

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.<sup>1</sup>

*Specific Performance, when decreed—Statute of Frauds—Compensation where Wife refuses to join in Conveyance.*—A bill in equity may be maintained to enforce the specific performance of a written contract for the conveyance of land, although the entire consideration is not named therein, if the plaintiff is willing and ready to pay the whole consideration orally agreed upon by the parties, and he has been guilty of no misconduct. And the bill in such case need not set forth that part of the consideration which was omitted in the written contract: *Park vs. Johnson*.

If the defendant in a suit in equity for the specific performance of a contract sets up in defence that the contract was obtained from him by misrepresentation, the burden of proof is on him to establish it: *Id.*

A decree for specific performance of a written contract for an exchange of lands will not be refused on account of the inferior value of the land which the plaintiff agreed to convey to the defendant, where the parties have fixed their own estimate of the value of the respective lands, and there has been no fraud, and the difference in value does not appear to have been unconscionable: *Id.*

Specific performance of an agreement by a married man to convey land with release of dower and homestead may be enforced, so far as he personally can execute the same, and compensation in damages decreed if his wife refuses to release dower and homestead: *Id.*

*Divorce—Fraudulent Divorce in another State no bar—What Evidence of such Fraud.*—It is no defence to a wife's libel for divorce, to prove that a divorce has already been granted in another State on the application of the husband, if it is proved that he was not a citizen of the State in which the divorce was granted, but went there from this Commonwealth, of which he was a citizen, for the purpose of obtaining it, while she remained in Massachusetts, and did obtain it fraudulently. And in such case, the decree of the Court granting the divorce is not conclusive evidence of his citizenship: *Shannon vs. Shannon*.

For the purpose of proving that a husband, who has obtained a divorce on the ground of desertion, in another State, was not a citizen thereof,

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

but went there from this Commonwealth, of which he was a citizen, for the purpose of obtaining it, while his wife remained here, and did obtain it fraudulently, evidence is competent to prove by records that before leaving this Commonwealth he twice instituted libels for divorce against her which were not sustained, and that he was compelled to pay and did pay the amount of a judgment against him for her board, for a part of the time during which, in his libel on which the divorce was granted, he alleged that she deserted him. And if such evidence is introduced, and other evidence is offered in support of her charges against him, it should be submitted to the jury: *Id.*

*Corporation—What primâ facie Evidence of its Existence—How Notes to, may be Indorsed—Evidence in Action by Indorsee.*—Proof of the execution of a note to the “Continental Insurance Company” is sufficient, *primâ facie*, to establish the legal existence of a corporation bearing that name, in an action by an indorsee of the note against the maker: *Topping vs. Bickford.*

The president of an insurance company may be authorized to make a valid indorsement of its notes, although the charter provides that the company shall have power “to make, execute, and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require; and every such contract, bargain, agreement, policy, or other instrument to be made by said company shall be in writing or in print, and signed by the president and secretary, or by such other officer or officers as the directors may appoint for that purpose.” And proof of a formal vote is not necessary: *Id.*

It is not necessary for a party who claims title to notes through the indorsement of a foreign corporation, to produce the books of the corporation, if they are out of the Commonwealth; and depositions of late officers of the company are admissible, although, in reply to cross-interrogatories requesting them to do so, they did not annex the records of the company, or copies of them, if the same were not in their custody: *Id.*

*False Pretences—What Indictment must allege.*—An indictment for obtaining an exchange of property by false pretences must allege in distinct terms that the defendant delivered to the person who was defrauded the property respecting which the false pretences were made, and that the latter received the same, and delivered other property in exchange there-

for, and that he was induced to do so by reason of the false pretences alleged: *Commonwealth vs. Goddard*.

*Mutual Insurance—Policy, when void for want of Cash Payment.*—A policy of insurance executed and delivered by a mutual insurance company is invalid until the cash premium has been actually paid at the office of the company, if it contains an express stipulation to that effect: *Mulrey vs. Shawmut Mutual Fire Insurance Company*.

