pennsylvania a surviving husband is entitled to courtesy of land of his deceased wife, though she had no actual possession, but only a potential seisin during her life. If she had possession by a tenant for years, or only the right to present possession, it is sufficient: *Buchanan* vs. *Duncan.*

A testator, by will, provided that his widow, during her life, should live upon the homestead farm, upon which she was to have certain rights and privileges; as, a portion of the dwelling-house, one-half of the garden, one-half of the share of the grain coming from the tenant, pasture in summer and hay in winter, for her cow and horses, firewood, &c. He then made a distribution of his whole estate, and after making a few legacies and bequests, gave to each of his two daughters, who were both married, the "one-half part of his real and personal estate for the use and benefit of her legal heirs;" afterwards, and before the death of the widow, one of the daughters, the wife of B., died, and her husband claimed his courtesy as one-half of the farm. In an action of ejectment, brought by him, it was *held*, that the widow had not an estate for life in the homestead farm, but only certain rights and privileges in it: *Ib.*

That, subject to the provisions in favor of the widow, it descended to the two daughters at the death of the testator, the wife of B. taking an estate in fee simple in one undivided moiety of the farm, in which her husband was entitled to an estate by courtesy at her death: *Ib.*

Remedy of Wife when Husband is one of two or more Debtors—Statute of Limitations as to such contract—Rule as to Hearing of Exceptions not made before Appeal to Supreme Court.—A married woman in 1845, lent to her husband and another trading in partnership, a sum of money on interest, out of her own separate estate. In 1857 the firm made an assignment for the benefit of creditors. Upon distribution of the firm

[1] From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

assets, under the assignment, it was *held*, that she was entitled to a distribution upon the amount of her note, with interest, and that her claim was not barred by the Statute of Limitations: *Kutz's Appeal.*

The wife could not maintain an action at law against the promissors, for one of them was her husband; and if the money was held *in trust*, and was not recoverable at law, the Statute of Limitations would not run against her. The disability of coverture, in equity as well as in law, under which she was, from the date of the note to the assignment, would prevent the running of the statute; so that she was not barred of her claim in equity: *Ib.*

Where the wife's claim was resisted before the Auditor and in the Court below, on the sole ground that it was barred by the statute, it is too late afterwards to object, that there was no proof that the sum loaned was not her separate estate. She was permitted to receive and loan out the money, and neither her husband nor the creditors claiming through him, can object that the money loaned was not hers: *Ib.*

Advancement, Evidence of—Expense of Educating Child not presumed to be an Advancement—Effect of Parent's Declarations.—Questions of advancement depend upon the intention of the parent, at the time when the property is received by the child: *Miller's Appeal.*

Money furnished by a parent for the education of a child will not be presumed to be an advancement, without proof that such was the intention of the parent; for the education of a child is a parental duty; nor is there such a presumption where security is taken from the child for the amount received, or where the parent attempts to preserve evidence of it as a debt, by note, bond, book account, or otherwise: *Ib.*

Therefore, where a parent expended money for the education of his son, which he charged against the son, in his "day book," (wherein he kept his accounts, and in which the son was credited for partial repayments,) and not in a "family book," where advanced portions are usually entered, it was *held*, that the money furnished by the parent was not an advancement, but a debt due by the son, intended to be such by the father, when it was expended for the use of the son: *Ib.*

Declarations by the father, made in the absence of the son, not communicated to him, and after most of the money had been furnished and charged against him in a book account, that "it" was to come off from his

"*erbschaft* or inheritance," are not sufficient to convert the existing debt into an advancement: *Ib.*

Advancement, charged by Testator against his Daughter—Effect of on Claim remitted to her Husband.—One purchased a farm from his wife's father, during her lifetime, and having paid most of the purchase-money, a portion of the balance due was remitted by the father, who took a bond for the remainder; the amount thus remitted was charged to the daughter in the "family book," as cash paid for her. After her death her husband administered upon her estate, and upon account filed, he was sought to be charged with the sum remitted: *Held*, that the transaction did not make the husband the debtor of the wife, and that he was not chargeable with it in administering upon her estate: *Mast's Appeal.*