Such stipulation is not complied with or waived by a payment of the premium to an insurance agent through whom the application was made and the policy delivered, if the policy contains an express stipulation that every insurance agent, broker, or other person forwarding applications or receiving premiums is the agent of the applicant, and not of the company; although the company were in the habit of settling a monthly account with him, and he, after the loss, tendered the premiums to them: *Id.*

*It seems*, that the officers of a mutual insurance company have no power to waive a stipulation in a policy which has been executed and delivered, that no insurance shall take effect until the cash premium has been actually paid at the office of the company: *Id.*

*Deed—President of Corporation, when not liable on Bond in name of Corporation.*—The president of a corporation is not personally liable on a bond in the following form: "Know all men by these presents that the Appleton Mutual Fire Insurance Company, by W. P., president of said company, as principal, and J. M. and S. M. as sureties, are held and firmly bound," &c. "To which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals." "W. P., President. (Seal.) J. M. (Seal.) S. M. (Seal.)" And an action alleging a joint execution of such bond by the president and the sureties cannot be maintained: *Ellis vs. Pulsifer*.

*Criminal Law—Evidence and Charge in Capital Case.*—No exception lies to a decision of this Court, in a capital trial, excluding additional evidence offered in defence after the closing argument for the prisoner has been finished, and that for the Commonwealth has been begun: *Commonwealth vs. Dower*.

Although the testimony of a prisoner charged with murder was taken in writing before the coroner's jury, her oral confessions at other times are competent evidence: *Id.*

No exception lies to the refusal of the Court, in a trial for murder, to instruct the jury that, on the evidence, another person had an equally strong motive with the prisoner to commit the alleged crime. This is a matter for them to determine: *Id.*

NEW YORK COURT OF APPEALS.<sup>1</sup>

*Highway—How and through what Land cut.*—Ground adjoining a saw-mill and used for piling logs, but whose limits are not fixed by fences or other visible marks, nor by definite occupation, is not within the statute (1 R. S., p. 514, § 57) prohibiting the laying out of public roads through mill-yards: *The People, ex rel. Williams, vs. Kingman et al.*

It is the duty of the commissioners, in laying a highway over such ground, to leave a sufficient area for the use of the mill-owner, and their discretion as to the quantum is not reviewable in any other proceeding: *Id.*

The ditch or canal by which the water is conducted to a mill is not a building, fixture, or erection within the meaning of the statute. A highway may be laid along it, comprehending it in whole or in part within the limits of the road; but if necessary to work the road to its entire width, it must be by so constructing a roadway over the channel as not to obstruct the flow of water: *Id.*

It is not essential to a highway, at common law or under our statute, that it be a thoroughfare. A road may be laid out by the public authority which has no issue at one extremity, and abuts upon private ground: *Id.*

*Banks—Dividends payable only in Cash.*—A dividend of the profits of a banking association, declared by the directors "payable in New York State currency," is payable in cash. The directors have no authority to declare it payable otherwise: *Ehle vs. The Chittenango Bank.*

Evidence of an understanding by the cashier that "State currency" meant country bank notes current in New York city at a discount of a quarter of one per cent., but not showing a general usage in that sense, is inadmissible. *Id.*

*Bankrupt Act—How far Assignee bound by Decree in pending Suit against Bankrupt.*—An assignee in bankruptcy under the Act of 1841, who has notice of a suit for the foreclosure of a mortgage pending against

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<sup>1</sup> From E. P. Smith, Esq., Reporter.

the bankrupt, which he could defend in the name of the bankrupt, is bound by the decree, though not made a party nor intervening in the suit: *Cleveland vs. Boerum et al.*

*It seems* that the assignee, or his grantees, if not foreclosed, were limited, by the eighth section of the Act of 1841, to the period of two years for the commencement of an action to redeem the land mortgaged: Per SUTHERLAND, J.; DENIO, GOULD, and ALLEN, Js., concurring: *Id.*

*Railroad—Liability as Carriers on connecting Roads.*—The statute (ch. 270 of 1847) making a Company which owns a railroad connecting with one or more other roads, and receives freight to be transported to a place on the line of a road thus connected, liable as common carriers for the delivery thereof, applies as well where one of the connecting roads is wholly beyond this State as where all are within it: *Burtis vs. The Buffalo and State Line Railroad Co.*

The statute not only imposes the duty, upon the Company undertaking it, of delivering the goods at the place of destination, but enables it to make a special contract for their delivery in a limited time. *Id.*

*Held*, accordingly, that a Company whose road terminated at the boundary of this State, where it connected with a chain of roads running through Pennsylvania, Ohio, &c., was liable under its special contract for the delivery of goods in three days, at a point in Illinois, upon such chain of roads: *Id.*

*It seems* that such special contract is valid at common law independently of the statute. Per DENIO, DAVIES, GOULD, and ALLEN, Js. *Id.*