The amount remitted by the father was an advancement to the daughter, though made to the husband; it was not a debt due to the wife from the husband, for when remitted, he ceased to owe it, and the direction in the father's will, that it should be deducted from the daughter's share, could not operate as an assignment of it as a debt against her husband: *Ib.*

The husband is not chargeable for receiving the amount remitted as his wife's money, for it was remitted directly from the father to the son-in-law, and was not her property under the Act 11th April, 1848, so that her husband could be responsible to her for receiving it: *Ib.*

Action by Widow against Innkeeper for Death of Husband caused by Intoxication.—Acts of April 15th, 1851, *May 8th*, 1854, *and April 26th*, 1855, *construed.*—Under the Act of April 15th, 1851, a widow may maintain an action for damages against an innkeeper, for furnishing her husband liquor when intoxicated, in consequence of which he fell under the wheel of his wagon and was killed: *Fink* vs. *Garman.*

That act not only regulated a common law right of action, by securing to it survivorship, but created a new and original cause of action, unknown to the common law, in favor of a surviving widow or personal representative, who had no right of action before: *Ib.*

The right of action under the Act of 1851, was for the "unlawful violence or negligence" of the defendant; and by the Acts of May 8th, 1854, and April 26th, 1855, the giving or selling liquor to a man of

known intemperate habits who was already intoxicated, was such "unlawful violence or negligence" as would render the innkeeper so doing, liable to respond in damages for any injury causing death, at the suit either of the widow, children, or parents of the decedent: *Ib.*

After the Act of 1854, the furnishing of liquor to an intemperate man, which was before that time unlawful under the laws of Pennsylvania, would clearly be an act of "unlawful negligence," within the meaning of the Act of 1851: *Ib.*

The act of the decedent in taking the liquor offered to him while intoxicated, is not such concurring negligence in him as would relieve the defendant from liability in damages; for it was not a responsible concurrence, and the Act of 1854, which makes it a misdemeanor to furnish an inebriate liquor, does not make the drunkard responsible for accepting the furnished liquor, nor take any notice of his act whatever: *Ib.*

It is not the party whom the inebriate injures, only, who can sustain an action for damages under the statutes; by the Act of 1854, "any person aggrieved" may sue, and the widow is a person "aggrieved" by the death of her husband, by the Act of 1855, under which she has her action: *Ib.*

Public policy and the statute law of Pennsylvania alike forbid that liquor should be furnished to one who is either at the time intoxicated, or who is habitually intemperate, though not presently intoxicated: *Ib.*

SUPREME COURT OF MASSACHUSETTS.[1]

Specific Performance not decreed upon Defective Title.—A court of equity will not compel one who has agreed to purchase land to accept a title so doubtful that it may be exposed to litigation: *Richmond* vs. *Gray.*

A decree for specific performance of an agreement to purchase land will not be ordered, if the vendor could not make a good title thereto at the time when, by the terms of the agreement, he was to deliver a deed thereof, or for more than six months after the vendee declined to accept a deed on account of a defect in the title; although he may be able to do so at the time when the decree is sought for, or the bill filed: *Id.*

If one who has agreed to purchase land enters into possession thereof

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

by consent of the vendor, and makes changes therein, by removing a cellar wall, cutting trees and exercising other acts of ownership, before the delivery of a deed, he will not for these reasons be compelled by a court of equity to accept a defective title, if he abandons the possession as soon as he learns of the defect: *Id.*

Bill of Lading not conclusive as to Property not Shipped.—A bill of lading is conclusive evidence against the master of a vessel in favor of a consignee, not a party to the contract, who has advanced money upon the faith of its statements, as to the amount and condition of the property of which it acknowledges the receipt, so far as from the whole instrument and usage of trade the facts may be regarded as absolute statements from the master's own knowledge; but it is not conclusive against the owners, as to property not actually shipped, because it is not within the scope of the master's authority from the owners to sign bills of lading for any property but such as is put on board: *Sears* vs. *Wingate.*