*Carrier—Intermediate Consignee—Rights and Duties of.*—The carrier of a boat-load of wheat lost or converted a portion of it, and discharged the residue into a barge provided by an intermediate consignee for transporting it to its ultimate destination. The intermediate consignee refused to pay freight for the quantity delivered, unless the carrier would allow and deduct the value of the wheat lost. *Held*, that no contract to pay the freight was to be implied under these circumstances, and that an action therefor would not lie against the intermediate consignee: *Davis vs. Pattison.*

An intermediate consignee is, in virtue of that character, authorized to adjust and receive damages from a loss of part of the property: *Id.*

The rights and duties of intermediate consignees discussed, per ALLEN, J.: *Id.*

*Partnership—Authority of Partners on Dissolution.*—Where there is no agreement to the contrary, each partner, after a dissolution, possesses the same authority to adjust the affairs of the concern, by collecting its debts and disposing of its property, as before the dissolution: *Robbins et al. vs. Fuller.*

This right is not lost by the fact that the partnership debts are paid; nor, *it seems*, does it depend upon the state of the accounts between the partners. at all events not as against persons having no notice of the fact: *Id.*

SUPREME COURT OF NEW YORK.<sup>1</sup>

*Justices of the Peace—Justification of Arrest by.*—An individual, in order to justify his arrest and imprisonment of another, by virtue of his authority as a justice of the peace, must show himself to have been at the time, not only *de facto* but *de jure*, a justice: *Newman vs. Tiernan.*

*Bonds taken by Public Officers—Waiver of Irregularities.*—A bond taken by a public officer, in a case which the law prescribes, and with the condition which it requires, is not void as given in a manner not authorized, because it was given by one surety, only, when the law requires two: *Morton vs. Campbell.*

Thus a bond taken by the sheriff, on the arrest of a defendant upon an attachment issued in supplementary proceedings, with only one surety, is not within the purview of the statute prohibiting the taking of any bond, &c., by a sheriff or other officer *colore officii*, in any other case or manner than such as are provided by law: *Id.*

Such a bond is not utterly void as forbidden by the statute, or taken corruptly. *colore officii.* It is irregular, and the plaintiffs are not bound to receive it. If they refuse to receive it, they may hold the sheriff for an escape of the prisoner: *Id.*

But if the plaintiff, on the failure of the defendant to appear, obtains an order for the assignment to him of the bond, and for the issuing of a further attachment, he will be held to have waived the irregularities of the sheriff's proceedings, and adopted his acts and the security which he had taken, at least so far as to excuse the sheriff from liability for an escape: *Id.*

*Assignment for the Benefit of Creditors—Rights of Assignee—Accommo-*

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<sup>1</sup> From the Hon. O. L. Barbour, Reporter of the Court

*dition Sureties.*—Unless the assignor in a general assignment for the benefit of creditors, could maintain an action on promissory notes held by him, his assignee cannot recover thereon. He does not occupy the place of a *bonâ fide* assignee of the payee, in such a sense as to exclude the equities existing between his assignor and a surety in the notes: *Reed vs. Sands*.

Where promissory notes were signed by S. as surety for A., at the request of A. G., to be placed in the hands of G. G., as collateral security for G. G.'s liabilities as indorser for A. G., and under an agreement with A. G. that they should not be put in circulation, and not be held or used as surety to A. G.: *Held*, that S. was a mere accommodation surety for A., and that neither A. G. nor his assignee in an assignment for the benefit of creditors, could recover on the notes against S.: *Id.*

*Promissory Notes—Representations of Holder—Defence of Usury.*—If the holder of a note or his agent, on the occasion of the sale and transfer thereof, represents to the purchaser that it was given for a valuable consideration, and the purchaser takes it upon the faith of such representation, and in ignorance of the fact that it has never had a legal existence as a note, both the holder and his agent will be estopped from alleging the contrary of such representations, or from availing themselves of the defence of usury: *Parshall vs. Lamoureux*.

But a mere accommodation guarantor of a note, making no representations in regard to the character of the paper, or the circumstances under which it was given, may set up the defence of usury, equally as if he were a simple indorser of the note: *Id.*

*Railroad Companies—Duty to erect and maintain Fences, &c.*—Railroad corporations, in order to secure the protection afforded by the 44th section of the General Railroad Act from liability for damages done to cattle, &c., on the track, where they shall erect and maintain fences and cattle-guards of the description therein mentioned, must *keep* their fences and cattle-guards up and in good repair, so that at all times and in all places they shall be of the description and in the condition required, and sufficient to answer the purpose intended: *McDowell vs. The New York Central Railroad Company*.