In an action by the owners of a vessel, of whom the master is one, to recover freight for goods actually carried, delivered and accepted, the consignee cannot recoup in damages a loss sustained by him by reason of a failure to deliver cargo never actually put on board, but which the master, without other authority than belonged to him in that capacity, improperly receipted for in the bill of lading. The proper remedy is by an action against the master, or the consignor: *Id.*

Administration granted before Death void—Savings Bank.—A depositor in a savings bank may maintain an action to recover the amount of his deposit, although, upon production of the deposit book, the bank has paid the amount due to one who has been appointed as his administrator under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from: *Jochumsen* vs. *Suffolk Savings Bank.*

By-laws of a savings bank which provide that "upon the death of any depositor, the money standing to his credit shall be paid to his legatee, or heir-at-law, or legal representative," and that "it is agreed that such payment shall discharge the corporation," and that, "as the officers of this institution may be unable to identify every depositor transacting business at the office, the institution will not be reponsible for loss sustained where a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment," and that "no person

shall receive any part of his principal or interest without producing the original book," will not prevent a depositor from maintaining an action against the savings bank to recover the amount of his deposit, which, upon production and delivery to it of the deposit book, it has paid to one who has been appointed administrator of the depositor, under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from: *Id.*

COURT OF APPEALS OF NEW YORK.[1]

Town, Erection or Division of—Form of Proceedings—Regularity to be presumed.—The question whether a town has been legally erected may be tested in an action in the nature of a quo warranto against one claiming to exercise the office of supervisor of such town: *The People* vs. *Carpenter.*

The act of a board of supervisors dividing a town and forming a new one from a portion thereof, only described the dividing line: *held,* that the uncertainty was cured by the reference in such act to the petition, &c., upon which it was founded, and from which it appeared that the new town was to lie south of the line of division, and by proof *aliunde* that the place named in the act for holding the first town meeting was south of such line: *Id.*

The statute (ch. 194 of 1849) does not, *it seems,* require that the published copy of notice of the application of twelve freeholders for the erection of a new town shall contain the names of such applicants. It is sufficient that the notice posted should be thus subscribed: *Id.*

An affidavit stating that a notice was left with another person to be posted up, "which was done," construed as a positive averment of the posting: *Id.*

The act of the supervisors is, it seems, one of a legislative character in favor of the regularity of which all presumptions are to be indulged. Those who would impeach it, have the burden of disproving a compliance with the conditions imposed by law as a requisite to the exercise of the power: *Id.*

Surrogate, Jurisdiction of—When Decree may be opened.—The effect of the repeal in 1837 (ch. 460, § 71), of the restrictive clause in respect

[1] From E. P. Smith, Esq., State Reporter.

to the jurisdiction of surrogates' courts (2 R. S., p. 221, § 1), is to restore to such courts the incidental powers possessed by them previous to the Revised Statutes: *Sipperly* vs. *Baucus.*

A surrogate has the power to open a decree made by him on the final accounting of an administrator, and to require a further account in respect to a sum received by him with which he had charged himself, as $14.80 instead of $1480: *Id.*

There is no positive limitation of the period in which such application may be made, and the lapse of four years does not of itself import laches: *Id.*

Corporations—Power to Commute for Taxes, where Profits below 5 per cent.—The act (ch. 654 of 1853), allowing corporations which have not received net annual profits equal to five per cent. upon their capital, to commute for taxes is applicable only to corporations which have been in existence for a full year before the assessment is made: *The Park Bank* vs. *Wood.*

Held, accordingly, that a bank which had been organized only three months was liable to be taxed for the full amount of its capital, though its income and profits were less than five per cent.: *Id.*

Will.—A will, after bequests of two small legacies, contained the following clauses: *Third.* I give and devise to my beloved wife, A. B., all my real and personal estate, together with any and all estate, right or interest which I may acquire after the date of this will, as long as she shall remain unmarried and my widow. *Fourth.* I give and bequeath to my beloved wife, A. B., all my household furniture, wearing apparel and all the rest and residue of my personal property." The testator died childless. *Held*, that she is entitled to take absolutely the furniture, wearing apparel and other personal property of the same kind, and the income, but not the principal, of the productive personal estate during her widowhood: *Dole* vs. *Johnson.*

Evidence—Attesting Witness—Agency—Ratification.—The execution of a witnessed instrument which is offered in evidence by one who is a party to it cannot be proved without calling the attesting witness, if he is living, competent and within reach of the process of the court; and this rule is not altered by the passage of a statute authorizing parties to testify: *Brigham* vs. *Palmer.*

If one assumes to sell the property of another and takes in payment a note running to himself, the owner of the property cannot sustain an action for goods sold and delivered against the purchaser: *Id.*

Promissory Note—Notice to Indorser.—It is sufficient to fix the liability of the first indorser of a promissory note, if on the day of its dishonor a duplicate notice for him was inclosed by a notary to the second indorser, who, immediately after receiving it, deposited it in the post office, properly addressed to him; although he lives in the same town where the note was payable and protested, and the second indorser lives in another town: *True* vs. *Collins.*

A notice addressed to "Mrs. Susan Collins, Boston," is *primâ facie* sufficient to charge her as an indorser, if she lived in Boston: *Id.*

Action—False Representations.—The owner of land who has directed an agent to erect a house at a particular place thereon cannot maintain an action against a third person who, by false representations as to the true boundary line of the land, has induced such agent in the owner's absence, to erect the house at a different place: *Silver* vs. *Frazier.*

Accord and Satisfaction—Promissory Note.—Payment of less than the face of several promissory notes, a portion of which are not due, is a good satisfaction of all of them, if upon the receipt and acceptance of the same by the holder the notes are given up to the maker: *Bowker* vs. *Childs.*

Equity—Reformation of Written Instruments.—In order to sustain a bill in equity to reform a deed on the ground of mistake, there must be full and satisfactory proof that it does not conform to the oral contract as understood by either party: *Sawyer* vs. *Hovey.*

Promissory Note—Composition.—A promissory note for the balance due to a creditor of the maker, over and above the amount paid to him under an agreement for composition, given after the maker has been discharged thereby, but in fulfilment of an oral promise by which the creditor was induced to sign the same, is invalid in the hands of the payee: *Howe* vs. *Litchfield.*

Bill of Exchange—Discharge of Indorser.—If the holder of a bill of exchange makes a valid compromise with the assignees of the acceptor, who is insolvent, by which the proof of the claim is withdrawn and the insolvent estate released, he thereby discharges from liability a stranger to the bill who wrote his name upon the back of it before its delivery: *Phœnix Cotton Manufacturing Company* vs. *Fuller.*

Way.—A town is not liable in damages to one who, while stopping in the highway for the purpose of conversation, leans against a defective

railing and is injured by reason of its insufficiency: *Stickney* vs. *City of Salem.*

Way—Dedication.—A way constructed and kept in repair by a private corporation upon its own land for its own use and convenience and the use and convenience of tenants occupying its houses upon both sides thereof, opening into a public street, having a sign "Private way" upon the corner, but left open to public travel for more than twenty years without interruption, is not thereby dedicated to the public; nor does it become a public way by prescription: *Durgin & wife* vs. *City of Lowell.*

Corporation—Principal and Agent—Joint action of Tort against Corporation and its Agents.—A joint action of tort, in the nature of trespass, may be maintained against a corporation and its servant, for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation, although they might have been equally well discharged without the use of undue or illegal force: *Hewett* vs. *Swift.*

The president of a corporation is not made liable to an action for a personal injury, merely by transmitting an order of the corporation to a servant who in executing it uses illegal force; but if the order is issued by him on his own responsibility, he is liable: *Id.*

Married Woman.—A married woman cannot form a partnership with her husband, and is not liable upon a promissory note given by a firm of which, by partnership articles, she and her husband have agreed to be members: *Lord* vs. *Parker.*

Married Woman—Promissory Notes—Consideration.—If a married woman has for her own benefit invested her sole and separate money in a firm of which her husband is a member, an assignment by her to a third person of her share, interest, contribution and investment in the firm is a sufficient consideration to support an express promise to pay an agreed price therefor; and such promise, though not in writing, may be enforced, if she, in consideration thereof, relinquished all claim against the firm: *Lord* vs. *Davison.*