They must not only erect but *maintain* the proper fences and cattle-guards. If these are suffered to go to decay or by accident are broken down, so as to allow the passage of cattle, &c., through or over them, and are not repaired within a reasonable time; or if they are opened and allowed to remain open unnecessarily, the corporation is liable in damages

to the owner of cattle straying upon the track through the opening, and there killed: *Id.*

The statute protects corporations from liability for damages after the fences, &c., are duly made and maintained, only where the damages are not done negligently or wilfully. If damages are caused either by the negligence or wilfulness of a corporation or its agents, the liability is the same as if there had been an entire omission to make fences and cattle-guards: *Id.*

*Judgment—Jurisdiction of Equity to restrain Collection of.*—To entitle a Court of equity to interfere to restrain the collection of a judgment obtained without fraud or mistake upon issue joined, it must appear: 1. That to allow the judgment to be executed would be contrary to equity and good conscience; and 2. That the facts which render it thus inequitable, were not available as a defence in the action in which the judgment was recovered: *Clute vs. Potter.*

SUPREME COURT OF PENNSYLVANIA.<sup>1</sup>

*What constitutes a valid Partnership as to third Parties—Partnership, how proved.*—If two persons, not partners in point of fact as between themselves, by their acts and declarations hold themselves out to the public as partners in such a manner as to induce the business men of the community to believe them partners, and to trust them accordingly, they will be held liable as partners to such creditors: *Drennen & Patterson vs. House & Co.*

Where two persons, as intended partners, purchase a stock of goods, and agree to give their notes therefor, and on receiving the goods at the time fixed, one of them, the other being absent, signs and delivers the notes in their joint names, the notes thus given are firm notes, and the agreement and its consummation, present a strong *primâ facie* case of partnership in an action against them, on a contract made by one of them with another party in the name of the firm: *Id.*

*Mechanics' Lien—Identity of Building—What Description necessary.*—A mechanics' lien is not necessarily void because it does not accurately describe the size of the building against which it is filed; if there be enough in the description of the locality, and other peculiarities of the building, to point out and identify it with reasonable certainty, it is a suf-

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<sup>1</sup> From Robert E. Wright, Esq., State Reporter, to be reported in the 5th volume of his Reports.

ficient compliance with the requisitions of the act: *Kennedy et al. vs. House & Horton.*

The question of identity is generally for the jury: *Id.*

Where the claim filed mentioned the county, township, and village in which the property was situated, the road on which it fronted, the owners of the adjoining property, the materials of which the building was constructed, the number of stories, that it had a finished basement, &c., and giving the correct width in front, but the depth incorrectly, it was *Held*, that this was not such a misdescription, or error, as would avoid the lien for uncertainty: *Id.*

*Trover for Articles stolen, when sustained—Statute of Limitations suspended until Prosecution terminates—Civil Remedy not superseded by Criminal Prosecution.*—Trover lies for the wrongful conversion or appropriation of property by theft, as well as by fraud or trespass: but in the case of theft, as a general rule, the private action for the value of the property stolen, is suspended until the public prosecution for the offence has been duly conducted and ended: *Hutchinson vs. Merchants' and Mechanics' Bank of Wheeling.*

Where one stole a large sum of money, and two years after was tried for the theft, and acquitted, an action of trover for the sum stolen, brought within six years after the acquittal, was in time, for the Statute of Limitations was suspended until the termination of the prosecution: *Id.*

The public prosecution for the theft does not supersede or in any way control the private action for the value of the thing stolen; and as the person wronged by the theft is not chargeable with the conduct of the prosecution, he cannot be affected by the result, even though it be a verdict of acquittal: *Id.*

*Bridge Company, power of to erect Piers in navigable Stream—Liability of for consequential Damages—Acts of 1725 and 1803 as to erection of Bridges over navigable Streams construed—Improper exercise of chartered Privileges redressed only on complaint of Commonwealth.*—A general power given to a company by Act of the Legislature, to construct a bridge over a navigable river, when limited by no express restrictions, includes the right to construct and maintain piers in the bed of the stream, that mode of support being at the time of the grant and since, common and usual: *Clarke vs. The Birmingham and Pittsburgh Bridge Company.*

In the proper exercise of such a right, the bridge company are not liable for any loss sustained, consequent merely upon the erection and