Partnership—Dissolution by Death.—A surviving partner cannot be held responsible on a contract made without his assent or knowledge by another partner, after the firm has been dissolved by the death of one of its members, although no notice of its dissolution has been given to the person with whom the contract was made: *Marlett* vs. *Jackman.*

Promissory Note—Consideration—Stock Jobbing.—A promissory note given in consideration of money paid by request of the maker to a broker, for losses sustained in stock jobbing transactions negotiated by the latter for the former, in violation of the statute, is valid; and money paid for losses in stock jobbing transactions cannot be recovered back: *Wyman* vs. *Fiske.*

Trust—Discharge of Voluntary Trustee.—One who undertakes to act as trustee of a particular fund for another, from whom he received it, without compensation, with no beneficial interest in the fund, and with no agreement to act for any specified length of time, is entitled to be discharged whenever the further execution of the trust becomes inconvenient to him: *Bogle* vs. *Bogle & others; Bogle* vs. *Bogle.*

A trustee who has mingled the trust fund with his own property, and in rendering his account has failed to charge himself with the full sum due from him, is not entitled to have the costs of a bill in equity instituted by him to obtain a discharge from the further execution of the trust allowed out of the fund; but will be charged with the payment of the expenses of taking the account: *Id.*

Seaman's wages—Unlawful Discharge of Seaman—Damages.—In an action of contract by the mate against the owners of a vessel to recover the damages sustained from the unlawful act of the master in wounding and discharging him in a foreign port while in the prosecution of a voyage, upon shipping articles signed by him, the plaintiff may recover such damages as will compensate him for the injury sustained by him in consequence of the breach of the contract; and no exception lies to an instruction by the presiding judge, authorizing the jury to allow to him wages up to the time when he was sufficiently recovered to sail for home, and for such further time as was reasonable for obtaining a passage, and making a voyage to the United States, and the expenses of his board, nursing, medicines and medical attendance until he had so recovered, and of his passage home, although the time so embraced was longer than that occupied by the voyage mentioned in his shipping articles: *Croucher* vs. *Oakman.*

Fraud—Sale.—Purchasing goods with an intention not to pay for them is a fraud which will render the sale void and entitle the vendor to reclaim the goods from the vendee or any subsequent purchaser with notice or without consideration, although there were no fraudulent misrepresentations or false pretences: *Dow* vs. *Sanborn.*

Legitimacy—Evidence.—Declarations of a deceased mother that her child was born before her marriage, and corroborating statements by her of the circumstances and history of her life, are competent evidence to prove that the child was illegitimate; but evidence of a general reputation that the child was illegitimate is not competent: *Haddock* vs. *Boston and Maine Railroad.*

Habeas Corpus—Husband and Wife—Insanity.—A married woman committed to an insane asylum by her husband is not entitled to be discharged, on *habeas corpus*, if it appears that the asylum is well managed, and she is subjected to no unnecessary or unusual restraint or improper treatment, and her remaining there will tend to promote her recovery. And it is immaterial that, previously to her commitment, she had consulted counsel in reference to a divorce, and has since filed a libel for divorce: *Denny* vs. *Tyler.*

Nuisance—Liability of Tenant for Years—Notice to abate.—Restoring a structure which was a nuisance to a right of way, and which has been abated, will render a tenant for years liable, although the structure existed before the commencement of his tenancy; but merely refitting it after it has been injured but not abated will not render him liable: *McDonough* vs. *Gilman.*

A tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy, if he has not been notified to remove it, or done any new act which of itself was a nuisance: *Id.*

A notice to a tenant for years to remove a nuisance which is only kept by him as it used to be before the commencement of his tenancy must be distinct and unequivocal, in order to lay the foundation of an action against him for its continuance: *Id.*

SUPREME COURT OF NEW YORK.[1]

Receiver in Supplementary Proceedings—Priority of Liens between Creditors—Lis pendens.—In proceedings supplementary to execution the court does not appoint more than one receiver of the property of the judgment debtor, however numerous may be the creditors' bills or supplementary proceedings against him: *Myrick* vs. *Selden.*

An action will not lie by one judgment creditor against another, to de-

[1] From the Hon. O. L. Barbour, reporter of the Court.

termine the question as to the priority of their respective liens upon the equitable property of the judgment debtor in the hands of the receiver: *Id.*

The commencement of a suit in equity by the service of a summons and injunction, creates a *lis pendens* and a lien in the nature of an attachment or a statute execution, upon the equitable property of the defendant. But the plaintiff must prosecute his action diligently, or the lien will be lost: *Id.*

Account payable in Specific Articles; Demand or Election.—If an account is payable in specific articles, upon demand, no action will lie for the recovery of money; nor can such account be used as a set-off, until after a demand and refusal to pay in the specified articles, and in the mode stipulated in the contract: *Smith* vs. *Tiffany.*

Where a creditor agrees to receive payment of his debt in lumber at the saw-mill, or in flour, meal, &c., at the grist-mill, of the debtor, there is no duty to pay in money, until the creditor has made his election to receive his pay in some of those articles, and has demanded payment accordingly: *Id.*

Slander; Pleadings and Proof; Variance.—An action for slander, in charging the plaintiff with having "*stolen*" property, "and carried it away," will not be sustained by proof of a charge that the plaintiff "*took*" things from the defendant, which were found in the plaintiff's possession: *Coleman et ux.* vs. *Playsted et ux.*

Where the question submitted to the jury is, what was the meaning and sense of the words proved, as understood at the time, all that was said by the defendant during the same conversation, and in the same connection, is admissible, for the purpose of giving character to the words spoken, and showing malice: *Id.*

Cloud upon the Title.—Where an instrument purporting to create a trust in respect to real estate is void upon its face, it will carry its own condemnation with it, and will not be, in a proper and legal sense, a cloud upon the title, which will authorize a court of equity to interfere, to set the instrument aside: *Hotchkiss* vs. *Etting.*

The existence of a power in trust, valid in itself, and once capable of execution, but now incapable of execution by reason of the death of the person having the power of appointment, without an exercise of the power, does not present a case for the exercise of the equitable power

of the court to remove a cloud upon the title, by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power: *Id.*

Judgment, against whom Evidence—Stockholders in Corporations; how proved to be such.—A judgment against a corporation as acceptor of a draft, is primâ facie evidence, in an action against a stockholder, to enforce his individual liability, that the draft was properly drawn and accepted by a duly authorized officer of the company: *Hoagland* vs. *Bell.*

Where the name of an individual appears on the stock-book of a corporation as a stockholder, this is presumptive evidence that he is so. And, in an action against him as a stockholder, the burthen of proving that he is not such is thrown upon him: *Id.*

Action for Divorce; Right of Defendant to have Marriage annulled.—In an action by a wife against a husband for a divorce, on the ground of cruelty, the defendant cannot have a judgment annulling the marriage, on the ground that the wife had a former husband living at the time it took place, even upon the default of the plaintiff at the hearing: *Linden* vs. *Linden.*

Partnership; Persons holding themselves out as Partners.—To enable creditors of a partnership to recover a debt against a person as a partner, on the ground that he held himself out as such, they must prove affirmatively that he did so represent and hold himself out *to them;* or, at least, that they were informed of such representations before the credit was given to the firm: *Irwin et al.* vs. *Conklin et al.*

A person not a partner in fact, will not make himself liable to creditors for the debts of the firm, by holding himself out as a partner, unless it appears that the creditors gave credit to the firm *after* such representations came to their knowledge: *Id.*

If there is no evidence that the creditors knew, at the time the goods were sold to the firm, that an individual had held himself out, or suffered himself to be held out as a partner, the latter will not be estopped from denying his liability as such: *Id.*

Innkeepers; Liability for Property Stolen.—Innkeepers are answerable for the honesty not only of their servants, but of their guests: *Gile* vs. *Libby.*

In an action against innkeepers by a guest, to recover the value of pro-